Backdating Marriage

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Many same-sex couples have been in committed relationships for years, even decades. Yet until 2004 no same-sex couples in the United States had the right to marry in any state and until the U.S. Supreme Court's 2015 decision in Obergefell v. Hodges *the right was unavailable to same-sex couples nationwide. Due to this longstanding denial of the right to marry, most same-sex relationships appear artificially short when measured solely by reference to the couple's civil marriage date.*

This circumstance has important legal consequences for many same-sex couples, as a number of rights associated with marriage are tied not merely to the fact of marriage, but also to its length measured either in absolute terms or relative to a legally significant event. These rights include social security benefits, immigration rights, the marital communications privilege, and the rights to division of property and awards of alimony on divorce. Moreover, a same-sex couple whose relationship ended before the legalization of same-sex marriage may not receive any rights associated with marriage.

This Article is the first to explore the phenomenon of backdating marriages as a means to ensure that same-sex couples are made whole for the harms caused by their longstanding inability to legally marry. The Article demonstrates that the Obergefell *decision applies not merely prospectively but also retroactively, and that same-sex couples have a constitutional right to have their marriages backdated to the date they would have married but for the existence of a legal barrier. Because such backdating can create significant short-term administrative challenges, the Article provides alternatives to actual backdating that are somewhat easier for government agencies to administer but that still provide same-sex couples with*

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constitutionally mandated "make whole" relief. Administrative challenges notwithstanding, the Article concludes that actual backdating—or its functional equivalent—is constitutionally necessary to remedy constitutional harms to same-sex couples imposed by the preexisting discriminatory scheme.

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INTRODUCTION

"How long have you been married?" The question—which arises with some frequency in social settings—is usually a simple one with a simple answer. Yet for some same-sex couples, the answer to the question can be somewhat more complex. Many same-sex couples have been in committed relationships for years, even decades. Yet same-sex couples did not have the legal right to civilly wed anywhere in the United States until 2004, when it

became lawful in Massachusetts after a state court order.[1] In the decade that followed, same-sex couples gained the right to marry in additional states through a combination of state[2] and federal[3] court orders as well as legislative action.[4] However, it was not until 2015, when the U.S. Supreme Court issued its watershed decision in *Obergefell v. Hodges*,[5] that all same-sex couples in the United States gained the right—grounded in the equal protection and due process guarantees of the Fourteenth Amendment—to wed in every state and to have that relationship recognized nationwide. For this reason, many same-sex relationships appear artificially short in endurance when measured solely by reference to the couple's civil marriage date. Moreover, the length of a couple's marriage is significant for far more than social bragging rights; it can also have serious legal ramifications.

Consider, as an example, a female couple with children living in Oregon. The two women began dating one another in 1996, and began referring to themselves as a married couple starting in 1999. In 2002, the couple participated in a religious marriage ceremony that the state would have recognized as a lawful civil marriage had they been an opposite-sex couple.[6] In 2004 the couple purported to civilly marry one another when a county in Oregon took it upon itself to issue marriage licenses to nearly three thousand same-sex couples—marriages that the Oregon Supreme Court subsequently declared invalid under Oregon law.[7] In 2008, the couple entered into a domestic partnership under Oregon law that extended to same-sex couples all of the rights, responsibilities, and privileges associated with marriage, but with a different label.[8] Finally, the couple once again married in Oregon in 2014, when same-sex marriage became lawful in that state by way of a federal court order.[9] When asked in 2017 how long they have been married, should the couple answer three, nine, thirteen, fifteen, eighteen or twenty-one years?

Of course, in a social setting, the couple is free to select any of these answers. However, which of these answers governmental bodies choose to recognize as the legal length of the couple's marriage can have serious ramifications. Although many legal consequences flow from the mere *fact* of

1. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003) (staying decision declaring ban on same-sex marriage unconstitutional until May 2004).
2. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008).
3. *See, e.g.*, Kitchen v. Herbert, 755 F.3d 1193, 1199 (10th Cir. 2014).
4. *See, e.g.*, 79 DEL. LAWS ch. 19 (H.B. 75) (2013).
5. 135 S. Ct. 2584 (2015).
6. *See, e.g.*, Shahar v. Bowers, 114 F.3d 1097, 1100 (11th Cir. 1997) (en banc).
7. *See* Li v. State, 110 P.3d 91, 102 (Or. 2005). Similar events took place in New Paltz, New York, and San Francisco around the same time. *See* Hebel v. West, 803 N.Y.S.2d 242, 244 (2005); Lockyer v. City & County of San Francisco, 95 P.3d 459 (Cal. 2004). In 2013, a similar event occurred in Montgomery County, Pennsylvania. *See* Commonwealth, Dep't of Health v. Hanes, 78 A.3d 676 (Pa. Commw. Ct. 2013).
8. *See* OR. REV. STAT. ANN. § 106.340 (2015).
9. *See* Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1129 (D. Or. 2014).

being married or unmarried, either the absolute length of one's marriage or its length relative to some given legally significant event also affect a number of legal rights. Some of these are rights vis-à-vis the government or third parties, while others are rights vis-à-vis the other spouse.

With respect to absolute length, a number of federal statutes establish a minimum number of months or years that a couple must have been married to qualify for particular government benefits. For example, the length of one's marriage determines one's eligibility for derivative federal social security benefits, including the right to receive benefits based on one's spouse's income,[10] the right to receive survivor social security benefits,[11] the right to receive benefits based on a divorced spouse's income,[12] and the right of stepchildren to receive social security benefits based on a stepparent's income.[13]

The length of one's marriage also impacts a variety of other federal rights, including certain immigration rights,[14] surviving spouse pension benefits for federal employees,[15] and surviving spouse pension and other benefits for military employees.[16]

At the state level, the absolute length of one's marriage affects a number of rights vis-à-vis the other spouse or third parties. For example, some state laws require that the couple have been married for a specified minimum length of time for one spouse to take an elective share of the other's estate.[17] In addition, a number of rights vary in scope depending on the length of the marriage—although the rights do not hinge on whether the couple is married for a specified minimum length. These include the amount of property[18] or alimony[19] awarded on divorce or, in some states, the percentage of the elective share of a spouse's estate.[20]

In other instances, the length of a couple's marriage relative to some other legally salient event determines whether they will be able to exercise a given right. For a couple to access such rights, they do not need to have been married for a specified minimum length of time, nor do they need to be legally married

10. *See* 42 U.S.C. §§ 402(b), (c), 416(b), (f) (2012).
11. *See* 42 U.S.C. §§ 402(e), (f), 416(c), (g).
12. *See* 42 U.S.C. §§ 402(b), (c), 416(d).
13. *See* 42 U.S.C. §§ 402(d), 416(e).
14. *See* 8 U.S.C. §§ 1154(g), 1186a(h)(1) (2012).
15. *See* 5 U.S.C. § 8341(a)(1)(A), (a)(2)(A) (2012); 5 C.F.R. § 843.303; Brathwaite v. Office Pers. Mgmt., 193 Fed. Appx. 966 (Fed. Cir. 2006); Charmack v. Office Pers. Mgmt., 28 Fed. Appx. 927 (Fed. Cir. 2001).
16. *See* 38 U.S.C. §§ 1102(a)(2), 1304, 1541(f) (2012).
17. *See, e.g.*, ARK. CODE ANN. § 28-39-401(a) (2015).
18. *See, e.g.*, MINN. STAT. § 518.58, subdiv. 1 (2016); WASH. REV. CODE ANN. § 26.09.080 (2011).
19. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-82 (2013).
20. *See, e.g.*, COLO. REV. STAT. §§ 15-11-202, 15-11-203 (2014); MINN. STAT. ANN. § 524.2-202(a) (2016); S.D. CODIFIED LAWS § 29A-2-202(a) (2010); TENN. CODE ANN. § 31-4-101(a)(1) (2012).

at the time the matter is being litigated. What matters is that the couple is deemed to have been lawfully married when the legally salient event took place. For example, at both the state and federal level, whether a given communication between two people is protected by the marital communications privilege turns on whether they were considered legally married at the time the communication was *made*, not the time the testimony was sought.[21] Similarly, the legal date of one's marriage relative to the birth of a child determines whether or not the marital presumption of parentage, in force in many states, results in both partners to a marriage being deemed legal parents of that child.[22]

Moreover, suppose that the hypothetical Oregon couple described above never had the opportunity to enter into a lawful same-sex marriage because one of them died in 2013, just before a federal court declared the state's prohibition on same-sex marriage unconstitutional.[23] If a court failed to treat the couple as legally married based on their earlier efforts to express a commitment to their relationship, the surviving partner would be denied not only any benefits that turn on the absolute or relative length of one's marriage, but also any that flow from the mere fact of marriage.

This Article is the first to explore the phenomenon of backdating marriages, a promising solution to the foregoing issues. Part I catalogues in detail the various ways that the absolute or relative length of a couple's marriage affects their ability to exercise certain rights associated with marriage. Part I further demonstrates that applying these restrictions to same-sex couples who only recently attained the legal right to marry—or whose relationship ended due to a breakup or the death of one partner before they attained that right—can create serious hardships. Part II identifies ways in which administrative agencies, legislative bodies, and courts have engaged in some degree of backdating same-sex marriages to ameliorate these harms. Part III demonstrates that the Court's 2015 decision in *Obergefell* applies not merely prospectively but also retroactively. It contends that same-sex couples possess

21. *See, e.g.*, United States v. Pensinger, 549 F.2d 1150, 1151 (8th Cir. 1977) ("It was clearly established that the statement was made prior to the marriage and thus was not within the scope of the marital privilege."); Wadlington v. Sextet Mining Co., 878 S.W.2d 814, 816 (Ky. 1994) ("The privilege as to 'confidential communications' is restricted to communications made during the existence of the marriage relation.").

22. *See, e.g.*, WASH. REV. CODE ANN. § 26.26.116(1) (2011).

23. *See, e.g.*, Matt Ferner, *Texas Judge Recognizes Same-Sex Common Law Marriage in Historic Ruling: A Widow Will Now Be Allowed to Inherit Some of the Assets of Her Late Wife*, HUFFINGTON POST (Sept. 18, 2015), http://www.huffingtonpost.com/entry/texas-judge-recognizes-same-sex-common-law-marriage_55fc868ae4b08820d918c34d [https://perma.cc/KBX4-TCV5] (last visited Dec. 7, 2015); Kim Lyons, *Same-Sex Couple Receive Retroactive Common-Law Marriage Status in Pennsylvania*, PITTSBURGH POST GAZETTE (Aug. 4, 2015), http://www.post-gazette.com/business/legal/
2015/08/04/Same-sex-couple-receive-retroactive-common-law-marriage-status-in-Pennsylvania/stories/201508040008 [https://perma.cc/D9WK-JRYT] (last visited Dec. 7, 2015).

a constitutional right to have their marriages backdated to the date they would have married, but for the existence of a legal barrier to doing so. Because such backdating can create significant administrative challenges, Part III provides examples of alternative remedial schemes to backdating that are easier for governmental agencies to administer. It also contends that such remedial schemes would pass constitutional muster even if they treated same-sex couples more favorably than opposite-sex couples for an interim period. This Article concludes that although backdating same-sex marriages can create significant short-term administrative challenges, those challenges are surmountable, and that allowing for such backdating—or its functional equivalent—is the only way to truly remedy the constitutional harms imposed by the preexisting discriminatory scheme.

I.
THE LEGAL SIGNIFICANCE OF MARRIAGE LONGEVITY

A. Rights with Absolute Minimum Marriage Lengths

Many federal and state benefits require couples to have been married for a certain number of years. Among the more significant federal benefits connected to marriage are those associated with the social security program.[24] As a general rule, to receive social security retirement benefits, a person must have earned—and paid social security taxes—on a threshold minimum amount of earnings for forty quarters (ten years).[25] Moreover, social security retirement benefits are not uniform; the monthly amount varies depending on the size of the individual's pre-retirement earnings.[26] Thus, a person with fewer than forty quarters of earned social security wages is not entitled to any benefit, and those who earned relatively low wages are entitled to lower benefits than higher wage earners.

However, under the social security program, one spouse is entitled to receive benefits based on the other spouse's earning record if that receipt would provide the person with a larger monthly benefit. A married person is entitled to receive either the monthly benefit based on her own earnings or one-half the monthly benefit based on her spouse's earnings, whichever is greater.[27] Moreover, a divorced spouse is likewise entitled to receive the greater of the monthly benefit based on her own earnings or one-half the monthly benefit based on her former spouse's earnings.[28] In addition, under certain

24. *See* Windsor v. United States, 699 F.3d 169, 191 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675, 2683 (2013); Massachusetts v. U.S. Dep't of Health & Human Servs., 682 F.3d 1, 6 (1st Cir. 2012).

25. *See* 42 U.S.C. §§ 402(a), 413(d), 414(a)(2) (2012).

26. *See* 42 U.S.C. § 415.

27. *See* 42 U.S.C. §§ 402(b), (c).

28. *See* 42 U.S.C. §§ 402(b)(D), (c)(D).

circumstances, a minor child is entitled to earn a monthly benefit equal to one-half of their retired parent's monthly benefit.[29]

The social security program also entitles the surviving spouse and children of a deceased beneficiary to receive a monthly benefit based on the deceased beneficiary's earnings. As a general rule, a surviving spouse is entitled to a monthly benefit equal to one hundred percent of their deceased spouse's monthly benefit if it exceeds their own monthly benefit.[30] A surviving child or stepchild is entitled to a monthly benefit equal to seventy-five percent of the deceased parent's benefit amount.[31]

Still, with the exception of social security benefits for natural or adopted children,[32] all of the derivative social security rights detailed above generally require that the marriage last a specified minimum length. One rationale for a minimum marriage length requirement is the concern that—given the very generous derivative benefits associated with marriage—a person might enter into a sham marriage with a beneficiary who is near death solely to receive such benefits.[33] Accordingly, the rights to receive surviving spouse benefits[34] or surviving stepchild benefits[35] require that the couple have been married for a minimum of nine months prior to the beneficiary's death. The rights to receive benefits calculated as a percentage of a living spouse's[36] or stepparent's[37] benefit require that the couple have been married for at least one year. And the right to receive benefits based on a divorced spouse's income requires that the couple have been married for a minimum of ten years.[38] Moreover, these length restrictions—which deny derivative benefits to people falling just hours or days short of the statutory minimums—are strictly construed by the Social Security Administration (SSA) and the courts. Indeed, in close cases, the parties often argue about whether the days on which people get married, divorced, or die count as "married" days for purposes of calculating marriage length.[39]

The marriage length requirements in the Social Security Act can have important consequences for same-sex couples whose marriages appear short in length only due to an unconstitutional barrier—as recognized in *Obergefell*—to

29. *See* 42 U.S.C. § 402(d).
30. *See* 42 U.S.C. §§ 402(e), (f).
31. *See* 42 U.S.C. § 402(d).
32. *See* 42 U.S.C. §§ 402(d), 416(e).
33. *See* Weinberger v. Salfi, 422 U.S. 749, 777 (1975).
34. *See* 42 U.S.C. §§ 402(e), (f), 416(c), (g).
35. *See* 42 U.S.C. §§ 402(d), 416(e).
36. *See* 42 U.S.C. §§ 402(b), (c), 416(b), (f).
37. *See* 42 U.S.C. §§ 402(d)(1)(H), 416(e).
38. *See* 42 U.S.C. §§ 402(b), (c), 416(d).
39. *See, e.g.*, Lewis v. Barnhart, 285 F.3d 1329, 1333 (11th Cir. 2002) (concluding that the marriage fell just short of nine months because the day of a spouse's death does not count as a married day); Charmack v. Office Pers. Mgmt., 28 Fed. Appx. 927, 928–29 (Fed. Cir. 2001) (holding that leap days do not impact the calculation); Moon v. Shalala, 1994 WL 740899, at *2 (N.D.N.Y. Oct. 4, 1994) (concluding that the marriage fell just short of ten years because a couple's marriage and divorce dates do not count as married days).

becoming legally married. Consider the hypothetical Oregon couple again. Suppose that just three months after their 2014 marriage, one of the women died suddenly. If the SSA and the courts legally recognized only the couple's 2014 marriage, the surviving spouse would not receive survivor social security benefits. If any of the earlier dates when the couple expressed a commitment to their relationship counted, she would receive those benefits. Suppose instead that neither one died but instead the couple divorces in 2019. Assume further that one of the women was a stay-at-home parent who did not independently earn an income. If only the 2014 marriage was considered legally significant, the non-wage earning spouse would not be entitled to receive social security benefits based on her ex-wife's earnings because the marriage lasted fewer than ten years. However, if any of the earlier dates on which the couple expressed a commitment to their relationship counted, she would receive such benefits.

Other important federal rights granted to married people also precondition those rights on a marriage of a specified length. Surviving-spouse federal pension benefits for those married to federal employees require a minimum marriage length of nine months,[40] while surviving spouse pension and other benefits for those married to military employees require at least a one-year marriage.[41] Finally, the length of a marriage between a U.S. citizen and an alien is significant for the exercise of certain immigration rights. First, the alien spouse in a marriage of fewer than two years in length is entitled only to a conditional green card.[42] Second, an alien's marriage to a U.S. citizen is not grounds for granting the alien spouse immediate relative status while in exclusion or deportation proceedings if the marriage is fewer than two years long.[43]

In addition, some rights granted at the state level either require that the couple have been married for a specified minimum length of time, or vary the scope of the right depending on the marriage length. For example, some states precondition a spouse's right to take an elective share of their spouse's estate on a given minimum marriage length,[44] while others vary the percentage of the elective share depending upon the length of the marriage.[45] Moreover, many states vary the amount of property[46] or alimony[47] awarded on divorce based on the length of the couple's marriage. Under any of these schemes, a same-sex

40. *See* 5 U.S.C. § 8341(a)(1)(A), (a)(2)(A) (2012); 5 C.F.R. § 843.303.
41. *See* 38 U.S.C. §§ 1102(a)(2), 1304(2), 1541(f)(2) (2012).
42. *See* 8 U.S.C. § 1186a(h)(1) (2012).
43. *See* 8 U.S.C. § 1154(g).
44. *See, e.g.*, ARK. CODE ANN. § 28-39-401(a) (2015).
45. *See, e.g.*, COLO. REV. STAT. §§ 15-11-202, 15-11-203 (2014); MINN. STAT. ANN. § 524.2-202(a) (2016); S.D. CODIFIED LAWS § 29A-2-202(a) (2010); TENN. CODE ANN. § 31-4-101(a)(1) (2012).
46. *See, e.g.*, MINN. STAT. § 518.58, subdiv. 1 (2016); WASH. REV. CODE ANN. § 26.09.080 (2011).
47. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-82 (2013).

couple's relationship can appear relatively short if measured only by reference to the date that they entered into a legally recognized civil marriage.

B. Rights with Relative Minimum Marriage Lengths

In other instances, the length of a couple's marriage relative to some other legally salient event determines whether they will be able to exercise a given right. For such rights to apply to a couple, they do not need to have been married for a specified minimum length of time, nor do they need to be legally married at the time the matter is litigated. What matters is that the couple is deemed to have been lawfully married at the time the legally salient event took place. The two most prominent applicable rights are the marital communications privilege and the presumption of parentage.

At both the state and federal levels, whether the marital communications privilege protects a given communication between two people turns on whether they were considered legally married at the time the communication was *made*,[48] as opposed to the time the testimony is sought.[49] The marital communications privilege accordingly does not protect premarital communications,[50] but it can be invoked to prevent disclosure of marital communications even after the marriage has ended in divorce.[51] Thus, in the case of the hypothetical Oregon couple described above, a confidential communication between them in 2007 would be protected by the privilege only if a court treated them as legally married as of 2004 or earlier, but not if it treated them as legally married as of 2008 or later.

In a similar fashion, the legal date of one's marriage relative to the birth of a child determines whether or not the marital presumption of parentage—present in many states—results in both partners to a marriage being deemed legal parents of that child.[52] Thus, if one spouse in the hypothetical Oregon couple gave birth to a child in 2003, both spouses would presumptively be the child's parents only if a court treated them as legally married as of 2002 or earlier, but not if it treated them as legally married as of 2004 or later.[53]

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48. *See supra* note 21.

49. This is not to be confused with the adverse spousal testimony privilege, which applies only if the couple is married at the time the testimony is sought, *see* United States v. Bad Wound, 203 F.3d 1072, 1075 (8th Cir. 2000), but which protects premarital communications, *see* United States v. Ammar, 714 F.2d 238, 258 (3d Cir. 1983).

50. *See* United States v. Pensinger, 549 F.2d 1150, 1151–52 (8th Cir. 1977); Wadlington v. Sextet Mining Co., 878 S.W.2d 814, 816 (Ky. 1994); State v. Dikstaal, 320 N.W.2d 164, 166 (S.D. 1982).

51. *See Pensinger*, 549 F.2d at 1151–52; *Wadlington*, 878 S.W.2d at 816.

52. *See, e.g.*, WASH. REV. CODE ANN. § 26.26.116(1) (2011).

53. *See* Russell v. Pasik, 178 So. 3d 55, 61 (Fla. Dist. Ct. App. 2015) (noting that if couple had the legal right to marry prior to the birth of their child and the breakdown of their relationship, they might have exercised that right and in turn would both be treated as the legal parents of the child whose custody was at issue).

In sum, although the *Obergefell* decision and the lower federal and state court decisions that preceded it opened for same-sex couples the door to marriage and its attendant rights, governments precondition many of those important rights upon the couple having been married for either an absolute or a relative minimum period. Had these couples not been precluded from marrying prior to those court decisions, many of them likely would have married. Yet if the federal and state governments use a couple's legal wedding date instead of the date the couple would have married but for the unconstitutional barrier to marrying to calculate the length of their marriage, they unfairly deny these individuals and their dependents rights that they otherwise would be entitled to exercise.

II.
CLUSTERS OF MARRIAGE BACKDATING

Even with the right to marry now firmly established for same-sex couples nationwide, such couples nonetheless suffer a legal disadvantage compared with opposite-sex couples. As demonstrated in Part I, the delay in achieving the right to marry means that same-sex couples are potentially denied rights that turn on the absolute or relative length of the marriage. Moreover, for some same-sex couples, marriage rights delayed are marriage rights denied; if the relationship ended due to a breakup or the death of one partner before they received the right to marry, the former couple may be unable to exercise not only the rights detailed in Part I, but also any rights that flow from the mere fact of marriage.

One way to ameliorate the unfairness to same-sex couples associated with their delayed (and in some instances denied) ability to lawfully wed is to backdate the legal date of their marriage to some earlier time. Such backdating is meant to put the same-sex couple on the same footing as an opposite-sex couple by identifying the date when the same-sex couple likely would have married, but for the unconstitutional prohibition on such marriages.

The concept of backdating marriages is fairly novel. Yet with marriage equality for same-sex couples now highlighting some of the inequities detailed above, governmental entities are beginning to implement the idea in limited ways. Their methods fall into three broad categories: legislative backdating, administrative backdating, and judicial backdating.

A. Legislative Backdating

Before extending marriage rights to same-sex couples, some states experimented with alternative schemes—like domestic partnerships and civil unions—that provided most or all of the rights, responsibilities, and privileges

associated with marriage to same-sex couples, but with a different label.[54] After a brief experimentation period, many of these states opted to extend marriage rights to same-sex couples and to allow—and in some cases force—those who had already entered into civil unions or domestic partnerships to convert those preexisting relationships into marriages.[55]

In the seven states that created a seamless mechanism[56] for converting civil unions or domestic partnerships to marriages, the statutory schemes providing for conversion all address an important question: Which date should count as the legal date of the marriage? Three of these states—Connecticut,[57] New Hampshire,[58] and Rhode Island[59]—treat the date when the preexisting relationship was converted into a marriage as the legal marriage date. Thus, to the extent married same-sex couples from these states seek to exercise any of the rights described in Part I, they are at a disadvantage since their legal marriage is of relatively short duration.

In contrast, the statutory schemes in three other states—Delaware,[60] Illinois,[61] and Washington[62]—backdate the legal marriage date to the date when the couple entered into the civil union or domestic partnership. Although couples from these states are not placed fully on the same footing as opposite-sex couples—because, no doubt, at least some couples would have married if permitted long before the domestic partnership or civil union schemes were put in place—they fare far better than their counterparts in states that do not backdate. The seventh state, Hawaii, splits the difference, and in effect gives

54. *See generally* PETER NICOLAS & MIKE STRONG, THE GEOGRAPHY OF LOVE: SAME-SEX MARRIAGE & RELATIONSHIP RECOGNITION IN AMERICA (THE STORY IN MAPS) 13–14 (5th ed. 2014).

55. *See* CONN. GEN. STAT. ANN. §§ 46b-38qq, 46b-38rr (2013); 13 DEL. CODE § 218 (2016); HAW. REV. STAT. ANN. § 572-1.7 (2013); 750 ILL. COMP. STAT. 75/65(b) (2013); N.H. REV. STAT. ANN. § 457:46 (2010); R.I. GEN. LAWS § 15-3.1-12 (2014); WASH. REV. CODE ANN. § 26.60.100 (2012).

56. The remaining states did not provide a streamlined means to convert the relationships into marriages, which resulted in same-sex couples getting married in addition to remaining in a civil union or domestic partnership, and some confusion regarding whether the couples should dissolve their civil unions or domestic partnerships. *See, e.g.*, *Marriage Registration FAQs*, OREGON.GOV, https://public.health.oregon.gov/BirthDeathCertificates/RegisterVitalRecords/Pages/marriagefaq.aspx#remarry [https://perma.cc/WY7D-WYFV] (last visited Oct. 11, 2016) ("We *anticipate* that a dissolution of the [domestic partnership] will not be required if the partners want to be married.") (emphasis added); *Marriage for Same-Sex Couples in California*, LAMBDA LEGAL, http://www.lambdalegal.org/publications/california-marriage-faq#12 [https://perma.cc/9ZV5-THGQ] (last visited Oct. 11, 2016) (indicating that individuals in California domestic partnerships can marry the same person without dissolving the domestic partnership).

57. *See* CONN. GEN. STAT. ANN. §§ 46b-38qq, 46b-38rr.

58. *See* N.H. REV. STAT. ANN. § 457:46.

59. *See* R.I. GEN. LAWS § 15-3.1-13.

60. *See* 13 DEL. CODE § 218(e).

61. Under the Illinois statutory scheme, backdating is only available if the conversion occurred within one year of when the law permitting same-sex marriage took effect. *See* 750 ILL. COMP. STAT. 75/65(b) (2013).

62. *See* WASH. REV. CODE ANN. § 26.60.100(4) (2012).

two different legal marriage dates to same-sex couples who convert their civil unions into marriages. Under Hawaii law, when the right at issue is associated with both civil unions and marriages, the date the couple entered into the civil union is salient, but when the right is specific to marriage, the conversion date is the relevant date.[63]

The retroactive recognition of marriages by legislative fiat finds some precedent outside the realm of same-sex marriage. For example, in the early nineteenth century, Connecticut enacted a law retroactively recognizing the validity of marriages that were otherwise invalid under state law because the marriage officiant was not legally authorized.[64] More recently, Louisiana has enacted laws that—while reiterating its preexisting prohibition on marriages between first cousins—retroactively recognize as lawful prior marriages between first cousins that violated state law.[65]

Returning to our hypothetical Oregon same-sex couple, the legal date of their marriage as a matter of Oregon law is uncertain. The couple possesses a domestic partnership certificate with a legal date in 2008 and a marriage certificate with a legal date in 2014, but because Oregon has no law providing for the conversion and merger of domestic partnerships into marriages, it is unclear which legal date an Oregon court would choose. Were the couple instead from a state such as Washington, their domestic partnership would have automatically converted into a marriage in 2014, and the legal date of their marriage would have been backdated to 2008.[66] Thus, in 2017, Washington law would consider the couple's marriage nine years old for any right under Washington law for which marriage duration is relevant. Moreover, to the extent that the federal government defers—as it typically does—to state law to determine marriage validity,[67] their marriage would likewise be deemed to be nine years old for purposes of any federal rights that turn on marriage duration. If instead the couple were from a state like Rhode Island, the state would not backdate the legal date of their marriage and would consider their marriage only three years old in 2017.[68]

Legislative backdating of same-sex marriages is an important tool to help make same-sex couples whole, but it suffers from three significant limitations. First, it is available only to the small percentage of couples who satisfy three criteria: (1) they reside in a state that previously allowed same-sex couples to

63. *See* HAW. REV. STAT. ANN. § 572-1.7 (2013).

64. *See* Town of Goshen v. Town of Stonington, 4 Conn. 209, 213 (1822).

65. *See* Ghassemi v. Ghassemi, 998 So. 2d 731, 743–47 (La. Ct. App. 2008).

66. *See* WASH. REV. CODE ANN. § 26.60.100.

67. *See, e.g.*, 42 U.S.C. § 416(h)(1)(A)(i) (2012) (treating couple as married for purposes of derivative social security benefits if they have a valid marriage under state law); United States v. Lustig, 555 F.2d 737, 747–48 (9th Cir. 1977) (holding that whether the federal spousal privileges apply turns on the existence of a valid marriage as determined by state law). *See generally* United States v. Windsor, 133 S. Ct. 2675, 2691–92 (2013).

68. *See* R.I. GEN. LAWS § 15-3.1-13 (2014).

enter into civil unions, domestic partnerships, or some other alternative to marriage; (2) the couple actually entered into such a relationship; and (3) the state is one of the handful that has legislatively provided for backdating. Couples living in states that had no marriage alternatives or that had such schemes but failed to legislatively provide for backdating receive no relief.

Second, even for couples fortunate to live in states with backdating, legislative backdating is incomplete, for it only backdates the relationship to the date when the couple entered into the civil union or domestic partnership relationship. Because these alternative relationship schemes were instituted fairly recently, the backdating still fails to take into account the many years or decades that some of these couples were together and would have married but for the legal barrier to marriage. In addition, even if the couple's relationship became serious only after the legalization of civil unions or domestic partnerships in their state, the couple may have opted not to enter into the alternative relationship scheme for reasons other than a lack of a lifelong commitment to one another. Some couples may have declined to enter into such relationships because they viewed the alternative schemes as inferior and were holding out for marriage rights,[69] while others may have declined to enter into them—and indeed even into state-sanctioned marriages—because of the tax and other regulatory complexities associated with federal non-recognition of same-sex relationships.[70]

Third, legislative backdating might fail to provide relief for couples in which one of the parties to the relationship died before the state extended marriage conversion rights to same-sex couples in alternative relationship schemes. Unless the state interprets the backdating procedures to apply retroactively after the death of one of the two parties to the relationship and issues a backdated marriage certificate, the surviving partner will not be entitled to any survivor rights that flow from marriage.

Because legislative backdating is thus of limited efficacy, the Sections that follow consider two additional methods of backdating same-sex marriage, administrative and judicial backdating.

B. Administrative Backdating

This Section describes the practice of administratively backdating same-sex marriages to fill the gaps for which legislative backdating fails to account. Administrative backdating involves a federal or state agency interpreting relevant statutes to allow for backdating a couple's legal marriage date. Thus far, administrative backdating has occurred with respect to two significant

69. *See* Barbara J. Cox, *Marriage Equality Is Both Feminist and Progressive*, 17 RICH. J.L. & PUB. INT. 707, 723–25 (2014).

70. *See Windsor*, 133 S. Ct. at 2694–95. Federal nonrecognition of same-sex relationships continued until 2013, when the U.S. Supreme Court struck down the Defense of Marriage Act. *See infra* notes 86–88.

benefits associated with marriage: social security and veterans' benefits. In some instances, such backdating treats the date when a couple entered into a civil union or similar relationship as the couple's legal marriage date, even if the relevant state law does not provide for backdating and even if the couple never converted their non-marital relationship into a marriage. In other instances, administrative backdating has occurred even when the couple never entered into any sort of legally recognized relationship. Rather, agencies retroactively recognize the date of the couple's religious marriage ceremony as the couple's legal marriage date, even though the ceremony occurred before the legalization of same-sex marriage.

1. Social Security Benefits

Today, the most common way to establish a right to receive spousal social security benefits is to demonstrate that the courts of the state in which the insured individual is domiciled would recognize the marriage between the individual and her spouse as valid.[71] Thus, the social security program defers to the law of the insured individual's domicile for both the fact of and the legally recognized duration of the marriage. As explained above, in most cases this method disadvantages same-sex couples because many did not attain the right to marry until the *Obergefell* decision or the years immediately preceding it.

However, although this "valid marriage" test is today the most common way to establish eligibility for spousal social security benefits, it is not the exclusive test and—having been first codified in 1957[72]—is not even the longest-standing one. Two other tests—the "legal impediment" and "intestacy devolution" tests—can result in a finding that a couple was married for social security purposes even if state law did not recognize the couple's relationship as a valid marriage.[73]

Under the legal impediment test, added to the Social Security Act in 1960,[74] a couple is treated as married for social security purposes if an applicant for spousal benefits in good faith went through a marriage ceremony with the insured individual, which resulted in a marriage that would have been valid but for a legal impediment not known to the applicant at the time of the ceremony.[75] At first glance, this might seem like a suitable vehicle for recognizing some same-sex marriages, like those that resulted from the

71. *See* 42 U.S.C. § 416(h)(1)(A)(i).

72. *See* Social Security Amendments, Pub. L. No. 85-238, 71 Stat. 518 (1957).

73. *See* Peffley-Warner v. Bowen, 778 P.2d 1022, 1024–25 (Wash. 1989) (en banc); Marjorie Dick Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 260–73 (1977).

74. *See* Pub. L. No. 86-778, § 208(a), 74 Stat. 915, 951 (1960). An amendment enacted thirty years later makes clear that in the event that this provision results in a finding that a person has multiple spouses, each of those spouses would earn full benefits. *See* Pub. L. No. 101-508, 104 Stat 1388, 279–80 (1990).

75. *See* 42 U.S.C. § 416(h)(1)(B)(i).

marriage licenses issued and marriage ceremonies performed by local officials in California, Oregon, and New York during a brief window in 2004 and in Pennsylvania during a brief window in 2013. Those officials stopped enforcing state laws prohibiting same-sex marriage because they determined that such laws were unconstitutional.[76] Couples could argue that the "legal impediment" was the requirement that the partners be of opposite sexes. Thus, the couples—who married in the good-faith belief that this was not a requirement—should be deemed married for social security purposes. However, the statutory provision setting forth the test defines the phrase "legal impediment" narrowly, limiting it to two situations: the lack of dissolution of a prior marriage (or a temporal restriction against remarriage following dissolution of a prior marriage still in effect at the time of remarriage), and a procedural defect in connection with the purported marriage.[77]

The third test for determining eligibility for spousal social security benefits, the intestacy devolution test, was the *exclusive* test from 1939, when derivative familial social security benefits were first created, until 1957.[78] Under this test, one is treated as a spouse if—pursuant to the law of the insured's domicile governing devolution of intestate personal property—the person would have the same ability to take intestate personal property as a wife, husband, widow, or widower whether or not they are in fact recognized under state law as such.[79]

The legislative history of the 1939 amendments to the Social Security Act does not illuminate why Congress selected the intestacy devolution test over other tests—perhaps most obviously the valid marriage test—for determining eligibility for spousal social security benefits. Congress may have selected the intestacy devolution test in lieu of the valid marriage test because the latter is both over- and underinclusive. The valid marriage test would at times result in awarding spousal benefits to someone who for policy reasons should not receive them despite nominally being the insured's spouse. For example, it allows for spousal benefits in situations in which the claimant murders or abandons the insured, where state law typically strips the person of their right to inherit from the other spouse even though their marriage remains technically

76. *See* Commonwealth, Dep't of Health v. Hanes, 78 A.3d 676, 681 (Pa. Commw. Ct. 2013); Li v. State, 110 P.3d 91, 92 (Or. 2005); Hebel v. West, 803 N.Y.S.2d 242, 244 (2005); Lockyer v. City & County of San Francisco, 95 P.3d 459, 464–66 (Cal. 2004).

77. *See* 42 U.S.C. § 416(h)(1)(B)(iv); SSA, Program Operations Manual System [hereinafter POMS], General [hereinafter GN] 00305.055 (Deemed Marriages), https://secure.ssa.gov/apps10/poms.nsf/Home?readform [https://perma.cc/Y8YW-MK43]. For example, a procedural defect may occur where a couple satisfied the solemnization requirement by means of a religious ceremony in a jurisdiction that requires the marriage to be solemnized in a civil ceremony. *See* SSA POMS GN 00305.055 (Deemed Marriages).

78. *See* Astrue v. Capato *ex rel.* B.N.C., 132 S. Ct. 2021, 2031 (2012); Rombauer, *supra* note 73, at 260–67.

79. *See* Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360, ch. 666, § 209(m) (1939).

valid.[80] However, the valid marriage test could also result in a denial of spousal benefits to someone who, while not lawfully the insured's spouse, had a valid claim to treatment as such. It would deny a claimant spousal benefits because she married the insured before his divorce from someone else was technically finalized, a situation in which the claimant would be entitled under the law of some states to inherit pursuant to the laws of intestate succession even though the marriage is not otherwise valid.[81]

Yet using the intestate devolution test as the exclusive test for derivative social security benefits proved problematic for several reasons. First, determining whether someone was entitled to inherit personal property via intestate succession created a lot of administrative complexity for the SSA, as it was required to delve into the nuances of intestate succession law for each individual U.S. state.[82] Second, because some state laws denied inheritance rights to nonresident alien spouses even if they would otherwise treat their marriages to state residents as valid, the intestate succession test had the effect of denying social security benefits to the nonresident alien surviving spouses of U.S. military members stationed abroad.[83] Third, because not all states provided relief via the intestacy laws for a spouse whose marriage was technically invalid due to a legal impediment of which they in good faith were unaware, the intestate succession test, like the valid marriage test, sometimes resulted in an unfair denial of benefits to an innocent spouse.[84] The first two of these concerns were addressed by the addition of the valid marriage test in 1957, while the third was addressed by the addition of the legal impediment test in 1960.[85] As a result, the intestate devolution test largely fell into desuetude.

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80. *See* Kandelin v. Soc. Sec. Bd., 136 F.2d 327 (2d Cir. 1943); Kandelin v. Kandelin, 45 F. Supp. 341, 344–45 (E.D.N.Y. 1942).

81. *See* Speedling v. Hobby, 132 F. Supp. 833 (N.D. Cal. 1955).

82. *See* Rombauer, *supra* note 73, at 267–68.

83. *See* 85 CONG. REC. 13959–60, 14169–71 (1957) (discussing generally the problem of benefits being denied to the non-resident alien spouses of U.S. service members stationed abroad and approving a variety of amendments, including the addition of the valid marriage test). At the time Congress was debating the issue, the U.S. Supreme Court's precedents permitted states to deny aliens the right to inherit personal property. *See* Clark v. Allen, 331 U.S. 503, 516–18 (1947). Although the decision was subsequently limited in some ways—in part based on concerns that states were interfering with foreign relations, *see* Zschernig v. Miller, 389 U.S. 429 (1968), and in part based on the application of strict scrutiny under the Equal Protection Clause to laws discriminating on the basis of alienage, *see* Graham v. Richardson, 403 U.S. 365 (1971)—state laws denying inheritance rights to *nonresident* aliens would potentially still pass constitutional muster today. *See* De Tenorio v. McGowan, 510 F.2d 92, 101 (5th Cir. 1975).

84. *See* Rombauer, *supra* note 73, at 268.

85. Whether someone qualified as a "child" under the Social Security Act initially was determined solely by use of the intestate devolution test. However, the definition of "child" was subsequently expanded to protect those—like children deemed "illegitimate" under state law—who would not be entitled to inherit from their father by intestate succession. For an excellent overview of developments in the definition of "child," see Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1487–89 (2013). So far as stepchildren are concerned, the Social

But in 2013, the SSA breathed new life into the intestate devolution test, using it as a vehicle to help same-sex couples qualify for derivative social security benefits. Until then, the SSA had not been able to extend derivative social security benefits to same-sex partners—regardless of whether they were validly married under state law or were in a state civil union or domestic partnership—due to a provision in the federal Defense of Marriage Act (DOMA).[86] Regardless of which of the three tests for derivative social security benefits was used, eligibility ultimately turned on a finding that the applicant was married to the insured or was the insured's "spouse" within the meaning of the Social Security Act.[87] DOMA provided that when any federal statute used the word "marriage," that term referred only to "the legal union between one man and one woman as husband and wife," while any federal statute that used the word "spouse" referred only to "a person of the opposite sex who is a husband or a wife."[88] The SSA thus could not use any of the tests to provide derivative benefits to those married to or in a nonmarital relationship with an insured person of the same sex.

In 2013, the U.S. Supreme Court in *United States v. Windsor*[89] declared this definitional provision of DOMA unconstitutional. As an immediate result of *Windsor*, the SSA began recognizing and processing derivative social security benefit claims—pursuant to the valid marriage test—of married same-sex couples domiciled in states recognizing such marriages.[90] The SSA went even further, declaring that it would also process derivative benefit claims for those who were not married at all, but who instead were in state-sanctioned domestic partnerships, civil unions, and other legally recognized nonmarital relationships.[91] Noting that the intestate devolution test was an alternative method of establishing benefit eligibility, and that virtually all of the statutory schemes governing nonmarital same-sex relationships provide the surviving partner with a right to inherit property to the same extent as a surviving married spouse, the SSA announced that it would treat those in such nonmarital relationships as married under the Social Security Act.[92] The SSA indicated that the date that the couple entered into the civil union or other nonmarital

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Security Act has always treated them differently from natural or adopted children, not subjecting them to the intestate devolution test. *See id.* at 1495–96. Instead, the Social Security Act has used the other two tests described in this Article—the valid marriage test and the legal impediment test—to determine a stepchild's eligibility for derivative social security benefits. *See* 42 U.S.C. § 416(e) (2012); 20 C.F.R. § 404.357.

86. *See* 1 U.S.C. § 7 (2012).

87. *See* 42 U.S.C. §§ 402, 416.

88. *See* 1 U.S.C. § 7.

89. 133 S. Ct. 2675 (2013).

90. *See* SSA POMS GN 00210.001–03 (*Windsor* Same-Sex Marriage Claims).

91. *See* SSA POMS GN 00210.004 (Non-Marital Legal Relationships (Such as Civil Unions and Domestic Partnerships)).

92. *See id.*

relationship was the relevant date for determining program eligibility.[93] Since the first nonmarital relationship scheme to provide for intestate succession rights was Hawaii's reciprocal beneficiary scheme—enacted in 1997[94]—there were suddenly same-sex relationships that were sufficiently long to satisfy all of the Social Security Act's various minimum marriage length requirements.

The SSA's regulations have left open the question of how to measure the length of a couple's marriage if the couple started out in a civil union or other legally recognized nonmarital relationship and later married, either as a result of a conversion provision or otherwise, and where neither the marital relationship nor the nonmarital relationship alone meets the minimum marriage length requirement. The SSA refers such cases to its internal legal counsel for an opinion.[95] But given the general thrust of the SSA's post-*Windsor* actions, it seems likely that it will ultimately allow for stacking the relationships and will treat the date the couple formed the nonmarital relationship as the relevant date for determining benefits eligibility.

Although the administrative discretion that the SSA exercises in retroactively recognizing same-sex marriages is important for those couples who benefit from it, it is rather modest in two different ways. First, the degree of discretion exercised by the agency is fairly minimal. Although Congress certainly did not have nonmarital same-sex relationships in mind when it codified the intestate devolution test, those relationships satisfy the plain textual requirements of the statute. Thus the agency was hardly overreaching in interpreting the test to encompass such relationships once DOMA was declared unconstitutional. Second, the agency's exercise of discretion provides only a partial remedy for the injuries to same-sex couples caused by their past inability to lawfully wed. Because civil unions and other nonmarital legal relationship schemes are of relatively recent vintage and were not even available in most states, using them as proxies to calculate the length that a same-sex couple's marriage would have been but for the existence of the unconstitutional prohibitions on same-sex marriages will result in underestimates.

2. Veterans' Benefits

As indicated in the previous Section, the modest administrative discretion exercised by the SSA, while important to those same-sex couples who benefit from it, will often underestimate the length that a same-sex couple's marriage would have been but for the unconstitutional prohibitions on same-sex marriage. A more robust form of administrative discretion would thus look instead to some other proxy for determining marriage length. Such an exercise

93. *See id.*

94. *See* 1997 HAW. SESS. LAWS 383 (H.B. 118).

95. *See* SSA POMS GN 00210.004 (Non-Marital Legal Relationships (Such as Civil Unions and Domestic Partnerships)).

of discretion—involving both a state and a federal agency—recently allowed a surviving partner to a same-sex relationship to receive military spouse survivor benefits after his partner died.

Joe Krumbach and Jerry Hatcher, a same-sex couple in Washington State, met and began dating in 1989.[96] In 2003, they had a religious wedding that had no legal force because of their status as a same-sex couple, but which would have been treated as a lawful civil marriage under state law had they been an opposite-sex couple.[97] The couple did not register as domestic partners when Washington State created a statewide domestic partnership registry in 2007. Hatcher, a military veteran, died in 2008, before same-sex marriage was legalized in Washington and before the state converted domestic partnerships into marriages and backdated them to the date that the couple entered into the domestic partnership.[98] Krumbach applied for and was initially denied military spouse survivor benefits on the ground that the couple did not meet either of the tests for being married where spousal military benefits are involved.[99] The military requires proof of either a marriage recognized as valid under the law of the state where the couple resided at the time of the wedding or at the time the benefits accrued, or a marriage that would have been valid but for a legal impediment of which the veteran's spouse lacked knowledge.[100]

However, after the U.S. Supreme Court in *Obergefell* declared all state laws prohibiting same-sex marriage unconstitutional, Krumbach's attorney used the decision to persuade the Washington Department of Health to retroactively recognize as valid the couple's 2003 religious ceremony and to change Hatcher's death certificate to indicate that Krumbach and Hatcher were married at the time of Hatcher's death.[101] With proof of a valid state marriage backdated to 2003 in hand, Krumbach's attorney once again approached the

96. *See* Jean Ann Esselink, *Widower Of Vietnam Era Army Vet Awarded Spousal Survivor Benefits*, NEW C.R. MOVEMENT (Nov. 5, 2015), http://www.thenewcivilrightsmovement.com/uncucumbered/widower_of_vietnam_era_army_vet_awarded_spousal_survivor_benefits?recruiter_id=17 [https://perma.cc/8YPJ-4GFE] (last visited Nov. 24, 2015); Susan Riemer, *In Historic Decision, Gay Islander Wins Legal Battle for Military Benefits*, VASHON-MAURY ISLAND BEACHCOMBER (Nov. 11, 2015), http://www.vashonbeachcomber.com/news/344989472.html# [https://perma.cc/9KHD-8EC9]; Jake Whittenberg, *Gay Military Widower Claims Victory After Landmark Decision*, KING 5 NEWS (Nov. 4, 2015), http://www.king5.com/story/news/local/2015/11/04/gay-widower-victory-va-benefit/75147680 [https://perma.cc/8MZC-LAAG] (last visited Nov. 24, 2015).

97. *See supra* note 96.

98. *See* Annotated Letter from David Ward, Legal Counsel for Mr. Krumbach, to Wash. Dep't of Health (June 30, 2015) (on file with author) [hereinafter Annotated Letter].

99. *See supra* note 96.

100. *See* 38 U.S.C. § 103(a), (c) (2012).

101. *See* Annotated Letter, *supra* note 98; Letter from Christie Spice, Wash. Dep't of Health, to David Ward, Legal Counsel for Mr. Krumbach (Aug. 4, 2015) (on file with author); Certificate of Death for Gerald Hatcher, Wash., File No. 8-61979 (on file with author).

Department of Veterans Affairs, which recognized the marriage as valid and awarded Krumbach survivor benefits.[102]

In contrast to the more modest discretion exercised by the SSA, that exercised by the Washington Department of Health in tandem with the Department of Veterans Affairs can more accurately determine a couple's "but-for" marriage date for purposes of determining benefits eligibility. Pursuant to the social security guidelines *standing alone*, Krumbach would not have been entitled to survivor social security benefits because the couple had never married, nor had they entered a legally binding domestic partnership. Moreover, even had the couple entered into a domestic partnership in 2007 or 2008, the length of their relationship—measured solely by reference to the registration date—might have been too short to satisfy the social security length thresholds. Yet by carefully examining the record to estimate the date when the couple would have married but for the unconstitutional ban on same-sex marriages and declaring the couple to be retroactively married even after the death of one of the partners, the Washington Department of Health opened the door to Krumbach receiving any state or federal benefits tied to a valid state marriage. If other federal agencies, including the SSA, are willing to accept such backdated state marriage certificates, same-sex couples will enjoy more fully effectuated rights.[103]

C. Judicial Backdating

1. Backdating Common Law Same-Sex Marriages

One of the obvious stumbling blocks for many same-sex couples seeking to establish a right to spousal benefits is the lack of a ceremonial marriage certificate, or at least one that accurately reflects the true length of their committed relationship. Due to laws prohibiting same-sex marriages, same-sex couples were until recently unable to obtain civil marriage licenses that are the precursors to obtaining marriage certificates.

Yet ceremonial marriage is not the only form of marriage legally recognized in the United States. Although it has fallen out of favor nationwide, eleven states plus the District of Columbia still recognize new common law

102. *See* Annotated Letter, *supra* note 98; Letter from Dep't of Veterans Affairs to Mr. Krumbach (Sept. 21, 2015) (on file with author).

103. Some degree of administrative backdating is also occurring in other countries. For example, in the United Kingdom, same-sex couples who have their civil partnerships converted into marriages receive marriage certificates listing the date of their civil partnership. *See Convert a Civil Partnership into a Marriage*, GOV.UK, https://www.gov.uk/convert-civil-partnership/convert-a-civil-partnership-in-england-and-wales [https://perma.cc/7RAJ-TV24] (last visited Nov. 28, 2015) (last visited Nov. 28, 2015); *Divorce with a Backdated Marriage Certificate*, GRANT STEPHENS FAMILY LAW (Nov. 26, 2014), http://www.grantstephensfamilylaw.co.uk/divorce-backdated-marriage-certificate [https://perma.cc/HXN4-5Q58] (last visited Nov. 28, 2015).

marriages,[104] while another four states recognize common law marriages entered into within their borders before specified dates.[105] Common law marriages differ from ceremonial marriages in that they originate through the statements and conduct of the two parties to the marriage—without formal solemnization or compliance with statutory formalities—but they nonetheless provide the couple the same rights, privileges, and responsibilities as a ceremonial marriage.[106] Most other states, even if they do not recognize common law marriages entered into within their borders, will recognize common law marriages lawfully entered into in sister states.[107] Moreover, for purposes of federal benefits such as social security, the federal government will recognize a common law marriage deemed valid under state law to the same extent as a ceremonial one.[108]

While the criteria for establishing a common law marriage vary from state to state, at the very least they include (1) the legal capacity to marry[109] and (2) a mutual intent and agreement to marry.[110] In some states, additional requirements include (3) cohabitation and (4) holding one's self out to others as a married couple or being so reputed within the community.[111] With state laws prohibiting same-sex marriage no longer having any legal force, same-sex couples can now form common law marriages to the same extent that opposite-sex couples can.[112]

Because couples in common law marriages lack marriage certificates, proving both the fact and date of the marriage is more complex than for ceremonial marriage. Typically, a couple must provide sufficient documentary

104. *See* Peter Nicolas, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931, 934, 943–46 (2011) (identifying Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire (for inheritance purposes only), Oklahoma, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia as jurisdictions where common law marriage is permitted); Jennifer Thomas, Comment, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 151, 151 (2009) (same).

105. *See* GA. CODE ANN. § 19-3-1.1 (2010) (recognizing those common law marriages entered into prior to Jan. 1, 1997); IDAHO CODE § 32-201(2) (2016) (recognizing those entered into prior to Jan. 1, 1996); OHIO REV. CODE ANN. § 3105.12(B)(2) (2004) (recognizing those entered into prior to Oct. 10, 1991); 23 PA. STAT. ANN. § 1103 (2005) (recognizing those entered into on or before Jan. 1, 2005).

106. *See* Nicolas, *supra* note 104, at 933–34.

107. *See id.* at 934 n.13.

108. *See, e.g.*, SSA, POMS GN 00305.060 (Common Law Marriage), 00305.065 (Development of Common-Law (Non-Ceremonial) Marriages); United States v. Lustig, 555 F.2d 737, 747–48 (9th Cir. 1977) (holding that a common law marriage entitled the couple to the marital communications privilege).

109. *See* Nicolas, *supra* note 104, at 935, 946; Thomas, *supra* note 104, at 152.

110. *See* Nicolas, *supra* note 104, at 935, 946; Thomas, *supra* note 104, at 152.

111. *See* Nicolas, *supra* note 104, at 935–37, 944–46.

112. *See id.* at 935–37, 943–46.

and testimonial evidence to either a court or an administrative agency to show that they have met the above criteria.[113]

Two states—Texas and Utah—provide methods to establish the fact and date of a common law marriage before an actual controversy arises regarding the relationship and any entitlement to rights that flow therefrom. In Texas, a couple that has formed a common law marriage can file a "Declaration of Informal Marriage" with the county clerk to declare both the fact of and the date that they formed the common law marriage. That declaration constitutes prima facie evidence in subsequent judicial or administrative proceedings regarding the marriage.[114] In Utah, a person or couple can petition a court to make a finding regarding the fact and formation date of their common law marriage, provided that they petition while the relationship is still extant or within one year of its termination.[115] In such a proceeding, the court determines whether and when the elements of a common law marriage were established and issues an order to that effect. Utah courts have described this order as akin to backdating because the marriage is recognized as having commenced not at the date of the court's order, but rather when the relationship was formed.[116]

Most states that permit common law marriages to be formed within their borders also had provisions in their state constitutions prohibiting same-sex marriage[117] that were only recently declared unconstitutional. This raises two practical questions. First, if the historical conduct of a same-sex couple satisfies all the elements of a common law marriage, what is the legal date of that marriage? Second, what if the relationship both formed and terminated before the state's ban on same-sex marriage was declared unconstitutional, such as where one partner died or the couple broke up before a lower court or the U.S. Supreme Court declared the ban unconstitutional?

In the wake of *Obergefell*, state courts in Pennsylvania, Texas, and Utah have issued orders retroactively recognizing common law same-sex marriages that were formed before court decisions declaring the states' same-sex marriage prohibitions unconstitutional went into effect. The Pennsylvania case involved a same-sex couple who had been in a relationship until 2013, when one of them

113. *See, e.g.*, SSA, POMS GN 00305.065 (Proof of Marital Relations, Development of Common-Law (Non Ceremonial) Marriages); UTAH CODE § 30-1-4.5(2) (2011); Lofton v. Estate of Weaver, 611 So.2d 335, 336 (Ala. 1992).

114. *See* TEX. FAM. CODE §§ 2.401, 2.404 (2005); *Declaration of Informal Marriage Form*, TEX. DEP'T OF AGING & DISABILITY SERVS., https://www.dshs.texas.gov/vs/reqproc/forms/VS-180_1-REV-6-15-Informal-Marriage-Application.pdf (last visited Feb. 6, 2017).

115. *See* UTAH CODE § 30-1-4.5 (2011).

116. *See* Whyte v. Blair, 885 P.2d 791, 794 (Utah 1994); *Judicial Recognition of a Relationship as a Marriage*, UTAH ST. CTS., https://www.utcourts.gov/howto/marriage/commonlaw [https://perma.cc/K627-5LTH] (last visited Nov. 27, 2015).

117. *See* Nicolas, *supra* note 104, at 943–44.

died[118] just months before a court declared Pennsylvania's ban on same-sex marriage unconstitutional.[119] In 2014, the surviving partner sought a judicial declaration recognizing the couple's marriage.[120] She cited evidence that the couple had a religious commitment ceremony in 2001, that they otherwise satisfied the requirements for a common law marriage, and that but for the prohibition on same-sex marriage, they would have ceremonially married.[121] In July 2015, a Pennsylvania court declared that the couple had formed a lawful common law marriage in 2001 that remained in force until 2013, and thus that the surviving partner was entitled to any rights that flow from being a surviving spouse.[122]

The Texas case involved a same-sex couple who had been in a relationship until one of them died in 2014, just one year before *Obergefell* voided Texas' prohibition on same-sex marriage.[123] The couple met in 2004 and had a religious marriage ceremony in Texas in 2008.[124] In probate proceedings—which were underway before *Obergefell* was issued—a Texas court declared the state's prohibition on same-sex marriage unconstitutional, which prompted the Texas attorney general to intervene to defend the state's ban on same-sex marriage.[125] A specific issue raised in the proceedings was the appropriateness of retroactively recognizing the relationship as a common law same-sex marriage effective at a date before the state court's invalidation of the same-sex marriage ban.[126] Ultimately, the parties entered into a settlement agreement that resulted in a court order retroactively recognizing the couple's relationship as a legal common law marriage.[127]

The Utah case involved a same-sex couple—Nicki Bidlack and Sara Clow—who had been in a relationship until Clow died in September 2014,[128]

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118. *See* Verified Declaratory Judgment Complaint and Amended Petition for Declaration of Common Law Marriage, *In re* Estate of Underwood, No. 2014-E0681-29 (Pa. Ct. C.P. 2015) [hereinafter Underwood Complaint]; Lyons, *supra* note 23.

119. *See* Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

120. *See* Underwood Complaint, *supra* note 118.

121. *Id.*

122. *See* Declaration of the Validity of the Marriage, *In re* Estate of Underwood, No. 2014-E0681-29 (Pa. Ct. C.P. 2015).

123. *See In re* Estate of Powell, No. C-1-PB-14-001695 (Tex. Prob. Ct. 2015); Ferner, *supra* note 23.

124. *See* Ferner, *supra* note 23.

125. *See* Plea in Intervention, *In re* Estate of Powell, No. C-1-PB-14-001695 (Tex. Prob. Ct. Feb. 17, 2015); Petition for Writ of Mandamus, *In re* State, 2015 WL 5127017 (Tex. Feb. 17, 2015).

126. *See supra* note 125; *see also* Real Parties in Interest James Powell and Alice Huseman's Response to Petition for Writ of Mandamus, *In re* State, 2015 WL 5127019 [hereinafter Real Parties]; Traditional and No-Evidence Motion for Summary Judgment of the State of Texas, *In re Estate of Powell*; James Powell and Alice Huseman's No Evidence Motion and Motion on the Pleadings for Summary Judgment, *In re Estate of Powell*; Sonemaly Phrasavath's Response to Motions for Summary Judgment, *In re Estate of Powell*.

127. *See* Ferner, *supra* note 23.

128. *See* Jennifer Dobner, *Groundbreaking Ruling Recognizes Same-Sex Common-Law Marriage in Utah*, SALT LAKE TRIB. (Dec. 28, 2015), http://www.sltrib.com/news/3352688-

just weeks before the U.S. Supreme Court declined to review a federal appeals court decision declaring Utah's prohibition on same-sex marriage unconstitutional[129] and before the stay on the appeals court's decision was lifted.[130] The couple met in 2006 and held a commitment ceremony in 2009.[131] In 2013, Bidlack gave birth to a child that was produced using Clow's egg and donor sperm, but because they were not considered legally married at the time, only Bidlack's name (as the birth mother) appeared on the child's birth certificate.[132] In early 2015, Bidlack filed a petition in a Utah district court seeking a declaration that the couple had formed a common law marriage before Clow's death.[133] In late 2015, the court issued an order both recognizing the marriage and amending the child's birth certificate to include both parents' names.[134]

The courts in the above cases issued brief orders that did not provide very detailed reasons for their decisions to retroactively recognize the relationships at issue as common law marriages. Yet, in deciding to backdate the common law marriages to dates before the respective state laws prohibiting same-sex marriage ceased to be in force, these courts clearly rejected the argument that the couples' legal marriage dates should align with the dates that laws banning same-sex marriages ceased to be in force. Instead, each court decision treated the respective state's ban on same-sex marriage as though it was a nullity at the time the couple formed their relationship, and applied the remainder of state law governing common law marriage validity.[135] In so doing, the courts in effect identified the date that the couples would have married but for the unconstitutional prohibition on same-sex marriage.[136]

155/groundbreaking-ruling-recognizes-same-sex-common-law-marriage [https://perma.cc/269D-536L] (last visited Dec. 30, 2015).

129. *See* Herbert v. Kitchen, 135 S. Ct. 265 (2014).

130. *See* Kitchen v. Herbert, 2014 WL 4960471 (10th Cir. Oct. 6, 2014).

131. *See* Dobner, *supra* note 128.

132. *See id.*

133. *See id.*

134. *See id.*; *see also* Findings of Fact and Conclusions of Law, *In re* Marriage of Bidlack & Clow (Utah Dec. 4, 2015) (on file with author) [hereinafter Findings of Fact].

135. The Utah decision was explicit in this respect, holding that in light of the federal court decisions declaring Utah's prohibition on same-sex marriage unconstitutional, the court—in determining whether a common law marriage existed—would disregard that portion of state law requiring that the relationship be between "a man and a woman." *See* Findings of Fact, *supra* note 134, at 4.

136. As indicated above, one requirement common across all common law marriage jurisdictions is that the parties have capacity to marry. Although at its narrowest, the term "capacity" is interpreted to refer to minimum age and mental capacity, *see* Nicolas, *supra* note 104, at 935, 945; Thomas, *supra* note 104, at 152, at its broadest, it encompasses any potential legal impediment to marrying, such as whether the parties are already married to other people, whether the marriage would be incestuous, or whether the parties to the relationship are of the same sex. *See In re* Estate of Hendrickson, 805 P.2d 20, 21 (Kan. 1991); MELISSA DELACERDA, 4 OKLAHOMA PRACTICE SERIES: OKLAHOMA FAMILY LAW § 1:6.3(B) (2007–2009); STEWART W. GAGNON ET AL., 1 TEXAS PRACTICE GUIDE: FAMILY LAW § 2:93 (2011). Where a legal impediment existed when a common law marriage was purportedly formed, precedent establishes that the relationship ripens into a marriage

2. Backdating Ceremonial Same-Sex Marriages

Even in states where common law marriage does not exist, courts can examine, and on occasion have examined, a same-sex couple's relationship history to pinpoint the date when they would have married but for a legal barrier to doing so. Three recent cases—two involving couples in which one of the partners died before they attained the legal right to marry and the third involving a couple that broke up before attaining the legal right to marry—pave the way for a retrospective review of the relationship history of same-sex couples residing in non-common law marriage states.

The first two cases involve litigation between a surviving partner—who seeks to be treated as having been legally married to her deceased partner for a particular purpose—and a third party who has a financial interest in the marriage not being retroactively recognized as valid. In this circumstance, courts in Connecticut and California deemed it appropriate to backdate same-sex marriages.

In the Connecticut case, a surviving partner had sued third parties for loss of consortium in connection with the injury and eventual death of her same-sex partner.[137] Although the couple was in a state-sanctioned civil union at the time the litigation commenced, they were neither married nor in a civil union at the time the injuries occurred.[138] The defendants sought to dismiss the action on the ground that the law governing loss of consortium claims requires that the couple was married at the time the injuries took place.[139] Recognizing the fundamental unfairness of such a rule as applied to same-sex couples, the Supreme Court of Connecticut expanded the common law loss-of-consortium action to encompass those same-sex couples who would have married but for the state law that prevented them from doing so.[140] It then remanded the case to the lower courts for factfinding on that question.[141]

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on the date when the legal impediment is eliminated. For example, if the parties were married to other people at the time a common law marriage would otherwise have been formed, the common law marriage begins when the parties terminate their marriages to other people. *See, e.g.*, Martin v. Brown, 15 Vet. App. 155 (Ct. Vet. App. 1996); Barnett v. Barnett, 80 So. 2d 626, 629–31 (Ala. 1955). Indeed, invoking this principle, one of the parties to the Texas litigation characterized the ban on same-sex marriage as a legal impediment that went to the capacity of the parties to marry, and thus contended that the court should recognize the marriage as valid only from the date the ban was struck down as unconstitutional. *See generally* Real Parties, *supra* note 126, at *4–*8. By backdating the couples' marriages, all three state courts thus either rejected the broader interpretation of "capacity" altogether or viewed its application in this context as constitutionally infirm.

137. *See* Mueller v. Tepler, 95 A.3d 1011, 1014 (Conn. 2014).

138. *See id.* at 1015.

139. *See id.* at 1015–16.

140. *See id.* at 1021–28. By expanding the scope of the common law cause of action for loss of consortium, the state supreme court avoided reaching the plaintiff's claim that failing to extend the right to sue to her violated the equal protection guarantee of the Connecticut Constitution. *See id.* at 1023 n.17. The Supreme Judicial Court of Massachusetts rejected a similar constitutional claim by a couple whose consortium injury arose before the date that the court announced that same-sex couples had a right to marry under the Massachusetts Constitution. *See* Goodridge v. Dep't of Pub. Health, 798

The California case involved Stacey Schuett and Lesly Taboada-Hall, a same-sex couple who had been in a committed relationship for twenty-seven years and had two children.[142] The couple had been in a state-sanctioned domestic partnership since 2001, and they held a marriage ceremony officiated by a local county supervisor on June 19, 2013, just one day before Taboada-Hall died.[143] Although lower federal courts had declared California's constitutional provision prohibiting same-sex marriages unconstitutional before the couple's marriage ceremony, those decisions were stayed pending U.S. Supreme Court review, and thus the couple could not obtain a marriage license.[144] Just six days after Taboada-Hall died, the U.S. Supreme Court in *Windsor* declared the definitional provision of DOMA unconstitutional. The court also handed down its decision in *Hollingsworth v. Perry*,[145] which held that the backers of California's ban on same-sex marriages lacked standing to defend the provision after state officials declined to appeal the lower court decisions striking it down.[146] As a result of *Hollingsworth*, same-sex marriages resumed in California on June 28, 2013, just eight days after Taboada-Hall died and just nine days after she and Schuett partook in a marriage ceremony.[147]

Schuett subsequently filed an action in California state court seeking a declaration regarding the fact and date of the couple's marriage. The state court issued an order declaring the couple's legal marriage date to be June 19, 2013, and issued a delayed marriage certificate listing that date.[148] Schuett then filed an action in federal court against Taboada-Hall's employer, seeking an order that Schuett was entitled to surviving spouse benefits from Taboada-Hall's pension on the ground that the couple was married at the time of Taboada-Hall's death.[149] The federal court agreed to recognize June 19, 2013, as the couple's legal marriage date, noting that it was clear that the couple would have been married on that date but for California's unconstitutional prohibition of such marriages:

N.E.2d 941, 968–70 (Mass. 2003) (describing its constitutional holding in *Goodridge* as acting prospectively only); *see also* Charron v. Amaral, 889 N.E.2d 946, 950–51 (Mass. 2008). Although the Massachusetts high court was free to interpret the state's constitutional guarantee as acting prospectively only, in future Massachusetts litigation involving rights associated with marriage, the analogous right to marry announced in *Obergefell* should apply retroactively for the reasons set forth in Part III of this Article. The broader federal right would trump the narrower right identified under the Massachusetts Constitution.

141. *See Mueller*, 95 A.3d at 1030 & n.26.

142. *See* Schuett v. FedEx Corp., No. 15-cv-0189-PJH, slip op. at 1 (N.D. Cal. Jan. 4, 2016), https://docs.justia.com/cases/federal/district-courts/california/candce/4:2015cv00189/283774/57 [https://perma.cc/FE5J-9RNB].

143. *See id.* at 1, 3.

144. *See id.* at 3.

145. 133 S. Ct. 2652, 2667–68 (2013).

146. *See Schuett*, slip op. at 3.

147. *See id.* at 3.

148. *See id.* at 3–4.

149. *See id.* at 4.

> They wanted to marry, intended to marry, and did everything possible to legally marry while Ms. Taboada-Hall was still alive. They plainly consented, and had the capacity to consent. The marriage was solemnized in front of numerous witnesses. At the time of the marriage, California law did not permit recognition of same-sex marriages, and they were thus unable to obtain a marriage license prior to the event. However, they complied with every other requirement imposed by California law. . . . Were it not for California's application of the unconstitutional law prohibiting same-sex marriage, there would be no question that plaintiff and Ms. Taboada-Hall were married as of the date of Ms. Taboada-Hall's death.[150]

Thus, just like the Pennsylvania, Texas, and Utah courts referenced above, the courts in the California case treated the state's ban on same-sex marriage as though it were a nullity at the time the couple formed its relationship and applied the remainder of state law governing ceremonial marriage validity.

The third case, arising in Oregon, involved litigation between two people of the same sex whose relationship ended before the couple had the legal option to marry. The case addressed whether the couple's relationship should retroactively be treated as a marital one when determining parental rights to a child born during the couple's relationship.

One female partner in an unmarried same-sex relationship had given birth to a child via artificial insemination.[151] Under Oregon law, when a woman gives birth to a child via artificial insemination, her spouse—if the spouse consents to the procedure taking place—is deemed a legal parent of the child.[152] At the time the child was born, same-sex marriage was neither permitted nor recognized in Oregon (although same-sex couples could enter into registered domestic partnerships), and so in terms the statute was inapplicable to the couple, who broke up before Oregon recognized same-sex marriage rights.[153] The Oregon court acknowledged that the artificial insemination statute's extension of parentage rights is inapplicable to an unmarried opposite-sex couple.[154] Nonetheless, it held that the statute's extension of parentage rights *could* apply to an unmarried same-sex couple, justifying the distinction on the ground that "same-sex couples were until recently prohibited from choosing to be married."[155] In determining whether the statute's extension of parentage rights applied to the unmarried same-sex

150. *Id.* at 7–8. The court then held that the U.S. Supreme Court's decision in *Windsor* applied retroactively, requiring private pension plans governed by the Employee Retirement Income Security Act of 1974 (ERISA) to recognize same-sex marriages for purposes of spousal pension benefits. *See id.* at 9–16. In so doing, the court cited the Supreme Court's retroactivity jurisprudence, which is detailed below. *See infra* notes 182–88.

151. *See In re* Madrone, 350 P.3d 495, 496 (Or. Ct. App. 2015).

152. *See id.* at 498.

153. *See id.*

154. *See id.* at 501.

155. *Id.*

partner of a woman who gave birth to a child, the key inquiry, according to the Oregon court, was "whether the same-sex partners *would have* chosen to marry before the child's birth had they been permitted to."[156] The Oregon court identified a number of factors relevant to making this factual determination:

> A couple's decision to take advantage of other options giving legal recognition to their relationship—such as entering into a registered domestic partnership or marriage when those choices become available—may be particularly significant. Other factors include whether the parties held each other out as spouses; considered themselves to be spouses (legal purposes aside); had children during the relationship and shared childrearing responsibilities; held a commitment ceremony or otherwise exchanged vows of commitment; exchanged rings; shared a last name; commingled their assets and finances; made significant financial decisions together; sought to adopt any children either of them may have had before the relationship began; or attempted unsuccessfully to get married.[157]

The court remanded the case to the trial court to make the factual determination whether the couple would have married had they been legally permitted to do so.[158]

Together, these three cases stand for the proposition that where a right associated with marriage is at stake in a ceremonial marriage state, the partners to that relationship are entitled to exercise that right through judicial backdating of the marital relationship even though they never actually entered into a legal marriage if they can show that they likely *would* have married one another but for the legal prohibition on same-sex marriage.

3. Administrative Backdating Sparked by Judicial Backdating

In some instances, judicial backdating of same-sex marriages can catalyze subsequent exercises of administrative backdating. Such actuated administrative backdating followed soon after the court decisions in Pennsylvania and Texas, recounted above, that retroactively recognized

156. *Id.*

157. *Id.* at 501–02.

158. *See id.* at 503; *accord* Lake v. Putnam, 2016 WL 3606081 (Mich. Ct. App. July 5, 2016) (Shapiro, J., concurring). The U.S. Supreme Court recently denied certiorari in a case seeking a similar form of backdating in a case involving child custody. *See* Willis v. Mobley, 171 So. 3d 739 (Fla. Dist. Ct. App. 2015), *cert. denied*, 136 S. Ct. 805 (2016). A lesbian couple living in Florida held a commitment ceremony in 2008. Soon thereafter, one of the women gave birth to a child that the couple jointly raised until 2013, when they separated. *See* Petition for Writ of Certiorari at 8–10, Willis v. Mobley, No. 15-500 (Oct. 13, 2015). In the petition for certiorari, the nonbiological parent contended that but for the state's prohibition on same-sex marriage, the couple likely would have married and under state law would both presumptively be the child's legal parents. *See id.* at 12–14. But the case was complicated by the absence of published lower court opinions and definitive court findings that the couple would have married but for the state's ban on same-sex marriage. *See id.* at 12, 15. In all events, a denial of certiorari does not constitute an expression of an opinion on the merits of a case. *See* Teague v. Lane, 489 U.S. 288, 296 (1989) (collecting cases).

common law same-sex marriages formed before the bans on same-sex marriage in those states were declared unconstitutional.

Administrative backdating in Pennsylvania grew out of litigation over the actions of the Montgomery County Orphan's Court clerk. In 2013, the clerk—after the U.S. Supreme Court's decision in *Windsor* and the announcement by Pennsylvania's attorney general that she would not defend the state's ban on same-sex marriage because it was "wholly unconstitutional"—began issuing marriage licenses to same-sex couples.[159] That year, a state court ordered the clerk to stop issuing marriage licenses but declined to rule on the validity of the licenses that he had already issued.[160] On May 20, 2014, a federal court declared Pennsylvania's ban on same-sex marriage unconstitutional,[161] a decision that became final after the Commonwealth declined to appeal it.[162] In the wake of that decision, the Commonwealth's Department of Health and the clerk sparred over the legal date of the couples' marriages, with the former contending it should be May 20, 2014—the date that the state ban was declared unconstitutional—and the latter contending that it should be the date the ceremonies were performed.[163] Toward the end of 2015, the Department of Health agreed to accept the dates of the marriage ceremonies, which all occurred before the ban on same-sex marriage was declared unconstitutional, as the legal dates of the marriages.[164]

Administrative backdating in Texas occurred shortly after the issuance of the Texas court decision that retroactively recognized a common law same-sex marriage formed before the U.S. Supreme Court invalidated the state's ban on same-sex marriage. A couple in Texas sought to file a "Declaration of Informal Marriage" with a county clerk using 1992—the year their relationship commenced—rather than 2015, the date same-sex marriage became lawful in Texas.[165] After initially rebuffing the couple, the Texas Department of State Health Services issued guidance indicating that same-sex couples were entitled

159. *See* Commonwealth, Dep't of Health v. Hanes, 78 A.3d 676, 678–81 (Pa. Commw. Ct. 2013).

160. *See id.* at 692–94.

161. *See* Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

162. *See* Whitewood v. Sec'y Pa. Dep't of Health, 2015 WL 4547750 (3d Cir. July 29, 2015).

163. *See* Jim Melwert, *Same-Sex Couples Who Got Married On Licenses Issued In Montco Before Ban Was Struck Down Can Keep Anniversary Date*, CBS PHILLY (Dec. 2, 2015), http://philadelphia.cbslocal.com/2015/12/02/same-sex-couples-who-got-married-on-licenses-issued-in-montco-before-states-ban-was-struck-down-can-keep-anniversary-date [https://perma.cc/97T6-NY92] (last visited Dec. 7, 2015); *Same-sex Couples Married Before Pa. Ban Was Overturned Can Keep Original Anniversary Dates*, PENN LIVE (Dec. 1, 2015), http://www.pennlive.com/news/2015/12/same-sex_marriage_pa_anniversa.html [https://perma.cc/6PS7-Q7T8] (last visited Dec. 7, 2015).

164. *See supra* note 163.

165. *See* Anna M. Tinsley, *Second Chance Success: Same-Sex Texas Couple's Union Becomes Common Law Marriage*, STAR-TELEGRAM (Sept. 28, 2015), http://www.star-telegram.com/news/politics-government/article36864789.html [https://perma.cc/J9R2-MVXC] (last visited Nov. 27, 2015).

to use the date their relationship began, rather than the date when courts deemed same-sex marriage a constitutional right.[166]

*D. Backdating in the Post-*Loving *Era*

The long delay in recognizing same-sex couples' right to marry is unusual, but it is not wholly without precedent. Backdating was applied after the historical ban on interracial marriage in the United States ended in 1967. That year, the U.S. Supreme Court, in *Loving v. Virginia*,[167] held that state laws prohibiting interracial marriage violated the equal protection and due process clauses of the Fourteenth Amendment.

In the post-*Loving* era, there were interracial couples whose relationships would have been recognized in their home states as marriages—common law or ceremonial—but for the past state laws prohibiting interracial marriages. Moreover, in some instances, one of the two partners to the relationship died before *Loving* invalidated those state laws. During that era, as in the current one, administrative and judicial marriage backdating occurred sporadically.

In the administrative context, the SSA issued regulations post-*Loving* making clear that, in applying the valid marriage test to interracial marriages, it would do so without reference to the state's anti-miscegenation law. It would thus backdate the marriage to the date when the other requirements of state law for forming a marriage were satisfied.[168] In the judicial context, courts retroactively applied[169]—or at least entertained the retroactive application of[170]—*Loving* to recognize as valid common law interracial marriages even where one of the two partners had died before *Loving*. In one case—involving Texas law—a federal court held that in applying the criteria for establishing a common law marriage, it would simply ignore the prohibition on interracial marriage.[171] In the other case, a federal court applied *Loving* retroactively but concluded that the couple did not satisfy the remaining criteria for establishing a common law marriage under Mississippi law.[172] In sum, the backdating of

166. *See id.*

167. 388 U.S. 1 (1967).

168. *See* SSR 67-56, 1967 WL 2993. The SSA recently announced that it intends to issue similar regulations regarding same-sex marriage. *See* Tara Siegal Bernard, *Gay Couples Are Eligible for Social Security Benefits, U.S. Decides*, N.Y. TIMES (Aug. 20, 2015), http://www.nytimes.com/2015/08/21/business/
gay-couples-are-eligible-for-benefits-us-decides.html [https://perma.cc/NK9N-CDBH] (last visited Nov. 29, 2015); Susan Sommer, *SSA Tells Court It Will Apply Obergefell Retroactively to Grant Spousal Benefits In Lambda Legal Case*, LAMBDA LEGAL (Aug. 20, 2015), http://www.lambdalegal.org/blog/20150820_ssa-apply-obergefell-retroactively-spousal-benefits [https://perma.cc/VFP9-AAXW] (last visited Nov. 29, 2015).

169. *See* Prudential Ins. Co. of America v. Lewis, 306 F. Supp. 1177, 1183 (N.D. Ala. 1969).

170. *See* Vetrano v. Gardner, 290 F. Supp. 200, 203–06 (N.D. Miss. 1968).

171. *See Lewis*, 306 F. Supp. at 1183.

172. *See Vetrano*, 290 F. Supp. at 203–06. The court rejected an argument that fear of criminal prosecution pre-*Loving* excused the couple from the duty of holding themselves out as married. *See id.* at 206.

marriages after a longstanding barrier to marriage is declared unconstitutional, while an unusual practice in the United States, is not unprecedented.

III.
A CONSTITUTIONAL RIGHT TO BACKDATING

The sporadic discretionary legislative, administrative, and judicial backdating of same-sex marriages described in Part II are a good second step—following full marriage equality—toward making same-sex couples whole for the injuries caused by state and federal laws prohibiting and refusing to recognize same-sex marriages. Yet by virtue of their discretionary nature, backdating remedies are not available to all same-sex couples nationwide. Moreover, even when discretion is exercised, it does not always relate back to the couple's true but-for marriage date.

This Section takes the concept of marriage backdating a step further. Applying general principles of constitutional retroactivity and the scope of remedial relief for constitutional violations, it demonstrates that *Obergefell* applies not merely prospectively but also retroactively. Relying on these general principles, it contends that, subject only to procedural bars to relief—such as res judicata and statutes of limitation—same-sex couples possess a constitutional right to have their marriages backdated to the date they would have married one another but for the existence of a legal barrier to doing so. If such backdating is not administratively feasible, couples are at least entitled to its functional equivalent.

A. General Retroactivity Principles

The U.S. Supreme Court has developed separate sets of principles regarding the retroactivity of its decisions in criminal and civil cases. As a general rule, the Court has treated its judicial pronouncements—particularly those on matters of constitutional law—as not merely prospective, but also retroactive in nature.[173] Over a century ago, the Court explained, "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[174]

However, in the 1960s and 1970s, the Court recognized two exceptions to this general principle. First, the Court declared that when it announced a new constitutional rule of criminal procedure, whether it would apply retroactively to other cases pending on either direct or habeas review turned on three factors: (1) the purpose served by the new rule; (2) the extent of reliance on the old rule; and (3) the effect on the administration of justice of applying the standard

173. *See* Robinson v. Neil, 409 U.S. 505, 507 (1973); Linkletter v. Walker, 381 U.S. 618, 622–23 (1965).

174. Norton v. Shelby County, 118 U.S. 425, 442 (1886).

retroactively.[175] Second, the Court declared that in civil cases, the decision whether to retroactively apply new principles of law turned on a different set of three factors: (1) whether the decision overruled past precedent on which litigants may have relied or resolved an issue of first impression whose resolution was not clearly foreshadowed; (2) whether retroactive application would further or retard the new rule's operation; and (3) the inequity imposed by retroactive application.[176]

Yet beginning in 1987, with its decision in *Griffith v. Kentucky*,[177] the Court significantly altered retroactivity principles in the criminal context. Under *Griffith*, in criminal cases, newly announced decisions always apply retroactively to those criminal cases still on direct review.[178] If the new principle was announced only after a given defendant exhausted his direct review options, it could still apply retroactively even to such cases on habeas review in one of two circumstances. First, if the new principle is *substantive* in nature—in the sense that it either interprets a criminal statute narrowly to exclude certain conduct from its scope, or declares as a matter of constitutional law that the particular conduct or persons covered by the statute are beyond the state's power to punish—it will be applied retroactively to cases on habeas review.[179] For example, *Loving* declared it beyond the power of states to criminalize interracial marriages.[180] If in contrast the new principle is merely *procedural* in nature, it will be applied retroactively to cases on habeas review only in the extremely rare circumstance that the Court characterizes the principle as a watershed rule of criminal procedure that implicates the fundamental fairness or accuracy of criminal proceedings.[181]

Soon after *Griffith*, the Court also significantly altered its retroactivity principles in the civil context. In *Harper v. Virginia Department of Taxation*,[182] the Court described its new civil retroactivity principles as follows:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and *as to all events, regardless of whether such events predate or postdate our announcement of the rule*.[183]

175. *See* Stovall v. Denno, 388 U.S. 293, 296–301 (1967); *Linkletter*, 381 U.S. at 636.

176. *See* Chevron Oil Co. v. Huson, 404 U.S. 97, 106–07 (1971).

177. 479 U.S. 314 (1987).

178. *See id.* at 328.

179. *See* Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004); *see also* Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion).

180. *See* Mackey v. United States, 401 U.S. 667, 692–93 & n.7 (1971) (Harlan, J., concurring in part and dissenting in part). The Court favorably cited Justice Harlan's opinion when it announced its general principles of retroactivity. *See Teague*, 489 U.S. at 311.

181. *See Schriro*, 542 U.S. at 352; *Teague*, 489 U.S. at 311–16.

182. 509 U.S. 86 (1993).

183. *Id.* at 97 (emphasis added).

The new standard thus made clear that when the Court decides a question of federal law, that holding applies retroactively not only to all civil cases still pending on direct review, but also to events that predate the Court's decision.[184] As Justice Antonin Scalia described the new standard, if the Court declares a law unconstitutional, lower courts are to proceed in subsequent litigation as though that law never existed:

> A court does not—in the nature of things it *can* not—give a "remedy" for an unconstitutional statute, since an unconstitutional statute is not in itself a cognizable "wrong." (If it were, every citizen would have standing to challenge every law.) In fact, what a court does with regard to an unconstitutional law is simply to *ignore* it. It decides the case "*disregarding the [unconstitutional] law*," *Marbury v. Madison*, 1 Cranch 137, 178 (1803) (emphasis added), because a law repugnant to the Constitution "is void, and is as no law," *Ex parte Siebold*, 100 U.S. 371, 376 (1880). Thus, if a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy. Or if a plaintiff seeks to enjoin acts, harmful to him, about to be taken by a government officer under an unconstitutional regulatory statute, "the court enjoins, in effect, not the execution of the statute, but the acts of the official, *the statute notwithstanding*."[185]

Although the standard of retroactivity in civil cases would appear to leave governmental bodies open to seemingly unlimited retroactive liability for any actions they took in reliance on a law subsequently deemed unconstitutional, the Court has been careful to explain that retroactivity in civil cases is limited by the need for finality. States can achieve this by enforcing procedural rules like res judicata, statutes of limitation, and laws requiring parties aggrieved by a law to provide timely notice of their objection.[186] The Court assesses the reasonableness of such procedural bars to relief as a matter of procedural due process,[187] and assuming they pass constitutional muster, retroactivity of newly

184. *See* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752 (1995) ("[W]hen (1) the Court decides a case and applies the (new) legal rule of that case to the parties before it, then (2) it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to all pending cases, whether or not those cases involve predecision events.").

185. *Id.* at 759–60 (Scalia, J., concurring).

186. *See id.* at 756 ("Suppose a State collects taxes under a taxing statute that this Court later holds unconstitutional. Taxpayers then sue for a refund of the unconstitutionally collected taxes. Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes. But what if a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity—a rule containing certain procedural requirements for any refund suit—nonetheless barred the taxpayers' refund suit? Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim."); *see also* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 541 (1991); McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla., 496 U.S. 18, 45 (1990).

187. *See McKesson Corp.*, 496 U.S. at 49–51.

announced principles in civil cases cannot reopen a door closed by such procedural rules.[188]

B. General Principles on the Scope of Remedial Relief

When the U.S. Supreme Court has invoked the Reconstruction Amendments to strike down laws that discriminate against discrete groups like women and African Americans, the Court has held that the remedial relief must be crafted so as to "make whole" the victims of unconstitutional discriminatory conduct. The scope of relief afforded to victims of such discrimination is not limited to a declaration not to perpetuate such discriminatory conduct in the future. Rather, relief must put victims in the same position they would have been in but for the discriminatory conduct.

Thus, for example, in *Louisiana v. United States*,[189] the Court declared unconstitutional—pursuant to the Fifteenth Amendment—a highly subjective "interpretation test" that allowed voting registrars to deny the right to register to vote to anyone who could not give a reasonable interpretation of any clause in the state or federal constitutions when asked.[190] With respect to the scope of remedial relief, the Court noted that "the court has not merely the power but the duty to render a decree which will so far as possible *eliminate the discriminatory effects of the past* as well as bar like discrimination in the future."[191] Accordingly, the Court held it appropriate to order the state to delay implementation of a new, uniform, and objective test for prospective voters.[192] The Court reasoned that because the old test was applied in a way that discriminated in favor of white applicants and against African American applicants, and because the state was not requiring everyone to reregister and take the new test, allowing the state to apply the new test to unregistered voters (who were predominantly African American) would perpetuate the effects of the past discrimination.[193] It thus held that the state would have to postpone the test unless and until it ordered "a complete reregistration of voters, so that the new test will apply alike to all or to none."[194]

Similarly, the Court, following its declaration in *Brown v. Board of Education*[195] that segregated schools violate the Equal Protection Clause of the Fourteenth Amendment, made clear in *Milliken v. Bradley*[196] that in enforcing *Brown*, the federal courts were not limited to merely ordering schools to cease engaging in such discriminatory action. The federal courts could also order the

188. *See James B. Beam Distilling Co.*, 501 U.S. at 541.
189. 380 U.S. 145 (1965).
190. *See id.* at 152–53.
191. *Id.* at 154 (emphasis added).
192. *See id.* at 154–55.
193. *See id.*
194. *Id.* at 155.
195. 349 U.S. 294 (1955).
196. 433 U.S. 267 (1977).

offending schools to implement remedial education programs designed to undo the effects of the prior discriminatory scheme.[197] The *Milliken* Court held that to implement the *Brown* decision fully, courts were empowered to order such action as they deemed necessary to "make whole" the victims of the pre-*Brown* discriminatory conduct by restoring them to the position they would have occupied in the absence of such conduct.[198]

The Court reiterated these general principles in its 1996 decision in *United States v. Virginia*,[199] which declared that excluding women from the Virginia Military Institute violated the Equal Protection Clause. The Court wrote that remedial decrees for constitutional violations "must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'"[200]

Although these specific cases arose in the context of groups that have traditionally received heightened scrutiny under the Equal Protection Clause, the Court's holdings regarding the scope of remedial relief were not tied to that fact. Rather, the Court described the remedy of restoring victims of unconstitutional discrimination to the position that they would have occupied but for the discrimination as animated by general equitable principles.[201]

C. The Right of Same-Sex Couples to Retroactive, "Make Whole" Relief

Applying the U.S. Supreme Court's general principles regarding the retroactivity of its federal law pronouncements, coupled with its pronouncements on the scope of remedial relief granted when constitutional rights are infringed, leads to two propositions regarding the impact of the Court's *Obergefell* decision. First, the various methods of discretionary marriage backdating for same-sex couples delineated above are in truth not merely discretionary, but rather are constitutionally compelled. Second, to the extent that—due to the minimum marriage length requirements associated with certain benefits—these methods of backdating fail to place a given same-sex couple in the same position they would have been in but for the bans on same-sex marriage, courts are empowered to craft alternative remedies calculated to put them in that position.

1. Retroactive Relief

The first proposition, which flows from the Court's retroactivity jurisprudence in civil cases,[202] is that same-sex couples are constitutionally

197. *See id.* at 279–88.
198. *See id.* at 280 & n.15.
199. 518 U.S. 515 (1996).
200. *Id.* at 547.
201. *See, e.g.*, *Milliken*, 433 U.S. at 279–80.
202. Virtually all of the rights detailed in Part I of this Article would arise, if at all, only in civil litigation. The one exception—the marital communications privilege—could arise in a criminal case,

entitled to have the *Obergefell* decision applied retroactively, meaning that in some circumstances they are entitled to have their marriage date backdated.

Four reference points have been used in administrative, legislative, and judicial contexts to backdate a same-sex marriage. These include (1) the date the couple satisfied the requirements for forming a common law marriage but for the fact that they were of the same sex; (2) the date the couple entered into a civil union or other formalized nonmarital relationship; (3) the date the couple went through a religious marriage ceremony; and (4) the date the couple received and acted upon a marriage license issued by local officials who concluded that bans on same-sex marriage were unconstitutional. If a person litigates the validity and legal date of their same-sex marriage with any governmental entity, the court should—at a minimum—use the earliest of any of these four reference points to determine the marriage's validity and legal date.

Taking as the simplest example the first reference point—adjudication of whether a common law marriage was formed—the court should apply *Obergefell* retroactively to determine the validity and legal date of the marriage. As *Harper* makes clear, new pronouncements of federal law apply to events that predate the Court's pronouncement.[203] Or to paraphrase Justice Scalia, in determining whether the couple formed a common law marriage, a court should proceed as though the prohibition on same-sex marriage never existed.[204] Indeed, the post-*Loving* cases did so explicitly in retroactively recognizing interracial common law marriages,[205] and the Pennsylvania, Texas, and Utah decisions recounted in Part II did so implicitly in retroactively recognizing common law same-sex marriages post-*Obergefell*.[206]

One can make a similar—albeit more nuanced—argument that retroactive application of *Obergefell* should lead a court to use the second or third reference points as the legal date of a couple's marriage. With respect to the date a couple entered into a civil union or other formalized nonmarital relationship,[207] state governments acted unconstitutionally by issuing different

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but so long as the case is still on direct review, *Obergefell* would apply retroactively. *See supra* text accompanying note 178.

203. *See supra* notes 182–84.

204. *See supra* note 185.

205. *See supra* notes 169–72.

206. *See supra* notes 118–36. The attorney representing the surviving partner in the Texas litigation made specific citation to the Supreme Court's retroactivity jurisprudence detailed above. *See* Sonemaly Phrasavath's Response to Motions for Summary Judgment, *In re* Estate of Powell, No. C-1-PB-14-001695 (Tex. Prob. Ct. 2015).

207. Although the formalized nonmarital relationship would typically be a civil union, domestic partnership or other marriage-like relationship, different types of formalized relationships are possible. In the past, for example, some same-sex couples formalized their relationship by having one partner legally adopt the other partner so that in the event of the death of one partner, the other would be entitled to certain legal protections associated with a parent-child relationship. Post-*Obergefell*, such couples could contend that courts should undo the adoption and treat the couple as retroactively married using the date of the adult adoption as the appropriate reference point for backdating. *See*

documentation—certificates of civil unions versus marriage certificates—to same-sex couples and opposite-sex couples, respectively, for essentially identical relationship recognition applications. Applying *Obergefell* retroactively, a court should ignore the unconstitutional separate-but-equal scheme and conclude that upon receipt of the paperwork, the state should have issued the same-sex couple a marriage certificate.

In a similar vein, courts should treat the date when a same-sex couple held a marriage ceremony officiated by a religious official as the legal date of the couple's civil marriage. In every state in the United States, religious officials are authorized to solemnize civil marriages.[208] Historically, when opposite-sex couples opt for a religious marriage ceremony, the religious official serves double duty as both the overseer of the religious marriage and the person who solemnizes the civil marriage. Only because of state laws prohibiting same-sex marriage were the religious marriages of same-sex couples not recognized as valid civil marriages. Accordingly, a court applying *Obergefell* retroactively should ignore the past law prohibiting same-sex marriage and give the religious marriage the legal force it otherwise warranted.

What makes these second and third reference points somewhat more attenuated than the first is that the parties' intent to form a civil marriage is less certain. Mutual intent and agreement to form a marriage is a core element of a common law marriage, so the parties' intent is necessarily clear if they are in a common law marriage.[209] In contrast, it is conceivable that one or both parties to a domestic partnership or civil union may have entered it knowing, say, that the relationship was not recognized as a marriage for federal purposes, which they might have found appealing for tax or other financial reasons.[210] It is likewise possible that a same-sex couple who participated in a religious ceremony was seeking only religious, not civil, recognition of their relationship. We would, of course, be more certain of the parties' intent to enter into a civil marriage had they first applied for a civil marriage license and been rebuffed. However, just as a couple's failure to apply for a marriage license does not necessarily deny them standing to challenge the constitutionality of

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generally John Culhane, *Before Marriage Was Possible, Gay People Adopted One Another. Now Sons Need to Become Husbands*, SLATE (Nov. 10, 2015), http://www.slate.com/blogs/outward/2015/11/10/adult_adoption_for_gay_couples_can_the_adoptions_be_undone_for_marriage.html [https://perma.cc/77PA-VCLT] (last visited Oct. 13, 2016); Elon Green, *The Lost History of Gay Adult Adoption*, N.Y. TIMES (Oct. 19, 2015), http://www.nytimes.com/2015/10/19/magazine/the-lost-history-of-gay-adult-adoption.html [https://perma.cc/BFG2-76S8] (last visited Oct. 13, 2016).

208. *See* Andrew C. Stevens, *By the Power Vested in Me? Licensing Religious Officials to Solemnize Marriage in the Age of Same-Sex Marriage*, 63 EMORY L.J. 979, 981 (2014); *see also* Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1137 (2009).

209. *See supra* note 110.

210. *See, e.g.*, Barbara K. Lundergan, *Love, Marriage, and the IRS: Tax Advantages of Illinois Civil Unions*, 100 ILL. B.J. 200 (2012).

laws prohibiting same-sex marriage,[211] it likewise should not prevent a court from using the second and third reference points as the likely dates of the couple's but-for marriage. Although theoretically possible, the likelihood that a same-sex couple wanted a civil union or a religious marriage but not a civil marriage seems sufficiently remote that intent should be presumed in the absence of counterproof. At the very least, a court should entertain additional evidence in support of the couple's likely intent like it would were it adjudicating the validity of a common law marriage.[212]

In contrast, with the fourth reference point—relating the marriage back to the date some same-sex couples received and acted upon marriage licenses briefly issued by a small group of local officials in California, New York, Oregon, and Pennsylvania—the couples' intent to marry seems ironclad.[213] Upon learning that marriage licenses were available, these couples rushed to the local offices, submitted their fees and paperwork, had their marriages officiated, and returned the paperwork in the hopes of receiving a marriage certificate.[214] Retroactive application of *Obergefell* should result in validating the marriages retroactive to that date, since a court adjudicating the validity of the marriages would disregard any prohibitions on same-sex marriage extant at the time the couples purported to marry.

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211. A plaintiff need not engage in a "futile" act to establish standing. *See* PETER NICOLAS, SEXUAL ORIENTATION, GENDER IDENTITY, AND THE CONSTITUTION 59 n.2 (2013) (citing Howard v. N.J. Dep't of Civil. Serv., 667 F.2d 1099, 1103 (3d Cir. 1981)); Hailes v. United Air Lines, 464 F.2d 1006, 1008–09 (5th Cir. 1972)).

212. In the face of significant uncertainty, it might be prudent for a court to distinguish between rights vis-à-vis the government—such as social security benefits—and rights as between the parties to the alleged marriage itself, such as alimony, or rights as against third parties, such as intestate succession. Where rights vis-à-vis the government are involved, erring on the side of recognizing the marriage might in some instances provide a windfall to one of the partners, but it does not result in harm to the other partner or to other private parties. In contrast, where the rights are as between the parties themselves (or as against third parties), it is appropriate to require more exacting proof of the relationship because recognizing the marriage could provide a windfall to one private party at the expense of the other. *Cf.* Lake v. Putnam, 2016 WL 3606081 (Mich. Ct. App. July 5, 2016) (declining to treat the couple as retroactively married for purposes of determining parentage rights and holding that "we simply do not believe it is appropriate for courts to retroactively impose the legal ramifications of marriage onto unmarried couples several years after their relationship has ended"); *id.* (Shapiro, J., concurring) ("My colleagues are rightfully concerned about retroactively imposing marriage on a same-sex couple simply because one party now desires that we do so. However, that concern is fully addressed by a factual inquiry into the facts as they existed at the time the child was born or conceived. The question is whether the parties would have married before the child's birth or conception but did not because of the unconstitutional laws preventing them from doing so.").

213. *See In re* Madrone, 350 P.3d 495, 501 (Or. Ct. App. 2015) ("Whether a particular couple would have chosen to be married, at a particular point in time, is a question of fact. In some cases, the answer to that question will be obvious and not in dispute. For example, there was no disputing that the parties in *Shineovich* would have chosen to marry—they actually did make that choice, and were not *legally* married only because their marriage was later declared void *ab initio*.") (citing Shineovich & Kemp, 214 P.3d 29, 32 (Or. Ct. App. 2009) (noting that the couple purported to marry after receiving a marriage license from Multnomah County, Oregon that was subsequently deemed improperly issued)).

214. *See supra* note 76.

However, the fourth reference point is complicated by pre-*Obergefell* litigation involving the validity of the clerks' actions, and in some cases, the validity of the marriages themselves.[215] Accordingly, it is conceivable that despite the general rule of retroactivity, a court might conclude that res judicata—a procedural bar to retroactivity— prevents it from reconsidering the issue.[216]

The doctrine of res judicata encompasses the related doctrines of claim and issue preclusion.[217] Claim preclusion forecloses relitigation of a previously adjudicated claim, regardless of whether the subsequent litigation raises the same or different issues.[218] In contrast, issue preclusion bars relitigation of an issue of fact or law resolved in prior litigation, even if the issue arises in a case involving a different claim.[219] However, subject to limited exceptions not applicable in any of the cases in the four states where clerks temporarily issued licenses, these doctrines cannot be invoked against those who were not parties to the earlier proceeding in which a given claim or issue was adjudicated.[220] A state court's application of the doctrines to those who were not parties to the prior litigation would violate the procedural due process rights of such parties.[221]

In the California, New York, and Pennsylvania proceedings, *none* of the same-sex couples to whom marriage licenses had been issued were parties to the litigation, which involved the local officials as defendants and other government officials as plaintiffs.[222] Indeed, for this reason, the New York and Pennsylvania courts declined to address the validity of the couples' marriage licenses. Instead, the courts ruled that the local officials' actions were unlawful and enjoined them from continuing to issue marriage licenses. The courts also held that the validity of the marriage licenses was properly adjudicated in separate proceedings involving the purportedly married couples themselves.[223] The majority opinion in the California proceeding addressed the validity of the marriage licenses and declared them to be of no legal effect,[224] but its decision to reach the issue was criticized by several of the concurring opinions in that case, some of which noted that doing so violated the procedural due process

215. *See infra* text accompanying notes 222–31.
216. *See supra* notes 186–88.
217. *See* Taylor v. Sturgell, 553 U.S. 880, 892 (2008).
218. *See id.*; *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).
219. *See Taylor*, 553 U.S. at 892.
220. *See id.* at 892–93.
221. *See id.* at 892; Hansberry v. Lee, 311 U.S. 32, 39–46 (1940).
222. *See* Commonwealth, Dep't of Health v. Hanes, 78 A.3d 676, 692–94 (Pa. Commw. Ct. 2013); *see also* Hebel v. West, 803 N.Y.S.2d 242, 244–45, 248 (App. Div. 2005); Lockyer v. City & County of San Francisco, 95 P.3d 459, 494–98 (Cal. 2004).
223. *See Hanes*, 78 A.3d at 692–94; *see also Hebel*, 803 N.Y.S.2d at 248.
224. *See Lockyer*, 95 P.3d at 495–98.

rights of the purportedly married couples.[225] Because applying res judicata to the nonparty couples in these three states would violate established principles of procedural due process, these earlier decisions cannot bar retroactive application of *Obergefell* to declare their marriages valid.[226]

In contrast, the Oregon proceedings *did* include at least some of the same-sex couples whose marriage licenses were at issue. Specifically, the case was brought by nine same-sex couples who had been issued marriage licenses against state officials who refused to recognize the marriages. The couples sought a declaration that the marriages were valid and that the state's law prohibiting same-sex marriage was unconstitutional.[227] The court found for the state officials and declared the couples' marriages invalid.[228] Although the couples did not specifically claim that the state's refusal to recognize the marriages violated the U.S.—as opposed to merely the Oregon—Constitution, res judicata would likely preclude them from relitigating the validity of the marriage licenses, since the doctrine encompasses not only those claims actually raised but also those that could have been raised in the earlier proceeding.[229] Moreover, had the couples filed the challenge as a class action, the judgment could have constitutionally bound all three thousand Oregon same-sex couples who received marriage licenses in 2004, since class actions are a recognized exception to the general rule that res judicata cannot be applied to those who were not parties to the earlier proceedings.[230] However, because only nine of the three thousand couples were parties to the Oregon proceedings and because the case was not a class action, the decision cannot bar retroactively applying *Obergefell* to declare valid the remaining Oregon marriages that took place in 2004.[231]

225. *See id.* at 507–08 (Kennard, J., concurring in part and dissenting in part); *id.* at 508–10 (Werdegar, J., concurring in part and dissenting in part); *see also In re* Marriage Cases, 183 P.3d 384, 454–55 (Cal. 2008) (Kennard, J., concurring). The majority may have been willing to address the validity of the marriage licenses because, in part, it did not have the benefit of the U.S. Supreme Court's later decision in *Taylor* that rejected an open-ended "virtual representation" exception to the general rule against nonparty preclusion that had been recognized by some lower federal courts. *See Taylor*, 553 U.S. at 895–901. Although *Taylor* was nominally a decision about the federal common law of preclusion doctrine—which is not binding on the states—the Court's interpretation of federal common law in that case was clearly informed by due process considerations, which *are* binding on the states. *See id.* at 892–901; *see also* Kathleen M. McGinnis, *Revisiting Claim and Issue Preclusion in Washington*, 90 WASH. L. REV. 75, 127–29 (2015) (so contending and collecting cases and secondary sources in support of that interpretation of *Taylor*).

226. *See supra* note 187.

227. *See* Li v. State, 110 P.3d 91, 94–95 (Or. 2005).

228. *See id.* at 102.

229. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980); *see also* Cromwell v. County of Sac, 94 U.S. 351, 352–53 (1876).

230. *See Taylor*, 553 U.S. at 894.

231. *See supra* text accompanying note 221.

2. "Make Whole" Relief

The second proposition—which flows from the Court's pronouncements on remedial relief for constitutional violations—is that same-sex couples are entitled to "make whole" relief. In other words, the remedy should put them in the same position that they would have been in but for the existence of the constitutionally infirm prohibitions on same-sex marriage. Yet reliance on the four reference points for backdating same-sex marriages delineated in the previous Section, standing alone, will fail to fully effectuate the *Obergefell* decision. Using them will not put all same-sex couples in the same position they would have been in but for the bans on same-sex marriage. Accordingly, where rights associated with same-sex marriage are involved, courts and policymakers need to consider alternative remedial schemes.

One problem with the four reference points is that not every same-sex couple has all or any of these reference points available. The first is available only to those in the small number of states that recognize common law marriage, while the second is available only to those in the small number of states that previously recognized formalized, nonmarital relationships for same-sex couples. The third is available only to those who subscribe to religious marriage, while the fourth is available only to a handful of couples in the handful of states that issued marriage licenses for a brief period of time.

Moreover, these reference points are incomplete even for couples who have them at their disposal. In light of the legal climate, same-sex couples in common law marriage states might have been reluctant to hold themselves out as a married couple for fear of ridicule or persecution.[232] Those in states offering civil unions or the equivalent may have opted not to enter into those relationships either because they viewed them as inferior and were holding out for marriage rights[233] or were concerned by the tax and other regulatory complexities associated with federal nonrecognition of such relationships.[234] Believers in religious marriage may have been holding out for a wedding that would have both religious and civil significance. And those whose local officials were willing to issue marriage licenses may have wanted assurance that the officials' actions were valid before proceeding.

In addition, even for couples who have one or more of these four reference points at their disposal and who exercise the opportunity, backdating using solely these reference points may provide them with incomplete relief. Many of these relationships solidified into lifelong commitments well before domestic partnerships or civil unions came into being, or before religious officials became open to performing same-sex weddings. To the extent that some of the benefits associated with marriage require a fairly long

232. *See* Nicolas, *supra* note 104, at 940–43; *cf.* Vetrano v. Gardner, 290 F. Supp. 200, 206 (N.D. Miss. 1968).

233. *See* Cox, *supra* note 69, at 723.

234. *See* United States v. Windsor, 133 S. Ct. 2675, 2694–95 (2013).

relationship—ten years, for example, in the case of divorced spouse social security benefits—using these reference points understates the true length of their relationships and results in unfairly denying benefits.

Because the purpose of remedial relief is to "make whole" the victims of unconstitutional discriminatory conduct—or to put them in the same position that they would have been in but for the discriminatory conduct[235]—courts should not deem any of these reference points decisive in determining a couple's but-for marriage date. Rather, courts attempting to pinpoint a same-sex couple's but-for marriage date should consider these reference points and other evidence as data in hearings akin to the evidentiary hearings used to determine whether and when a couple entered into a common law marriage.[236]

Because such hearings are complex and administratively burdensome, a court might instead opt for alternative remedies that are easier to administer. So long as these alternative remedies are designed to give same-sex couples the benefit of the doubt,[237] they could likewise provide them with "make whole" relief while simultaneously easing the burden on courts and administrative agencies. Two examples of alternate remedies are a presumption and the temporary suspension of minimum marriage length requirements.

Presumptions are tools that courts, legislative bodies, or administrative agencies can create to help them make factual determinations in the face of uncertain evidence. With a presumption, upon proof of a basic fact or facts, the trier of fact is required to draw a particular conclusion—the presumed fact—in the absence of counterproof.[238] For example, if a person has been absent without tidings for seven years (basic fact), they are presumed to be dead

235. *See supra* notes 189–201.

236. *See, e.g.*, *In re* Madrone, 350 P.3d 495, 501–02 (Or. Ct. App. 2015) ("Whether a particular couple would have chosen to be married, at a particular point in time, is a question of fact. . . . A number of factors may be relevant to the fact finder's determination. A couple's decision to take advantage of other options giving legal recognition to their relationship—such as entering into a registered domestic partnership or marriage when those choices become available—may be particularly significant. Other factors include whether the parties held each other out as spouses; considered themselves to be spouses (legal purposes aside); had children during the relationship and shared childrearing responsibilities; held a commitment ceremony or otherwise exchanged vows of commitment; exchanged rings; shared a last name; commingled their assets and finances; made significant financial decisions together; sought to adopt any children either of them may have had before the relationship began; or attempted unsuccessfully to get married."); *accord* Lake v. Putnam, 2016 WL 3606081 (Mich. Ct. App. July 5, 2016) (Shapiro, J., concurring).

237. As set forth above, *see supra* note 212, giving the couple "the benefit of the doubt" is much clearer when a right as against the government is involved. When the right is as against the other partner to the alleged marriage or as against a third party, giving the benefit of the doubt to one private party harms another. Accordingly, these alternative remedies may be most appropriate only when the former, not the latter, is at stake.

238. *See* PETER NICOLAS, EVIDENCE: A PROBLEM-BASED AND COMPARATIVE APPROACH 731 (Carolina Academic Press 3d ed. rev. printing 2014). The constitutional limitations on the use of presumptions in civil cases are minimal. To pass constitutional muster, there need only be a "rational connection" between the basic and presumed facts. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 28 (1976); *see also* Mobile, Jackson & Kan. City R.R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910).

(presumed fact) in the absence of counterproof.[239] Courts already use presumptions in the realm of marriage validation. For example, if a person has been married multiple times, there exists a presumption that the latest marriage is valid, even if it is uncertain whether the earlier marriages ended in death or divorce.[240]

Relying on statistical averages of the typical lapse of time between a couple's first meeting and their marriage, a court could create (or direct the creation of) a presumption that, upon proof that a same-sex couple dated for *x* years and cohabitated (basic facts)—with *x* representing the average duration of courtship—the couple would have married but for the legal prohibition. Because it is merely a presumption, one party could provide supplementary evidence tending to suggest that the couple would have married sooner, and the opposing party could rebut the presumption by counterproof suggesting that the couple would not have married or would have married later.

Alternatively, in lieu of seeking to pinpoint each same-sex couple's specific but-for marriage date, a court might instead order a temporary suspension of the minimum marriage length requirements for same-sex couples and allow those requirements to be phased back in over time. After all, the legal injury to same-sex couples is not the date printed on their marriage certificates, but rather the consequences that flow therefrom where marriage duration is relevant. Consider, for example, the Social Security Act's requirement that a couple be married for a minimum of ten years in order for one of them to receive divorced spouse benefits based on the other spouse's earnings.[241] A couple's but-for marriage date might have been 2010, but they were unable to legally marry until the Court's 2015 *Obergefell* decision. If they divorce in 2024, neither will qualify for divorced spouse benefits even though their marriage will have been fourteen years old had they been legally permitted to wed in 2010.

Yet because pinpointing a couple's but-for marriage date is complex and time consuming, a court could instead require the SSA to temporarily suspend, and later phase back in, its ten-year minimum marriage length requirement so far as divorced spouse benefits for same-sex couples are concerned. In other words, for ease of administration, a court could direct the SSA to assume that *no* same-sex couples had the legal right to marry until 2015 and thus to require no minimum marriage length for those who divorced in 2015, a one-year minimum for those who divorced in 2016, and a two-year minimum in 2017, and to continue phasing the minimum back in until 2025, when it would return to a ten-year minimum marriage length requirement for both same-sex and

239. *See, e.g.*, Malone v. Reliastar Life Ins. Co, 558 F.3d 683, 688 (7th Cir. 2009).

240. *See, e.g.*, Smith v. Heckler, 707 F.2d 1284, 1285–86 (11th Cir. 1983); *see also* Crosby v. Ellsworth, 431 F.2d 35, 40 (9th Cir. 1970).

241. *See* 42 U.S.C. §§ 402(b), (c), 416(d) (2012).

opposite-sex couples.[242] Such a remedy would thus ensure that same-sex couples are not disadvantaged due to the previous discriminatory scheme.[243]

In sum, courts can use the breadth and flexibility inherent in their equitable remedial powers[244] to devise a remedy, or set of remedies, that will simultaneously ensure "make whole" relief for all same-sex couples and minimize the administrative burden for courts, administrative agencies, and the couples themselves.

D. Voluntary Governmental Remediation

The preceding discussion assumes the initiation of a judicial challenge to remedy the harms associated with the historical prohibition on same-sex marriage. However, legislators and administrative agencies need not await a court order before crafting remedies calculated to make same-sex couples whole. They can instead voluntarily modify their own laws or regulations to give same-sex couples the necessary relief.

For example, a legislature in a state that otherwise does not recognize common law marriages entered into within its borders could enact a law retroactively recognizing only *same-sex* common law marriages created before same-sex couples were lawfully permitted to enter into ceremonial marriages in the state. Or Congress might amend the Social Security Act to suspend and phase back in the minimum marriage length requirements for derivative benefits—as described in the previous Section—but only for same-sex couples.

At first glance, such remedial schemes appear themselves to be discriminatory, in the sense that they recognize same-sex but not opposite-sex common law marriages, or because they apply a minimum marriage length requirement to opposite-sex but not to same-sex couples. This raises the specter that an opposite-sex couple could bring an equal protection challenge to the constitutionality of such remedial actions. However, for a number of reasons, courts would readily dispose of such challenges.

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242. Because such an alternative remedial scheme would fail to provide relief for a couple whose relationship ended in death or a breakup before they gained the legal right to marry, courts and administrative agencies would still have to engage in fact finding to pinpoint such a couple's but-for marriage date. However, that would involve a much smaller number of cases. Moreover, in such situations, the court does not, in fact, have to retroactively deem the couple married, an awkward result given that the couple's relationship has since ended. Rather, the court can simply extend to the couple the specific marriage-associated right that they are seeking. *See, e.g.*, *In re* Madrone, 350 P.3d 495, 501 (Or. Ct. App. 2015) (holding that the statute extending parental rights to the spouse of a person who undergoes artificial insemination is retroactively applicable to a same-sex couple who would have chosen to marry had same-sex marriage been legal, even though the remedy is generally not available to unmarried couples).

243. *Cf.* Louisiana v. United States, 380 U.S. 145, 154–55 (1965) (holding that the court has a duty to implement a remedy that will "eliminate the discriminatory effects of the past as well as bar like discrimination in the future").

244. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

As an initial matter, the U.S. Supreme Court has not applied anything more rigorous than rational basis scrutiny to equal protection claims grounded in sexual orientation discrimination.[245] Under rational basis scrutiny—which only requires that the means employed be "rationally related" to furthering a "legitimate" governmental interest[246]—such remedial schemes would easily pass muster. The Court has stated that remedying past discriminatory governmental action is a "compelling" governmental interest when applying its highest level of equal protection analysis, strict scrutiny, for race-based classifications.[247] By definition, if such an interest is "compelling" in the strict scrutiny context, it is also "legitimate" under rational basis review.[248] Moreover, the means-end "fit" requirement under rational basis review is quite forgiving, permitting governmental entities to paint with a broad brush even if the resulting scheme is overinclusive, underinclusive, or both.[249] Thus, although these schemes would benefit some same-sex couples whose pinpointed but-for marriage date suggests that they should not receive such a benefit, rational basis review allows a governmental entity to eschew case-by-case analysis in favor of a broad categorical approach in the interest of administrative convenience.[250]

Moreover, even if the Court were eventually to hold that sexual orientation discrimination, like sex discrimination, is subject to intermediate scrutiny—as some lower courts have held[251]—that would not be fatal to the constitutionality of such remedial schemes. Under intermediate scrutiny, a classification will be upheld if it is "substantially related" to an "important" governmental interest.[252] That level of scrutiny is thus more stringent than

245. *See generally* Peter Nicolas, Obergefell*'s Squandered Potential*, 6 CALIF. L. REV. CIRCUIT 137 (2015). Moreover, it is an open question whether discrimination between same-sex and opposite-sex couples even constitutes sexual orientation discrimination for equal protection purposes. *See* Peter Nicolas, *Gay Rights, Equal Protection, and the Classification-Framing Quandary*, 21 GEO. MASON L. REV. 329, 338–55 (2014) [hereinafter Nicolas, *Classification-Framing*].

246. *See* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 n.6 (1993); *see also* Vance v. Bradley, 440 U.S. 93, 97 (1979).

247. *See* Shaw v. Hunt, 517 U.S. 899, 910 (1996); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 497–98 (1989) (plurality opinion); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274–76 (1986) (plurality opinion).

248. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 553–54 (4th ed. 2011) (describing the necessary strength of a governmental interest under strict scrutiny as greater than its strength under rational basis review); Peter Nicolas, *Gayffirmative Action: The Constitutionality of Sexual Orientation-Based Affirmative Action Policies*, 92 WASH. U. L. REV. 733, 740–41 (2015) (same). In this regard, it is worth noting that the governmental interest recognized by the court in its race cases was not the specific interest in remedying past *race-based* governmental discrimination, but rather the more general interest in remedying past governmental discrimination, which would apply to race-based and sexual orientation-based discrimination alike. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007) (plurality opinion).

249. *See generally* Nicolas, *supra* note 248, at 768–71.

250. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 637–43 (1986).

251. *See, e.g.*, Windsor v. United States, 699 F.3d 169, 185 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675, 2683 (2013).

252. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

rational basis, both in terms of the strength of the governmental interest required ("important" versus "legitimate") as well as the means-end fit ("substantially related" versus "rationally related").[253]

Applying intermediate scrutiny, the Court has held that remedial schemes that compensate women for prior discrimination further an "important" governmental interest.[254] For example, in *Schlesinger v. Ballard*,[255] the Court upheld a statutory scheme that required the discharge of male officers who had served nine years without being promoted, but allowed female officers a thirteen-year period before discharge.[256] The Court held that due to the historical restrictions on combat duty for women, they had fewer opportunities for promotion than their male counterparts, which justified the additional time to achieve promotion.[257] Additionally, in *Califano v. Webster*,[258] the Court upheld a Social Security Act provision that calculated benefits for women in a more advantageous way by excluding from the benefits computation a greater number of a female's lower-earning years than a male's lower-earning years.[259] The Court reasoned that the statutory scheme was justified as a way to compensate women for past employment discrimination that resulted in lower historical wages.[260] Moreover, in both *Schlesinger* and *Califano*, the Court upheld these remedial schemes even though the means-end fits were not perfect. The Court did not make individualized determinations about each specific employee or applicant's actual prior discrimination or limited opportunities, but instead relied on women's average or typical experiences.[261]

The types of alternative remedial schemes for same-sex couples detailed above are analogous to those upheld for women in *Schlesinger* and *Califano* and thus should withstand intermediate scrutiny should courts apply that standard to discrimination on the basis of sexual orientation (or should courts deem discrimination against same-sex couples a form of sex discrimination[262]). Just as in *Schlesinger* and *Califano*, the remedial schemes proposed above are designed to compensate same-sex couples for past discrimination that made it difficult or impossible to establish the sort of record that a similarly situated opposite-sex couple could establish. Moreover, as in *Schlesinger* and *Califano*, the remedial schemes proposed rely not on an individualized finding in each case, but instead on the generalized experience of same-sex couples as a whole.

253. *See* Nicolas, *supra* note 248, at 741.

254. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 728 (1982); *see also* Califano v. Webster, 430 U.S. 313, 317 (1977).

255. 419 U.S. 498 (1975).

256. *See id.* at 499–505.

257. *See id.* at 508.

258. 430 U.S. 313 (1977).

259. *See id.* at 314–16.

260. *See id.* at 318–20.

261. *See Califano*, 430 U.S. at 314–20; *see also Schlesinger*, 419 U.S. at 499–505; United States v. Virginia, 518 U.S. 515, 573 (1996) (Scalia, J., dissenting).

262. *See generally* Nicolas, *Classification-Framing*, *supra* note 245, at 355–65.

Precedent applying intermediate scrutiny also holds that any remedial schemes should be time-limited in nature.[263] The remedial schemes proposed above satisfy this requirement as well. They either apply only to couples whose relationships began before 2015—when same-sex couples achieved a nationwide right to marry—or they are designed to suspend the minimum marriage length requirements only so long as is necessary to ensure that no same-sex couples are disadvantaged by the previous discriminatory scheme.

CONCLUSION

In *Obergefell v. Hodges*, the Court broke important ground for same-sex couples by ensuring their right to marry nationwide. However, merely applying *Obergefell* prospectively to permit same-sex couples to lawfully wed in the future and to exercise the rights associated with marriage fails to remedy the constitutional injuries suffered by those couples whose relationships ended before *Obergefell*, either due to a breakup or the death of one partner. Moreover, prospectively applying *Obergefell* results in a continuing injury to most other same-sex couples with respect to any marriage benefits tied to marriage longevity.

This Article has identified a number of ways that state and federal benefits are tied to not merely the fact, but also the length, of a couple's marriage, and has shown how the application of minimum length requirements disadvantages same-sex couples. It has also discussed various methods that legislators, judges, and administrative agencies use to identify proxies for establishing a same-sex couple's but-for marriage date and to backdate the legal date of their marriage for purposes of determining benefits eligibility.

Furthermore, this Article has shown that because *Obergefell* was not merely a prospective ruling but also a retroactive one, states and the federal government are required to backdate the legal marriage dates of same-sex couples to the date they would have married but for the bans on same-sex marriage. Such backdating provides same-sex couples with the "make whole" relief they are entitled to for past violations of their constitutional right to marry. Alternatively, this Article has provided examples of remedial schemes that would accomplish the same result without unduly burdening governmental agencies and couples with complex factfinding procedures.

Although these requirements pose some short-term administrative challenges, the challenges are surmountable, and backdating the legal marriage dates of same-sex couples—or its functional equivalent—is the only way to truly remedy the constitutional harms imposed by the preexisting discriminatory scheme.

263. *See* Nicolas, *supra* note 248, at 768; *cf.* Grutter v. Bollinger, 539 U.S. 306, 341–43 (2003) (so holding with respect to race-based affirmative action programs, where strict scrutiny is involved).