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(In)Formal Marriage Equality

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ARTICLES

(IN)FORMAL MARRIAGE EQUALITY

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In 2015, same-sex couples throughout the United States obtained formal marriage equality. But is the prospective ability to obtain marriage licenses sufficient to achieve Obergefell v. Hodges*'s promise of equality? What about individuals whose same-sex relationship did not survive—either through death or dissolution—to see marriage equality become the law of the land? Or those couples who did ultimately wed but now have a marriage that appears to be artificially short when considering just how long the couple has actually been together in a marriage-like relationship? With marriage benefits conditioned not only on the fact of marriage but also the length of marriage, individuals in both categories continue to suffer harm as a result of the unconstitutional laws that prevented them from marrying at an earlier point in time. Although some states have attempted to remedy this problem by backdating same-sex marriages, the reality is that the availability of such relief varies by state and, what is more, no state has yet formulated a test to adequately protect the interests of those individuals. This Article is the first to propose a specific solution to these problems—a solution that requires states to formulate and adopt a new equitable remedy, referred to here as "equitable marriage." Drawing on existing equitable doctrines that states have already developed to extend formal family law benefits to those in informal family-like relationships, equitable marriage would treat same-sex relationships that predated formal marriage equality as the equivalent of a legal marriage with all the attendant rights and obligations. In the case of same-sex couples who ultimately did wed, equitable marriage would require that the time the couple spent in a marriage-like relationship count as part of the formal marriage, so as to extend all marital benefits conditioned on length of marriage. To succeed, claimants would need to establish that the couple would have wed during that time period but for the unconstitutional laws depriving them of that fundamental right. Understanding the complexity of such an approach, this Article offers guidance on how courts should implement and apply equitable marriage so as to achieve full*

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marriage equality while, at the same time, resisting impermissible gender stereotypes and heterosexist notions of how marriage "should" look.

INTRODUCTION

> I made sure to add "and days past" in our vows because by the time we got married, we had already lived together for 42 years. You can't forget that.
>
> —Edith Windsor[1]

On three separate occasions, the United States has witnessed large, discrete groups of adults simultaneously earning the right to marry the person of their choice—a right that had been denied them for many years. The first occurred after the passage of the Thirteenth Amendment,[2] which cleared the way for former slaves to finally enter into legal marriages.[3] The second came in 1967

1. Corinne Werder, *20 Epic Edie Windsor Quotes to Always Remember Her By*, GO MAG. (Sept. 13, 2017), http://gomag.com/article/20-epic-edie-windsor-quotes-to-always-remember-her-by [https://perma.cc/88DJ-R9DT]. Edith Windsor was the named plaintiff in *United States v. Windsor*, 570 U.S. 744 (2013).

2. U.S. CONST. Amend. XIII.

3. Prior to emancipation, slaves were permitted to "marry," but such unions had absolutely no legal effect: "As chattel, slaves were objects, not subjects. Marriage for them was not an inviolable union between two people but an institution defined and controlled by the superior relationship of master to slave." TERA W. HUNTER, BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY 6 (2017).

after the U.S. Supreme Court's decision in *Loving v. Virginia*[4] struck down anti-miscegenation laws in the sixteen states that still prohibited interracial marriage.[5] The third example, which forms the basis of this Article, came in 2015 when the Supreme Court's ruling in *Obergefell v. Hodges*[6] ushered in marriage equality for same-sex couples throughout the United States. In each instance, those couples impacted by the change in law were now permitted to solemnize their relationships and, thus, enjoy all the legal protections that flow from formal marriage. At the same time, each instance prompted the question of what, if any, legal effect was to be given to the time some couples spent in a quasi-marital state while awaiting the right to legally wed. After all, to ignore those years altogether would lead to a number of legal harms—harms inconsistent with the ideal of true marriage equality.[7]

To illustrate, consider Michael Ely and James Taylor, who met in 1971 when Michael was eighteen and James was twenty.[8] The two men became involved and would spend the next forty-three years together, living first in California and later in Arizona.[9] In October 2014, five days after U.S. District Court Judge John Sedgwick ruled that Arizona's prohibition on same-sex marriage was unconstitutional,[10] the two men obtained a marriage license and married just two weeks later.[11] Sadly, their legal marriage only lasted six months because, in May of 2015, James died of cancer at the age of sixty-three.[12] Michael, devastated by the loss of his partner of over forty years, also suffered financially given that the couple primarily relied on James's employment for income.[13] Michael filed for Social Security benefits as James's surviving spouse, but his application was denied because of a provision in the Social Security Act[14] that requires a surviving spouse to have been married to the "insured individual" for nine months to qualify for benefits.[15] Due to the timing of James's death—but primarily to the fact that the two men had been legally prohibited from getting married for the majority of their relationship—Michael was three months shy of meeting that requirement.[16]

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4. 388 U.S. 1 (1967).

5. *See* Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 2733, 2746 (2008) ("Despite the moral and practical untenability of antimiscegenation laws, they remained in place in sixteen states (all of them in the South) by the time the Supreme Court decided *Loving v. Virginia*.").

6. 576 U.S. 644 (2015).

7. *See infra* Part II.A.

8. Complaint for Declaratory, Injunctive & Other Relief at 2, Ely v. Saul, No. 18-cv-0557, 2020 WL 2744138 (D. Ariz. May 27, 2020) [hereinafter Ely Complaint].

9. *Id.* at 2–3.

10. *See generally* Connolly v. Jeanes, 73 F. Supp. 3d 1094 (D. Ariz. 2014).

11. Ely Complaint, *supra* note 8, at 3.

12. *Id.*

13. *Id.*

14. Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

15. Ely Complaint, *supra* note 8, at 3–4; *see also* 42 U.S.C. §§ 402(e)–(f), 416(c), (g).

16. Ely Complaint, *supra* note 8, at 3–4.

Ely and Taylor represent just one of the many same-sex couples whose relationships began long before marriage equality was even a consideration, much less a reality. For those couples that were ultimately able to wed, their marriage licenses bestowed legal benefits that had been denied them for many years. For instance, James Obergefell, the named plaintiff in the case responsible for securing this new freedom, had been living in a marriage-like relationship with his partner for over twenty years.[17] Similarly, Edith Windsor, the woman responsible for ending the portion of the Defense of Marriage Act[18] (DOMA) that excluded same-sex spouses from the federal definition of "spouse,"[19] had been with her partner for forty years before the two were finally permitted to marry.[20] Other same-sex couples never even got that opportunity as, in many cases, individuals died before they could legally marry the person they had been waiting to wed. The question that emerges then is what remedy should apply to those in same-sex relationships who were either never permitted to wed or those whose eventual marriages fail to capture the true length of their "marital" relationships.

In *Obergefell*, Justice Anthony Kennedy spoke of the "constellation of benefits"[21] that marriage affords and two years later, the Court reiterated that "a State may not 'exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.'"[22] As Ely and Taylor's story illustrates, however, a number of marital benefits are tied not just to the *fact* of marriage but to the *length* of the marriage.[23] Accordingly, if states are to comply with *Obergefell*'s directive, there must be some accounting for the time same-sex couples spent in relationships that—but for the legal prohibitions against it—would have been marriages. And this requirement must apply to those who were precluded from ever marrying and those same-sex spouses who first spent time in a quasi-marital state awaiting that right. To do otherwise would permit an unconstitutional law—the kind Justice Antonin Scalia has described as "void, and . . . as no law"[24]—to continue to harm the very population on whose behalf the law was struck down. Such a result is impermissible. As the Supreme Court has made clear, when a law is deemed unconstitutional, "that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on

17. Tom Watts, *From* Windsor *to* Obergefell*: The Struggle for Marriage Equality Continued*, 9 HARV. L. & POL'Y REV. ONLINE S52, S60 (2015).

18. Pub. L. No. 104-199, 110 Stat. 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

19. *See generally Windsor*, 570 U.S. 744.

20. Edith Windsor and her partner, Thea Spyer, were wed in 2007 in Canada. *See id.* at 749; *see also* Christine L. Nemacheck, *The Path to* Obergefell*: Saying "I Do" to New Judicial Federalism?*, 54 WASH. U. J.L. & POL'Y 149, 163 (2017) (noting that, prior to marrying, the couple had been together for over forty years).

21. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

22. Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017) (quoting *Obergefell*, 576 U.S. at 647).

23. *See infra* Part II.A.

24. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 760 (1995) (Scalia, J., concurring) (quoting *Ex parte* Siebold, 100 U.S. 371, 376 (1879)).

direct review and as to all events, *regardless of whether such events predate or postdate our announcement of the rule*."[25]

Whereas other scholars have noted this need for some form of retroactive application of *Obergefell*,[26] there is as of yet no formulation of how exactly courts should do it. And to the extent courts have wrestled with this issue, they have taken vastly different approaches and have arrived at opposite conclusions.[27] A few have given effect to the time same-sex couples spent in relationships while awaiting the right to formally wed, doing so either through laws relating to common-law marriage or by looking into whether the couple would have married earlier had that option been available to them.[28] Others have simply refused to go beyond the dates of a legal marriage, thus not affording any legal significance to time spent in a pre-equality relationship, regardless of how long that relationship lasted or the severity of the harms that would result from failing to count that time.[29] True marriage equality, then, remains a work in progress. This is problematic not only for the continued discrimination faced by those who—pre-*Obergefell*—spent time in committed, same-sex relationships but also for the fact that the right to marry is a constitutionally protected right and, as such, some standards are required. After all, "it is the nature of a constitution to set outer limits to legislative competence."[30]

There are, however, a number of thorny questions associated with any attempt to backdate same-sex marriages. For instance, how does the law determine when a premarital relationship became sufficiently "marriage-like" to warrant counting some portion of it toward the length of the eventual marriage? Relatedly, how can the law accurately determine when a same-sex couple would have married had they been given the opportunity? Further, given the discrimination faced by the LGBTQIA+ community, many of them might have kept their relationships secret, making it difficult for them to now prove the earlier existence of a marriage-like relationship. Finally, given the heteronormative foundation of marriage,[31] what does "marriage-like" even mean anymore, especially when applied to a group of Americans whom society has for decades conditioned to view marriage as a social institution reserved for people who are unlike them?[32] As one commentator

25. Harper v. Va. Dep't of Tax'n, 509 U.S. 86, 97 (1993) (emphasis added).

26. *See, e.g.*, Peter Nicolas, *Backdating Marriage*, 105 CALIF. L. REV. 395 (2017); Charles W. Rhodes, *Loving Retroactivity*, 45 FLA. ST. U. L. REV. 383 (2018); Mark Strasser, Obergefell*, Retroactivity, and Common Law Marriage*, 9 NE. U. L. REV. 379 (2017); Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873.

27. *See infra* Part II.B.

28. *See infra* Part II.B.

29. *See infra* notes 179–87 and accompanying text.

30. Marc A. Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law*, 16 STAN. L. REV. 789, 798 (1964).

31. Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1371 (2005) (referencing "[m]arriage's heteronormative roots").

32. *See* Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 444 (2012) ("[I]t appears implausible that the law, once it has recognized same-sex marriage, will

said after witnessing marriage equality in the Netherlands in 1998, "it was an amazing feeling . . . because I had never imagined that possibility."[33]

It is the goal of this Article to provide answers to those questions. In so doing, this Article seeks to offer a path forward for states as they attempt to give effect to the full promise of *Obergefell*. That path is made easier by the fact that states already employ their inherent equitable powers to bestow family law protections on informal relationships that arose outside the legal requirements for family formation.[34] Although none of the state remedies are adequate in this context, they are nonetheless instructive when it comes to fashioning a new equitable doctrine that would adequately address the time same-sex couples spent in marriage-like relationships while awaiting marriage equality. Essentially, that doctrine—referred to here as "equitable marriage"—would treat that time as either a legal marriage or, in the case of same-sex couples who ultimately wed, as part of the formal marriage if the claimant could establish that the couple would have wed during that time period but for the unconstitutional laws depriving them of that fundamental right.

This Article proceeds in four parts. Part I chronicles the history of formal marriage equality in the United States as it applies to same-sex couples. Part II then turns to informal marriage equality, focusing on how *Obergefell* stands for the proposition that, going forward, states must do more than simply issue marriage licenses to remedy the unconstitutional denial of same-sex couples' right to marry. In so doing, Part II explores the benefits tied to marriage, particularly those tied to length of marriage, and how states have attempted to answer the question of whether *Obergefell* demands retroactive application. Part III proposes the need for an equitable remedy that, in some form or another, all states must adopt. To understand that need and what form the remedy might take, Part III details similar equitable remedies that courts have previously relied on to provide family law benefits to family-like relationships. Part IV then explores how the proposed equitable marriage remedy would provide similar protections to those marriages that fail to account for informal relationships that would have been marriages had legal prohibitions not prevented solemnization. As part of that proposal, Part IV examines how courts might apply equitable marriage, offering potential solutions to the complications and objections any such remedy will inevitably bring.

I. THE PATH TO FORMAL MARRIAGE EQUALITY

In 1967, when the Supreme Court struck down state laws that prohibited an individual from marrying someone of another race, the Court identified

develop a more nuanced understanding of sexuality that undercuts its heteronormative assumptions.").

33. Laurie J. Kendall, *Dancing with My Grandma: Talking with Robyn Ochs About Complex Identities and Simple Messages in the Marriage Equality Movement*, *in* BISEXUALITY AND SAME-SEX MARRIAGE 181, 199 (M. Paz Galupo ed., 2009).

34. *See infra* Part III.

"freedom of choice" as an implicit component of the right to marry.[35] That case was, of course, *Loving v. Virginia*, and five years later, Richard Baker and James McConnell would rely on it when they became the first same-sex couple to challenge discriminatory marriage laws.[36] The two men had sought a marriage license under Minnesota law, which did not explicitly require the two parties to be of opposite sex.[37] Nonetheless, their application was denied, and the two men subsequently brought suit, arguing that "the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory."[38]

Baker and McConnell lost both at the trial court and on appeal to the state supreme court.[39] In ruling, the Minnesota Supreme Court rejected the plaintiffs' reliance on *Loving*, holding that, "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[40] On appeal to the U.S. Supreme Court, the two men would lose once more, this time with a mere one-sentence summary disposition: "Appeal . . . dismissed for want of substantial federal question."[41] And with that, the nation's first legal challenge to state laws that prevented individuals from marrying a person of the same sex would come to an end.

For the most part, the issue would lie dormant for the next twenty years. Then, in the 1990s, something happened that would cause "the issue of same-sex marriage [to] burst into the consciousness of the American public."[42] Specifically, three same-sex couples in Hawaii decided to apply for marriage

35. Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations.").

36. Anthony Michael Kreis, *Stages of Constitutional Grief: Democratic Constitutionalism and the Marriage Revolution*, 20 U. PA. J. CONST. L. 871, 881 (2018) ("Baker and McConnell alleged Minnesota's marriage law ran afoul of the First, Eighth, Ninth, and Fourteenth Amendments.").

37. *See* Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971) ("Petitioners contend, first, that the absence of an express statutory prohibition against same-sex marriages evinces a legislative intent to authorize such marriages."), *appeal dismissed*, 409 U.S. 810 (1972) (mem.), *overruled bv* Obergefell v. Hodges, 576 U.S. 644 (2015).

38. *Id.* at 186.

39. *Id.*

40. *Id.* at 187.

41. *Baker*, 409 U.S. at 810.

42. Arthur S. Leonard, *Going for the Brass Ring:* The Case for Same-Sex Marriage, 82 CORNELL L. REV. 572, 572 (1997) (reviewing WILLIAM N. ESKRIDGE JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUALITY LIBERTY TO CIVILIZED COMMITMENT (1996)); *see also* David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 526 (1999) (noting that the Hawaii opinion "stirred by far the most attention, for it led to the first appellate decision in the United States suggesting that same-sex couples were constitutionally entitled to marry and produced a seismic political reaction in Hawaii and the mainland"); Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099, 1107 (2015) ("[W]hen the Hawaii Supreme Court shocked the nation in 1993 and ruled in favor of Nina Baehr's petition to marry her female partner in *Baehr v. Lewin*, the issue of same-sex marriage drew prominent national attention." (footnote omitted)).

licenses.[43] When their applications were denied, the couples filed suit, arguing that Hawaii's marriage law, which "restrict[ed] the marital relation to a male and a female,"[44] was in violation of Hawaii's constitution.[45] The trial court dismissed the case.[46] On appeal to the Supreme Court of Hawai'i, however, the court ruled that, although there was no fundamental right to same-sex marriage, under the Hawaii Constitution, "[s]ex is a 'suspect category' for purposes of equal protection analysis."[47] For that reason, the court held that the state's discriminatory definition of marriage was presumptively unconstitutional, and the state could only rebut that presumption by a showing that "(a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights."[48]

On remand, Circuit Court of Hawai'i Judge Kevin S. C. Chang ruled that the state failed to rebut the presumption and issued an injunction that prevented the state from denying licenses solely because the applicants were of the same sex.[49] Thus, in 1996, Hawaii seemed poised to become the first state to recognize same-sex marriage. However, pending appeal, Judge Chang issued a stay of his order, and that appeal was subsequently mooted in 1998 when Hawaii voters passed a constitutional amendment providing that "[t]he legislature shall have the power to reserve marriage to opposite-sex couples."[50] Americans did not know it at the time, but it would be another eight years before a state would legalize same-sex marriage, and it would not be Hawaii.[51]

Nonetheless, the fact that Hawaii had even considered legalizing same-sex marriage caused great consternation among many of the other states and the response was swift.[52] With the assumption that same-sex marriages performed in one state would potentially be entitled to full faith and credit in all others,[53] many states took what they hoped would be preemptive action

43. *See* Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505, 506 (1994) ("In December 1990, three same-sex couples—Ninia Baehr and Genora Dancel, Tammy Rodrigues and Antoinette Pregil, and Pat Lagon and Joseph Melilio—applied to Hawaii's Department of Health for marriage licenses.").

44. Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

45. *Id.* at 49–50.

46. *Id.* at 52.

47. *Id.* at 67.

48. *Id.*

49. *See generally* Baehr v. Miike, No. CIV. 91–1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997) (unpublished table decision), *and rev'd*, 994 P.2d 566 (Haw. 1999), No. 20371, 1999 WL 35643448 (Haw. Dec. 9, 1999) (unpublished table decision).

50. HAW. CONST. art. I, § 23.

51. *See infra* notes 77–82 and accompanying text.

52. *See* Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1157 (2009) (noting how events in Hawaii "ignited the national backlash against same-sex marriage").

53. *See* Brian H. Bix, *State Interest and Marriage—the Theoretical Perspective*, 32 HOFSTRA L. REV. 93, 105–06 (2003) ("[T]he combination of national citizenship (as enforced

and began the process of amending their constitutions to define marriage as being between one man and one woman.[54] The hope was that, in so doing, a state could refuse to recognize "marriages" that did not comply. Eventually, thirty-one states passed such amendments.[55] Alabama, for example, passed the Sanctity of Marriage Amendment,[56] which provided that "[t]he State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued."[57] Voters in the state passed the amendment with 81 percent voting in favor.[58]

As political pressure mounted, Congress became involved and, in 1996, passed DOMA.[59] The Act had two main purposes.[60] The first was to declare that no state would be required to recognize same-sex marriages performed in other states.[61] Second, DOMA provided that, when it came to federal law "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[62] In other words, to the extent federal law conditioned marriage benefits on whether the couple was married in their state of residence, the federal government would exclude any same-sex marriages a state might recognize. Congress took this step even

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by the Full Faith and Credit Clause) and the usual rules of recognizing marriages validly celebrated in another state, meant that . . . there was a fear . . . that all other states would have to recognize same-sex unions celebrated in Hawaii." (footnote omitted)).

54. *See* William Buss & Emily Buss, *Escaping the American Blot?: A Comparative Look at Federalism in Australia and the United States Through the Lens of Family Law*, 48 CORNELL INT'L L.J. 105, 133 n.151 (2015) ("Within twelve years of the Hawaii Supreme Court's ruling, many states, including Hawaii, had added an express ban on same-sex marriage to their laws, and a majority of these prohibitions were ultimately adopted as constitutional amendments."); Julie L. Davies, *State Regulation of Same-Sex Marriage*, 7 GEO. J. GENDER & L. 1079, 1080 (2006) ("Following the first failure of a statute banning marriage for same-sex couples in Hawaii, states began turning to state constitutional amendments to restrict marriage.").

55. Kenneth P. Miller, *Defining Rights in the States: Judicial Activism and Popular Response*, 76 ALB. L. REV. 2061, 2087–88 (2013) ("Over time, voters in thirty-one states have approved constitutional amendments expressly limiting the definition of marriage to a union between a man and a woman or, in Hawaii's case, authorizing the legislature to do so.").

56. ALA. CONST. amend. 774.

57. *Id.* art. I, § 36.03(e).

58. *See* Dave Woods, Note, *Crosspollination of Same-Sex Parental Rights Post-DOMA: The Subtle Solution*, 46 CONN. L. REV. 1651, 1677 (2014).

59. Mark A. Tumeo, *Civil Rights for Gays and Lesbians and Domestic Partner Benefits: How Far Could an Ohio Municipality Go?*, 50 CLEV. ST. L. REV. 165, 169 (2002) ("In 1996, the United States Congress capitulated to political pressure from the conservative religious right and passed the Defense of Marriage Act . . . .").

60. *See* United States v. Windsor, 570 U.S. 744, 752 (2013) (noting that "DOMA contains two operative sections").

61. 28 U.S.C. § 1738C ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.").

62. 1 U.S.C. § 7.

though at that time, same-sex marriage was not recognized anywhere in the United States.[63]

Nonetheless, just as events in Hawaii galvanized efforts to block nationwide marriage equality, members of the LGBTQIA+ community began to hope that something many of them had assumed would never happen in their lifetimes might instead become a reality.[64] As a result, after losing in Hawaii, a number of activists began to target other states. Just one year after Hawaii passed its constitutional amendment, those advocates scored a new victory when Vermont ruled that its prohibition on same-sex marriage violated the state's constitution, ordering the legislature "to consider and enact legislation consistent with" the Common Benefits Clause of the state constitution.[65] The court did note, however, that "[w]hether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative, rests with the Legislature."[66] In 2000, the Vermont legislature would adopt the latter approach, making Vermont—if not the first state to allow same-sex marriage—the first to institute civil unions for same-sex partners.[67]

After Vermont, progress toward legalized same-sex marriage slowed for a few years. Then, in 2003, the Supreme Court issued its opinion in *Lawrence v. Texas*.[68] On its face, the case merely concerned the constitutionality of Texas's sodomy law, which criminalized homosexual but not heterosexual sodomy—a law that, according to the Court, implicated "liberty of the person both in its spatial and in its more transcendent dimensions."[69] Basing its decision on the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court ruled that the law was unconstitutional. In so ruling, the Court noted that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason

63. *See* Tritt, *supra* note 26, at 880–81 ("Notably, at the time DOMA was enacted, neither same-sex marriage nor polygamous marriage was legal in any state, territory, or possession of the United States." (footnote omitted)).

64. *See* Christopher R. Leslie, *Embracing* Loving*: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1092 (2014) (noting that the Hawaii decision "provided a glimmer of hope for same-sex couples that their country, or at least their state, might recognize their relationships in their lifetimes"); Tina C. Campbell, Comment, *The "Determination of Marriage Act": A Reasonable Response to the Discriminatory "Defense of Marriage Act,"* 58 LOY. L. REV. 939, 946 (2012) (noting that "*Baehr v. Lewin* brought hope to the same-sex marriage movement").

65. Baker v. State, 744 A.2d 864, 889 (Vt. 1999). The clause provides: "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." VT. CONST. ch. I, art. 7.

66. *Baker*, 744 A.2d at 867.

67. An Act Relating to Civil Unions, No. 91, 2000 Vt. Acts & Resolves 72 (codified in relevant part at VT. STAT. ANN. tit. 15, § 1204 (2021)).

68. 539 U.S. 558 (2003).

69. *Id.* at 562.

for upholding a law prohibiting the practice,"[70] explicitly overruling its earlier decision[71] in *Bowers v. Hardwick*.[72]

The Court was careful to try to limit the reach of *Lawrence*. In fact, Justice Kennedy's opinion went so far as to proclaim that "[t]he present case does not . . . involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[73] To that point, however, Justice Scalia dissented, saying, "Do not believe it."[74] He continued:

> Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is "no legitimate state interest" for purposes of proscribing that conduct; and if, . . . "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring," what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising "[t]he liberty protected by the Constitution?"[75]

Justice Scalia was not the only one to interpret the *Lawrence* majority opinion in this manner. Shortly after the opinion was released, a case summary in the *Harvard Law Review* had this to say about the opinion: "*Lawrence* suggests that remaining forms of government-sanctioned anti-gay discrimination—including laws barring same-sex marriage, gay adoption, and service in the armed forces by gays and lesbians who acknowledge their sexual orientation—must either be narrowly tailored to further a compelling government purpose or be invalidated."[76]

In fact, just a few months after *Lawrence* was issued, Massachusetts would become the first state to formally extend marriage equality to same-sex couples.[77] In its 2003 decision, *Goodridge v. Department of Public Health*,[78] the state's highest court ruled that "barring an individual from the

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70. *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

71. *Id.* at 578 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

72. 478 U.S. 186 (1986).

73. *Id.*; *see also* John G. Culhane, *Marriage, Tort, and Private Ordering: Rhetoric and Reality in LGBT Rights*, 84 CHI.-KENT L. REV. 437, 461 (2009) ("For all of its affirming language and sympathetic tone, though, *Lawrence* also reiterates—via needless dictum—that the case is not about marriage.").

74. *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

75. *Id.* at 604–05 (alterations in original) (citations omitted) (quoting *id.* at 567, 578 (majority opinion)).

76. *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 226, 298 (2003).

77. *See* Douglas Nejaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 166 (2014) (describing the Massachusetts Supreme Judicial Court decision as "the first state supreme court decision opening marriage to same-sex couples").

78. 798 N.E.2d 941 (Mass. 2003).

protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[79] In so ruling, the court quoted *Lawrence*: "Our obligation is to define the liberty of all, not to mandate our own moral code."[80] When it came to fashioning a remedy, the court did not strike down Massachusetts's existing marriage laws but instead borrowed an approach from the highest court in Ontario, Canada, which held: "[T]he appropriate remedy . . . . is to declare invalid the existing *definition* of marriage to the extent that it refers to 'one man and one woman,' and to reformulate the definition of marriage as 'the voluntary union for life of two persons to the exclusion of all others.'"[81] Unlike Vermont, the Massachusetts court did not give the legislature the option of creating civil unions and, on May 17, 2004, Massachusetts began issuing marriage licenses to same-sex couples.[82]

Now that one state had officially extended the right to marry to same-sex couples, more states began to pass constitutional amendments aimed at insulating them from having to recognize same-sex marriages performed in other states. That would not stop other states, however, from following Massachusetts's lead. In 2008, the highest courts in Connecticut[83] and California[84] likewise ruled that the state constitutions protected the right of same-sex couples to wed. In so ruling, the Connecticut high court rejected civil unions as an option for curing the constitutional violation: "Although marriage and civil unions do embody the same legal rights under our law, they are by no means equal. The former is an institution of transcendent historical, cultural and social significance, whereas the latter is not."[85] The following year, the Supreme Court of Iowa would do the same, making it the first midwestern state to do so.[86] Later that year, Vermont earned the

79. *Id.* at 969.

80. *Id.* at 948 (quoting *Lawrence*, 539 U.S. at 571).

81. Halpern v. Canada (Att'y Gen.) (2003), 65 O.R. 3d 161, paras. 144–48 (Can. Ont. C.A.) (emphasis added) (quoting Hyde v. Hyde and Woodmansee (1866) 1 LRP & D 130 at 133 (Eng.)). The *Goodridge* court "concur[red] with this remedy, which is entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards." *Goodridge*, 798 N.E.2d at 969.

82. *See* Mary L. Bonauto, Goodridge *in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 7 (2005) ("For the plaintiff couples in the *Goodridge* case, May 17 was the most important day of their lives . . . . Others, too, were overwhelmed by the power of the government to acknowledge our humanity and our citizenship.").

83. *See generally* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008).

84. *See generally In re* Marriage Cases, 183 P.3d 384 (Cal. 2008). California would, however, cease issuing marriage licenses in November of that year after voters passed Proposition 8, which amended the California's constitution to define marriage as involving one man and one woman. *See* Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1297 (2010) ("The court, however, left intact the roughly eighteen thousand marriages that had occurred between the *Marriage Cases* decision and the passage of Proposition 8."). Same-sex marriage would not resume in California until 2013, when the U.S. Supreme Court issued its decision in *Hollingsworth v. Perry*, 570 U.S. 693 (2013), which let stand the district court's ruling that Proposition 8 was unconstitutional. *Hollingsworth*, 570 U.S. at 709 (holding that appellants lacked standing to appeal the district court's opinion).

85. *Kerrigan*, 957 A.2d at 418.

86. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

distinction of becoming the first state to legalize same-sex marriage not because the state's highest court demanded it but through legislation—legislation that would define marriage as "the legally recognized union of two people."[87] From 2009 to 2012, three other states and the District of Columbia would likewise pass legislation extending the right to marry to same-sex couples.[88]

Although same-sex marriage had thus far involved questions of state law, the issue would take on federal constitutional dimensions in 2013 when the Supreme Court struck down section 3 of DOMA, which precluded same-sex spouses from qualifying for federal marriage benefits.[89] The case was *United States v. Windsor*[90] and involved a same-sex couple, Edith Windsor and Thea Spyer, who had been in a relationship since 1963.[91] The two women, who lived in New York, where they registered as domestic partners in 1993, were married in Canada in 2007.[92] In 2009, Spyer died, leaving her estate to Windsor.[93] Had Windsor been male, she could have taken advantage of the marital exemption for federal estate tax, but because she was female, DOMA denied her that marital benefit, forcing her to pay over $300,000 in estate taxes.[94] Thus, Windsor argued that DOMA was unconstitutional, and the Supreme Court agreed, ruling that section 3 was unconstitutional and characterizing it as violative of "basic due process and equal protection principles applicable to the Federal Government."[95] The Court observed:

> DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others.[96]

87. An Act Relating to Civil Marriages, No. 3, § 5, 2009 Vt. Acts & Resolves 33, 33 (codified in relevant part at VT. STAT. ANN. tit. 15, § 8 (2021)). Previously, this provision had read: "Marriage is the legally recognized union of one man and one woman." *See* An Act Relating to Civil Unions, No. 91, § 25, 2000 Vt. Acts & Resolves 72, 82; Calvin Massey, *Public Opinion, Cultural Change, and Constitutional Adjudication*, 61 HASTINGS L.J. 1437, 1448 n.47 (2010).

88. *See* Obergefell v. Hodges, 576 U.S. 644, 693 (2015) (Roberts, J., dissenting) (identifying Vermont, New Hampshire, New York, and Washington, D.C.).

89. Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013); *see supra* notes 60–63 and accompanying text.

90. 570 U.S. 744 (2013).

91. *Id.* at 753.

92. *Id.* Despite the fact they married in Canada, New York did recognize the validity of their marriage. *Id.*

93. *Id.*

94. *Id.* ("Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax.").

95. *Id.* at 769.

96. *Id.* at 775.

The Court concluded that "[b]y seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."[97]

On the heels of *Windsor*, the marriage equality movement gained considerable steam. In his 2014 opinion in favor of marriage equality, Judge Richard Gergel of the District of South Carolina noted that "[i]n the approximately 17 months since the *Windsor* decision, federal courts in virtually every circuit and in every state with a same sex marriage ban have heard lawsuits challenging the constitutionality of such state law provisions."[98] A majority of those courts, including four federal circuit courts of appeals, would ultimately rule in favor of same-sex couples looking to marry.[99] Notably, however, one appellate court—the Sixth Circuit—reached the opposite conclusion and overturned lower court decisions in Kentucky, Michigan, Ohio, and Tennessee.[100] In late 2014, the Sixth Circuit issued its opinion, essentially holding that the voters and not the courts should decide the issue of same-sex marriage—an approach the dissent characterized as failing "to grapple with the relevant constitutional question."[101] That decision was *DeBoer v. Snyder*,[102] but once the Supreme Court granted certiorari, it would be consolidated with another case and given a new name: *Obergefell v. Hodges*.

The Court would use *Obergefell* to finally address the larger question of whether a state may constitutionally prohibit same-sex marriage.[103] Although the Court had previously held that "the right to marry is protected by the Constitution,"[104] the precedent cases in which that right had developed all involved laws that had clearly "presumed a relationship involving opposite-sex partners."[105] Nonetheless, in his majority opinion, Justice Kennedy held that an analysis of those opinions "compels the conclusion that same-sex couples may exercise the right to marry."[106] Specifically, the Court identified four essential "principles and traditions" related to marriage that justified its classification as a fundamental right—principles and traditions that, according to the Court, "apply with equal force to same-sex couples."[107]

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97. *Id.* According to the Court, "the Fifth Amendment . . . withdraws from Government the power to degrade or demean in the way this law does." *Id.* at 774.

98. Condon v. Haley, 21 F. Supp. 3d 572, 582 (D.S.C. 2014).

99. Carl Tobias, *Marriage Equality Comes to the Fourth Circuit*, 75 WASH. & LEE L. REV. 2005, 2008 (2018) ("The U.S. Courts of Appeals for the Fourth, Seventh, Ninth, and Tenth Circuits affirmed district invalidations.").

100. DeBoer v. Snyder, 772 F.3d 388, 413 (6th Cir. 2014), *rev'd sub nom.*, Obergefell v. Hodges 576 U.S. 644 (2015); *see also* Watts, *supra* note 17, at S68–S69.

101. *DeBoer*, 772 F.3d at 421 (Daughtrey, J., dissenting).

102. 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.*, *Obergefell*, 576 U.S. 644.

103. *Obergefell*, 576 U.S. at 651.

104. *Id.* at 664.

105. *Id.* at 665. The Court did acknowledge, however, *Baker v. Nelson*, 409 U.S. 810 (1972). *See supra* notes 37–41 and accompanying text. *Obergefell*, of course, overruled *Baker*. *Obergefell*, 576 U.S. at 675.

106. *Obergefell*, 576 U.S. at 665.

107. *Id.*

First, going back to its decision in *Loving*, the Court noted that "the right to personal choice regarding marriage is inherent in the concept of individual autonomy,"[108] recognizing that "[t]here is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."[109] Second, according to the Court, marriage is a fundamental right because the institution "supports a two-person union unlike any other in its importance to the committed individuals."[110] Third, the Court held that marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[111] Citing *Windsor*, where the Court noted how laws prohibiting same-sex marriage "harm and humiliate the children of same-sex couples,"[112] the Court explained that "[b]y giving recognition and legal structure to their parents' relationship, marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'"[113] Finally, the Court justified the fundamental nature of the right to marry, noting that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress."[114]

Having distilled the right to marry into those four components, each justifying its recognition as a fundamental right, the Court found no basis for excluding same-sex couples from that right:

> Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.
>
> The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.[115]

Accordingly, the Court held that the Due Process Clause prohibits states from denying same-sex couples the ability to marry on terms equal to those of opposite-sex couples, paving the way for same-sex couples around the country to immediately begin exercising their constitutional right to marry—something many of them had waited decades to do.[116]

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108. *Id.*

109. *Id.* at 666 ("The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality.").

110. *Id.* As the Court explained, marriage "offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other." *Id.* at 667.

111. *Id.* (first citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); and then citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

112. *Id.* at 668 (citing United States v. Windsor, 570 U.S. 744, 772 (2013)).

113. *Id.* at 668 (quoting United States v. Windsor, 570 U.S. 744, 772 (2013)); *id.* ("Marriage also affords the permanency and stability important to children's best interests.").

114. *Id.* at 669 (quoting Maynard v. Hill, 125 U.S. 190, 211 (1888)).

115. *Id.* at 670–71.

116. *Id.* at 671–72.

II. *OBERGEFELL* AND PRE-EQUALITY "MARRIAGES"

At its most basic level, *Obergefell* permitted same-sex couples to prospectively enter into formal marriages. What it did not do was give legal effect to the relationships they had entered into years earlier when marriage was not an option.[117] Thus, the question arises whether those couples are entitled to any credit for the time they spent waiting for marriage equality and, if so, how such credit is to be determined. After all, *Obergefell* made clear that same-sex couples were not only entitled to the right to wed but were likewise entitled to do so "on the same terms and conditions" as opposite-sex couples.[118] Just two years after *Obergefell*, the Court issued *Pavan v. Smith*,[119] a per curiam order in which a majority reiterated that same understanding when it characterized *Obergefell* as being committed "to provide same-sex couples 'the constellation of benefits that the States have linked to marriage.'"[120]

As the remainder of this part makes clear, however, there are a number of marital benefits that would have accrued to those in same-sex relationships if not for the unconstitutional denial of their right to wed. Thus, failure to count the years same-sex couples spent in an informal marriage-like state would undermine *Obergefell*'s promise of "liberty and equality under the Constitution."[121] After discussing several of the marital benefits that fall into this category, this part then looks to the disparate approaches states have taken when confronted with the issue of whether to "backdate" marriages for same-sex couples.

A. Benefits Conditioned on Length of Marriage

This Article began by discussing Michael Ely's pursuit of Social Security benefits, which is but one of the "constellation of benefits" tied to length of marriage.[122] In their case, the Social Security Administration had refused to recognize Ely as a surviving spouse given that he was unable to satisfy the Social Security Act's requirement that he be married to the insured for nine months.[123] Other federal benefits have similar restrictions. For instance, the statute governing pension benefits for surviving spouses of federal employees has the same nine-month marriage requirement.[124] Additionally, the federal statute that deals with pension benefits for surviving spouses of military veterans withholds eligibility "unless such surviving spouse was

117. *See* Rhodes, *supra* note 26, at 433 ("The Supreme Court could have exceeded the presented issues and ordered remedial backdating in *Obergefell* as a constitutional minimum—but it did not.").

118. *Obergefell*, 576 U.S. at 676.

119. 137 S. Ct. 2075 (2017).

120. *Id.* at 2077 (quoting *Obergefell*, 576 U.S. at 670).

121. *Obergefell*, 576 U.S. at 674.

122. *See Pavan*, 137 S. Ct. at 2077 (quoting *Obergefell*, 576 U.S. at 670); *see also* Ely Complaint, *supra* note 8.

123. And this is but one of the Social Security benefits tied to length of marriage. For an excellent discussion of others, see Nicolas, *supra* note 26, at 408–12.

124. *See* 5 U.S.C. § 8341(a)(1)(A), (a)(2)(A).

married to such veteran . . . before the expiration of fifteen years after the termination of the period of service in which the injury or disease causing the death of the veteran was incurred or aggravated; or . . . for one year or more."[125] Beyond benefits related to surviving spouses, federal law likewise imposes length-of-marriage restrictions in the area of immigration law. For instance, one can petition to have a spouse classified as an immediate relative only after "the alien has resided outside the United States for a 2-year period beginning *after* the date of the marriage."[126]

At the state level, there are additional benefits that are conditioned on being married for a certain amount of time. In Arkansas, for instance, a surviving spouse's ability to take an elective share is conditioned on having "been married to the decedent continuously for a period in excess of one (1) year."[127] Similarly, a number of other states calculate the amount of the elective share by looking at how long the parties were married.[128] A number of states condition certain divorce protections on the length of the marriage. For instance, when it comes to the decision of whether to award alimony and in what amount, some states have statutes requiring courts to consider the length of the marriage.[129] Indeed, in the absence of a statutory directive, several states have held that there is a rebuttable presumption of permanent alimony if the marriage was "long-term."[130] Many states also consider the length of the marriage when determining property distribution.[131] A divorce statute in Washington, for instance, directs that "the court shall . . . make such disposition of the property and the liabilities of the parties . . . after

125. 38 U.S.C. § 1102(a)(1)–(2); *see also id*. §§ 1304, 1541(f).

126. 8 U.S.C. § 1154(g) (emphasis added).

127. *See* ARK. CODE ANN. § 28-39-401(a) (2020). The term "elective share" comes from "state law [that] gives surviving spouses the right to make claims against their deceased spouses' estates, even if the deceased spouses explicitly disinherited them." Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1245.

128. *See, e.g.*, MINN. STAT. § 524.2-202 (2020).

129. *See, e.g.*, Lyudmila Workman, *Alimony Demographics*, 20 J. CONTEMP. LEGAL ISSUES 109, 110 (2011) ("Length of marriage is one significant factor in determining the distribution of alimony awards.").

130. *See id.* (discussing a study that found "that women who had been housewives in marriages lasting 10 years or more were much more likely to be awarded support than those in marriages of less than five years, and that the likelihood of receiving alimony increased proportionately to the length of the underlying marriage"); *see also* Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317, 341 (2016) (noting that "many states now restrict permanent alimony to long-term marriages").

131. *See, e.g.*, Impullitti v. Impullitti, 415 N.W.2d 261, 264 (Mich. Ct. App. 1987); ("Factors to be considered in the division are the property's source, contribution towards its acquisition, length of the marriage, and the needs and earning capacities of the parties."); Swanson v. Swanson, 921 N.W.2d 666, 670 (N.D. 2019) ("A long-term marriage generally supports an equal property distribution."); *see also* CONN. GEN. STAT. § 46b-81 (2020) ("In fixing the nature and value of the property, if any, to be assigned, the court . . . shall consider [among other things] the length of the marriage."); IOWA CODE § 598.21 (2020) ("The court shall divide all property, except inherited property or gifts received or expected by one party, equitably between the parties after considering [among other things]: *a.* The length of the marriage.").

considering all relevant factors including . . . [t]he duration of the marriage or domestic partnership."[132]

Beyond absolute length of marriage, many marital benefits at the state level are conditioned on whether the parties were married during the occurrence of certain events. One of the most notable examples relates to property distribution. Upon divorce, the majority of states equitably divide a couple's *marital* property between the two parties but not each spouse's *separate* property, which remains with the spouse who owns it.[133] Determining whether particular property qualifies as marital or separate typically relates to when that property was acquired—if before marriage, it is separate; if during the marriage, it is marital.[134] For an economically dependent spouse, this distinction can be crucial, especially if the most valuable property is ultimately declared the separate property of the other spouse.

To illustrate, consider a same-sex couple who entered into a committed relationship in 2005. The two would have married had they had the right to do so but instead were forced to wait until 2015, when *Obergefell* finally ushered in marriage equality. The two immediately married but then divorced three years later. In many states, any property the two had acquired between 2005 and 2015 would be considered separate and, thus, not subject to division upon divorce. Had the couple been permitted to wed in 2005, however, that same property would have likely been classified as divisible, marital property. Similar marital benefits that are conditioned on the parties being married at a certain point in time include the marital privilege, which protects only communications made between two people who were married at the time of the communication;[135] the ability to bring a claim for loss of

132. WASH. REV. CODE § 26.09.080(3) (2020).

133. *See* ANN LAQUER ESTIN, DOMESTIC RELATIONSHIPS: A CONTEMPORARY APPROACH 713 (2019) ("Most states are 'marital property' states, which require the divorce court to classify the property owned by the spouses at the time of divorce as either marital or separate, and then authorize the court to divide all marital property."). Community property states follow a similar approach but label the property acquired during marriage as "community property," a designation that influences the "management and use" of that property not only when the marriage ends but during the marriage as well. *Id.* at 714. A minority of states follow the "hotchpot" approach, whereby all property is subject to division regardless of when it was acquired. Marsha Garrison, *Is Consent Necessary?: An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 836 n.76 (2005) (noting that only fourteen states "permit[] the division of premarital assets").

134. There are typically exceptions, however, for property acquired during marriage as a result of inheritance or gift. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-213 (2020) ("A spouse's real and personal property that is owned by that spouse before marriage *and that is acquired by that spouse during the marriage by gift, devise or descent*, . . . is the separate property of that spouse." (emphasis added)); *see also* Carla M. Roberts, *Worthy of Rejection: Copyright as Community Property*, 100 YALE L.J. 1053, 1059–60 (1991) ("Separate property typically is anything an individual owned prior to entering a marriage, income received from separate property, and property received by descent, devise, or gift during the marriage.").

135. *See* Steven A. Young, Note, *Retroactive Recognition of Same-Sex Marriage for the Purposes of the Confidential Marital Communications Privilege*, 58 WM. & MARY L. REV. 319, 330 (2016) ("[I]t is critically important that the privilege requires 'spouses,' meaning the two parties must be married at the time the communication was made.").

consortium, which requires the claimant to have been married to the injured party at the time of the injury;[136] and the marital presumption, which presumes the spouse of a mother is the child's second parent but only if the two were married when she gave birth.[137]

At the same time, one cannot lose sight of the marital benefits tied to the very fact of marriage and how the availability of those benefits has impacted same-sex relationships that predated marriage equality. For instance, there are a number of individuals living today who never formalized their same-sex relationships simply because their partners died before they were legally permitted to wed. For those survivors, the timing of their partners' deaths caused significant legal harm. Consider, for instance, Helen Thornton and Margery Brown, who were in a committed relationship in Washington for twenty-seven years.[138] The two women met in 1979, and their relationship lasted until 2006, when Brown died of cancer.[139] Given that same-sex marriage was not permitted in Washington State until 2012, the two women were unable to marry.[140] Accordingly, when Thornton filed for Social Security benefits as a surviving spouse, her application was denied.[141]

In addition, there are a number of same-sex relationships that the parties dissolved prior to marriage equality. The potential harm to individuals in those relationships stems from the fact that, had they been permitted to marry, those relationships might have been marital and thus could only have been dissolved in accordance with the protections afforded by the states' divorce laws. For example, in 2004, Kimberly Sutton proposed marriage to Charlene Ramey.[142] The Oklahoma couple spent the next eight and a half years living together and holding themselves out as a committed couple.[143] The two even agreed to become parents.[144] Using artificial insemination, Kimberly became pregnant and gave birth to a son in 2005.[145] Nonetheless, Kimberly acknowledged Charlene as the child's other parent.[146] In fact, Charlene served as primary caregiver to the child, who referred to Charlene as

136. *See infra* notes 156–64 and accompanying text.

137. *See* Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 662 (2014) ("Long before paternity tests were available, in other words, the marital presumption assumed that married women did not bear children fathered by men other than their husbands."); *see also infra* note 150 and accompanying text.

138. Complaint for Declaratory, Injunctive & Other Relief at 2, Thornton v. Berryhill, No. 18-1409, 2020 WL 5494891 (W.D. Wash. Sept. 11, 2020).

139. *Id.*

140. *Id.*

141. *Id.*

142. Ramey v. Sutton, 362 P.3d 217, 220 (Okla. 2015) ("Ramey . . . wore a diamond ring to reflect their mutual commitment.").

143. *Id.* at 219.

144. *Id.*

145. *Id.* Although "[a] friend of the couple agreed to be the donor," the court noted that "[t]he donor understood and agreed that Ramey and Sutton would co-parent and raise any child conceived as their own and that he did not have any obligations." *Id.* at 219 n.4.

146. *Id.* at 219 ("Sutton prepared a baby book for their child identifying both Sutton and Ramey as parents. Sutton gave a card to Ramey congratulating her on becoming a 'mother' to their son and that she would be a wonderful mom.").

"mom."[147] Likewise, the trio held themselves out to friends and relatives as a family.[148]

When the relationship between the two women ultimately ended, Kimberly argued that Charlene was not entitled to custody or visitation, given that she was not a biological parent and the two had never married.[149] Had the two wed at any point prior to dissolving their relationship, there would have been no question that Charlene was a legal parent.[150] Charlene did ultimately prevail, but it was not because the court was willing to consider the quality of the relationship during a time when marriage was an impossibility. Instead, the court ruled that, "although the biological mother enjoys many rights as a parent, it does not include the right to erase a relationship that she voluntarily created and fostered with their child."[151]

Thus, for the LGBTQIA+ Americans who were lucky enough to have lived to see marriage equality become the law of the land, they still face discrimination when it comes to receiving "the same terms and conditions" as different-sex couples.[152] Specifically, individuals today who were in same-sex relationships that would have been marriages had the law not prevented them from formalizing their unions are being denied a number of protective benefits. Although these benefits are likewise denied to different-sex couples whose relationships ended before they could marry or who spent years cohabitating prior to formal marriages, there is a key difference: for same-sex couples, marriage was a legal impossibility.

B. State Responses

The concept of formal marriage equality is still relatively new and, as such, there are a number of questions regarding the reach of *Obergefell* with which the law must still grapple.[153] Justice Kennedy's equal protection analysis, for instance, did little to illuminate the standard of review that applies to

147. *Id.* The child would not refer to Kimberly as her mother "until the age of five or six." *Id.* ("Even today, their child will sometimes refer to Sutton, the biological mom as Kimberly and not as 'mom.'").

148. *Id.*

149. *Id.*

150. OKLA. STAT. tit. 10, § 7700-204 (2021) (stating that "[a] man is presumed to be the father of a child if . . . [h]e and the mother of the child are married to each other and the child is born during the marriage"). Although the statute is written in gendered terms, the Supreme Court has ruled that a state cannot extend the marital presumption to different-sex marriages without also extending it to same-sex marriages. *See* Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017).

151. *Ramey*, 362 P.3d at 221. In ruling for Ramey, however, the court did note that "[t]he couple's failure to marry cannot now be used as a means to further deprive the nonbiological parent, who has acted *in loco parentis*, of a best interests of the child hearing." *Id.* at 220–21.

152. Obergefell v. Hodges, 576 U.S. 644, 676 (2015).

153. Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379, 467 (2016) (noting that *Obergefell* "resolved doctrinal debates over same-sex marriage, but . . . raised unanswered questions concerning LGBT discrimination, polygamy, and other forms of constitutional liberty").

discrimination on the basis of sexual orientation.[154] What does seem clear, however, in the wake of both *Obergefell* and *Pavan* is that whatever marital benefits a state extends to different-sex couples, it must likewise extend to same-sex couples. The question arises, however, as to how states are to apportion marital benefits to same-sex couples who were prohibited by law from marrying. Since *Obergefell*, the issue has arisen in a variety of contexts and, not surprisingly, the states have taken a number of different approaches.

Even before *Obergefell*, the Supreme Court of Connecticut became one of the earliest courts to rule that same-sex couples are entitled to marital benefits if—but for the prohibition against same-sex marriage—they would have wed at an earlier date. In *Mueller v. Tepler*,[155] Margaret Mueller and Charlotte Stacey were in a longtime relationship that began in 1985.[156] In 2001, Margaret's physician diagnosed and subsequently treated her for ovarian cancer when, in fact, she was suffering from cancer of the appendix.[157] Left untreated, Margaret's cancer progressed to the point where surgery was no longer an option, and she died in 2009.[158] In 2006, however, she brought a medical malpractice claim, which included a claim by Charlotte for loss of consortium.[159] The defendants moved to strike Charlotte's claim on the basis that, at the time of the alleged negligence, she and Margaret were not married, as required by the state's law regarding loss of consortium claims.[160] Although the two did enter into a civil union in 2005 pursuant to Connecticut law, the plaintiffs had alleged that the medical malpractice occurred before that date.[161]

Nonetheless, the court ruled that the requirement that the plaintiff must have been married to the injured party at the time of the injury "only has logical force . . . if the couple was capable of entering into a 'formal marriage relation' prior to the injury."[162] Because that option was not available to Margaret and Charlotte, the court expanded the ability to bring a loss of consortium claim "to members of couples who were not married when the tortious conduct occurred, but who would have been married if the marriage

154. *See, e.g.*, Peter Nicolas, *Reconstruction*, 10 U.C. IRVINE L. REV. 937, 985 (2020) ("[T]he Court appeared to apply something more rigorous than traditional rational basis review, [but] never articulated a standard of review.").

155. 95 A.3d 1011 (Conn. 2014).

156. *Id.* at 1015.

157. *Id.* (noting that the doctor "either failed to review the pathology report or misinterpreted its findings").

158. *Id.* ("Although the error was discovered in April, 2005, Mueller's cancer had progressed to a stage where some of the tumors no longer could be removed surgically.").

159. *Id.*

160. *Id.*; *see also* Gurliacci v. Mayer, 590 A.2d 914, 931–32 (Conn. 1991) ("[V]irtually all of the jurisdictions that have considered the question take the position that '[a]n action for loss of consortium cannot be maintained unless the plaintiff was married to the injured person at the time of the actionable conduct.'" (second alteration in original) (quoting Briggs v. Butterfield Mem'l Hosp., 479 N.Y.S.2d 758, 758 (App. Div. 1984))).

161. *Mueller*, 95 A.3d at 1015. The court did note, however, that the two were not permitted to enter into the civil union until a year after the doctor had stopped treating Margaret. *Id.* at 1015 n.4.

162. *Id.* at 1017 (quoting plaintiff's objection to defendants' motion to strike).

had not been barred by state law."[163] In light of that expansion, the court remanded the case to determine whether the women's relationship met that test.[164]

The following year, an Oregon court adopted a similar test. There, Karah and Lorrena Madrone held a commitment ceremony in 2005.[165] Two years later, the two women decided to have a child by artificial insemination and Lorrena agreed to carry the child.[166] Afterwards, the two women both changed their last names to Madrone and registered as domestic partners pursuant to Oregon law.[167] The relationship between the women "deteriorated" and in 2012, Karah filed for a dissolution of the domestic partnership.[168] She also sought a declaration that she was the legal parent of the child born to Lorrena.[169] Karah did so by relying on an Oregon statute that provided that a husband of a woman who conceives by artificial insemination is presumed (assuming he consented to the insemination) to be the legal father.[170] Although Oregon courts had previously extended the statute's protections to same-sex partners,[171] Lorrena objected on the basis that the two women did not enter into a domestic partnership until after the child was born.[172] The court rejected her argument, however, and held that "*choice* is the key to determining whether [the Oregon statute] applies to a particular same-sex couple."[173] The court further opined:

> Given that same-sex couples were until recently prohibited from choosing to be married, the test for whether a same-sex couple is similarly situated to the married opposite-sex couple contemplated in [the statute] cannot be whether the same-sex couple chose to be married or not. Rather, the salient question is whether the same-sex partners *would have* chosen to marry before the child's birth had they been permitted to.[174]

For those reasons, the case was remanded to determine whether the "couple would have married had that choice been available."[175]

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163. *Id.* at 1023.
164. *Id.* at 1030–31.
165. *In re* Madrone, 350 P.3d 495, 497 (Or. Ct. App. 2015).
166. *Id.*
167. *Id.* at 498 n.1.
168. *Id.* at 497–98.
169. *Id.* at 498 ("Petitioner alleged that, at the time of R's conception and birth, she was respondent's 'domestic and life partner,' that she and respondent had planned the pregnancy with the intent to raise the child together, and that she had consented to the artificial insemination procedure.").
170. *Id.* at 498 (noting the statute provides the same rights to the mother's husband "as if the child had been naturally and legitimately conceived by the mother and the mother's husband" (quoting OR. REV. STAT. § 109.243 (2018))).
171. *See* Shineovich v. Kemp, 214 P.3d 29, 40 (Or. Ct. App. 2009) (extending "the statute so that it applies when the same-sex partner of the biological mother consented to the artificial insemination").
172. *In re Madrone*, 350 P.3d at 499 (quoting Lorrena's argument that "the protections afforded in [the Oregon statute] apply to domestic partners, not simply people in a relationship").
173. *Id.* at 501.
174. *Id.*
175. *Id.* at 502.

The Connecticut and Oregon cases both arose in states where same-sex couples, even before they obtained the right to marry, had the option of entering into civil unions or domestic partnerships. Since *Obergefell*, many of those states have adopted legislation concerning how time spent in these "alternative species of quasi-marriage"[176] will count toward the length of the marriage. Specifically, as Professor Peter Nicolas explains, seven states that permitted same-sex couples to enter into domestic partnerships or civil unions pre-*Obergefell* have since "created a seamless mechanism for converting civil unions or domestic partnerships to marriages."[177] Of those, about half have legislated that the marriage began on the date the relationship was converted to a formal marriage, while the remainder set the date as the time the couple first entered into the domestic partnership or civil union.[178] Although the latter approach allows the same-sex couple to count more of their actual relationship toward the subsequent marriage, it still only applies to those portions that came after the couple entered into the domestic partnership or civil union—legal options that may not have been available until after the couple had already been in a relationship for many years.

Nonetheless, such an approach is still superior to that being taken in states that fail to even offer civil unions or domestic partnerships. In the few cases that have arisen in those states, courts have simply refused to grant marital benefits to same-sex couples whose relationships spanned time periods in which they were prohibited from marrying. Consider, for instance, a Michigan case involving two women, Deanna and Johanna Mabry, who were in a relationship that began in 1995 and lasted until 2010.[179] During that time, the two bought a house together and participated in a commitment ceremony, and Johanna even took Deanna's last name.[180] Most relevant to the subsequent litigation, however, was the fact that the relationship produced three children.[181] Johanna was the biological mother, having conceived using an anonymous donor.[182] Nonetheless, Deanna's role in the children's lives was "significant" in that she "provided [them] with health insurance, she was the sole financial provider for the family, and she provided care and guidance to the children."[183] In fact, Johanna's will

176. Andersen v. King County, No. 04–2–04964–4, 2004 WL 1738447, at *12 (Wash. Super. Ct. Aug. 4, 2004), *rev'd*, 158 P.3d 963 (Wash. 2006).

177. Nicolas, *supra* note 26, at 405.

178. *Id.* at 405–06; *Compare* WASH. REV. CODE § 26.60.100(4) (2020) ("[T]he date of the original state registered domestic partnership is the legal date of the marriage."), *with* 15 R.I. GEN. LAWS § 15-3.1-13 (2020) ("For purposes of determining the legal rights and responsibilities involving [married] individuals who previously entered into a civil union in this state, . . . the date of the recording of the marriage certificate shall be the operative date by which legal rights and responsibilities are determined.").

179. Mabry v. Mabry, 882 N.W.2d 539, 540 (Mich. 2016) (McCormack, J., dissenting).

180. *Id.* (observing that the two took additional steps, including "filing a declaration of domestic partnership, . . . entering a formal domestic-partnership agreement, . . . and entering into a marriage covenant in the form of a ketubah").

181. *Id.*

182. *Id.*

183. *Id.* (noting that all three children "were biological children of the defendant but took the plaintiff's last name and were parented by both the defendant and the plaintiff").

provided that, "in the event of her death, [Deanna] would be the children's legal guardian and conservator."[184]

However, when the parties ended their relationship and Deanna petitioned for custody, the Michigan court ruled that she lacked standing because she was never formally married to the children's mother.[185] Unlike the courts in Connecticut and Oregon,[186] the Michigan court refused to even consider whether the couple would have married had they been permitted to do so. A year earlier, a court in Florida, on very similar facts, reached the same conclusion.[187] Thus, in comparison to states like Connecticut and Oregon, states that never adopted alternatives to marriage currently appear to be more hostile to backdating claims of those in same-sex relationships.

There is, however, one exception—the handful of states that permit informal or common-law marriage. A survey of decisions from those states reveals that some have been willing to offer relief by finding that the couple had effectuated a common-law marriage. To illustrate, consider the South Carolina case of Debra Parks, who ended a forty-year relationship with her partner in 2017.[188] During this time, the two had bought a house and "other property together, had joint bank accounts, used each other on tax documents, and lived together until 2016."[189] The couple resided in South Carolina, which did not permit same-sex marriage until 2014.[190] South Carolina does, however, recognize common-law marriage.[191] When Parks sued to have her relationship declared a common-law marriage, the judge agreed.[192] In essence, the court ruled that not only had the two entered into a common-law marriage but that it had commenced when Parks divorced her husband in 1987—twenty-seven years before South Carolina would begin allowing same-sex marriage.[193] Other states that recognize common-law marriage have reached similar results when dealing with individuals whose same-sex partners died before they were able to legally wed.[194]

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184. *Id.*

185. *Id.* at 541 ("The order held that the plaintiff did not have standing to bring a custody action pursuant to the equitable-parent doctrine because that doctrine is only available to a parent who was married.").

186. *See supra* notes 156–75 and accompanying text.

187. *See generally* Willis v. Mobley, 171 So. 3d 739 (Fla. Dist. Ct. App. 2015), No. 5D14–3424, 2015 WL 4389054 (Fla. Dist. Ct. App. July 14, 2015) (per curiam) (unpublished table decision).

188. *See* Andrew Dys, *Same-Sex Legal Groundbreaker: Judge Says Rock Hill Couple Married in S.C. for Decades*, HERALD (Mar. 23, 2017, 8:48 AM), https://www.heraldonline.com/news/local/article139540723.html [https://perma.cc/Z46Q-QGZZ] (reporting the facts of York County Family Court case, *Parks v. Lee*, 2016-DR-451061 (2016)).

189. *Id.* According to Parks, "We were a family, even when society didn't accept it." *Id.*

190. *Id.*

191. *Id.*

192. *Id.* According to the judge, "Quoting William Shakespeare, 'A rose by any other name would smell as sweet,' . . . . The law established by the U.S. Supreme Court in *Obergefell* . . . should be applied retroactively in South Carolina." *Id.*

193. *Id.*

194. *See* Nicolas, *supra* note 26, at 416–18 (collecting cases); Young, *supra* note 135, at 338–43 (collecting cases).

Because very few states permit common-law marriage, however, the vast majority of states have had to fashion new tests for dealing with same-sex relationships that predated marriage equality. And, as detailed earlier, those states have done so with varying approaches and with divergent opinions as to what true marriage equality entails. That itself is problematic, in light of the fact that the right to marry is a constitutionally protected right.[195] As such, there necessarily must exist some standards to which all states must adhere. Of course, family law is largely within the primary province of the states and, as such, it would be unreasonable to expect all states to have an identical response to this issue.[196] In fact, as Professor Charles Rhodes has pointed out, "family law courts, as a rule, traditionally have broad judicial discretion in adjudicating disputes and fashioning just outcomes."[197] Nonetheless, because "federal constitutional rights are understood to extend equally across the land,"[198] there are limits to how divergent states can be when it comes to resolving the issue of backdating same-sex marriage.[199]

Thus, a more consistent remedy is necessary if states are to redress the harms that many individuals from same-sex relationships continue to experience as a result of the unconstitutional laws that had long prevented them from marrying.

III. THE LAW OF INFORMAL FAMILY CREATION

States that refuse to consider the pre-equality portion of a same-sex couples' relationships are producing two separate but related harms. First, they are shortchanging individuals in same-sex marriages who seek marital benefits tied to length of marriage.[200] Second, these states completely deny all marital benefits to those who were in same-sex relationships that ended (either through dissolution or death) prior to the time marriage became a legal option. Both harms run counter to the Court's holding in *Obergefell* and thus a new remedy is required.

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195. *See* Michael J. Higdon, *Polygamous Marriage, Monogamous Divorce*, 67 DUKE L.J. 79, 96 (2017) ("[T]he Court has declared that, under the substantive component of the Due Process Clause of the Fourteenth Amendment, the right to marry is a fundamental right.").

196. *See* Elizabeth G. Patterson, *Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law*, 25 GA. ST. U. L. REV. 397, 406 (2008) ("Leaving family law to the states, however, allows diversity to exist within the United States, and individuals whose values differ from those of the majority in one location have the alternative of emigrating to another, more compatible, community."); Milton C. Regan Jr., *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 VA. L. REV. 1515, 1524 (1993) ("[A] cardinal tenet of United States jurisprudence is that family law is primarily the province of individual states—a principle that explicitly invites the codification of diverse particular judgments about how family life should be arranged.").

197. Rhodes, *supra* note 26, at 432.

198. Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 169 (2009).

199. Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1490 (2018) ("[L]ike all constitutional rights, [parenthood] must necessarily possess some core limits that bind the states.").

200. *See* Nicolas, *supra* note 26, at 397 ("[M]any same-sex relationships appear artificially short in endurance when measured solely by reference to the couple's civil marriage date.").

In formulating an appropriate remedy, however, it is important to first recognize that states are not starting from a blank slate when it comes to awarding family-like benefits to individuals who lack formal family relationships. Instead, the states already possess a number of equitable doctrines that operate in a variety of different contexts to do just that—doctrines that can greatly assist the courts in crafting a new remedy to protect same-sex couples whose relationships predated marriage equality. These existing remedies operate against a backdrop where, despite the robust legal protections that exist for American families, there is little consensus on the precise legal definition of "family."[201] When people talk of "starting a family," one typically imagines marriage and the eventual addition of children, either through birth or adoption. The reality, however, is much more complicated, and over the years, that complexity has only grown.[202] Couples may get married or they may not. Perhaps the couple thought they were married when, in reality, the marriage was void for some reason. The two may have children together or they may not. Perhaps they end up raising children who only have a biological relationship with one of them. Maybe the nonbiological parent adopts the new children but perhaps not. Maybe they agree to take in a child from a friend or relative and, despite an intent to do so, never get around to formally adopting the child.

Family law is no stranger to dealing with any of these scenarios, consistently drawing on its "built-in flexibility to adapt to changing times."[203] And, indeed, over the years, states have developed a number of doctrines that permit courts to extend familial rights even to those who failed to formally create legal family relationships. What follows is a brief survey of five different examples that courts have relied on to fashion a new remedy for same-sex couples whose "marriages" predated the legal recognition of their right to form such unions. In reviewing these existing doctrines, it is important to note how the courts resort to them primarily for reasons of equity, focusing on the need to protect parties from the harms they would otherwise suffer were the courts to rigidly insist on form over substance.

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201. Kirsten Korn, Comment, *The Struggle for the Child: Preserving the Family in Adoption Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1291 (1994) ("Although the Supreme Court has held that the Constitution protects various aspects of the family, as well as the parent-child relationship, determining what constitutes a 'family' and who may be considered 'parents' for purposes of such protection has proved difficult.").

202. Michael J. Higdon, *The Quasi-parent Conundrum*, 90 U. COLO. L. REV. 941, 948–49 (2019) (discussing various social changes that have led to American families being "more heterogeneous than ever before").

203. Supriya Kakkar, Note, *Unauthorized Embryo Transfer at the University of California, Irvine Center for Reproductive Health*, 24 HASTINGS CONST. L.Q. 1015, 1031 (1997); *see also* Bradley G. Silverman, *Federal Questions and the Domestic-Relations Exception*, 125 YALE L.J. 1364, 1392 (2016) ("Crafting a workable system of family law requires calibrating a 'complex level of benefits' to which state law entitles those who occupy different familial roles." (quoting Brief of Amici Curiae Mae Kuykendall, David Upham & Michael Worley in Support of Neither Party & Urging Affirmance on Question 1, at 15, Obergefell v. Hodges, 576 U.S. 644 (2015) (No. 14-556))).

A. Informal Marriage

Common-law marriage provides likely the most obvious example of legally recognized family relationships that arise through informal means. Also referred to as informal marriage, common-law marriage "is formed by the conduct, statements, and intent of the parties to the marriage without official involvement or formalities."[204] However, unlike the other equitable remedies discussed below, where parties can claim *some of the rights* associated with either marriage or parentage, common-law marriage results in a legal union that carries with it the same rights and obligations of formal marriage.[205] As Judge Richard Posner explained in a 2000 opinion from the Seventh Circuit: "The purpose of common law marriage is not to create a second-class sort of marriage, but rather to repair unintended deficiencies in the ceremony . . . . [and thus] a common law spouse has the same rights as any other spouse."[206]

Despite the implications of its name, common-law marriage is largely an American invention.[207] An 1809 case out of New York is commonly credited as the first to recognize the legality of informal marriage[208] and the facts of that case help explain why states would embrace having this alternative path to legal marriage. In *Fenton v. Reed*,[209] Mrs. William Reed claimed a widow's pension from a local provident society after the 1806 death of her husband.[210] The society refused, however, on the basis that her marriage to William was invalid.[211] After all, William was not her first husband.[212] Instead, she had previously wed a man named John Guest, who left her in 1785 and traveled to "foreign parts."[213] When he did not return, she married Reed in 1792, believing her first husband to be dead.[214] Guest was not dead, however, and returned to New York later that year, where he lived until his death in 1800.[215]

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204. Rhodes, *supra* note 26, at 437.

205. *See* Peter Nicolas, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931, 934 (2011) ("When entered into, a common law marriage provides the same rights, privileges, and responsibilities as a ceremonial marriage, and is as durable as a ceremonial marriage, requiring divorce proceedings to terminate the relationship.").

206. Barron v. Apfel, 209 F.3d 984, 985–86 (7th Cir. 2000) (citations omitted).

207. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 202 (2d ed. 1985) ("Probably there was no such institution [as common-law marriage] in England."); Adair Dyer, *The Internationalization of Family Law*, 30 U.C. DAVIS L. REV. 625, 626 (1997) (noting that "the informal contractual status known as 'common law marriage' may have been an American innovation").

208. *See* Charles P. Kindregan Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAM. L.Q. 427, 434 n.45 (2004) ("Informal marriage appears to have first been recognized by the New York court in *Fenton v. Reed*.").

209. 4 Johns. 52 (N.Y. Sup. Ct. 1809) (per curiam).

210. *Id.* at 52–53.

211. *Id.*

212. *Id.*

213. *Id.* at 52.

214. *Id.* ("[I]t was reported, and generally believed, that [Guest] had died in foreign parts.").

215. *Id.*

During this time, Guest "did not object to the connection between the plaintiff and Reed, and said that he had no claim upon her, and never interfered to disturb the harmony between them."[216] Nonetheless, given that she never divorced her first husband and he was still living when she married Reed, the society argued that her second marriage was void.[217] Had she attempted to marry Reed again following Guest's death, the marriage would have been valid, but she did not resolemnize her relationship with Reed.[218] The court, however, held that it was not necessary to prove that the marriage had been solemnized, holding instead that "[a] marriage may be proved . . . from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred."[219] Turning to the facts of the case, the court found that circumstances were such that, although her attempt to formally marry Reed was invalid given her existing marriage to Guest, she subsequently effectuated a common-law marriage with Reed after her first husband died: "The parties cohabited together as husband and wife, and under the reputation and understanding that they were such, from 1800 [when Guest died] to 1806, when Reed died."[220]

Other states would soon embrace the doctrine and its ability to protect the interests of those in economically dependent relationships.[221] By the end of the nineteenth century, common-law marriage would become the law in a majority of the states.[222] It proved popular for a number of reasons, including how well suited it was to frontier conditions where finding someone to perform a formal wedding might be difficult,[223] how it provided individuals with greater autonomy and freedom from the state,[224] how it helped legitimize children,[225] and how it provided for unsuspecting women who

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216. *Id.*

217. *Id.* at 53. In part, the court agreed: "The marriage of the plaintiff below with William Reed during the life-time of her husband John Guest, was null and void." *Id.*

218. *Id.* at 52 ("[N]o solemnization of marriage was proved to have taken place between the plaintiff and Reed, subsequent to the death of Guest.").

219. *Id.* at 54 ("No formal solemnization of marriage was requisite. A contract of marriage made *per verba de presenti* amounts to an actual marriage.").

220. *Id.*

221. *See* Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 65–66 (1981) ("The idea that marriage could be validated by the mere consent of the spouses gained strength from cases that . . . recognized informal or 'common law' marriages and appeared in community property as well as in common law states.").

222. *See* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 715 (1996) (noting that the doctrine was recognized by "a majority of the states in 1920 and even more in the nineteenth century").

223. *See* Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1147 (2009) (identifying "the difficulty of requiring resort to either a governmental or religious official in a dispersed frontier society" as one of the reasons states embraced common-law marriage).

224. *See* Nicolas, *supra* note 205, at 939 ("One oft-cited rationale [for common-law marriage] is a libertarian concept of autonomy and independence, the idea that marriage is a natural right and that individuals should be free to enter into marriages without the need to invoke the power of the state.").

225. *See* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2166 (2014) ("Judges and

relied to their detriment on the existence of a valid marriage.[226] In 1877, the Supreme Court seemingly gave its blessing to the idea of marriage by informal means when it held that, unless a state explicitly required formal marriage, marriage laws that required a license and a ceremony were "merely directory."[227]

As the United States entered into the twentieth century, however, common-law marriage began to lose favor rather rapidly.[228] The various reasons for that decline have been well-documented elsewhere and thus do not require expansive discussion here, but in the words of Professor Cynthia Grant Bowman, they essentially boil down to "urbanization, industrialization, concerns about fraud, the ideology of the family, racism, and eugenics."[229] Currently, only eight states and the District of Columbia allow their citizens to effectuate marriage through informal means.[230] Even those states, however, have heightened proof requirements to establish a common-law marriage,[231] the most central being that the two parties show "an express mutual agreement, which must be in words of the present tense."[232] Recognizing that, in the absence of a formal ceremony, it might be difficult to prove the existence of such an agreement, many states permit parties to prove the agreement by relying on evidence of cohabitation and having a reputation in the community as being married.[233] Other states

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lawyers acknowledged that a primary purpose of common law marriage was to ensure that children born of such a union were legitimate.").

226. *See* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 964 (2000) ("As common law marriage triumphed as a dominant legal rule over the course of the nineteenth century, it took as its premise that the law should protect innocent women from the whims and contrivances of irresponsible or rakish men.").

227. Meister v. Moore, 96 U.S. 76, 79 (1877).

228. *See* Ashley Hedgecock, *Untying the Knot: The Propriety of South Carolina's Recognition of Common Law Marriage*, 58 S.C. L. REV. 555, 562 (2007) ("Beginning in the late nineteenth century, many jurisdictions that previously recognized common law marriage began to abolish the doctrine.").

229. Grant Bowman, *supra* note 222, at 732.

230. *See Common Law Marriage by State*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 11, 2020), http://www.ncsl.org/research/human-services/common-law-marriage.aspx [https://perma.cc/LH8B-UBPW] (listing states); *Common Law Marriage Is Alive and Well in the District of Columbia*, JOSEPH, GREENWALD & LAAKE, PA (Aug. 2, 2018), https://www.jgllaw.com/blog/common-law-marriage-alive-well-district-columbia [https://perma.cc/ZA6R-96AT]. However, the Supreme Court of South Carolina recently ruled that, going forward, it will no longer allow its citizens to enter into common-law marriages, although it will continue to honor those that couples effectuated in the past. *See generally* Stone v. Thompson, 833 S.E.2d 266 (S.C. 2019).

231. *See* Michael J. Higdon, *Fatherhood by Conscription: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. 407, 453 (2012) ("[C]ourts in those states recognizing common law marriage have noted that such claims are a 'fruitful source of perjury and fraud' and, as such, have placed a heavy burden on the party claiming common law marriage." (quoting Staudenmayer v. Staudenmayer, 714 A.2d 1016, 1019 (Pa. 1998))).

232. Cerovic v. Stojkov, 134 A.3d 766, 777 (D.C. 2016).

233. *See* Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1842–43 (1987) ("Although the doctrine of common law marriage purportedly depends on the existence of an agreement to be married, normally an agreement is inferred by courts when a couple engages in cohabitation and acquires a reputation as husband and wife.").

explicitly require the parties to prove cohabitation and reputation along with the existence of the agreement to enter into a common-law marriage.[234] States also require that the parties had the capacity to wed one another.[235]

Although most states do not permit people within the state to effectuate a common-law marriage, under full faith and credit, all states recognize a common-law marriage validly effectuated in a state that does permit such unions.[236] States do so pursuant to the lex loci rule by which "courts 'will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and respect.'"[237] Thus, even states that do not permit common-law marriage can nonetheless use the doctrine to extend family law protections to citizens who spent time in a state that does permit informal marriage. Many states have done just that, often by liberally construing the common-law marriage requirements of a sister state.[238] In reviewing such cases, it is clear that courts do so to protect economically dependent "spouses" from the harms that would result from a finding that there was never a valid marriage.

The classic example is *Renshaw v. Heckler*,[239] a 1986 case out of the Second Circuit. There, Edith Renshaw claimed to be the common-law wife of Albert Renshaw for purposes of securing Social Security benefits following Albert's death.[240] The couple was never formally married but had been living as though they were for over twenty years.[241] They exchanged rings, celebrated their anniversary every year, and represented themselves as

234. Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 74 n.132 (1994) ("Most jurisdictions also require cohabitation, or actually and openly living together as husband and wife . . . . Some jurisdictions further require that the parties hold themselves out to the world as husband and wife, and acquire a reputation as a married couple." (alteration in original) (quoting Sol Lovas, *When Is a Family Not a Family?: Inheritance and the Taxation of Inheritance Within the Nontraditional Family*, 24 IDAHO L. REV. 353, 361 (1987))).

235. *See* Strasser, *supra* note 26, at 414 ("A couple barred by law from celebrating a ceremonial marriage will also be barred from contracting a common law marriage."). In terms of how that term is defined, Peter Nicolas explains that capacity "is interpreted to refer to minimum age and mental capacity" but also "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." Nicolas, *supra* note 26, at 418 n.136.

236. *See* Lisa Milot, *Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family*, 87 VA. L. REV. 701, 707–08 (2001) ("[B]ecause of the full faith and credit afforded a valid marriage in one state by other states, though, all states recognize the legal legitimacy of a common-law marriage contracted in another jurisdiction.").

237. Port v. Cowan, 44 A.3d 970, 975 (Md. 2012) (quoting Wash. Suburban Sanitary Comm'n v. CAE-Link Corp., 622 A.2d 745, 757 (Md. 1993)).

238. *See* Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 759 (2011) ("[C]ourts in states that do not recognize common law marriage sometimes stretch doctrine to recognize common law marriages of couples who reside there.").

239. 787 F.2d 50 (2d Cir. 1986).

240. *Id.* at 51.

241. *Id.*

married to those around them.[242] The two even had a child together.[243] The problem, however, was that they resided in New York, which no longer permitted common-law marriage.[244]

Nonetheless, the court found that the two had effectuated a common-law marriage.[245] It did so by relying on the fact that, for seven years in a row, the two took an annual road trip to Virginia and North Carolina[246]—two states that likewise do not permit common-law marriage. Pennsylvania, however, did allow informal marriage and that fact proved relevant because the couple spent a single night in Pennsylvania during each of these trips.[247] Like other common-law states, Pennsylvania looked to cohabitation and reputation when determining whether a couple had effectuated a common-law marriage.[248] The Renshaws had clearly satisfied those elements over the course of their long-term relationship, but the question was whether they had done so *while in Pennsylvania*.[249] Despite noting that Pennsylvania places a "heavy burden"[250] on those seeking to establish a common-law marriage, the court nonetheless found that Edith had met that standard:

> The Renshaws' stays in Pennsylvania were admittedly short; but they cohabitated during the entire time that they were there. While the evidence of reputation is not extensive, they held themselves out as husband and wife to every individual they knew that they saw in Pennsylvania—his mother, her brother, and their daughter. Moreover, Mrs. Renshaw testified that when Mr. Renshaw made reservations over the phone, he indicated on at least one occasion that the reservations were for himself, his wife, and their daughter.[251]

Although the court stated that, "[i]n different circumstances, such facts alone might not prove sufficient,"[252] it nonetheless held that "the Renshaws' conduct while in Pennsylvania and elsewhere is . . . sufficient to . . . conclude

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242. *Id.* Additionally, she took his last name and "the couple filed joint tax returns as husband and wife, and Mr. Renshaw listed Mrs. Renshaw as his wife and beneficiary on his life insurance policy." *Id.*

243. *Id.*

244. *Id.* at 52.

245. *Id.* at 53–54.

246. *Id.* at 51–52.

247. *Id.* at 52.

248. *Id.* ("Generally, a common-law marriage may be created by uttering words in the present tense with the intent to establish a marital relationship; but where no such utterance is proved, Pennsylvania law also permits a finding of marriage based on reputation and cohabitation when established by satisfactory proof." (citation omitted) (first citing Commonwealth v. Sullivan, 398 A.2d 978, 980 (Pa. 1979); and then citing *In re* Estate of Wagner, 159 A.2d 495, 498 (Pa. 1960))).

249. *Id.* It was on this basis that the lower court had ruled against Mrs. Renshaw finding that "at best only 16 days out of Mr. Renshaw's lifetime were spent in Pennsylvania [and] the overwhelming bulk of the supporting evidence rests on actions taken outside of Pennsylvania in non-common law states." *Id.* at 53 (quoting Magistrate's Decision & Order at 9, *Renshaw*, 787 F.2d 50 (No. 85-6272)).

250. *Id.* at 52.

251. *Id.* at 53.

252. *Id.*

that the Renshaws entered into a valid common-law marriage under Pennsylvania law."[253]

Renshaw is but one example where a court has held that a valid common-law marriage arose after only a few days in a common-law marriage state.[254] Although the reasoning in these cases appears to be a bit of a stretch,[255] the states are clearly motivated to protect the economic interests of vulnerable citizens.[256]

B. Invalid Marriage

Whereas common-law marriage allows parties to effectuate a marriage through informal means, other doctrines in the law allow a party to collect marital benefits from a formal marriage that was nonetheless invalid. Collectively, these doctrines are often referred to as the marriage validation principle, which courts use to try and find a valid marriage even in the face of facts that cast enormous doubt on that conclusion.[257] The courts take this approach in light of the harms that could befall an economically dependent "spouse" who ultimately discovers that her marriage is invalid, thus depriving her of the benefits and protections to which she thought she was entitled.[258] Two notable examples of ways in which courts attempt to validate questionable marriages are the doctrines of marriage by estoppel and putative marriage.

Marriage by estoppel prohibits a party from using an invalid divorce to void a subsequent marriage. However, the doctrine "is unlike classic equitable estoppel in that it does not focus solely on whether one party has made a misrepresentation on which the other has reasonably relied."[259] Instead, "[t]he focus is broader and requires a consideration of all of the circumstances surrounding not only the procurement of the divorce but also

253. *Id.* at 54.

254. *See, e.g.*, Blaw-Knox Constr. Equip. Co. v. Morris, 596 A.2d 679, 687 (Md. Ct. Spec. App. 1991) (holding that a Maryland couple effectuated a common-law marriage after spending two nights at a Pennsylvania hotel to attend a funeral); *In re* Coney v. R.S.R. Corp., 563 N.Y.S.2d 211, 212 (App. Div. 1990) (holding that a couple effectuated a common-law marriage after spending three days visiting family in Georgia).

255. *See* Candeub & Kuykendall, *supra* note 238, at 759 (noting that "courts in states that do not recognize common law marriage sometimes stretch doctrine to recognize common law marriages of couples who reside there").

256. *See* Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 453 (2013) (pointing out that, because "traditional common law marriage is not likely to make a modern comeback . . . alternative constructs and regulations are used to protect vulnerable parties in long-term cohabitant relationships").

257. *See* ESTIN, *supra* note 133, at 98 ("[T]he marriage validation principle . . . seeks to uphold marriages whenever possible.").

258. *See* Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1198 ("The goal of protecting the financial interests or financial equity of individuals who enter into such relationships is similar to the policy underlying common law marriage, putative spouse, and equitable doctrines.").

259. Lowenschuss v. Lowenschuss, 579 A.2d 377, 381 (Pa. Super. Ct. 1990).

the conduct of the parties thereafter and the effect of a declaration of the invalidity of the divorce on others."[260] As such, "[i]t is sufficient, in many cases, that a court find only that it would be unfair to let a party take advantage of the legal invalidity of a divorce decree and the invalidity of the subsequent marriage."[261]

Consider the case of *Lowenschuss v. Lowenschuss*,[262] where Pennsylvania resident Beverly Lowenschuss divorced her first husband in 1964 after traveling to Alabama.[263] However, because she failed to establish residency in Alabama, her divorce was invalid.[264] Not realizing her failure, Beverly returned to Pennsylvania, where she met and married Fred Lowenschuss.[265] The couple eventually had four children together.[266] Although Fred testified that he learned of Beverly's defective divorce in 1974, he nonetheless remained in the relationship as though nothing had changed.[267] In 1981, Beverly filed for divorce.[268] In response, Fred argued that, because she had never legally divorced her first husband, he and Beverly were never legally married.[269] The court, however, held that Fred was estopped from raising the circumstances of Beverly's previous divorce.[270]

Even though Fred was not a party to her prior divorce proceedings, the court ruled that, in light of his conduct, it would be inequitable for him to raise that defense at such a late date.[271] "[B]oth parties relied in good faith on the Alabama divorce in marrying each other in 1965 and continued to rely on that divorce at minimum until 1974. . . . Husband conducted himself as a married man for nine years before 1974 and after 1974 he continued to live as he had before."[272] Ultimately, the court found that

> [n]o social purpose will be served by a decision that this marriage simply does not exist and that wife is still the legal wife of her first husband and that her four children were born of an illicit relationship. To hold that

260. *Id.*

261. JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 42–43 (4th ed. 2013).

262. 579 A.2d 377 (Pa. Super. Ct. 1990).

263. *Id.* at 378. Around this time, Alabama was a popular destination for those seeking a relatively easy and quick divorce. *See Migratory Divorce: The Alabama Experience*, 75 HARV. L. REV. 568, 569 (1962).

264. *Lowenschuss*, 579 A.2d at 378 ("Wife spent at most two days in Alabama and does not dispute the fact that she has never been a bona fide resident of Alabama.").

265. *Id.* Fred was an attorney and he "knew that wife was divorced, but denies knowing any of the details concerning how the divorce was procured." *Id.*

266. *Id.*

267. *Id.* He learned of the divorce that year after he commenced a divorce action, which he subsequently withdrew. *Id.*

268. *Id.* at 377.

269. *Id.*

270. *Id.* at 386.

271. *Id.* ("Such a decision would contravene the strongly entrenched policy of this Commonwealth favoring preservation of the family unit.").

272. *Id.* at 385.

> husband may now raise this challenge simply in order to avoid the financial obligations of his marriage would be grossly inequitable.[273]

To justify its ruling, the court reiterated the important and protective functions of both marriage and divorce, writing that "a decision which would allow husband to avoid his marital obligations at this late juncture would be completely inconsistent with the Commonwealth's contemporary attitude toward divorce, which is grounded in the application of equitable principles to achieve economic justice and overall fairness between the parties."[274] As the court's opinion makes clear, Fred was estopped largely because he continued in the marriage long after he learned of the faulty divorce. Had he sought to invalidate the marriage shortly after learning the truth, he would have had a stronger argument. However, Beverly might have still had some recourse as a putative spouse.

Putative marriage is another marriage validation principle, and it allows courts to extend the civil effects of marriage to one who in good faith entered into a marriage that was nonetheless invalid.[275] In other words, "[a] putative marriage . . . is a marriage which is in reality null, but which allows the civil effects of a valid marriage to flow to the party or parties who contracted it in good faith."[276] The only requirements parties must meet to avail themselves of this protection are to have had a ceremonial marriage and to have entered it with a good faith belief that the marriage was valid[277]—good faith being defined as "an honest and reasonable belief that there exists no legal impediment to the marriage."[278]

Although putative marriage does not equal legal marriage,[279] the doctrine is nonetheless intended to promote equity and to protect innocent spouses—for example, individuals who innocently but erroneously believed that they had obtained a valid divorce prior to remarrying. As one court explained, "[a] marriage contracted when one spouse is a party to a previously

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273. *Id.* at 386 ("Therefore, we hold that principles of estoppel based on well-established social policies favoring preservation of the family and economic justice require us to estop husband from asserting the invalidity of wife's Alabama divorce.").

274. *Id.*

275. *See* Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 6 (1985).

276. *Id.*

277. *See* Katherine Shaw Spaht, *Revision of the Law of Marriage: One Baby Step Forward*, 48 LA. L. REV. 1131, 1150 (1988) ("A prerequisite to the application of the putative marriage doctrine is *contracting* the marriage in good faith. The word contracting suggests a ceremony, which would mean that a marriage that is absolutely null because of no ceremony would never produce civil effects.").

278. Casey E. Faucon, *"Living Separate and Apart": Solving the Problem of Putative Community Property in Louisiana*, 85 TUL. L. REV. 771, 774 n.11 (2011); *see also* Succession of Marinoni, 164 So. 797, 804 (La. 1935) (defining good faith as "ignoran[ce] of the cause which prevents the formation of the marriage or the defects in its celebration which caused its nullity" (emphases omitted)).

279. *See* Lee v. Hunt, 431 F. Supp. 371, 376 (W.D. La. 1977) ("[A] 'putative spouse' is not a spouse and has no personal status. Instead, a 'putative marriage' merely creates the responsibilities that one spouse owes the other because one spouse is guilty of a fault and the other innocently believes the marriage is genuine.").

undissolved marriage is absolutely null; however, equity demands that innocent persons not be injured through an innocent relationship."[280] As Professor Christopher Blakesley points out, the primary motivation behind this doctrine is the desire to ensure fairness: "The putative marriage doctrine is a device developed to ameliorate or correct the injustice which would occur if civil effects were not allowed to flow to a party to a null marriage who believes in good faith that he or she is validly married."[281]

To illustrate, consider the 2004 Nevada case of *Williams v. Williams*.[282] There, Richard and Marcie Williams were married in 1973 and lived together as husband and wife for the next twenty-seven years, at which time Richard learned that Marcie had never divorced her first husband.[283] As a result, Richard filed an annulment action to have his marriage to Marcie declared void.[284] The Supreme Court of Nevada used this opportunity to adopt the putative spouse doctrine to ensure "[f]airness and equity."[285] The court ruled that a putative marriage existed despite Richard's argument that Marcie had not entered into their marriage in good faith.[286] Specifically, Marcie testified "that in 1971, she ran into [her first husband] at a Reno bus station, where he specifically told her that they were divorced and he was living with another woman."[287] Richard argued that such reliance was unreasonable given that she had never been served with divorce papers and, at the very least, she had had a duty to inquire further into the existence of the divorce before marrying again.[288] The court, however, rejected Richard's arguments and held that "[t]he record reflects no reason for Marcie to have disbelieved him and, thus, no reason to have investigated the truth of his representations."[289]

In ruling as it did, the court took extensive note of Marcie's financial circumstances:

> During the 27 years that the parties believed themselves to be married, Marcie was a homemaker and a mother. From 1981 to 1999, Marcie was a licensed child-care provider for six children. During that time, she earned $460 a week. At trial, Marcie had a certificate of General Educational Development (G.E.D.) and earned $8.50 an hour at a retirement home. She was 63 years old and lived with her daughter because she could not afford to live on her own.[290]

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280. Lee v. Hunt, 483 F. Supp. 826, 842 (W.D. La. 1978), *aff'd* 631 F.2d 117 (5th Cir. 1980).

281. Blakesley, *supra* note 275, at 6.

282. 97 P.3d 1124 (Nev. 2004) (per curiam).

283. *Id.* at 1126.

284. *Id.* ("Marcie answered and counterclaimed for one-half of the property and spousal support as a putative spouse.").

285. *Id.* at 1128.

286. *Id.* at 1127–29.

287. *Id.* at 1127 ("According to Marcie, she discovered she was still married to [her first husband] during the course of the annulment proceedings with Richard.").

288. *Id.* at 1129.

289. *Id.* Relatedly, the court also ruled that "[g]ood faith is presumed. The party asserting lack of good faith has the burden of proving bad faith." *Id.* at 1128.

290. *Id.* at 1127.

Implicit in this recitation is the court's awareness of the degree to which Marcie would be harmed if forced to walk away from a twenty-seven-year relationship, which she believed was a marriage, with no rights to the "marital" property. By finding that Marcie was—if not a legal spouse—a putative spouse, the property acquired during her marriage to Richard was labeled quasi-community property and divided equally between them.[291]

C. No Marriage

Some states have even used their equitable powers to award marital benefits to individuals who never married but merely cohabitated in a domestic relationship. Historically, the states did very little to protect the economic interests of those who enter into such relationships.[292] And they did so purposefully, reasoning that any benefits afforded cohabitating couples might discourage formal marriage.[293] With its landmark decision in *Marvin v. Marvin*,[294] however, California began to change all that, holding that express contracts between cohabitants regarding property distribution were enforceable so long as they were not conditioned "upon the immoral and illicit consideration of meretricious sexual services."[295] In the absence of an express agreement, the Supreme Court of California held that recovery was likewise permitted on the basis of an implied contract "or equitable remedies such as constructive or resulting trusts."[296]

By opening the door to legal protections for cohabitants, *Marvin* was heavily criticized by those who feared that such an approach would "weaken marriage as the foundation of our family-based society."[297] However, in the more than forty years that have elapsed since *Marvin*, most agree that overall it had little impact.[298] First, a handful of states continue in their refusal to enforce any cohabitation agreements.[299] Second, even among those that do,

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291. *Id.* at 1129–30.

292. *See* Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 159 (2005) ("[H]istorically, the cohabiting relationship was treated as a 'negative status' in the law. That is, unmarried cohabitants experienced significant legal *burdens* by virtue of their relationship alone.").

293. *See* Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 722 (2006) (noting the concern that providing "legal equivalence between marriage and cohabitation will devalue and discourage marriage").

294. 557 P.2d 106 (Cal. 1976).

295. *Id.* at 112.

296. *Id.* at 110.

297. Hewitt v. Hewitt, 394 N.E.2d 1204, 1207 (Ill. 1979). The court held that cohabitation agreements "are unenforceable for the reason that they contravene the public policy [of the state] . . . disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants." *Id.* at 1211.

298. As Professor Deborah Rhode has pointed out, "[w]hat little empirical evidence is available suggests that cohabitation generally is not the result of a conscious choice. Rather, individuals tend to drift into such relationships without focusing on the future or its legal implications." DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 138 (1989).

299. Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1039 (2015) ("[E]ven today, Illinois,

Marvin and its progeny only offer limited protections. Specifically, state law protections for cohabitants typically require that the parties entered into an agreement regarding their respective rights.[300] While some states permit implied agreements, others require that they be express.[301] Some states even insist that the agreements be in writing.[302] Regardless, by conditioning legal protection on the existence of a contract, relatively few cohabitants are likely to benefit given that, as one commentator aptly notes, "[i]f couples do not in fact think of their relationship in contract terms, then a doctrine that directs courts to decide their disputes by looking for a contract is unlikely to find one."[303]

Nonetheless, two states that do offer protections for cohabitants whose relationship has ended analogize to the states' divorce laws. For example, the Supreme Court of Nevada has held that property that cohabitants agreed to hold "as if they were married" is subject to the state's community property laws.[304] In so ruling, the court emphasized that it "by no means seeks to encourage, nor does this opinion suggest, that couples should avoid marriage."[305] Instead, the court "reaffirm[ed] this state's strong public policy interest in encouraging legally consummated marriages."[306] Nonetheless, the court pointed out that "this policy is not furthered by allowing one participant . . . to abscond with the bulk of the couple's acquisitions."[307]

Washington has gone one step further and eschews the contract approach altogether, focusing instead on the existence of "a stable, marital-like relationship."[308] For cohabitants who establish the existence of such a relationship (sometimes referred to as the "meretricious relationship test"[309]), the Supreme Court of Washington has held that "income and property acquired during [the relationship] should be characterized in a similar manner

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Georgia, and Louisiana still do not recognize cohabitation contracts between either opposite-sex or same-sex couples.").

300. *See* Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 262 (describing the "contract-based" approach as the "default framework").

301. *See, e.g.*, Morone v. Morone, 413 N.E.2d 1154, 1158 (N.Y. 1980) ("The notion of an implied contract between an unmarried couple living together is, thus, contrary to both New York decisional law and the implication arising from our Legislature's abolition of common-law marriage.").

302. *See* Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 832 n.103 (2008) ("At least three states require a written contract when the consideration is nonmarital conjugal cohabitation.").

303. Ira Mark Ellman, *"Contract Thinking" Was* Marvin*'s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1368 (2001).

304. W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1222 (Nev. 1992).

305. *Id.* at 1223.

306. *Id.*

307. *Id.* at 1223–24.

308. *See* Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995) (en banc) ("A meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.").

309. *See generally* Gavin M. Parr, *What Is a "Meretricious Relationship"?: An Analysis of Cohabitant Property Rights Under* Connell v. Francisco, 74 WASH. L. REV. 1243 (1999).

as income and property acquired during marriage."[310] Washington courts have even applied this approach to same-sex cohabitants, giving them marriage-like remedies years before the state would permit same-sex marriage. Consider, for instance, a 2004 case in which Lynn Gormley and Julia Robertson were involved in a ten-year relationship.[311] After examining the nature of the couple's relationship, the court ruled that they were entitled to an equitable division of property.[312]

In so ruling, the court rejected the argument that, because the two women could not legally marry, their relationship could not be construed as quasi-marital: "[I]t is of no consequence to the cohabitating couple, same-sex or otherwise, whether they can legally marry. Indeed, one of the key elements of a meretricious relationship is knowledge by the partners that a *lawful* marriage between them does not exist."[313] While agreeing that "[w]hether same-sex couples can legally marry is for the legislature to decide," the court concluded that the duty to "'examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property' is a judicial, not a legislative, extension of the rights and protections of marriage to intimate, unmarried cohabitants."[314]

D. Informal Adoption

States have not only relied on informal acts to award marital benefits; they also permit informal acts to justify recognition of certain parent-child relationships. One such example is the doctrine of equitable adoption, also referred to as virtual adoption, de facto adoption, and adoption by estoppel.[315] Equitable adoption is designed to protect an individual who mistakenly believes themselves to be the legal child (whether biological or through adoption) of another.[316] The doctrine, which has been recognized in a majority of the states,[317] typically arises in the context of parental disinheritance, but courts have also relied on the doctrine in other areas as

310. *Connell*, 898 P.2d at 836.

311. Gormley v. Robertson, 83 P.3d 1042, 1043 (Wash. Ct. App. 2004).

312. *Id.* at 1046–47. "They pooled their resources and acquired property as well as debt. They had a joint banking account that was used to pay all monthly obligations, whether preexisting or incurred separately or jointly." *Id.* at 1044.

313. *Id.* at 1045.

314. *Id.* at 1046 (quoting *In re* Marriage of Lindsey, 678 P.2d 328, 331 (Wash. 1984) (en banc)).

315. *See* Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 225 (2008).

316. *See* Lindsay Ayn Warner, *Bending the Bow of Equity: Three Ways Florida Can Improve Its Equitable Adoption Policy*, 38 STETSON L. REV. 577, 585 (2009) (explaining that equitable adoption protects the interests of children who, though blameless, were never legally adopted by their adoptive parents).

317. *See* Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1, 6 (2006) ("Since at least twenty-eight states do recognize equitable adoption, the doctrine remains a theoretical option in a majority of states.").

well, including divorce proceedings[318] and claims of parental rights.[319] Historically, equitable adoption has been "predicated upon principles of contract law and equitable enforcement of [an] agreement to adopt."[320] Thus, courts have typically required the existence of an adoption contract before permitting a party to pursue a claim for equitable adoption.[321]

Requiring the existence of a contract, however, can work great injustice. The case of *O'Neal v. Wilkes*[322] provides an excellent example. There, Hattie O'Neal was a child born in 1949 to an unwed mother who died when Hattie was only eight years old.[323] After living with her paternal aunt for some time, Hattie was placed with a married couple, Mr. and Mrs. Roswell Cook, who were looking to adopt a little girl.[324] Although the Cooks never formally adopted Hattie, from the time she went home with the Cooks until she married in 1975, she was in all meaningful ways their daughter.[325] After Hattie left their home and got married, she continued her relationship with the Cooks, who referred to Hattie's children as their grandchildren.[326] When Mr. Cook died without a will, Hattie brought suit, claiming that Cook had adopted her by way of a virtual adoption and, as such, she was entitled to inherit from him.[327] The Supreme Court of Georgia refused Hattie's claim for the sole reason that her aunt did not have the legal authority to enter into an adoption contract with the Cooks.[328]

Recognizing the unfairness that can arise from such a rigid requirement, a number of states have instead started to rely "on equitable principles of fairness and intent rather than the ordinary rules of contract law."[329] Consider, for instance, the 2013 case of *DeHart v. DeHart*[330] in which the Supreme Court of Illinois was confronted with an individual who was disinherited by the man he had always believed to be his father.[331] The

318. *See, e.g.*, Johnson v. Johnson, 617 N.W.2d 97, 109 (N.D. 2000) ("The substantive circumstances of this case, a divorce in which child support was requested, are identical to the other cases in which husbands have been held to have equitably adopted children for the purposes of imposing child support.").

319. *See, e.g.*, Nguyen v. Boynes, 396 P.3d 774, 779 (Nev. 2017) (concluding "that the district court did not err in granting [respondent] paternity through equitable adoption of the child").

320. Lankford v. Wright, 489 S.E.2d 604, 606 (N.C. 1997) (quoting 2 AM. JUR. 2d *Adoption* § 53 (1994)).

321. *See* Higdon, *supra* note 315, at 225 ("[T]he tests that courts have developed to determine whether an equitable adoption exists almost invariably require that there first have been a contract to adopt between the natural and 'foster' parents.").

322. 439 S.E.2d 490 (Ga. 1994).

323. *Id.* at 491.

324. *Id.*

325. *Id.* ("Although O'Neal was never statutorily adopted by Cook, he raised her and provided for her education and she resided with him until her marriage in 1975.").

326. *Id.*

327. *Id.*

328. *Id.* at 492 ("Because O'Neal's relatives did not have the legal authority to enter into a contract for her adoption, their alleged ratification of the adoption contract was of no legal effect.").

329. DeHart v. DeHart, 986 N.E.2d 85, 103 (Ill. 2013).

330. 986 N.E.2d 85 (Ill. 2013).

331. *Id.* at 90–91.

plaintiff, James DeHart, was born in 1944.[332] For almost sixty years, the decedent, Donald DeHart, had represented himself to the community as James's biological father.[333] In addition, Donald even provided James with a birth certificate that seemingly confirmed his parentage.[334] In 2000, however, James obtained a certified copy of his birth certificate, and it made clear that his father was someone other than Donald.[335]

Donald subsequently conceded that he was not James's biological father but that he had nonetheless adopted James in 1946.[336] Consistent with that representation, Donald continued to hold James out as his son.[337] When Donald subsequently died in 2007, however, his will included the statement, "I have no children" and, indeed, it appeared that he had lied about having adopted James.[338] In the will, Donald left nothing to James and instead left everything to a woman Donald had wed just two years prior to his death.[339] James filed a challenge to the will, arguing in part that he had been equitably adopted by Donald.[340] Although Donald's widow disputed the claim, the court ruled in James's favor, holding that, "where there is sufficient, objective evidence of an intent to adopt (or fraudulently or mistakenly holding out as a natural child on a continual basis), supported by a close enduring familial relationship, . . . equitable adoption [will] be recognized."[341]

In so ruling, Illinois joined other states that have permitted equitable adoption claims even in the absence of a formal adoption contract. West Virginia was seemingly the first state to do so when its highest court stated that, "[w]hile the existence of an express contract of adoption is very convincing evidence, an implied contract of adoption is an unnecessary fiction created by courts as a protection from fraudulent claims."[342] Accordingly, the court held that an equitable adoption could take place even without a contract to adopt, so long as the proponent "can, by clear, cogent and convincing evidence, prove sufficient facts to convince the trier of fact that his status is identical to that of a formally adopted child, except only for the absence of a formal order of adoption."[343] California followed a similar approach in 2004 when its highest court held that one who claims to be an equitably adopted child need only "demonstrate the existence of some direct

332. *Id.* at 90.
333. *Id.*
334. *Id.* ("Donald and plaintiff used the purported birth certificate, to conduct the affairs of life (until the year 2000), using it to enroll plaintiff in grade school and high school and using it to convey to those requesting proof of identity that plaintiff was Donald's son.").
335. *Id.*
336. *Id.* ("Donald also explained in no uncertain terms that he had hired a lawyer in Homewood, Illinois, to handle the adoption so that 'it was all legal.'").
337. *Id.*
338. *Id.* ("There is no legal documentation of an adoption in the record.").
339. *Id.* at 90–91.
340. *Id.* at 91.
341. *Id.* at 104.
342. Wheeling Dollar Sav. & Tr. Co. v. Singer, 250 S.E.2d 369, 374 (W. Va. 1978).
343. *Id.*

expression, on the decedent's part, of an intent to adopt the claimant."[344] The court explained that such intent could be established by the existence of "an unperformed express agreement or promise to adopt"[345] but can also arise from "an invalid or unconsummated attempt to adopt, the decedent's statement of his or her intent to adopt the child, or the decedent's representation to the claimant or to the community at large that the claimant was the decedent's natural or legally adopted child."[346]

E. No Adoption and No Biological Link

Somewhat related to equitable adoption is the concept of an equitable parent, which different courts have referred to as a quasi-parent, in loco parentis, and a psychological parent.[347] Essentially, an equitable parent is one who gains some parental rights as a result of having acted as a parent to a legally unrelated child,[348] typically with the consent of the legal parent.[349] In a growing number of cases, including *Ramey v. Sutton*,[350] same-sex partners have relied on claims of equitable parenthood to gain parental rights over children with whom they lack a biological tie. After all, medical science currently does not permit two people of the same gender to conceive,[351] meaning that children of same-sex couples will only have, at most, a biological connection with one member of the same-sex relationship.

Those in same-sex relationships, of course, are not the first to bring such claims. Individuals who have acted as quasi-parents have a long history of petitioning the courts for parental rights. Although they have not always been successful, the point remains that this is yet one more area of family law where the courts have been willing to bestow familial rights on those who lack formal family relationships. Before looking at those cases, however, it is important to understand that this is an area of the law that is rapidly evolving, due in large part to the fact that family complexity has changed drastically in the last few decades due to "higher rates of divorce, nonmarital childbearing, cohabitation, and remarriage."[352] As a consequence of these

344. Bean v. Ford (Estate of Ford), 82 P.3d 747, 754 (Cal. 2004).

345. *Id.*

346. *Id.*

347. *See* Higdon, *supra* note 202, at 944.

348. *See* Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 458 (2007) (defining a quasi-parent as "a person not a legal parent who nonetheless has greater rights in a contest with the legal parent than does any other third party").

349. *See, e.g.*, Holtzman v. Knott (*In re* Custody of H.S.H.-K.), 533 N.W.2d 419, 435 (Wis. 1995) (adopting a four-part test "[t]o demonstrate the existence of the petitioner's parent-like relationship with the child," the first element of which is "that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child"); *see also supra* note 151 and accompanying text.

350. 362 P.3d 217 (Okla. 2015); *see also supra* notes 142–51 and accompanying text.

351. As advances in assisted reproduction continue, even this may change. *See* Michael Boucai, *Is Assisted Procreation an LGBT Right?*, 2016 WIS. L. REV. 1065, 1093 (discussing technologies whereby sperm cells might be converted to egg cells and vice versa, permitting same-sex couples to reproduce).

352. Ariel Kalil et al., *Time Investments in Children Across Family Structures*, 654 ANNALS AM. ACAD. POL. & SOC. SCI. 150, 150 (2014).

new dynamics, children today are more likely to look to individuals as parents who are, in reality, legal strangers.[353] Thus, courts are being asked to increasingly wrestle with the difficult question of, in the absence of a biological or legal connection to the child, whether an individual can ever become a parent. And, if so, how is a court to reconcile that recognition with the parental rights of the child's legal parents.

In several cases, including claims brought by cohabitants, courts have seemed resistant to extend such recognition. For instance, Donald Merkel cohabitated with his girlfriend, Tamera Cooper, and her son for seven years.[354] Despite being neither the child's legal nor biological father, Donald nonetheless assumed responsibility for helping raise the boy.[355] When the relationship between the two adults ended, the Supreme Court of South Dakota refused to recognize him as an equitable parent: "Before a parent's right to custody over his or her own children will be disturbed in favor of a nonparent a clear showing against the parent of 'gross misconduct or unfitness, or of other extraordinary circumstances affecting the welfare of the child' is required."[356] Stepparents have faced similar difficulties. For example, in a 2009 case out of Illinois, Nicholas Gansner and Miki Mancine were married a few months after Miki adopted a son, William.[357] Nicholas never adopted William but nonetheless held himself out as William's father and served as the child's primary caregiver.[358] When Miki filed for divorce, Nicholas petitioned for sole custody.[359] The court, however, rejected his claim, noting that the state had not recognized equitable parentage and that Nicholas, despite knowing "at all times that he would have to formally adopt William in order to be his legal parent," failed to do so.[360]

Other courts have been more sympathetic to such claims. For instance, in 1992, a Minnesota court granted visitation to a stepfather, David Simmons, over the objections of the child's mother, JoEllen Vasicheck.[361] The couple had married in 1989.[362] At the time, JoEllen had a five-year-old son from a previous relationship.[363] When the couple separated eighteen months later, David petitioned the court for visitation.[364] While acknowledging that "the

353. The term "legal stranger" is often used as a synonym for "nonparent." *See generally* John DeWitt Gregory, *Blood Ties: A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351 (1998) (using "nonparent" and "legal stranger" interchangeably); *see also* David D. Meyer, *What Constitutional Law Can Learn from the ALI Principles of Family Dissolution*, 2001 BYU L. REV. 1075, 1087 (noting that "long-time caregivers lacking biological or adoptive ties are classified as nonparents, or legal 'strangers'").

354. Cooper v. Merkel, 470 N.W.2d 253, 254 (S.D. 1991).

355. *Id.*

356. *Id.* at 255 (quoting Langerman v. Langerman, 336 N.W.2d 669, 670 (S.D. 1983)).

357. *In re* Marriage of Mancine, 9 N.E.3d 550, 555 (Ill. App. Ct. 2014).

358. *Id.* at 556.

359. *Id.*

360. *Id.* at 568.

361. Simmons v. Simmons, 486 N.W.2d 788, 790 (Minn. Ct. App. 1992).

362. *Id.* at 789.

363. *Id.* ("[The] biological father has had no contact with him and has surrendered his parental rights.").

364. *Id.* at 790.

question of whether a former stepparent may assert a common-law right to visitation is one of first impression," the trial court ruled in his favor.[365] Specifically, the court held that "a former stepparent who was in loco parentis with the former stepchild may be entitled to visitation under the common law."[366] Finding nothing in the record to contradict the trial court's determination that visitation with David would be in the child's best interest, the appellate court affirmed.[367] A number of courts have offered similar relief to those who fail to qualify as legal parents.[368]

Included within those cases are instances where courts have used equitable parentage to bestow parental rights on those in same-sex relationships. For instance, a North Carolina court, applying the best interest of the child standard, awarded joint legal and physical custody of a child to the mother, Irene Dwinnell, and the mother's former partner, Joellen Mason.[369] Although the mother argued that the ruling would infringe her constitutional rights to direct the upbringing of her child, the court announced that "[w]hen a legal parent invites a third party into a child's life, and that invitation alters a child's life by essentially providing him with another parent, the legal parent's rights to unilaterally sever that relationship are necessarily reduced."[370] In so ruling, the court noted that the two women "lived together as a family and Dwinnell led her child to believe that Mason was one of his parents."[371]

These cases illustrate but a few examples of the evolving family forms that have led to increasing numbers of children being reared (sometimes exclusively) by those who fail to qualify as a formal legal parent. These cases likewise reveal the degree to which the protections afforded to equitable parents vary by state. In light of the harms that can befall children when those they see as parents are not treated as such by the law, a number of scholars have argued that state law needs to be more consistent when it comes to recognizing equitable parenthood and in providing equitable parents with legal parental rights.[372] The same is true regarding backdating claims by those who are unable to count the pre-equality portion of a same-sex relationship toward a formal marriage given the unconstitutional laws prohibiting such unions. Just as the states have found ways to award family-

365. *Id.*

366. *Id.* at 791. According to the court, "[b]ecause [the statute] does not contain any clause specifically repealing, restricting, or abridging a non-parent's common-law visitation rights, we construe the statute to extend and supplement the common-law rule." *Id.*

367. *Id.* at 792.

368. At least one court has relied on equitable adoption to extend parental rights to a same-sex spouse. *See* Stankevich v. Milliron, 882 N.W.2d 194, 198 (Mich. Ct. App. 2015) (ruling that a same-sex spouse could qualify as an "equitable parent" to the biological child of the other spouse when that child was born during the marriage).

369. Mason v. Dwinnell, 660 S.E.2d 58, 60 (N.C. Ct. App. 2008).

370. *Id.* at 69 (quoting Middleton v. Johnson, 633 S.E.2d 162, 169 (S.C. 2006)).

371. *Id.* at 68.

372. *See* Higdon, *supra* note 202, at 956 ("Although state variation is not an inherently bad thing, discrimination on the basis of family structure and the harm such discrimination plays in the lives of children is something the law should not tolerate.").

like benefits to other relationships that fail to meet the formal requirements of family law, so too must they find ways to extend marital benefits to those who were in relationships that would have been marital had that been a legal option. Although the states need not do so in the same precise way, it is the position of this Article that *Obergefell* demands some form of equitable remedy—one that currently does not exist in the law but for which the above equitable remedies are highly instructive.

IV. EQUITABLE MARRIAGE

As detailed above, courts already use a number of equitable doctrines that enable them to extend family law protections to those who have spent time in informal family-like relationships.[373] Each doctrine owes its existence to the courts' desire to protect vulnerable citizens from the harms that can arise from misplaced reliance on the existence of a formal domestic relationship. Consider, for instance, someone who spends twenty years in a relationship that she believes to be a marriage. Imagine that she does not work outside the home and all valuable property is in her spouse's name. If it were somehow revealed that the marriage was invalid, she would—absent some other remedy—be left with very little financially to show for those twenty years and have limited ability to now rebuild her life. It is primarily within this space that these equitable doctrines operate.[374] There is, however, another concern at play—the goal of fulfilling party expectations.[375] As many courts have referenced when applying them, these doctrines concern individuals who entered into relationships in good faith, assuming that they would be protected or, at the very least, that they were not jeopardizing their economic self-interests in the process.

Those concerns apply with equal force in the context of those who spent time in same-sex relationships that would have been marriages but for the unconstitutional laws preventing such unions. In truth, these individuals are even more entitled to some sort of protection given the constitutional right at play. As a number of scholars have made clear, a retroactive application of *Obergefell* is not merely good policy, it is constitutionally required. For instance, Professor Lee-ford Tritt has concluded that "*Obergefell* should be

373. *See supra* Part III.

374. *See supra* notes 281, 307 and accompanying text.

375. *See, e.g.*, Ceja v. Rudolph & Sletten, Inc., 302 P.3d 211, 216 (Cal. 2013) ("Our court made clear from the beginning that the fundamental purpose of the putative spouse doctrine was to protect the expectations of innocent parties and to achieve results that are equitable, fair, and just."); W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1224 (Nev. 1992) ("[T]his court must protect the reasonable expectations of unmarried cohabitants with respect to transactions concerning their property rights."); Sol Lovas, *When Is a Family Not a Family?: Inheritance and the Taxation of Inheritance Within the Nontraditional Family*, 24 IDAHO L. REV. 353, 371 (1987) ("[C]ourts have developed the doctrines of 'equitable adoption' and 'adoption by estoppel' to protect the child's justifiable expectations."); Kathryn S. Vaughn, Comment, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?*, 28 HOUS. L. REV. 1131, 1140 (1991) ("The first, and probably most important, function of common-law marriage is protecting the good faith expectations of the parties.").

applied purely retroactively as to both choice-of-law matters and remedial considerations" so as to "rectif[y] the property deprivations of unconstitutional unrecognized marriages."[376] Similarly, Professor Nicolas explains that "backdating provides same-sex couples with the 'make whole' relief they are entitled to for past violations of their constitutional right to marry."[377] Such sentiments are consistent with what the Supreme Court itself has said regarding remedial decrees: "[they] must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'"[378]

Thus, if individuals are to be provided with true marriage equality, some retroactivity is required. Unfortunately, none of the existing doctrines is currently suited to address this particular situation. As a result, these individuals require a new form of protection given that their relationships either ended before marriage equality became the law of the land or their eventual marriages fail to capture the true length of the relationship, on which a number of marital benefits are conditioned.[379] The remainder of this part explores why, despite being inapposite in this context, the existing doctrines are nonetheless instructive when it comes to crafting a new equitable doctrine—referred to here as equitable marriage—that would offer the necessary protections. With that in mind, this part then puts forth concrete suggestions on how equitable marriage should be applied and how courts should deal with the potential criticisms and complications that could arise.

A. Filling the Equitable Void

To deal with same-sex relationships that predated marriage equality, one might ask why not simply bring back some form of common-law marriage? It is, after all, the only equitable doctrine of the five discussed that gives formal recognition, with all the attendant rights and obligations, to an informally created relationship.[380] In contrast, the others merely provide for limited rights and remedies. Additionally, there is some precedent for using common-law marriage in this context. After *Loving*, courts took this approach to retroactively extend marriage equality to interracial relationships that were either already in existence[381] or had ended before *Loving*.[382] Further, as discussed earlier, a few states have already relied on common-law marriage to retroactively convert some same-sex relationships into marriages.[383]

376. Tritt, *supra* note 26, at 945.
377. Nicolas, *supra* note 26, at 441.
378. Milliken v. Bradley, 433 U.S. 267, 280 (1977) (quoting Milliken v. Bradley, 418 U.S. 717, 746 (1974)).
379. *See supra* Part II.A.
380. *See supra* notes 205–06 and accompanying text.
381. *See* Nicolas, *supra* note 26, at 424–25.
382. *See, e.g.*, Prudential Ins. Co. of Am. v. Lewis, 306 F. Supp. 1177, 1183–84 (N.D. Ala. 1969) (recognizing a common-law marriage between an interracial couple even though the husband died a few months before *Loving* was issued).
383. *See supra* notes 188–94 and accompanying text.

Nonetheless, there are a number of problems with relying on common-law marriage in this context. First, compared to the legal landscape at the time *Loving* was decided, today, only a small number of states permit common-law marriage and that number continues to dwindle.[384] In 2019, for instance, the Supreme Court of South Carolina *prospectively* abolished the doctrine after finding that it violated the public policy of the state, which "is to promote predictable, just outcomes for all parties involved in these disputes, as well as to emphasize the sanctity of marital union."[385] Additionally, most states abolished common-law marriage through legislation,[386] and thus, resurrecting the doctrine at this point could take considerable time and pose significant political challenges.

Of greater salience, however, is the fact that the traditional tests for common-law marriage are largely based on outdated, heteronormative views of what a marriage should look like. For instance, many states require that parties prove that they cohabitated and had a reputation in the community as being married in order to establish an informal marriage.[387] However, relationships today—even formal marriages—are less likely to satisfy those elements. Married couples are more likely today to live separately,[388] and with the reduced societal stigma concerning romantic relationships outside of marriage, they are less likely to proclaim to those around them that they are, in fact, married.[389] This is especially true when considering same-sex couples who may have feared discrimination and scorn had they openly shared their relationship status with others. In that sense, cases dealing with common-law marriage claims involving interracial couples are instructive. For instance, in 1904, the Supreme Court of Missouri refused to recognize a common-law marriage between a couple that had lived together for thirty years, had eight children, and referred to one another as husband and wife.[390] The problem was that the two failed the reputation requirement because "he was never known to be with her and acknowledge her as his wife outside of

384. *See supra* note 230 and accompanying text.

385. *See* Stone v. Thompson, 833 S.E.2d 266, 270 (S.C. 2019). The court would, however, continue to recognize common-law marriages effectuated prior to that date. *Id.* at 267 ("[F]rom this date forward—that is, purely prospectively—parties may no longer enter into a valid marriage in South Carolina without a license.").

386. *See* Grace Ganz Blumberg, *Legal Recognition of Same-Sex Conjugal Relationships: The 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective*, 51 UCLA L. REV. 1555, 1577 (2004) ("[D]uring the past two centuries, common law marriage has been legislatively abolished in most states.").

387. *See supra* note 234 and accompanying text.

388. *See* Simon Duncan, *Why More Couples Are Choosing to Live Apart*, THE CONVERSATION (Jan. 3, 2020, 4:40 AM), https://theconversation.com/why-more-couples-are-choosing-to-live-apart-124532 [https://perma.cc/4TTN-LHW2] ("Not only is it surprisingly common, but living apart together is increasingly seen as a new and better way for modern couples to live.").

389. *See Stone*, 833 S.E.2d at 269 ("By and large, society no longer conditions acceptance upon marital status or legitimacy of children.").

390. Keen v. Keen, 83 S.W. 526, 526–27 (Mo. 1904).

his own house."[391] The reason he had not done so was clearly because he was white and she was Black, but the court gave no weight to that fact.[392]

There is one final reason that common-law marriage does not work particularly well in the context of same-sex relationships that predate marriage equality, and it is a problem also shared by the marriage validation principles of marriage by estoppel and putative marriage—namely, all three operate on the assumption that there was in fact a *marriage*, albeit one that is invalid or was entered into informally. Indeed, the essential requirement for common-law marriage is a shared intent of the parties to be legally married.[393] Thus, common-law marriage requires not that the parties subjectively believed their relationship to be the equivalent of a marriage but that they intended to enter into a relationship that they believed *would be recognized* as a legal marriage.[394] In fact, states that allow common-law marriage require the parties to have first had the capacity to marry, meaning that they could have obtained a formal marriage had they so chosen.[395] However, at the heart of the marriage equality movement lies the fact that same-sex couples were denied that capacity. Thus, for those who entered into same-sex relationships before gaining the right to legally wed, they may have considered themselves the equivalent of married, but they were always well aware that it was an extralegal relationship that came with no marital benefits or protections.[396]

Likewise, marriage by estoppel assumes that, although there may have been an invalid divorce, there was a subsequent marriage ceremony that was otherwise valid.[397] Thus, the doctrine has limited utility here—besides the fact it only operates in a very specific factual setting, a subsequent marriage was something same-sex couples simply could not obtain prior to marriage equality. Similarly, the putative spouse doctrine requires a showing that there was a marriage ceremony and that the parties entered into that "marriage" in good faith.[398] Again, prior to earning the right to marry, same-sex couples could not meet that requirement. It is true that the law could retroactively

391. *Id.* at 527.

392. *See id.*; *see also* Vetrano v. Gardner, 290 F. Supp. 200, 206 (N.D. Miss. 1968) (refusing to find a common-law marriage even though it was "suggested that the parties would have conducted themselves publicly as husband and wife but for their fear of prosecution under state criminal statutes banning interracial marriage").

393. *See* Cerovic v. Stojkov, 134 A.3d 766, 777 (D.C. 2016).

394. *See* Morrow v. Dillard, 257 So. 3d 316, 324 (Ala. Civ. App. 2017) ("In order '[t]o establish a common-law marriage, there must be a present agreement or mutual understanding to enter into the marriage relationship.'" (alteration in original) (quoting Luther v. M&M Chem. Co., 475 So. 2d 191, 193 (Ala. Civ. App. 1985))).

395. *See supra* note 235 and accompanying text.

396. *See, e.g.*, Swicegood v. Thompson, No. 2018-000008, 2020 WL 3551786, at *1 (S.C. Ct. App. July 1, 2020) ("Thompson attested Swicegood knew they were not married. She stated she and Swicegood participated in a 'commitment ceremony' . . . but they knew it was not a wedding and that they could not legally marry."); *see also* Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2032 (2017) ("The choice to marry also embodies consent to the legal consequences of marriage.").

397. *See supra* notes 258–74 and accompanying text.

398. *See supra* notes 275–90 and accompanying text.

treat—as some states have done through legislation[399]—civil unions and domestic partnerships as marriages, but that too fails because: (1) relatively few states even offered those marriage alternatives[400] and (2) like marriage equality itself, those options did not become available until after many same-sex couples had already spent years in committed relationships.[401] Finally, a putative spouse is not entitled to the full panoply of marital benefits, thus making it less than an ideal template in this context.[402]

For that reason, the law of cohabitation may appear a better alternative, but it too fails in this context. First, the doctrine and its attendant remedies are directed solely at *nonmarriage*, and to achieve true marriage equality, there needs to be some mechanism for treating an informal relationship as an actual marriage. Second, most states that permit cohabitants to avail themselves of marriage-like protections do so through contract law—often requiring express, written agreements.[403] The contract requirement is problematic here because, even if one could succeed on that theory, the remedy is limited to the terms of the contract and not the full range of marriage benefits. Further, it is unlikely that same-sex couples who were in committed relationships awaiting the right to legally marry would have even thought of their relationships as contracts, much less have thought of them in express terms that they then reduced to writing. There is, however, at least one state that does not require an agreement but instead looks to the quality of the relationship.[404] Nonetheless, it still only provides successful litigants with *some* of the benefits of marriage. It does not permit a finding that the couple was in fact married, thus it denies them the full "constellation of benefits" to which *Obergefell* spoke.[405]

What remains, then, are the equitable doctrines relating to parent-child relationships. Although neither pertains to marriage, they nonetheless provide helpful examples of how courts have constructed remedies that extend family law protections to those who fail—at least formally—to qualify as a "family." As an initial matter, they both share the same defects as some of the other doctrines, most notably the limited remedies they provide. For instance, succeeding as an equitable parent merely offers the

399. *See supra* notes 176–78 and accompanying text.

400. *See, e.g.*, Mitchell L. Engler & Edward D. Stein, *Not Too Separate or Unequal: Marriage Penalty Relief After* Obergefell, 91 WASH. L. REV. 1073, 1088 (2016) ("By 2012, . . . nine states allowed same-sex civil unions or domestic partnerships.").

401. California was the first to pass a domestic partnership registry in 1999, and Vermont was the first to pass legislation permitting civil unions in 2000. *See* David B. Oppenheimer et al., *Religiosity and Same-Sex Marriage in the United States and Europe*, 32 BERKELEY J. INT'L L. 195, 197 (2014).

402. *See, e.g.*, Allen v. W. Conf. of Teamsters Pension Tr. Fund, 788 F.2d 648, 650 (9th Cir. 1986) ("Marriage is a status precisely defined in California and does not cover putative spouses."); Williams v. Williams, 97 P.3d 1124, 1131 (Nev. 2004) (declining "to extend the [putative spouse] doctrine to permit an award of spousal support"); Helen Chang, *California Putative Spouses: The Innocent, the Guilty, and the Law*, 44 SW. L. REV. 327, 328 (2014) ("Only certain benefits and privileges of a legal marriage are available to putative spouses.").

403. *See supra* notes 300–02 and accompanying text.

404. *See supra* notes 308–14 and accompanying text.

405. Obergefell v. Hodges, 576 U.S. 644, 670 (2015).

possibility of some discrete parental rights—the equitable parent is still not recognized as a legal parent.[406] Likewise, establishing that one has been equitably adopted only provides limited remedies vis-à-vis the rights afforded to formally adopted children.[407] Further, as detailed earlier, most states are fairly formalistic when it comes to applying these doctrines. In equitable adoption, for example, most courts insist on the existence of an unfulfilled adoption contract, which may be unusual in situations where informal adoption is likely to occur.[408] Relatedly, equitable parentage cases often focus too much on the role the legal parent played in cultivating the relationship between the child and the quasi-parent and not enough on the quality of the relationship that developed between the two or the harm that would result from failing to protect that relationship.[409]

Nonetheless, a survey of the states that have applied these doctrines reveals that a few have instead adopted a more nuanced approach, one that is similar to how Washington deals with unmarried partners.[410] Specifically, these courts have utilized a functional approach, which "focuses the inquiry on whether the relationship at issue shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs."[411] Although such an approach might appear to be the minority approach regarding these doctrines, family law as a whole has increasingly moved in the functional direction.[412] This Article contends that a similar approach would also be well suited to this context and provide courts with the necessary flexibility to examine same-sex relationships that predated marriage equality.

Thus, what courts need is a new doctrine, equitable marriage, which would draw on elements of the existing approaches to recognizing informal relationships. At a minimum, this doctrine would need to give the courts license to extend benefits to a marriage-like relationship that cannot otherwise qualify as a legal marriage. In that sense, this new doctrine would

406. *See, e.g.*, P.L. v. Shirley M., 37 Cal. Rptr. 3d 6, 8–9 (Ct. App. 2005) ("De facto parents have limited rights . . . [and] that status does not give them the rights accorded to a parent or legal guardian.").

407. *See, e.g.*, Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J.L. & PUB. POL'Y 1, 46–47 (2015) ("The doctrine provides limited remedies when a functional parent dies intestate, but virtually no remedy for the plethora of ancillary rights dependent upon the legal status of being a parent or a child.").

408. *See supra* notes 320–21 and accompanying text.

409. Although some states are willing to consider harm, the harm has to be fairly severe before the court will act on that basis. *See, e.g.*, Roth v. Weston, 789 A.2d 431, 445 (Conn. 2002) (holding that a quasi-parent can only justify state interference with the rights of the child's legal parent if the quasi-parent can prove that the child will otherwise "suffer real and substantial emotional harm").

410. *See supra* notes 308–14 and accompanying text.

411. Recent Development, *Winning Arguments/Losing Themselves: The (Dys)functional Approach in* Thomas S. v. Robin Y., 29 HARV. C.R.-C.L. L. REV. 559, 566 (1994).

412. *See* Kate Redburn, Note, *Zoned Out: How Zoning Law Undermines Family Law's Functional Turn*, 128 YALE L.J. 2412, 2422 (2019) ("In many states, parentage and partnership doctrines have taken a 'functional turn' over the past forty years.").

be similar to the marriage validation principles of marriage by estoppel and putative marriage, which protect void marriages, and equitable parentage and adoption, which protect informal parent-child relationships. However, unlike those doctrines, this new equitable doctrine needs to provide not just some family law protections but all of the rights and obligations associated with marriage. In that sense, as a remedy, it would be akin to common-law marriage, which confers all the benefits associated with formal marriage. At the same time, however, the approach that is needed in this context cannot share common-law marriage's rigid, outdated definition of marriage. Nor, like typical cohabitation law and equitable adoption, can it blindly insist on the existence of a contractual relationship. Instead, it should be more functional, similar to that taken by a minority of courts regarding cohabitation, equitable adoption, and equitable parentage. Finally, given the fundamental right at issue, this doctrine requires nationwide application (in whatever precise form each state decides) to remedy the constitutional harms that stem from the states' history of refusing to permit same-sex marriage.

B. Applying Equitable Marriage

At its most basic level, equitable marriage would allow an individual who spent time in a same-sex relationship prior to the legalization of same-sex marriage to argue that some portion of that relationship should be considered either *the equivalent of* a legal marriage or, in the case of a couple that ultimately did wed, *as part of* that eventual marriage. To prevail, a claimant would have to demonstrate that the parties would have wed during that period if the law had permitted them to do so. For those who succeed, the court would then rule that there was a legal marriage during that period of the relationship—a remedy that, like common-law marriage, brings with it all the "same terms and conditions" as formal marriage.[413]

Given the large number of LGBTQIA+ Americans living today who were in same-sex relationships impacted by the denial of marriage equality, it is likely that individuals from this group will be asking courts for such relief for years to come. As courts grapple with how to respond to such claims, equitable marriage offers a way of not only addressing them but doing so in a way that fulfills *Obergefell*'s promise of true marriage equality. Still, as courts implement such a doctrine, a number of questions are likely to arise—questions the remainder of this section identifies and attempts to address.

1. Who Has Standing?

As an initial matter, the question arises as to who would be permitted to raise an equitable marriage claim and whether there would be any time limits for doing so. There are two groups of people who could conceivably raise such claims. First are those individuals who ultimately wed same-sex partners with whom they had enjoyed nonmarital relationships prior to

413. Obergefell v. Hodges, 576 U.S. 644, 676 (2015).

obtaining the right to legally wed.[414] The second group includes those who were in nonmarital relationships that ended, either through divorce or dissolution, prior to the arrival of formal marriage equality. Individuals in either category would have the potential to raise a claim of equitable marriage.

It would only be a potential claim given that some states may opt to impose some time limits. There are two such restrictions that could come into play. First, for those who ultimately did wed and are seeking to backdate their wedding dates to an earlier point in time, there is the question of how soon after obtaining the right to marry the couple wed. For instance, claimants would certainly be more sympathetic if they requested and received a marriage license the very day their state started issuing marriage licenses. For those who did not immediately wed, however, the issue gets a bit more complicated. Planning a wedding can certainly take time, but imagine a couple that waited five years after their state started issuing licenses before finally entering into a formal marriage. Given that marital backdating would remain somewhat of an extraordinary remedy, the states may feel it only fair to reserve that remedy to those who promptly did all they could to formalize their relationships once given the ability to do so. Thus, it may well be that states would be correct in refusing claims for equitable marriage by those who waited too long to marry after receiving the right to do so.

States must be mindful, however, of not unfairly punishing those who did not immediately wed. For a historical example, consider how the Southern states, following passage of the Thirteenth Amendment, forced former slaves to either promptly wed or face criminal conviction. Specifically, "[t]hose who were already in cohabiting relationships were told to immediately legalize their unions and legitimize their children and grandchildren."[415] At least one Southern state gave the former slaves just six months to do so or subject themselves "to criminal prosecution for adultery and fornication."[416] Thus, as Professor Katherine M. Franke has discussed, "the robust enforcement of bigamy, fornication, and adultery laws served to domesticate African American people who were either unaware of, or ignored, the formal requirements of marital formation and dissolution."[417]

In requiring that same-sex couples promptly marry to evidence an intention to wed earlier than they had been legally permitted to do so, states must be mindful that imposing too short a deadline would continue to promote the very discrimination *Obergefell* was aimed at ending. There is, unfortunately, one case where that has already occurred. In *Ferry v. De*

414. Because different states recognized this right to wed at different points in time, *see supra* Part I, it is this Article's assumption that equitable marriage would account for when marriage equality became available in the state in which the same-sex couple resided.

415. HUNTER, *supra* note 3, at 236.

416. Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1421 (2004).

417. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMANS. 251, 256–57 (1999).

Longhi America, Inc.,[418] a case arising out of California, Patrick Ferry and Randy Sapp started living together in 1985.[419] In 1993, they "were married in a religious ceremony performed by a religious leader pursuant to the principles of [their] beliefs."[420] The two men lived together until December 2013, when Randy tragically died as a result of a heater that allegedly malfunctioned.[421] When Patrick brought a wrongful death action, the manufacturer moved to dismiss on the basis that Patrick was not Randy's legal spouse and, thus, lacked standing.[422] The court agreed, noting that same-sex marriage became legal in California in June 2013 and, thus, the two men could have legally wed prior to Randy's death if they had so intended.[423] In essence, then, the two men had lived as a married couple for over thirty years but were punished for not obtaining a marriage license in the six months between finally gaining the right to do so and Randy's death.

A second potential time restriction relates to when someone could bring a claim for equitable marriage. For those who ultimately wed, it would seem they would have to bring a claim at the point in time—most likely death or divorce—when they are being denied a marriage benefit on the basis of marital length. However, states might do what Utah has done regarding common-law marriage and condition backdating on the requirement that the spouses first petition the court, either during the relationship or within one year of its termination, for an order setting the start date of their marriage at a point earlier than when they formally wed.[424] The benefit of such an approach is that it forces individuals in this position to ask for backdating sooner rather than later, when problems of proof may be exacerbated by the passage of time or the death or incapacity of one of the spouses.

The question is more complex, though, when applied to those whose same-sex relationships ended before they were permitted to marry. To illustrate, consider two men who were in a long-term relationship that began in 1995 but ended in 2010 when the couple decided to go their separate ways. One of the men dies in 2021. The other wants to claim that he should receive widower's benefits, and so he brings a claim for equitable marriage in which he argues that the two would have wed prior to 2010 if permitted to do so. There are a few ways states might deal with such issues. First, the court could simply treat it as a marriage that was never legally terminated. That would pose problems if either had subsequently remarried. However, under the subsequent marriage presumption, most states would honor the later marriage, presuming that the earlier one ended in divorce before the

418. 276 F. Supp. 3d 940 (N.D. Cal. 2017).

419. *Id.* at 942–43.

420. *Id.* at 943. According to Patrick, "'[h]ad it been possible to do so,' they 'would have obtained a marriage license.'" *Id.* (quoting Declaration of Plaintiff Patrick Ferry in Opposition to Partial Motion for Summary Judgment at 2, *Ferry*, 276 F. Supp. 3d 940 (No. 16-cv-00659)).

421. *Id.*

422. *Id.* at 944–45.

423. *Id.* at 947–50. Per the court, "the act of obtaining a marriage license is an administrative burden that all couples must bear if they wish to avail themselves of the legal rights and privileges of a formal marriage." *Id.* at 952.

424. *See* UTAH CODE ANN. § 30-1-4.5 (2020).

subsequent marriage took place, and it would be very hard for the surviving partner to prove otherwise.[425] If neither had remarried, then the claimant would be permitted to prove the existence of an equitable marriage.

A better solution, however, might be for states to create a statute of limitations that applies to those who wish to have a pre-equality relationship adjudicated a marriage. Texas, for instance, provides that a claimant's ability to establish a common-law marriage will fail "[i]f a proceeding in which a marriage is to be proved . . . is not commenced before the second anniversary of the date on which the parties separated and ceased living together."[426] States could implement something similar regarding equitable marriage for those who seek marital benefits from a relationship that ended before the arrival of formal marriage equality. However, the event that would start the clock in this context would likely need to be the date on which the state began recognizing equitable marriage, given that many of these relationships might have already ended many years earlier.

2. How Would a Claimant Prove an Equitable Marriage?

One might ask, given the deprivations they have faced regarding marriage, why not simply give same-sex couples the benefit of the doubt and automatically presume that any relationship that existed prior to marriage equality was a marriage and is entitled to all the corresponding rights and benefits? There are two responses to that question. First, such a permissive approach could very easily give rise to fraudulent claims, especially considering that such claims might not arise until after the alleged spouse has died. Second, marriage does not simply bring benefits, it also brings obligations. Accordingly, whenever an individual succeeds in backdating a same-sex marriage, that person's spouse then has marital obligations—obligations that person may have never intended to bear. In other words, backdating a same-sex marriage might be very beneficial to one spouse, but it can also be quite damaging to the other.[427] Thus, more careful consideration is required if the law is to adequately protect both members of the same-sex couple.

Indeed, not every same-sex relationship that came into being prior to formal marriage equality would have been a marriage. To begin with, the decision to marry typically does not arise until after some period of courtship,[428] which usually takes as much time as the couple deems

425. *See* Higdon, *supra* note 195, at 117 ("In essence, the subsequent marriage presumption operates by presuming a divorce, when in fact, one likely never occurred.").

426. *See* TEX. FAM. CODE ANN. § 2.401(b) (2019).

427. Relatedly, if one partner dies, retroactively finding a marriage can cause significant harm to the deceased partner's heirs if that person died intestate. *See, e.g.*, Irene D. Johnson, *There's a Will, but No Way—Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?*, 4 EST. PLAN. & CMTY. PROP. L.J. 105, 123 (2011) ("Intestate succession statutes send a decedent's property to a spouse and children, or if there is no spouse or children, then to blood relatives.").

428. One scholar has described marriage as having four distinct stages:

necessary. Thus, just because a claimant can prove the existence of a pre-equality relationship, does not mean the parties would have been married at that previous point in time. Further, with the reduced social stigma associated with cohabitation,[429] a growing number of different-sex couples consciously choose not to marry, and those same considerations might have easily influenced same-sex couples to elect to do the same even if they had had the option of marrying. Additionally, some same-sex couples may have possessed unique reasons for rejecting the idea of marriage, most notable of which is the belief of some in the LGBTQIA+ community that "it puts undue emphasis on a heteronormative institution."[430] As one commentator recently described, "[g]ay marriage is not without controversy, even among LGBT rights activists. Queer theorists, radical feminists, and libertarians like Judith Butler, Martha Fineman, and David Boaz, reject gay marriage and advocate for the abolition of marriage in general."[431]

Thus, for all those reasons, the question arises as to how courts are to, ex post, differentiate between same-sex relationships that would have been marriages and those that would not have. Even for those that would have been marriages at some point prior to formal marriage equality, the question becomes, when did the relationship reach that point? All of these questions are made even more complicated by the fact that, once the same-sex relationship ends, the two parties may have very different perspectives on what was intended at any one point in time. And, as Professor Kaiponanea Matsumura has pointed out, "[a]n individual's right to autonomous self-definition does not extend to conscription of an unwilling partner."[432] Thus, failure to get it right could be quite damaging to one or both individuals in the same-sex relationship.

Consider, for instance, *Estate of Leyton v. Hunter*,[433] where a New York court declined to backdate a same-sex marriage when doing so would have harmed the surviving member of that relationship.[434] There, Mauricio Leyton's mother and sister brought suit to have his former partner, David

> [T]he courtship stage, in which the couple meets and decides to marry; the entry stage, in which the couple undergoes whatever licensing and ceremonial requirements are necessary to achieve marital status; the intact marriage stage, in which the couple is legally married; and the exit stage, in which the couple divorces, has the marriage annulled, or one of the spouses dies.

Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1628 (2007).

429. *See* Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 444 (2017) (noting that, "[t]oday, there is less social stigma associated with living in a nonmarital family").

430. David Luban, *The Moral Complexity of Cause Lawyers Within the State*, 81 FORDHAM L. REV. 705, 709 (2012).

431. Jessica Brown, *Human Rights, Gay Rights, or Both?: International Human Rights Law and Same-Sex Marriage*, 28 FLA. J. INT'L L. 217, 221 (2016).

432. *See* Matsumura, *supra* note 396, at 2045.

433. 22 N.Y.S.3d 422 (App. Div. 2016).

434. *Id.* at 423.

Hunter, disqualified as a beneficiary under Mauricio's will.[435] When Mauricio died, his will identified David as his "former romantic partner and long-time friend."[436] Mauricio's family argued that, under New York law, David was a "former spouse," and thus he should be disqualified as a beneficiary.[437] The two men were never formally married. They did, however, have a commitment ceremony in 2002 but eventually separated.[438] As a result, Mauricio's family argued that "because the minister at the commitment ceremony observed that [Mauricio and David] were entering into a state of companionship that the world recognizes as marriage, they were in fact married, and therefore their subsequent separation was a divorce."[439] The lower court denied the family members' claim on the basis that same-sex marriage was not permitted in New York until 2011.[440] The appellate court affirmed and further noted that *Obergefell* "does not compel a retroactive declaration" that a marriage existed in this instance, holding that "according the union between decedent and Hunter retroactive legal effect would be inconsistent with their understanding that they had never been legally married."[441]

The challenge, then, is "to design clear criteria that separate marriage-like unions from those in which the parties are not married because they do not want marital commitment or obligations."[442] And when it comes to setting that criteria, at least one scholar has advocated for "bright-line markers."[443] Specifically, Professor Allison Tait has proposed that courts look to "instances of clear legal intention to form an economic partnership."[444] Tait includes within that category asset-specific events, such as the purchase of a family home; the date upon which the couple entered into an alternative marital state, like a civil union or a domestic partnership; and other legal contracts that signal "shared purpose and relationship commitment."[445] It is the position of this Article that these "legal markers" would indeed be excellent indicators for courts to rely on when deciding whether a same-sex relationship that predated marriage equality would have been marital or was instead intentionally nonmarital.

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435. *In re* Leyton, No. 2013-4842, 2015 WL 3882524, at *1 (N.Y. Sur. Ct. June 16, 2015) ("The relief sought would increase petitioners' interests as beneficiaries under the will."), *aff'd*, *Estate of Leyton*, 22 N.Y.S.3d 422.

436. *Id.*

437. *Id.* (relying on N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a)(4) (McKinney 2020)).

438. *Id.*

439. *Id.*

440. *Id.* ("Here, petitioners seek to have this court apply the Marriage Equality Act retroactively to the commitment ceremony, deeming that ceremony as formalizing a marriage and the subsequent separation as a divorce.").

441. Estate of Leyton v. Hunter, 22 N.Y.S.3d 422, 423 (App. Div. 2016).

442. Scott, *supra* note 300, at 258.

443. *See* Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1303 (2015).

444. *Id.*

445. *Id.* at 1303–06. According to Tait, "[c]ivil unions, registered domestic partnerships, designated beneficiary relationships, and relationship contracts all enable couples to signal a clear legal intent." *Id.* at 1306.

Courts, however, must be willing to delve deeper. As discussed earlier in the context of cohabitation and equitable adoption,[446] relying too heavily on legal formalities will precipitate discrimination against a number of same-sex couples. For instance, only a small number of states even permitted same-sex couples to enter into civil unions and domestic partnerships.[447] Thus, those who lived in states without that option would be at a disadvantage if courts were to place undue weight on those marriage alternatives. Further, even those states that did offer that option did so only relatively recently,[448] meaning that many individuals in those states had already spent years in a same-sex relationship before they even had the choice of entering into a civil union or domestic partnership.

Somewhat relatedly, if courts were to rely too heavily on contractual arrangements between same-sex partners—such as designated beneficiary or cohabitation agreements[449]—as a proxy for their earlier desire to marry, that would penalize those individuals who were ignorant of such options or who lacked access to the legal representation required to effectuate such agreements.[450] Relying too heavily on the acquisition of joint property, like a family home, would likewise have a disproportionate impact on those who were in less affluent relationships—ones that could not afford such purchases. In short, relying exclusively on "bright-line" markers would fail to account for various ways in which same-sex couples might have expressed their commitment to one another when formal marriage was not an option.

As a result, it is the position of this Article that courts should look beyond discrete markers and instead adopt a more functional approach. Unlike the more rigid approaches courts have taken regarding cohabitation and equitable adoption, courts should permit claimants to rely on other evidence that the couple would have married had that option been available. For instance, as evidenced by the equitable parentage cases discussed above,[451] a couple's decision to have and jointly raise children should likewise have bearing on the question of equitable marriage. States that permit common-law marriage already take into account such evidence when deciding whether there was an informal marriage[452] and it would thus seem odd to apply a more

446. *See supra* Parts III.C–D.

447. *See* Engler & Stein, *supra* note 400, at 1088.

448. *See* Oppenheimer et al., *supra* note 401, at 197.

449. *See* Tait, *supra* note 443, at 1306.

450. Tait acknowledges these limitations. *See id.* at 1309 ("Using legal markers privileges those individuals who have access to legal representation and can write cohabitation agreements, wills, and other legal documents.").

451. *See supra* Part III.E.

452. *See, e.g.*, Seabrook v. Simmons, No. 2005-UP-459, 2005 WL 7084298, at *3 (S.C. Ct. App. July 19, 2005) (noting that the preponderance of the evidence supported the conclusion that the parties had effectuated a common-law marriage, including the fact that they had two children together); *see also* Dubler, *supra* note 226, at 971 ("[I]n cases involving children, who would be deemed illegitimate if a court found their parents' relationship nonmarital, courts recognizing common law marriages clung to a similar presumption in favor of legitimacy as opposed to illegitimacy.").

restrictive test here in light of the remedial nature of a doctrine like equitable marriage, especially when such a remedy is likely constitutionally required.

Similarly, the cohabitation and reputation requirements of common-law marriage should likewise play some role in equitable marriage. Individuals who were in same-sex relationships that involved many years of living together should be able to at least present such evidence for the court to consider. After all, "in the case of long-term relationships—especially those accompanied by economic dependency and specification of roles—extra-contractual considerations like protecting weaker, dependent parties, take on a greater weight."[453] Indeed, as one scholar points out, "long-term cohabitation and joint ownership of property might be the best indicator that two people expect to be able to liveout [sic] their lives enjoying the jointly-owned property."[454] So too should those who publicly represented themselves as being in a committed relationship—either through general reputation in the community or through informal declarations like a commitment ceremony—be permitted to rely on that evidence to prove that they would have married had that choice been available.

This is not to say that any of this evidence, by itself, should be dispositive of an earlier intent to wed. After all, the evidence could objectively indicate more than one possible intent and the parties themselves may not be particularly helpful in sorting that out given that "at the dissolution of a relationship, parties may easily disagree or remember differently what intent existed at what point in time."[455] Nonetheless, to foreclose claimants even raising such evidence, and instead allow only specific events to serve as evidence of marital intent, would fail to recognize the nuance that is necessary to achieve true marriage equality in any meaningful way.[456] As Professor Jeffrey Evan Stake observed: "What different people want and expect out of marriage, and divorce, is not the same, probably ought not be the same, and in any case cannot be made the same."[457]

That last point has particular salience in this context. Namely, homosexual relationships are not identical to heterosexual relationships. Many of those who spent time in same-sex relationships prior to marriage equality grew up

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453. Shahar Lifshitz, *Married Against Their Will?: Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1621 (2009).

454. Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 516 (2009); *see also* Kandoian, *supra* note 233, at 1864 (describing "long-term cohabitation" as "evidence presumptive of marriage").

455. Tait, *supra* note 443, at 1308 n.323.

456. Professor Kaiponanea Matsumura suggests one way to prove the existence of an informal marriage while remaining sensitive to the concern of "conscripting unwilling or unwitting participants into marriage" is to have different standards of review depending on the factual setting of the case. *See* Matsumura, *supra* note 396, at 2038. Specifically, when the parties disagree as to the existence of a marriage, he advocates for a clear and convincing standard "[i]n light of the importance of self-definition, notice, and consent." *Id.* at 2055. However, when the marriage is agreed on by the parties but is being contested by the government or other third party, "the more lenient preponderance standard" may be more appropriate. *Id.*

457. Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 398–99 (1992).

in a society where marriage was not only impossible but the relationships they were permitted to have were both marginalized and, in many respects, demonized. In light of those societal forces, it is entirely reasonable to assume that those same-sex relationships would look somewhat different from traditional marriages that were occurring around the same time. Thus, as courts go about trying to discern whether a prior same-sex relationship would have been a marriage, they must be careful to not be overly swayed by heterosexist conceptions of what marriage *should* look like.[458] In that sense, the words of scholar Paula Ettlebrick, which she uttered in 1989 when marriage equality was only a whisper, are particularly instructive: "The moment we argue . . . that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices."[459]

Many of these differences were explored above when discussing how common-law marriage provides a less than ideal remedy in this context.[460] Specifically, same-sex couples who faced discrimination and hostility over their relationship status may have been less likely to live together or announce their relationship status to the larger community. But there is another key difference as well and it relates to the gender stereotypes often associated with marriage. As courts attempt to look back in time to determine whether a same-sex relationship would have been a marriage, they will be unable to rely on the popular stereotypes of the "working husband" and "homemaker wife." There is a great deal of literature about how so much of family law has been built on those stereotypes,[461] but one of the most recent examples, which is particularly instructive in this context, is the law of nonmarriage and cohabitation. As Professor Albertina Antognini has pointed out, in looking at cases that wrestle with whether to extend marital benefits to cohabitating couples based on how closely those relationships resemble a marriage, "[t]he overarching definition of marriage that these decisions impose is one steeped in archetypal gender relations."[462] When analyzing relationships involving two men or two women, however, such defaults are even less likely to be effective and, thus, the law must "confront[] the sleeping dog, by challenging the rigidity of gender role and identity that

458. *See* Matsumura, *supra* note 396, at 2051 ("[C]ourts ask whether the parties' conduct matches performances that the law deems salient. These performances tend to reinscribe a narrow view of acceptable performances that often reflect harmful stereotypes.").

459. Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK IN GAY AND LESBIAN POLITICS 757, 758 (Mark Blasius & Shane Phelan eds., 1997).

460. *See supra* notes 384–96 and accompanying text.

461. Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 60 (2017).

462. *See id.*; *see, e.g.*, Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 291 (2006) (noting that "pernicious gender stereotypes . . . arise[] from the patriarchal (and racist) context in which we have traditionally approached marriage, reproduction, and family law more generally").

conspires with political will to deny the creative possibility and richness in *all* lives of committed intimate relation."[463]

Thus, just as *Obergefell* distilled marriage down to the four essential attributes that rendered it a fundamental right,[464] so too must courts discern what are the hallmarks of marital relationships—after heterosexist notions are stripped away—that would allow an individual in a same-sex relationship to prove an intent to be married during a time when that right was being unconstitutionally denied. Although the above discussion attempts to delineate what form this evidence might take, courts must be mindful of the lens through which they view that evidence. In short, it is no longer permissible to use the pre-*Obergefell* construction of marriage.

CONCLUSION

In *Obergefell*, when discussing the flexible role that history and tradition play in constitutional jurisprudence, the majority noted it "respects our history and learns from it without allowing the past alone to rule the present."[465] Similarly, the courts cannot allow unconstitutional deprivations from the past to continue harming people in the present. Thus, as courts wrestle with how to fulfill *Obergefell*'s promise of true marriage equality, they must be mindful of all the individuals who continue to face harm as a result of the states' denial of same-sex marriage through laws that, until 2015, were considered perfectly legal in many states. Although some courts have begun experimenting with ways to backdate marriages and thus ameliorate those harms, states have done so on an inconsistent basis and none have fashioned remedies that adequately capture the unique and varied attributes of same-sex relationships in the United States. Thus, it is the position of this Article that states must do more. Specifically, by borrowing and expanding on the equitable doctrines that already exist for awarding family law benefits to those in informal family-like relationships, the states must develop a doctrine for recognizing equitable marriage to protect the rights and interests of those individuals who spent time in relationships that would have been marriages had an unconstitutional law not stood firmly in the way. In that respect, the words of Justice Ruth Bader Ginsburg in *United States v. Virginia*[466] are instructive: "A remedial decree . . . must closely fit the constitutional violation; it must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'"[467]

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463. John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1149 (1999) (emphasis added).

464. *See supra* notes 107–14 and accompanying text.

465. Obergefell v. Hodges, 576 U.S. 644, 664 (2015).

466. 518 U.S. 515 (1996).

467. *Id.* at 547 (quoting Milliken v. Bradley, 418 U.S. 717, 746 (1974)).