LOVING RETROACTIVITY

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ABSTRACT

Pending actions across the nation highlight the ongoing struggle between adjudicative retroactivity and marital equality. The Supreme Court's constitutional decisions overruling prior precedents or applying new legal rules to the parties retroactively govern all pending and future adjudicative proceedings on direct review, even if the underlying operative events occurred under a prior legal framework. But this understanding of the temporal boundaries of legal change is being challenged after the Supreme Court's holding in Obergefell v. Hodges *that laws excluding same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples are invalid. The retroactive application of* Obergefell *to backdate same-sex relationships into ceremonial or common-law marriages in certain contexts may disrupt settled understandings and expectations, such as in property transactions with third parties or in divorce actions predicated on the parties' cohabitation beginning and ending before legal recognition was afforded to their union.*

This Article constructs a comprehensive, layered account of the institutional, remedial, and procedural doctrines that protect reliance, fairness, and efficiency interests in a regime of retroactive application of judicial decisions. It explores for the first time the intersection of adjudicative retroactivity with three separate judicial institutional norms—stare decisis, incrementalism, and signaling—and identifies underappreciated remedial principles that mitigate transitional reliance costs. The Article appraises the retroactivity issues currently facing same-sex marriages to test the proposed framework, relying on a heretofore unrecognized distinction between the retroactive application of the right and the recognition of ceremonial and common-law marriages. This appraisal demonstrates that remedial and procedural doctrines such as judgment scope, declaratory breadth, limitations periods, and judgment finality, in conjunction with the Court's prior incrementalism on same-sex marriage, can secure settled expectations without sacrificing the promise of marriage equality.

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I. INTRODUCTION

Assaults on marital equality continue.[1] In Texas, for example, a conservative activist has unabashedly admitted his ongoing state-court lawsuit challenging Houston's provision of spousal benefits to same-sex couples is an instrument for overturning same-sex marriage, "given the changing composition" of the U.S. Supreme Court.[2] Despite (or perhaps because of) such bluster, the Texas Supreme Court this summer caved to conservative pressure and performed procedural somersaults to bless the suit's continuance.[3]

The City of Houston had implemented, after the U.S. Supreme Court's 2013 decision in *United States v. Windsor*,[4] a policy entitling public employees in a lawful same-sex marriage celebrated in another state to obtain the spousal benefits granted to opposite-sex married couples.[5] Two Houston taxpayers challenged this policy directive in state court, urging that the Texas Constitution, the Texas Family Code, and the Houston City Charter prohibited any government recognition of same-sex marriages. The state trial court agreed and temporarily enjoined the directive; at that time, no binding precedent required state and local governments to recognize lawful same-sex marriages from other states.[6] But while the city's appeal was pending, the U.S. Supreme Court decided *Obergefell v. Hodges*, which mandated that states must recognize prior same-sex marriages from other states.[7] In light of *Obergefell*, as well as the Fifth Circuit's holding invalidating the Texas constitutional and statutory bans on same-sex marriages, the state intermediate appellate court reversed

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1. *See* Reva B. Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, 64 UCLA L. REV. (forthcoming 2017) (manuscript at 24) ("*Obergefell* has not ended debate over marriage but instead has channeled it into new forms."). As one of several possible examples, some states refused to issue birth certificates that named the nonbiological spouse in a same-sex relationship until forced to do so by the federal courts, including last summer's mandate by the U.S. Supreme Court that Arkansas (despite a contrary state supreme court ruling) must treat same-sex and opposite-sex couples equally with respect to birth certificates and the other benefits of marriage. Pavan v. Smith, 137 S. Ct. 2075, 2078 (2017); *accord* Henderson v. Adams, 209 F. Supp. 3d 1059 (S.D. Ind. 2016); Marie v. Mosier, 196 F. Supp. 3d 1202 (D. Kan. 2016); Waters v. Ricketts, 159 F. Supp. 3d 992 (D. Neb. 2016).

2. *See* Alexa Ura, *Texas Supreme Court to Take Up Same-Sex Marriage Case*, TEX. TRIB. (Feb. 28, 2017, 12:00 AM), https://www.texastribune.org/2017/02/28/texas-supreme-court-take-same-sex-marriage-case/ [https://perma.cc/D8YZ-YMRH].

3. Pidgeon v. Turner, 60 TEX. SUP. CT. J. 1502, 1507-08 (June 30, 2017), *cert. denied*, 138 S. Ct. 505 (2017) (reversing the Texas court of appeals due to potentially ambiguous remand instructions); *see infra* note 12.

4. 570 U.S. 744 (2013).

5. *Pidgeon*, 60 TEX. SUP. CT. J. at 1504.

6. *Id.* at 1505-06.

7. 135 S. Ct. 2584, 2608 (2015).

the temporary injunction and remanded for reconsideration consistent with the change in governing law.[8] And that should have been the end of the story.

But it wasn't. The taxpayer challengers persevered, maintaining the legal transition to marital equality did not bar their entitlement to relief. The taxpayers petitioned the Texas Supreme Court for discretionary review, arguing (among other contentions) that *Obergefell* should be interpreted narrowly and it was not retroactive, such that they were entitled to "claw[] back" taxpayer money spent on same-sex spousal benefits before *Obergefell* was issued.[9] *Obergefell* simply could not be retroactive, they maintained, without risking "chaos and bedlam;" otherwise, "every same-sex couple that lived together in jurisdictions that recognize common-law marriage would be retroactively hitched," subject to back alimony and bigamy prosecutions for long-ago jettisoned relationships, and every "municipality in the United States [would be] liable for money damages" for denying same-sex couples marriage licenses or marital recognition before *Obergefell*.[10]

Despite initially declining discretionary review, the Texas Supreme Court reconsidered and agreed to hear the case after receiving politically threatening amicus briefs from conservative state political office holders and leaders echoing the taxpayers' concerns on the reach and retroactivity of *Obergefell*.[11] The state high court then reversed on the stated basis that the intermediate appellate court's remand instructions were susceptible of being misread as equating a federal circuit court opinion as binding precedent, although the court's predominant focus was repeatedly highlighting that the tax-

8. Parker v. Pidgeon, 477 S.W.3d 353, 354-55 (Tex. App. 2015), *rev'd*, 60 TEX. SUP. CT. J. 1502, 1507-09 (June 30, 2017).

9. Petition for Review at 7-8, Pidgeon v. Turner, 60 TEX. SUP. CT. J. 1502 (June 30, 2017) (No. 15-0688), 2015 WL 12914476, at *7-8.

10. *Id.* at 8; Petitioners' Reply at 6, Pidgeon v. Turner, 60 TEX. SUP. CT. J. 1502 (June 30, 2017) (No. 15-0688), 2015 WL 9356986, at *6.

11. *Pidgeon v. Turner*, 60 TEX. SUP. CT. J. 233 (Jan. 20, 2017) (granting review and withdrawing prior order denying review). Amicus briefs urging the Texas Supreme Court to resolve the case included those filed by Texas state senators, Texas state representatives, and numerous conservative leaders throughout Texas—including Governor Greg Abbott, Lieutenant Governor Dan Patrick, Attorney General Ken Paxton, and Representative Will Metcalf. *See Supreme Court Case Information, Case 15-0688*, TEX. JUD. BRANCH, http://www.search.txcourts.gov/Case.aspx?cn=15-0688&coa=cossup [https://perma.cc/HU23-FWEW]. The briefs included thinly veiled political ramifications for the next judicial elections if the case was not granted. *E.g.*, Amicus Curiae Brief of State Senators, State Representatives, and numerous Conservative leaders throughout Texas at 21-22, Pidgeon v. Turner, 60 TEX. SUP. CT. J. 1502 (June 30, 2017) (No. 15-0688), 2016 WL 6298733, at *20-21. The brief of statewide officeholders argued that *Obergefell* did not "retroactively authorize state or local officials to violate state laws prior to June 26, 2015." Amicus Curiae Brief of Governor Greg Abbott, Lieutenant Governor Dan Patrick, and Attorney General Ken Paxton at 7, Pidgeon v. Turner, 60 TEX. SUP. CT. J. 1502 (June 30, 2017) (No. 15-0688), 2016 WL 6465938, at *7.

payers' "interesting and important" temporal and precedential scope challenges were not foreclosed by *Obergefell*, including the alleged horribles from marital equality's retroactive application.[12]

Even scholars celebrating *Obergefell*'s retroactive application acknowledge the potential consequences of backdating same-sex marriages to before such a union was possible.[13] Nevertheless, some scholars contend that same-sex couples are entitled, as a matter of constitutional law under adjudicative retroactivity and remedial principles, to have their marriages backdated to the date they would have married one another if legal barriers to their marriage had not existed.[14] Under this understanding of the temporal scope of *Obergefell*, though, the Texas challengers' prediction of "chaos and bedlam" may not be that far-fetched, at least in those cases not barred by preclusion, limitations, or a similar procedural doctrine. At the very least, the backdating of any same-sex relationship to a marriage effective years or decades earlier could upset settled expectations and reliance interests in past property transactions or distributions between or among gay spouses, estate beneficiaries, transferees, buyers, creditors, and lenders.[15]

Such reliance concerns in other contexts have evoked doubts regarding the normative foundations for the U.S. Supreme Court's adjudicative retroactivity doctrine, which applies holdings overruling prior precedents or establishing new legal rules to all pending and

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12. Pidgeon v. Turner, 60 TEX. SUP. CT. J. 1502, 1508-14 & n.18 (June 30, 2017). The Texas Supreme Court held that the state intermediate appellate court erred in remanding for proceedings "consistent with" *Obergefell* and a federal circuit court ruling; apparently, to be more clear, the state appellate court should have remanded for proceedings "consistent with *Obergefell*" and "in light of" the federal circuit court ruling. *Id.* at 1508-09. The Texas Supreme Court then spent the remainder of the opinion summarizing the taxpayers' other arguments and explaining that those arguments could be asserted on remand because *Obergefell* "did not hold that states must provide the same publicly funded benefits to all married persons." *Id.* at 1512. But that's not how the U.S. Supreme Court interpreted *Obergefell* in a case issued a few days before *Pidgeon*. *See* Pavan v. Smith, 137 S. Ct. 2075, 2077-78 (2017) (quoting *Obergefell*, 135 S. Ct. 2601, to hold differential treatment between same-sex and opposite-sex couples regarding the "terms and conditions" of marriage, including "the constellation of benefits that the States have linked to marriage," is prohibited).

13. Andrea B. Carroll & Christopher K. Odinet, Commentary, *Gay Marriage and the Problem of Property*, 93 WASH. U. L. REV. 847, 848-49 (2016); Peter Nicolas, *Backdating Marriage*, 105 CALIF. L. REV. 395, 427-28 (2017).

14. *E.g.*, Nicolas, *supra* note 13, at 399-400.

15. Carroll & Odinet, *supra* note 13, at 848-49; Lee-Ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873, 875-76; *see also* Huiyi Chen, Comment, *Balancing Implied Fundamental Rights and Reliance Interests: A Framework for Limiting the Retroactive Effects of* Obergefell *in Property Cases*, 83 U. CHI. L. REV. 1417, 1435 (2016) ("[E]mphasizing that the stakes are high and the disruptive effects great . . . .").

future court proceedings on direct review.[16] Scholars have reasoned that retroactive applications of legal changes often disrupt settled expectations; thus, because the judiciary's avoidance of such disruptions may stymie necessary legal reforms, the concept of adjudicative retroactivity needs reconsideration.[17]

This Article unravels this transition costs predicament with a layered account of adjudicative retroactivity that incorporates existing institutional, remedial, and procedural doctrines to balance competing reliance, fairness, and efficiency interests in periods of legal change. During any legal transition, it is true, of course, that retroactive application of the new, more efficient rule has the potential to contravene settled expectations.[18] But this Article illustrates that such detrimental reliance consequences are manageable under preexisting remedial, institutional, and procedural canons, without any need to modify adjudicative retroactivity principles or sacrifice the promise of marital equality.

Professors Fallon and Meltzer established that altering the remedies after well-established legal precedents are overruled in specified categories of constitutional litigation alleviates the harshness in upending settled expectations.[19] They limited their account, however, to

16. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993). The meaning and usefulness of the term "retroactivity" in the adjudicative context is debatable. *E.g.*, Kermit Roosevelt III, *A Retroactivity Retrospective, With Thoughts for the Future: What the Supreme Court Learned from Paul Mishkin, and What It Might*, 95 CALIF. L. REV. 1677, 1677-78 (2007). The typical judicial understanding is that a decision announcing a new legal principle is applied retroactively when employed to govern events or actions occurring before the decision. *E.g.*, James B. Bean Distilling Co. v. Georgia, 501 U.S. 529, 534-35 (1991) (opinion of Souter, J.). But the impact of this application may take stronger and weaker forms, from actually changing the prior legal consequences of predecision conduct to providing future consequences for predecision conduct. *Cf.* Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 383 (1977) (explaining that strong and weak interpretations differ regarding "the impact of a retroactive law on earlier acts in the period prior to its creation").

17. *See, e.g.*, Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 983-90 (2006) [hereinafter Heytens, *Transitional Moments*] (urging that a nonretroactivity approach provides a better mechanism for addressing the disruptive effects of legal change and therefore promotes beneficial criminal procedure rules); Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 28 (1960) (defending prospectivity as "facilitating more effective and defensible judicial lawmaking"); Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 HASTINGS L.J. 533, 540-42 (1977) (suggesting a rigid rule of retroactivity may prevent overruling unsound precedents).

18. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1057 (1997) (identifying the animating struggle underlying retroactivity doctrine as an attempt "to reconcile competing and often conflicting concerns about fairness and economic efficiency").

19. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1758 (1991). Debate exists regarding whether the government's provision of such transitional relief to mitigate reliance costs is, in general, economically efficient. *Compare* Louis Kaplow, *An Economic Analysis of Legal*

three forms of action,[20] even though other underappreciated remedial doctrines serve to safeguard fairness during a period of constitutional interpretive change. This Article identifies and evaluates such other doctrines, including the scope of an equitable or declaratory decree and the remedial "fix" for an unconstitutional statute (that is, invalidation in whole, in part, on its face, as applied, or effectively amended by judicial construction).

This Article also explores for the first time the intersection of adjudicative retroactivity with three separate judicial institutional norms: stare decisis, incrementalism, and signaling. Strategically employing signaling and incrementalism to modify or overrule precedent disquiets existing legal principles and extends the transition period for legal change, providing a societal opportunity to arrange affairs gradually in light of the impending new legal order. The manipulation of such institutional norms thereby diminishes reliance costs in legal transitions, in addition to providing a feedback mechanism from affected constituencies that tends to improve judicial decisionmaking.

This Article additionally assesses procedural doctrines, such as preclusion, forfeiture, and limitations, which also may mitigate the costs of legal change. Although these procedural doctrines serve other independent purposes in our legal system, the outcomes resulting from their application often prevent the upending of settled expectations from long-ago events that cannot be managed under institutional and remedial strategies.

This Article's comprehensive account of the intersection of retroactivity with these institutional, remedial, and procedural doctrines furnishes extensive guidance for resolving the retroactivity issues arising in marital equality cases. The outlined principles demonstrate, for example, that the City of Houston should (eventually) prevail in the taxpayers' challenge to its past provision of same-sex benefits, but that such a holding does not portend the dire ruinous financial and societal consequences predicted by the taxpayers. The key is comprehending that the *Obergefell* Court issued two remedial declarations, one with respect to the *right* of same-sex couples to marry and the other concerning the *recognition* of lawful same-sex marriag-

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Transitions, 99 HARV. L. REV. 509, 529-50 (1986) (arguing against the efficiency of governmental transitional relief), *with* Kyle D. Logue, *Tax Transitions, Opportunistic Retroactivity, and the Benefits of Government Precommitment*, 94 MICH. L. REV. 1129, 1131-32 (1996) (urging transition relief may be justified due to the efficiency of government commitment to legal rules). Irrespective of this normative debate, transitional reliance costs as a descriptive matter are a well-settled consideration in the Supreme Court's evaluation of whether to create new legal rules and a factor in ascertaining the scope of the appropriate constitutional remedy. *See infra* Parts II & III.

20. Fallon & Meltzer, *supra* note 19, at 1737 (discussing constitutional tort actions, unconstitutional tax collections, and habeas corpus proceedings).

es from other states.[21] Each declaration had a different temporal scope, which impacts the constitutionally mandated retroactive application of *Obergefell*.

With respect to the right to marry, *Obergefell* did not facially invalidate the challenged marital exclusion laws, but rather held that "same-sex couples may exercise the fundamental right to marry" such that the challenged laws were "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."[22] The Court thus did not retroactively alter the legal status of the challengers and decree that they were already married based on their prior desire to do so, but instead provided the *future opportunity* for these same-sex couples—and other similarly situated same-sex couples—to obtain the needed licenses for ceremonial marriages. *Obergefell* ensured that the government can no longer discriminate against same-sex couples in issuing licenses, but did not order any remedy for the past failures to do so, allowing the states to have the leeway to ascertain the appropriate remedy, if any, for these past failures.[23]

In contrast, with respect to marriage recognition, the Supreme Court held that states had to recognize lawful same-sex marriages from other states, including the pre-*Obergefell* marriages of certain challengers.[24] This holding retroactively altered the legal marital status of the challengers in nonrecognition states because the necessary operative events—government licensure and the marriage ceremony—already occurred.[25] Thus, a state must backdate recognition of same-sex marriages to the date in which a lawful marriage became extant, mandating that Houston's provision of benefits to same-sex couples before *Obergefell* must be sustained. Yet the scope of such relief will be tempered by procedural doctrines such as limitations, administrative exhaustion, and preclusion. Moreover, the Court's incrementalism and signaling during the transition period to marital equality should have provided an opportunity to mitigate societal reliance costs, as Houston did in providing same-sex spousal benefits shortly after *Windsor*.

This Article's analysis proceeds as follows. Part II examines the Supreme Court's decisions on adjudicative retroactivity, focusing on the underlying normative concerns that led the Court from adjudicative retroactivity to selective prospectivity and then back to retroac-

21. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05, 2607-08 (2015).

22. *Id.* at 2605.

23. *See infra* Section IV.A.

24. *Obergefell*, 135 S. Ct. at 2607-08.

25. *See infra* Section IV.A.

tivity for noncollateral civil adjudicative proceedings. Because the Court first developed the policies now governing civil adjudications in the criminal procedure context, Part II also incorporates a brief retelling of the Court's transitions to its current criminal adjudicative regime, which distinguishes between cases on direct review and those on collateral habeas corpus review. Part III proceeds to construct a typology of the institutional, remedial, and procedural doctrines that serve to protect reliance, fairness, and efficiency interests under a norm of retroactive application of civil judicial decisions. Part IV then employs these doctrines to evaluate potential retroactivity issues facing same-sex marriages, including whether common-law or informal same-sex marriages must be backdated to their formation if the couple could not legally marry at that time.

II. THE PATH OF ADJUDICATIVE RETROACTIVITY

The Supreme Court now abides by the doctrine that decisions applying new legal rules to the parties govern all pending and future noncollateral adjudicative proceedings, even if the operative events in that proceeding occurred under a different legal framework; however, the Court experimented for a time with nonretroactivity, or prospectivity, of certain rulings. This Part recounts the normative principles that motivated the Court's transitions from one understanding of temporal adjudicative boundaries to a different understanding and then back again. My purpose here is not to provide a full case-by-case recounting of the stormy doctrinal history of the Court's shifts, which has been well documented by other scholars.[26] Rather, my goal is to employ this summary of the doctrinal evolution of adjudicative retroactivity to highlight the animating policies governing the temporal reach of constitutional decisions.

A. The Ancient View of the Judicial Role

Before the twentieth century, the concept of adjudicative retroactivity, as Professor Roosevelt insightfully demonstrated, was essentially unknown.[27] This was not because judicial decisions did not gov-

26. *E.g.*, 1 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 1:9 (3d ed. 2011); Paul E. McGreal, *Back to the Future: The Supreme Court's Retroactivity Jurisprudence*, 15 HARV. J.L. & PUB. POL'Y 595, 597-608 (1992); Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1082-1103 (1999); Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 816-33 (2003); Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515, 1517-58 (1998).

27. Roosevelt, *supra* note 26, at 1082. Although *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), is sometimes referenced as the foundation of American retroactivity doctrine, the case did not address the topic of this Article—the retroactivity of

ern predecision conduct and events, but because the judicial function was predominantly viewed in Blackstonian terms: "[N]ot . . . to pronounce a new law, but to maintain and expound the old one."[28] Under this view, judges declared the law as it already existed rather than made the law. The overruling of a decision, then, did not signify "that the law is changed, but that it was always the same as expounded by the later decision, and that the former decision was not, and never had been, the law."[29] The declaratory theory's perception of law as an unchanging constant obviated any need to consider adjudicative retroactivity—the current judicial doctrine had always been correct and therefore governed all past and future proceedings.

The rise of legal positivism and realism challenged this perception. Despite their fundamental differences, both theories acknowledge that judicial adjudication in some sense "makes" law,[30] such that the "old" law and the "new" law can be identified when a court overrules a prior precedent or announces a new governing legal principle. This distinction presented the judiciary a potential choice: whether to apply the "new" law or "old" law to events or conduct predating the court's decision.[31] Some academics—as well as state courts—urged that parties should be governed by the law in effect at the time of their actions (i.e., "old" law), with "new" law reserved for events arising after the decision.[32]

Nonetheless, without much discussion, the principle that the law as announced governed all past and future proceedings continued to

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judicial decisions—but instead approved legislative retroactive change via a treaty in a pending judicial proceeding. *See id.* at 110.

28. 1 WILLIAM BLACKSTONE, COMMENTARIES *69; *see* Frederic Bloom, *The Law's Clock*, 104 GEO. L.J. 1, 20 (2015) ("Judges are not 'delegated to pronounce a new law,' in Blackstone's famous adage, 'but [simply] to maintain and expound the old one.' " (alteration in original)).

29. Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 211 (1863) (Miller, J., dissenting); *accord* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 12 (1842) (explaining judicial decisions "are, at most, evidence of what the laws are and are not, of themselves, laws").

30. *See* Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138, 1140-44 & 1147-49 (1999) (reviewing ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)) (describing central tenets of positivism and realism).

31. *See* Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1349-53 (2010).

32. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 146-47 (1921) (arguing against the "injustice and oppression" of applying newly changed law to intervening transactions between the judicial voiding and validating of a statute); Charles E. Carpenter, *Court Decisions and the Common Law*, 17 COLUM. L. REV. 593, 604 (1917) ("[I]f the decisions of the courts make the law, the over-ruling decision need have no retroactive operation beyond that involved in the decision itself, because the over-ruling decision merely changes the law from the time it is made and leaves the law prior to that time unchanged."); Levy, *supra* note 17, at 7-8 (discussing early state court cases prospectively overruling prior decisions).

hold sway at the Supreme Court during most of the twentieth century. Justice Holmes famously opined that "[j]udicial decisions have had retrospective operation for near a thousand years."[33] While the Supreme Court perceived no federal constitutional bar to a state court decreeing prospectivity for a state law decision,[34] and sometimes refused, in the early part of the twentieth century before *Erie Railroad Co. v. Tompkins*,[35] to accept intervening state law decisions in diversity cases,[36] the Court continued to presume that judicial pronouncements governed predecisional conduct.[37] But the constitutional criminal procedure upheavals of the Warren Court propelled the Court in a new direction.

B. Reliance, Retroactive Effect, and Selective Judicial Prospectivity

The Court's understanding that its pronouncements governed predecisional events confronted a challenge when its criminal procedure decisions during the 1960s potentially impacted the validity of untold thousands of prior convictions. In cases overruling prior decisions or adopting new prophylactic rules, the Warren Court held that the exclusionary rule applied to the states in *Mapp v. Ohio*;[38] that prosecutors could not comment on the accused's failure to take the stand in *Griffin v. California*;[39] that warnings must be administered regarding an individual's rights before custodial interrogations in *Miranda v. Arizona*;[40] and that counsel had to be present in pretrial witness identifications of the accused in *Gilbert v. California*.[41] These and other new constitutional pronouncements, never before applied to the states, previously had not been routinely followed in state criminal proceedings (although some states had previously adopted

33. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

34. Great N. Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358, 364 (1932) ("A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.").

35. 304 U.S. 64 (1938) (holding state substantive law rather than a general federal common law governed diversity cases in federal court).

36. *E.g.*, Concordia Ins. Co. v. Sch. Dist. No. 98, 282 U.S. 545, 553-54 (1931); *Kuhn*, 215 U.S. at 356-61.

37. *E.g.*, Vandenbark v. Owens-Ill. Glass Co., 311 U.S. 538, 543 (1941) ("Intervening and conflicting decisions will thus cause the reversal of judgments which were correct when entered."); Dorchy v. Kansas, 264 U.S. 286, 289 (1924) (concluding "the Court must consider changes in law and in fact which have supervened since the judgment was entered below" to appropriately dispose of a case in the interest of justice).

38. 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949)).

39. 380 U.S. 609 (1965).

40. 384 U.S. 436 (1966).

41. 388 U.S. 263 (1967); *accord* United States v. Wade, 388 U.S. 218 (1967).

one or more analogous rules under state statutes or state constitutional interpretations).[42] Countless prior convictions thus presumably violated the High Court's new holdings. This required the Supreme Court to confront "a most troublesome question in the administration of justice," the extent to which its new constitutional pronouncements governed proceedings conducted before these decisions.[43]

Linkletter v. Walker first addressed this question in 1965, in the context of retroactive application of the exclusionary rule in habeas corpus proceedings brought by petitioners whose convictions had become final before *Mapp*'s issuance.[44] The Court explained that its pronouncements in both civil and criminal cases governed all direct review proceedings, but the impact of new decisions on collateral habeas proceedings depended upon such factors as expectations, finality, and public policy.[45] In order to determine whether new legal rules applied to habeas review, the Court adopted a doctrine-by-doctrine balancing standard examining the purpose of the new doctrine, the extent of reliance on the old doctrine, and the effect of retrospective application on the administration of justice.[46] Evaluating the purpose-reliance-effect factors, *Linkletter* held that retroactive application would not advance the deterrence purpose of the exclusionary rule, the states justifiably relied on the Supreme Court's old doctrine, and thousands of hearings regarding whether evidence long ago presumed admissible should now be excluded would devastate the administration of justice.[47]

Even though *Linkletter* distinguished between direct and collateral review, the next term the Court began applying the purpose-reliance-effect factors to limit application of new legal principles in some criminal cases on direct review as well.[48] Responding to the cri-

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42. *See Mapp*, 367 U.S. at 651 (detailing states shifting toward adopting the exclusionary rule in the years between 1949 and 1961).

43. Linkletter v. Walker, 381 U.S. 618, 620 (1965).

44. The Court defined "final" in this context as appeal exhaustion with the time for a petition for certiorari already elapsed. *Id.* at 622 n.5. The Court previously applied *Mapp* to those cases pending on direct review when *Mapp* issued. *E.g.*, Stoner v. California, 376 U.S. 483 (1964); Fahy v. Connecticut, 375 U.S. 85 (1963); Ker v. California, 374 U.S. 23 (1963).

45. *Linkletter*, 381 U.S. at 627 (quoting Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

46. *Id.* at 636.

47. *Id.* at 637.

48. Johnson v. New Jersey, 384 U.S. 719, 732-34 (1966) (holding that legal rules from *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964), applied only to cases commenced after those holdings were announced). *Johnson* highlighted that law enforcement authorities had not previously been apprised of these new procedural safeguards designed to guarantee the full effectuation of the privilege against self-incrimination, such that retroactive application, whether on direct or collateral

tique that wholly prospective judicial rulings were incompatible with the judicial function,[49] *Stovall v. Denno* clarified a year later that, although the parties in the law-changing decision had to obtain the benefit of any newly pronounced rule, the Court could employ a selective prospectivity doctrine examining the purpose-reliance-effect factors to deny other similarly situated litigants the benefit of the same rule.[50] The Court explained that "sound policies," bottomed in the "cases or controversies" requirement of Article III, necessitated applying holdings (rather than prospective dictum) to the parties before the Court; however, reliance interests and the burden on the administration of justice could preclude retroactive application to other similarly situated litigants, despite the "arguabl[e]" resulting inequity.[51] According to the *Stovall* dissent, though, there was nothing arguable about the inequity: the Court's approach was "rank discrimination," incompatible with the judicial role, "to legislate a timetable by which the Constitution's provisions shall become effective."[52]

Over continued objections that the Court's selective prospectivity regime was both inequitable and essentially legislative,[53] the Warren

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review, was not warranted in light of the preexisting alternative avenues to challenge involuntary confessions. *See id.*

49. *E.g.*, *Linkletter*, 381 U.S. at 644 (Black, J., dissenting) (arguing that limiting judgments to prospective application was lawmaking rather than judicial interpretation). Thomas Cooley made a similar argument in his treatise a century earlier. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 91 (1868) (distinguishing between judicial and legislative acts on the basis that the judiciary determines "what the existing law is in relation to some existing thing already done or happened," while the legislature predetermines "what the law shall be for the regulation of all future cases").

50. 388 U.S. 293, 299-301 (1967). *Stovall* addressed the retroactivity of the Court's contemporaneous pronouncements in companion cases that counsel had to be present for pretrial witness identifications of the accused. *Id.* at 294. The Court held that, because both state and federal law enforcement officers across the nation had previously believed that the Constitution did not mandate counsel's presence at pretrial identifications, retroactive application was not warranted, either on direct or collateral review. *Id.* at 299-300.

51. *Id.* at 301.

52. *Id.* at 304 (Black, J., dissenting).

53. *See, e.g.*, Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., concurring) (contending that the judicial function was incompatible with a regime under which the Court made "its new constitutional rules wholly or partially retroactive or only prospective as it deems wise"); *id.* at 714 (Douglas, J., dissenting) ("I can find nothing in the Constitution that authorizes some constitutional rules to be prospective and others to be retroactive. . . . The Constitution grants this Court no such legislative powers."); Desist v. United States, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting) ("We depart from [our] basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law."). Justice Harlan preferred a rule distinguishing between direct review and habeas corpus proceedings as *Linkletter* did, but applying "new" rules retroactively to habeas proceedings only in narrow circumstances based on the purposes of the great writ. *E.g.*, *Mackey*, 401 U.S. at 682-95 (Harlan, J., concurring); *Desist*, 394 U.S. at 260-68 (Harlan, J.,

Court and then the early Burger Court continued to privilege law enforcement's reliance interests and judicial administrative burdens over equal treatment of similarly situated criminal litigants. New constitutional criminal procedure rules concerning such issues as the right to a criminal jury trial,[54] electronic surveillance,[55] searches incident to arrest,[56] and the right to have petit juries selected from a fair cross-section of the community[57] were held to apply only to the parties in the law-changing decision and to the future conduct of law enforcement and judicial officials.

In the midst of these criminal procedure decisions, the Burger Court extended similar principles to govern the temporal scope of new judicial rules in civil proceedings. In *Chevron Oil Co. v. Huson*,[58] the Court considered whether its earlier decision in *Rodrigue v. Aetna Casualty & Surety Co.*,[59] which held that state law rather than admiralty law governed remedial issues in personal injury suits under the federal Lands Act, necessitated that a state limitations period barred Huson's suit, even though his suit, filed before *Rodrigue*'s issuance, relied on admiralty law's more generous laches doctrine.[60] After deciding that the state limitations period applied, *Chevron Oil* declared, analogizing to the criminal procedure decisions, that three factors controlled whether to apply *Rodrigue*'s rule to Huson: (1) whether the decision truly established "a new principle of law, either by overruling clear past precedent on which liti-

dissenting). As discussed below, the Court eventually adopted an analogous approach. *See infra* Section II.C.

54. DeStefano v. Woods, 392 U.S. 631, 633-35 (1968) (per curiam) (holding that the Court's prior pronouncements requiring the states to provide a jury trial in serious criminal cases and serious criminal contempt proceedings applied only to the litigants in those prior cases and to trials beginning after the date of those decisions under the purpose-reliance-effect factors).

55. *Desist*, 394 U.S. at 249-54 (holding that *Katz v. United States*, 389 U.S. 347 (1967), which overruled previous decisions requiring a trespass to implicate the Fourth Amendment, applied only to the surveillance in *Katz* and to electronic surveillance occurring after the *Katz* decision, because the purpose of the new rule was to deter police misconduct, law enforcement officials had relied on the old rule, and revisiting prior judicial determinations could constitute a burden on the administration of justice).

56. Williams v. United States, 401 U.S. 646, 656-59 (1971) (plurality opinion) (concluding that *Chimel v. California*, 395 U.S. 752 (1969), which limited the permissible scope of searches incident to arrest, applied only to the search in *Chimel* and to searches occurring after the issuance of the *Chimel* decision); *id.* at 662 (Brennan, J., concurring) (agreeing that *Chimel*'s rule should be applied only prospectively in light on the purpose-reliance-effect factors).

57. Daniel v. Louisiana, 420 U.S. 31, 32 (1975) (per curiam) (relying on *DeStefano* to hold that *Taylor v. Louisiana*, 419 U.S. 522 (1975), was not to be applied retroactively to juries empaneled before the *Taylor* decision).

58. 404 U.S. 97 (1971).

59. 395 U.S. 352 (1970).

60. *Chevron Oil*, 404 U.S. at 105.

gants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether retroactive application would further the operation of the new legal principle in light of its purpose and effect; and (3) whether retroactive application would cause inequity, injustice, or hardship.[61] Examining these factors, the Court held that *Rodrigue* pronounced a new legal principle overruling clear circuit court precedent that did not apply to bar Huson's claims, as the Lands Act's purpose was to aid injured employees, and the balance of the equities favored Huson, who had no reason to suspect a shorter limitations period when he filed suit.[62]

These three *Chevron Oil* factors, focusing on the new judicial rule's purpose and effect and the equities of reliance and hardship, demonstrated that the Court then viewed the question of adjudicative retroactivity similarly in civil and criminal proceedings. The administrative and other burdens from upsetting settled expectations could, on a rule-by-rule basis, preclude the application of a newly announced legal rule to predecision conduct, especially when the new rule "so change[d] the law" by overruling settled precedent or longstanding judicial practices.[63] But this high tide of nonretroactivity would begin to ebb a decade later.

C. The Adjudicative Function, Equality, and Finality

The Supreme Court began shifting course during the 1980s, declaring that " '[r]etroactivity' must be rethought."[64] As the complaints that selective prospectivity was inequitable, unprincipled, and nonjudicious gained additional adherents, the Court slowly adopted the current adjudicative retroactivity doctrine that applies new principles of law in subsequent noncollateral proceedings.

The Court first moved in the criminal procedure context. Building on an earlier decision cabining the scope of prospectivity in criminal cases on direct review,[65] the Rehnquist Court in *Griffith v. Kentucky* disclaimed any judicial authority whatsoever to limit its holdings to

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61. *Id.* at 106-07 (citations omitted).

62. *Id.* at 107-09. The Court concluded: "Both a devotion to the underlying purpose of the Lands Act's absorption of state law and a weighing of the equities requires nonretroactive application of the state statute of limitations here." *Id.* at 109.

63. Williams v. United States, 401 U.S. 646, 659 (1971) (plurality opinion).

64. United States v. Johnson, 457 U.S. 537, 548 (1982) (quoting Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting)).

65. *See id.* at 554, 562-63 (holding that Fourth Amendment decisional pronouncements were to be applied retroactively to all subsequent cases on direct review, unless falling within an exception for pronouncements constituting "a clear break with the past" that was not implicated by the Fourth Amendment rule under consideration).

prospective application on direct criminal review.[66] Two constitutional adjudicative norms buttressed the Court's conclusion. The first was the nature of the judicial function: under Article III, the Court "adjudicate[s] specific cases, and each case usually becomes the vehicle for [the] announcement of a new rule," with the "integrity of judicial review" necessitating that the judiciary "apply that rule to all similar cases pending on direct review."[67] The second principle was equal treatment for similarly situated defendants: the lottery-like selection of one or two defendants' cases to pronounce and apply a new legal rule—without applying that rule to all the other defendants nationwide who previously raised a similar issue—constituted an intolerable inequity.[68] These two principles mandated, according to the Court, that a new criminal rule must be applied retroactively to all pending or nonfinal criminal proceedings, irrespective of the government's settled expectations in prior precedent or practices.[69]

Griffith left open, however, the retroactive application of new legal principles to collateral habeas corpus proceedings.[70] The Court confronted that question in *Teague v. Lane*.[71] Focusing on the purpose of habeas corpus as a collateral remedy to incentivize compliance with established constitutional standards, along with interests in comity and finality, the *Teague* plurality reasoned that a new constitutional criminal procedural rule should not apply to those cases becoming final before the announcement of the rule, unless the rule was either a "watershed" procedural rule or a substantive rule placing conduct beyond the criminal law's authority to proscribe.[72] In the plurality's

66. 479 U.S. 314, 316 (1987) (holding that *Batson v. Kentucky*, 476 U.S. 79 (1986), applied to cases still pending on direct review when *Batson* was decided).

67. *Id.* at 322-23. The Court supported this conclusion by quoting from Justice Harlan's concurring opinion in *Mackey v. United States*, 401 U.S. 667, 679 (1971), which contended that the "assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation."

68. *Griffith*, 479 U.S. at 323.

69. *Id.* at 328 ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past.").

70. *Id.* at 329 (Powell, J., concurring).

71. 489 U.S. 288 (1989).

72. *Id.* at 306-11 (plurality opinion). Justice White concurred in the result, indicating that he preferred the *Stovall* approach, but that the plurality proffered "an acceptable application in collateral proceedings of the theories embraced by the Court in cases dealing with direct review." *Id.* at 317 (White, J., concurring). Justice Stevens, joined by Justice Blackmun, agreed with the plurality's basic distinction between direct and habeas review, but contended that the exceptions authorizing retroactive application of new rules should be broadened. *Id.* at 318-20 (Stevens, J., concurring). The exceptions have been narrow in practice—the Court has never applied the exception for watershed rules of procedure, and only occasionally has applied the substantive rule exception. *See, e.g.*, Montgomery v.

words: "Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[73] The plurality had an expansive view of the scope of a "new" rule that typically could not be presented in a habeas petition; the plurality concluded that a new rule exists "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[74] Despite complaints that the plurality's approach impermissibly narrowed the scope of habeas relief,[75] a Court majority endorsed the approach later the same term,[76] and Congress essentially codified *Teague* a few years later.[77] Finality and remedial concerns thereby today sharply curtail the application of new legal principles to final criminal convictions, but such new legal principles must be applied on direct criminal review when properly preserved.

Griffith had indicated, though, that civil retroactivity was still governed by the *Chevron Oil* standard,[78] creating a dichotomy between the governing temporal scope of decisions in criminal and civil cases. But the Court eventually (albeit again via a tortured path) largely harmonized the doctrines.

A year after *Teague*, the Court split into three camps in refusing to apply its earlier holding invalidating flat highway use taxes retroactively.[79] A plurality reasoned that the *Chevron Oil* standard was necessary to prevent the "harsh and disruptive effect on those who relied on prior law," and that neither precedent nor policy supported

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Louisiana, 136 S. Ct. 718, 728-32 (2016) (applying, as a substantive rule for habeas proceedings, a decision invalidating mandatory life sentences without parole for juveniles).

73. *Teague*, 489 U.S. at 310 (plurality opinion).

74. *Id.* at 301.

75. *Id.* at 333-34 (Brennan, J., dissenting) (criticizing the plurality's "new" rule definition as "extremely broad"). Scholars largely agreed with Justice Brennan. *E.g.*, Fallon & Meltzer, *supra* note 19, at 1748 n.84; Joseph L. Hoffman, *The Supreme Court's New Vision of Federal Habeas for State Prisoners*, 1989 SUP. CT. REV. 165, 182-84.

76. Penry v. Lynaugh, 492 U.S. 302, 315, 319, 322, 328-30 (1989). Justice White, who concurred in *Teague* on the basis that he preferred the *Stovall* approach but the plurality's approach was "acceptable," *Teague*, 489 U.S. at 317 (White, J., concurring), joined the plurality from *Teague* to comprise the majority in *Penry*.

77. 28 U.S.C. § 2254(d)(1) (2012) (restricting habeas relief for claims decided on the merits by state courts to cases in which the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"). For insightful scholarly examinations of the intersection of section 2254(d)(1) and retroactivity analysis, see A. Christopher Bryant, *Retroactive Application of "New Rules" and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1 (2002); Heytens, *Transitional Moments*, *supra* note 17.

78. Griffith v. Kentucky, 479 U.S. 314, 322 n.8 (1987).

79. Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 191-94, 196-97, 200-02, 205-06 (1990).

extending *Griffith*'s rationale to civil cases.[80] The concurring Justice, while agreeing that the earlier holding here should not be extended (based on his dissent from that holding), nevertheless disagreed with the plurality's reliance on *Chevron Oil* under a neodeclaratory jurisprudential philosophy: "[P]rospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be."[81] The dissent, on the other hand, believed the determinative concerns had been pronounced in *Griffith*: "[F]airness and legal process dictate that the same rules should be applied to all similar cases on direct review. Considerations of finality and the justifiable expectations that have grown up surrounding a rule are ordinarily and properly given expression in our rules of res judicata and *stare decisis*."[82] The Court's separate opinions thereby encompassed the entire historical panoply of adjudicative temporal scope norms: declaratory jurisprudential theory, legal change's impact on settled expectations, judicial functioning, equal treatment of litigants, and finality.

The Court's sequel a year later followed similar (but more complex) plot lines, although this time with a different ending. Two-thirds of the Court agreed that, at the very least, when a new legal rule (in this case, invalidating higher excise taxes on imported liquor) was applied to the litigants in the law-changing decision, that rule governed all subsequent civil actions absent a procedural or finality bar.[83] Yet the Court's still-festering normative fissures manifested in five separate opinions, none of which commanded the support of more than three Justices. The lead opinion argued that principles of equal treatment of litigants and the nature of stare decisis prevented the judiciary from thereafter differentiating between similarly situated litigants once a legal rule was applied to the parties before the Court, while explicitly leaving open whether the Court in a civil case could pronounce a purely prospective legal rule that was inapplicable to the

80. *Id.* at 191, 198-99 (plurality opinion). Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justices White and Kennedy, characterized *Griffith*'s normative foundation as privileging protections for criminal defendants over the government's reliance interests, a concern not implicated in civil cases. *Id.* at 197-99. But although *Griffith* indicated that *Chevron Oil* still controlled civil proceedings, *Griffith* provided no supporting rationale for that suggestion. *Griffith*, 479 U.S. at 320-28, 322 n.8.

81. *Am. Trucking*, 496 U.S. at 201 (Scalia, J., concurring). Justice Scalia reasoned that stare decisis principles did not require him to retroactively apply a decision that he viewed as improperly overruling prior law. *Id.* at 205.

82. *Id.* at 212 (Stevens, J., dissenting). Justice Stevens was joined by Justices Brennan, Marshall, and Blackmun.

83. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 529 (1991) (opinion of Souter, J.).

litigants in the law-changing decision.[84] A solo concurrence reluctantly agreed with the lead opinion that precedent foreclosed selective prospectivity, but nevertheless favored the Court's authority to pronounce legal rules in a wholly prospective fashion.[85] Two concurrences comprised of the same three Justices preferred banning any prospective holdings in civil cases, whether selective or full; one concurrence focused on the nature of judicial review under Article III,[86] and the other concurrence emphasized the common-law declaratory tradition of pronouncing what the law is, not what it shall be.[87] Finally, a three-Justice dissent argued that the settled expectations of those relying on past decisions warranted selective prospective application in civil cases.[88] Once again, then, all the normative principles historically underlying the temporal scope of adjudicative decisionmaking appeared, from declaratory jurisprudence to settled expectations and then to judicial functioning, equality, and finality.

Two years later, in *Harper v. Virginia Department of Taxation*, a Court majority buried selective prospectivity, finally extending *Griffith*'s ban on "selective application of new rules" to the civil context.[89] The Court declared:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.[90]

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84. *Id.* at 540-44. Justice Souter was joined by Justice Stevens in his opinion announcing the judgment of the Court. Justice Souter's opinion incorporated a summary of the normative costs and benefits of the three potential judicial mechanisms to resolve the temporal scope of adjudicative legal change, which he termed full retroactivity, pure prospectivity, and modified or selective prospectivity. *Id.* at 535-38.

85. *Id.* at 545 (White, J., concurring). Justice White believed that *Griffith*, when combined with the Court's prior precedents on civil temporal scope all evincing full rather than selective prospectivity, necessitated that subsequent litigants have the benefit of the rule applied in the law-changing decision. But he believed that the Court, under its prior precedents, had the power to pronounce a new purely prospective rule without applying it to the pending parties. *See id.*

86. *Id.* at 547 (Blackmun, J., concurring). Justice Blackmun was joined by Justices Marshall and Scalia, and Justices Blackmun and Marshall also joined Justice Scalia's separate concurrence.

87. *Id.* at 549 (Scalia, J., concurring).

88. *Id.* at 559 (O'Connor, J., dissenting). Justice O'Connor was joined by Chief Justice Rehnquist and Justice Kennedy.

89. 509 U.S. 86, 97-100 (1993).

90. *Id.* at 97 (quoting Griffith v. Kentucky, 479 U.S. 314, 323 (1987)). The Court emphasized that this federal retroactivity doctrine, under the Supremacy Clause, supersedes any contrary approach to retroactivity under state law. *Id.* at 100.

The Court reasoned that the "basic norms of constitutional adjudication," as described in *Griffith*, applied equally to civil cases, and the substantive law should not vary according to the equities of particular parties' "actual reliance on an old rule and of harm from a retroactive application of the new rule."[91] Although the Court did not mention the continued validity of full prospectivity in civil cases, the emphasized norms discounted reliance interests, which appears incompatible with any form of prospective holdings, as the separate opinions observed.[92]

The Court's subsequent decisions have not adjusted the appraisal that after-the-fact selective prospectivity is dead. *Reynoldsville Casket Co. v. Hyde* held that "simple reliance" is not a basis to craft an exception to retroactivity for a new legal principle (at least if the rule is applied to the civil litigants in the law-changing decision).[93] Instead, only under limited conditions may the retroactive effect of a new legal rule be avoided in a subsequent case, such as an alternative curative remedy, the doctrine of qualified immunity, or preexisting procedural or other independent legal doctrines.[94] Later, the Court hinted that the continued validity of even full prospectivity under *Chevron Oil* is doubtful.[95] While the Court has not, as Professor Tribe noted, "renounced the power to make its decisions *entirely* prospective, so that they do not apply even to the parties before it,"[96] the Court has *never since exercised* such a power.[97] Our journey through the rise and

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91. *Id.* at 97 (quoting *Griffith*, 479 U.S. at 322).

92. *See id.* at 110 (Kennedy, J., concurring) ("I cannot agree with the Court's broad dicta that appears to embrace in the civil context the retroactivity principles adopted for criminal cases . . . ." (citations omitted)); *id.* at 115 (O'Connor, J., dissenting) ("Rather than limiting its pronouncements to the question of selective prospectivity, the Court intimates that pure prospectivity may be prohibited as well.").

93. 514 U.S. 749, 759 (1995). Justice Kennedy, joined by Justice O'Connor, concurred, suggesting that the Court's opinion had not surrendered authority to decide in advance "that in some exceptional cases, courts may shape relief in light of disruption of important reliance interests or the unfairness caused by unexpected judicial decisions." *Id.* at 761 (Kennedy, J., concurring).

94. *Id.* at 759.

95. Ryder v. United States, 515 U.S. 177, 184-85 (1995) ("But whatever the continuing validity of *Chevron Oil* after *Harper v. Virginia Dept. of Taxation* and *Reynoldsville Casket Co. v. Hyde*, there is not the sort of grave disruption or inequity involved in awarding retrospective relief to this petitioner that would bring that doctrine into play." (citations omitted)).

96. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 3-3, at 226 (3d ed. 2000).

97. While acknowledging selective prospectivity is foreclosed, some federal appellate courts have applied their own newly pronounced legal rules wholly prospectively. *E.g.*, Nunez-Reyes v. Holder, 646 F.3d 684, 690-94 (9th Cir. 2011) (overruling prospectively its precedent treating state expungements of drug possession equivalently to federal expungements); Crowe v. Bolduc, 365 F.3d 86, 93-95 (1st Cir. 2004) (applying new procedural holding purely prospectively). Another circuit has agreed that full prospectivity is still viable, but held a prospective application under the presented circumstances was not warranted. *E.g.*, Glazner v. Glazner, 347 F.3d 1212, 1216-21 (11th Cir. 2003). Other

fall of the various animating policies governing the temporal reach of constitutional decisions has thus returned to the initial presumptive outcome, albeit now with underlying normative complexity.

D. The Return to Adjudicative Retroactivity

In the beginning, the temporal scope of judicial decisions was simpler. Under the declaratory theory of law, the Court applied its own decisions retroactively on noncollateral proceedings until the mid-1960s, while granting state courts the freedom to limit the retroactive impact of their own state law interpretations.[98] But due to concerns regarding the impact of abrupt legal changes during the 1960s on settled expectations, the Court thereafter started limiting certain of its holdings to prospective operation, first employing selective prospectivity in criminal cases and then extending similar concepts to order prospective application in a handful of civil cases.[99] Yet this new approach met immediate opposition, with critics contending the judicial function was incompatible with prospective decisionmaking, and selective prospectivity inequitably distinguished between simi-

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circuits, though, have expressed doubts regarding full prospectivity. *E.g.*, Kolkevich v. Att'y Gen., 501 F.3d 323, 337 n.9 (3d Cir. 2007) (concluding the issue was "unclear," but reasoning that pure prospectivity was not warranted in any event); Hulin v. Fibreboard Corp., 178 F.3d 316, 333 (5th Cir. 1999) (concluding in dictum that the Supreme Court has returned to "the general rule of adjudicative retroactivity, leaving only an indistinct possibility of the application of pure prospectivity in an extremely unusual and unforeseeable case"); Fairfax Covenant Church v. Fairfax Cty. Sch. Bd., 17 F.3d 703, 710-11 (4th Cir. 1994) (expressing doubts regarding the continued validity of full prospectivity but nevertheless applying the *Chevron Oil* factors to hold the district court erred in refusing to apply its decision retroactively).

98. *See supra* Section II.A. The Supreme Court has not retreated from its holding in *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364-66 (1932), that state judiciaries are typically free to limit the retroactive application of their state law interpretations. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 100 (1993) (citing *Great N. Ry.*, 287 U.S. at 364-66). A number of state courts accordingly have recognized the propriety of prospective application of state law under specified circumstances. *E.g.*, Smith v. Rae-Venter Law Grp., 58 P.3d 367, 385 (Cal. 2002) (ordering prospective application of judicial decision due to "considerations of fairness and public policy," including "retroactivity's effect on the administration of justice"); Gurnee v. Aetna Life & Cas. Co., 433 N.E.2d 128, 130 (N.Y. 1982) (concluding that courts may order prospective application only when a change is such a sharp break in existing law that its "impact will 'wreak more havoc in society than society's interest in stability will tolerate' " (quoting another source)); Elbaor v. Smith, 845 S.W.2d 240, 251 (Tex. 1992) (ordering prospective application of a newly announced legal rule holding Mary Carter agreements void as against public policy under state's adoption of *Chevron Oil* factors).

99. *See supra* Section II.B. Professor Roosevelt laid bare the irony in the rise of prospectivity to ameliorate these concerns, however, as the Warren Court had a simpler path to prevent such disruptions: maintaining a decision-time model which would typically view (with a couple of exceptions) the decision framework for habeas proceedings at the time of conviction. Roosevelt, *supra* note 26, at 116-24. As Roosevelt narrated, this whole circular journey arose from the Court's attempt to resolve a problem it unnecessarily invented. *See id.*

larly situated litigants.[100] According to the detractors, other methods existed to mitigate reliance costs, such as finality, limitations, remedies, and forfeiture.[101] Heeding these competing policy concerns, the Court first ended selective prospectivity in direct review criminal cases, and then followed suit in civil cases.[102] Although the Court has not resolved whether a federal court has the power to issue a purely prospective ruling not applying to the parties,[103] it is now well established that when the Supreme Court applies a federal doctrine to the parties in a pending case, all courts—both federal and state—must employ that doctrine as binding federal law in all noncollateral proceedings.[104]

Nonetheless, this tale leaves open questions. How can settled expectations be preserved in a legal regime of retroactive application of judicial decisions? Should some form of pure adjudicative prospectivity be available when a new rule will wreak havoc on society's settled expectations? Such issues hold important insights for ascertaining the retroactive adjudicative scope of marriage equality.

III. MANAGING ADJUDICATIVE RETROACTIVITY

Our journey through the Supreme Court's retroactivity jurisprudence identified one predominant value consistently trumpeted *against* adjudicative retroactivity and *for* prospectivity: the disruptive impact of legal change on settled expectations.[105] A correlative concern occasionally mentioned by the Court and frequently raised by commentators is that adjudicative retroactivity stymies more efficient legal change because the judiciary may be hesitant to discard an outmoded rule due to the transition's impact on settled expectations.[106] Full retroactive application is thus a barrier, according to this view, to implementing needed legal reforms. Professor Hetyens aptly synthesized this perspective in the criminal procedure context,

100. *See supra* Section II.B.

101. *See supra* Section II.B.

102. *See supra* Section II.C.

103. *See supra* notes 90-97 and accompanying text.

104. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 100 (1993).

105. *Cf.* Stephens, *supra* note 26, at 1573-74 (urging, after an extensive analysis of the Court's retroactivity jurisprudence, that demonstrable justified and actual reliance in some contexts should sanction fully prospective adjudicative decisionmaking despite the retroactivity presumption).

106. *See, e.g.*, Jenkins v. Delaware, 395 U.S. 213, 218 (1969) (extolling prospectivity as a necessary technique to implement "long overdue reforms"); Heytens, *Transitional Moments*, *supra* note 17, at 983-90 (urging that a nonretroactivity approach provides a better mechanism for addressing the disruptive effects of legal change and therefore promotes beneficial criminal procedure rules); Levy, *supra* note 17, at 28 (defending prospectivity as "facilitating more effective and defensible judicial lawmaking"); Traynor, *supra* note 17, at 540-42 (suggesting a rigid rule of retroactivity may prevent overruling unsound precedents).

arguing that "providing courts with tools to limit the disruptive effects of legal change is a good thing *because* it facilitates rights-expanding decisions."[107]

This Part details that courts already have sufficient tools to manage such disruptive impacts without employing adjudicative prospectivity. As a result, the nonretroactivity experiment should not be revisited in light of its incompatibility with the traditional judicial function and its inequitable distinctions between similarly situated litigants. Rather, the judiciary can strategically employ the institutional, remedial, and procedural doctrines discussed below to ensure rights expansion while managing the accompanying disruptions, including the upheaval attributable to the rights-expansive transition to marriage equality.

A. Institutional Strategies: Stare Decisis, Incrementalism, and Signaling

The traditional and ongoing institutional function of the judiciary is resolving actual disputes between litigants in an adversary context impacting the rights and obligations of the litigating parties. Courts do not decide such disputes in a vacuum, but rather in light of preexisting law—the rules, standards, principles, and holdings evident from the existing legal framework and past judicial decisions. Such past precedential doctrine is, therefore, a core institutional component of our judicial system.

The premise of precedent is that a court will typically abide by prior adjudicative decisions, regardless of whether the court would reach the same result if confronted with the same controversy anew, in order to improve judicial decisionmaking, ensure adjudicative fairness, minimize legal instability, and promote predictability.[108] The obligation of a lower court to abide by decisions of higher courts is known as vertical precedent, while horizontal precedent, or stare decisis, is a court's commitment to adhering to its own prior authorities in resolving future controversies, thereby privileging its past pronouncements over its current interpretations.[109] The stare decisis justification for a court's temporal priority given to past decisions rests on the need for predictability and stability in the law, which allows individuals to predict the consequences of their actions in light of

107. Toby J. Heytens, *The Framework(s) of Legal Change*, 97 CORNELL L. REV. 595, 609 (2012) [hereinafter Heytens, *Legal Change*].

108. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 595-602 (1987) (identifying four justifications for adhering to precedent: fairness, predictability, improved decisionmaking, and stability).

109. *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015 (2003) (distinguishing between horizontal and vertical effects of stare decisis).

preexisting rules that will also apply to their conduct.[110] Thus, as the Supreme Court explained, the discretionary adherence to the policy of stare decisis helps "settle" applicable rules of law in a manner that enhances societal expectations and safeguards reliance interests.[111]

Consequently, stare decisis principles cabin the temporal boundaries of adjudicative legal change by constraining a court's ability to alter prior judicial rules.[112] As Professor Fisch observed, strict adherence to stare decisis necessitates that other institutions initiate any legal change, while weaker adherence "empowers courts to initiate change themselves rather than deferring to other lawmaking institutions."[113] In many respects, then, stare decisis is functionally a mechanism that limits adjudicative legal transitions.

Nevertheless, "change happens."[114] Courts sometimes must disavow prior decisions that, for instance, represent an unworkable rule, depend upon erroneous factual assumptions, or conflict with other legal developments.[115] The Supreme Court accordingly does not perceive stare decisis as an "inexorable command," but as a policy judgment to be jettisoned under the appropriate circumstances.[116] While the nature of these appropriate circumstances for disavowing or overruling prior decisions is intensely debated among both members of the Court and the academy, the fundamental postulate for present purposes is that, despite stare decisis principles, the Court does undertake legal transitions by overruling or modifying prior precedent.[117]

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110. Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368 (1988) (contending most common justification for stare decisis is "the need for certainty in the law" so that individuals can "predict the legal consequences of their actions"); Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 70 (1988) (explaining precedent furthers "predictability in our affairs").

111. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 235 (1997) (urging that stare decisis is "a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than that it be settled right.' " (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932))); Payne v. Tennessee, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.").

112. Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis*, 13 J. CONTEMP. LEGAL ISSUES 93, 95 (2003).

113. *Id.*

114. Heytens, *Legal Change*, *supra* note 107, at 595.

115. *E.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854-60 (1992) (plurality opinion).

116. *E.g.*, *Payne*, 501 U.S. at 828 ("*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanical formula of adherence to the latest decision.' " (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940))).

117. *See, e.g.*, Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 114-31 (1991) (analyzing competing judicial views of stare decisis). *Compare, e.g.*, Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 724 (1988) (arguing that longstanding precedent should

Such legal transitions can upset settled expectations by attaching new legal consequences to the prior conduct of those relying upon the earlier precedent. Yet reliance costs in adjudicative legal change are not inevitable. A number of factors impact the existence and magnitude of reliance costs—including the nature of the prior rule, the clarity of the prior rule, the extent of the prior rule's integration into societal affairs, the stabilizing force of the prior rule, the expectations regarding the prior rule's continuance, and the foreseeability of the new rule.

As a simplified illustration, consider a constitutional decisional rule adopted by the Supreme Court authorizing law enforcement officials to procure, without a warrant, the phone numbers dialed by suspected criminal offenders. In reliance on this rule, law enforcement officers across the country routinely obtain such records without a warrant (even when a warrant would readily be available), thereby integrating this clear legal principle into their daily affairs both to ease their overburdened workload and to satisfy constitutional strictures. If the Supreme Court later, without any prior warning, overturned this rule in a retroactive adjudicative decision, the legal transition would substantially disrupt settled societal expectations and engender considerable costs on the prosecutorial system and the administration of justice. Yet such reliance costs could be minimized if the Supreme Court foreshadowed the transition before its implementation, either by proceeding incrementally or by signaling that the prior principle was under reconsideration. By foreshadowing a potential change in the governing legal framework, the prior clarity and stability of the existing rule would be severely undermined. The rule's continuation would be uncertain and unpredictable, such that law enforcement officials would no longer be justified in ordering their conduct in reliance upon its continuing force. Instead, the further undertaking of acquiring any readily available warrants should be pursued, diminishing reliance costs if the Supreme Court subsequently overturns the rule.

As a result, a crucial constituent of the scale of reliance costs in adjudicative legal transitions is the temporal period over which the change occurs. In other words, is the legal change gradual, implemented by incremental or minimalist judicial decisionmaking that serves to provide some foreshadowing or notice of a potential impending legal transition? Or is the change instead avulsive, constituting a clear break with past doctrine in an unexpected fashion? By ruling

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trump original understandings of constitutional text), *with* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 24 (1994) (arguing that precedent, in some familiar applications, is actually unconstitutional).

incrementally, with a foreshadowing of potential future directions, the Court can mitigate detrimental reliance and typically evade the purported benefit of adjudicative prospectivity.[118]

The claim here is limited to graduated legal transitions rather than what has been termed "stealth overruling."[119] A stealth overruling occurs when the Court intentionally renders a prior precedent a nullity without actually overruling it.[120] But such a *sub silentio* overruling does not mitigate reliance costs. *Arizona v. Gant*, for example, effectively overruled (while claiming to merely disavow a "broad reading" of) a prior rule permitting a warrantless search incident to an arrest of the passenger compartment of an automobile, instead holding that such a search is permissible only in two narrowly defined circumstances.[121] Yet note that *Gant*'s "stealth overruling" (i.e., overruling while claiming not to) technique furnishes no more transitional relief than an explicit overruling: *Gant* neither extended the legal transition period nor provided an opportunity for law enforcement to mitigate its reliance on the prior rule.

Nonetheless, other techniques for moving the law can extend the transition period and thereby provide the opportunity to mitigate reliance costs. For example, the Court can employ a constitutional avoidance canon to forgo any constitutional holding in a case while signaling that the continuation of the prior constitutional rule is in doubt.[122] The Court can also inhibit a preexisting rule's scope in the

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118. *See* RONALD DWORKIN, LAW'S EMPIRE 402 (1986) (arguing retroactive imposition of liability for past acts is troublesome in the absence of signaling).

119. *E.g.*, Ronald Dworkin, *The Supreme Court Phalanx*, N.Y. REV. BOOKS, Sept. 27, 2007, at 92 (accusing Roberts Court Justices of "remaking constitutional law by overruling, most often by stealth, . . . central constitutional doctrines"); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 16 (2010) (defining "stealth overruling" as deliberately "drawing distinctions that are unfaithful to the prior precedent's rationale" or "reducing a precedent to essentially nothing without justifying its de facto overturning"); Geoffrey R. Stone, *The Roberts Court, Stare Decisis, and the Future of Constitutional Law*, 82 TUL. L. REV. 1533, 1538 (2008) (contending that Roberts Court Justices "purport to respect a precedent while in fact cynically interpreting it into oblivion").

120. *E.g.*, Charles W. "Rocky" Rhodes, *What Conservative Constitutional Revolution? Moderating Five Degrees of Judicial Conservatism After Six Years of the Roberts Court*, 64 RUTGERS L. REV. 1, 36-38 (2011).

121. 556 U.S. 332, 322 (2009). The two circumstances are either when an arrestee is "within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351. But under the prior rule of *New York v. Belton*, 453 U.S. 454, 462-63 (1981), the passenger compartment of an automobile could always be searched incident to a lawful arrest.

122. *See, e.g.*, Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 204 (2009) (deciding case challenging the 2006 extension of the Voting Rights Act on statutory grounds, but outlining "serious constitutional questions" raised by the extension). The Court later relied on these "serious constitutional questions" to invalidate the preclearance formula of the Voting Rights Act on constitutional grounds. Shelby Cty. v. Holder, 570 U.S.

specific circumstances of a particular case, with the limitation indicating the potential for the rule's subsequent overruling or modification.[123] Another method is for the Court, or a few members of the Court, either to invite future litigants to mount a direct challenge to a particular rule[124] or to specify that the rule at a defined future point will be ripe for reconsideration.[125] Alternatively, the Court might employ unnecessarily broad language to resolve a relatively narrow issue, with the phraseology suggesting the potential for a new legal framework.[126] Or the Court could begin to develop novel legal principles in a series of decisions that impugn the logic of an old rule, leading to the old rule's subsequent invalidation.[127] All these methods tend to mitigate reliance costs before a subsequent legal transition by disquieting existing legal clarity and prolonging the transition period.

The counter-argument against incremental legal transitions is the inherent delay in implementing the optimal rule. During the transition interval, the more efficient legal reform is postponed. The inefficiency in the interim, one might argue, warrants that the Court should either immediately overrule the decision in spite of the reliance costs or fashion a prospective rule. Admittedly, this counter-argument has merit in those situations in which the benefits from the new rule outweigh the administrative and societal costs of upset-

529, 555-57 (2013). For the classic compilation of the various constitutional avoidance canons, see the concurring opinion of Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

123. *See, e.g.*, Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 450 (2007) (invalidating corporate and union electioneering ban in the Bipartisan Campaign Reform Act in the context of an as-applied challenge even though the prohibition was earlier upheld facially in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 203-09 (2003)). The Court later invalidated the ban facially, thereby overruling *McConnell* in part, in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

124. *See, e.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2546 (2014) (Scalia, J., concurring) ("It can be argued, and it should be argued in the next case, that . . . the Court itself has *sub silentio* (and perhaps inadvertently) overruled *Hill*.").

125. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 343 (2003) ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.").

126. *See, e.g.*, Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 309-23 (2012) (suggesting discomfort with any compulsory union dues as a condition of public employment in the course of deciding a narrower issue of the notice and consent required for a special assessment or dues increase). The Court later granted certiorari to reconsider its prior holdings on public-sector agency shops under the First Amendment, but affirmed the lower court by an equally divided Court after the passing of Justice Scalia. Friedrichs v. Cal. Teachers Ass'n, 136 S. Ct. 1083 (2016). The Court is poised to reconsider the issue again during the October 2017 Term. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 54 (2017) (granting certiorari).

127. *See, e.g.*, Miller v. Alabama, 567 U.S. 460, 465 (2012) (relying on series of cases indicating concern for juvenile's "lessened culpability" and "greater 'capacity for change' " to hold that mandatory life without parole sentences for juvenile offenders transgressed the Eighth Amendment (citation omitted)).

ting heretofore settled expectations. In those situations, the better course is to overrule the prior rule immediately.

But a cost-benefit analysis does not support prospective adjudicative rules as an alternative to incrementalism for managing reliance costs. Prospective rulemaking could be justified only if the Court possessed the institutional resources to experiment with prospective future decisionmaking in the manner that generally optimizes outcomes. Employing a comparative institutional choice analysis evaluating the strengths and weaknesses of institutions as instruments for legal reform,[128] the Court's strength is resolving disputes between adverse litigants in concrete factual contexts;[129] however, the Court is not similarly positioned to pronounce legal propositions to govern future conduct untied to the resolution of a particular dispute.

The Court suffers from well-known informational deficits due to its insular role, rendering optimal prospective decisionmaking unlikely.[130] Judges are generalists with limited aptitude to pronounce a future prospective rule. The Court does not have the structural capacity to conduct independent investigations of the potential applications of—and consequences from—its new legal pronouncements. Instead, the Court's assessment typically is confined to that information provided by the parties and their amici, which, as advocacy, may distort the potential impact on other situations. Moreover, these disclosures languish from differential group access, as only sophisticated and galvanized special interest groups typically participate in adjudicative proceedings.[131]

As a result, the judiciary frequently must assess pending and subsequent litigation to ascertain the actual consequences of newly announced legal rules.[132] Judicial administration of the constitutional rule to the presented case ensures the workability of the rule in that context, and implementation to pending cases provides additional indicia of the rule's feasibility. In future cases involving unforeseen

128. *E.g.*, NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5-6 (1994) (explaining the process of comparative institutional analysis); Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1114-16 (2010) (describing institutional choice as evaluating "which institution is the most appropriate vehicle for legal reform"); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (arguing questions of constitutional interpretation cannot be resolved without attention to institutional competencies).

129. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 2.3, at 50 (4th ed. 2011) (explaining that concrete controversies between adverse parties are "best suited for judicial resolution" due to the judiciary's limited investigatory capacity).

130. *E.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 51-52 (1977).

131. *E.g.*, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 77-80 (1991).

132. *E.g.*, HOROWITZ, *supra* note 130, at 55-56.

circumstances, the rule may be modified or limited, if necessary. But prospective decisionmaking at best delays for years—and at worst evades—this integral adjudicative feedback loop. Judicial institutional encumbrances thus render the likelihood of achieving optimal prospective rules pure happenstance.

Another difficulty in the constitutional context is that ascertaining optimal efficiency depends in large measure on the relative "rightness" or "wrongness" of a legal change. Normative principles and policies govern this inquiry, so that reasonable persons oftentimes disagree. For instance, the Roberts Court, during its twelve terms, has now expressly overruled in whole or in part ten prior constitutional precedents in seven cases.[133] Yet support for these legal transitions—including such blockbusters as *Citizens United v. Federal Election Commission* and *Obergefell v. Hodges*—divides jurists, scholars, politicians, and the polity. Such legal constitutional transitions are essentially the current Court favoring its interpretation over that of a prior Court, whether based on intervening precedent, the hierarchy of constitutional modalities, or different moral and ethical understandings. The propriety of a particular constitutional rule is usually not verifiable either theoretically or factually; instead, the judgment of history is frequently determinative.[134]

In light of the Court's institutional constraints, caution is typically the prudent course. As Justice Robert Jackson observed: "Moderation

133. *E.g.*, Hurst v. Florida, 136 S. Ct. 616, 616 (2016) (overruling Hildwin v. Florida, 490 U.S. 638 (1989) (per curiam) and Spaziano v. Florida, 468 U.S. 447 (1984)); Obergefell v. Hodges, 135 S. Ct. 2584, 2585 (2015) (overruling Baker v. Nelson, 409 U.S. 810 (1972)); Johnson v. United States, 135 S. Ct. 2551 (2015) (overruling Sykes v. United States, 564 U.S. 1 (2011) and James v. United States, 550 U.S. 192 (2007)); McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1437 (2014) (overruling in part Buckley v. Valeo, 424 U.S. 1 (1976)); Alleyne v. United States, 570 U.S. 99 (2013) (overruling Harris v. United States, 536 U.S. 545 (2002)); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 312 (2010) (overruling Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) and overruling in part McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003)); Montejo v. Louisiana, 556 U.S. 778, 778 (2009) (overruling Michigan v. Jackson, 475 U.S. 625 (1986)). As far as express overrulings of constitutional precedent, this is a relatively low rate of legal transitions, translating into a mean average of 0.58 decisions per term overruling 0.83 prior constitutional precedents. The comparable mean averages of the Supreme Court over the last century are 1.68 decisions overruling 2.05 precedents for the Rehnquist Court; 2.06 decisions overruling 4.47 precedents for the Burger Court; 1.44 decisions overruling 2.0 precedents for the Warren Court; 0.86 decisions overruling 1.57 precedents for the Vinson Court; 1.60 decisions overruling 2.0 precedents for the Stone Court; 1.55 decisions overruling 2.17 precedents for the Hughes Court; 0.35 decisions overruling 0.47 precedents for the Taft Court; and 0.27 decisions overruling 0.27 precedents for the White Court. *See* Rhodes, *supra* note 120, at 33-34 (compiling a table comparing rates of overruling constitutional decisions during the last century using data from MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 209-245, app. tbl. 1 (2008)).

134. *Cf.* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1087-88 (2001) (noting jurists and decisions are frequently evaluated for being "on the right side as judged by subsequent history").

in change is all that makes judicial participation in the evolution of the law tolerable."[135] Graduated transitions provide an opportunity for feedback from affected constituencies that tends to improve judicial decisionmaking. An incremental approach to constitutional adjudicative transitions thus both comports with the judiciary's institutional role and establishes a mechanism for mitigating reliance costs.

B. Remedial Discretion

The judiciary also may, in the appropriate circumstances, fashion remedial relief in a manner to minimize the impact of legal transitions on settled societal expectations. As Professor Jeffries noted, remedial limits "facilitate[] constitutional change by reducing the costs of innovation."[136] While Professor Jeffries was addressing monetary damages for constitutional torts, his insight applies to other constitutional remedies as well: in certain situations, remedial relief may be manipulated to mitigate society's reliance costs from legal change.

The potential counter-argument is that judicial remedial modifications are inappropriate because remedial relief is designed to make the injured party whole. The well-known Blackstonian adage proclaims that "where there is a legal right, there is also a legal remedy."[137] Alternatively, in the famous dictum of Chief Justice Marshall in *Marbury v. Madison*, "every right, when withheld, must have a remedy, and every injury its proper redress."[138] The law, in other words, must furnish a remedy for the violation of vested legal rights.[139] A remedy, then, according to this view, cannot be withheld and should not be restricted to serve other goals.

But even Chief Justice Marshall in *Marbury* acknowledged that, in "peculiar" cases, the injured party may not obtain legal redress.[140] In reality, a unity between rights and remedies is largely a fictional aspiration rather than a doctrinal description.[141] The core of remedies jurisprudence, according to Professor Gewirtz, mediates the gap between the real and the ideal interconnection of rights and remedies, attempting to alleviate the "deficiency [] of what is lost between de-

135. Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944).

136. John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90-91 (1999).

137. 3 WILLIAM BLACKSTONE, COMMENTARIES *23.

138. 5 U.S. (1 Cranch) 137, 147 (1803).

139. *Id.* at 163 (declaring the U.S. government "will certainly cease to deserve [a] high appellation, if the laws furnish no remedy for the violation of a vested legal right").

140. *Id.* at 163-64.

141. *E.g.*, DAVID SCHOENBROD ET AL., REMEDIES: PUBLIC AND PRIVATE 49-50 (1990); Paul Gewirtz, *Remedies and Resistances*, 92 YALE L.J. 585, 587 (1983).

claring a right and implementing a remedy."[142] The declaration of a right and the implementation of a remedy are simply not equivalent.

This is no less true when constitutional rights are at stake. The Supreme Court's pronouncement of a rights violation does not necessarily establish the appropriate remedy. The Supreme Court employs its discretion and judgment in forging remedial decrees, and even lower state and federal courts may, in some cases, exercise their own discretion to frame an appropriate remedy *after* the Supreme Court's holding.[143] For instance, some choices between appropriate remedial alternatives to cure an unconstitutional state law—such as whether a benefit unconstitutionally excluding a class should be extended to the class or withheld from everyone—depend upon controlling issues of state law that the Supreme Court generally remands to the state courts.[144] Although the Supreme Court retains the authority to ensure that the chosen state remedy fulfills the constitutional mandate of eliminating ongoing impermissible discrimination, the states in such cases entertain the latitude to select among the permissible remedial alternatives.[145] And even the lower federal courts often have discretion in choosing among available remedies after the Supreme Court pronounces a constitutional violation.[146] This discretion afforded to lower federal and state courts in selecting and implementing remedies highlights that constitutional rights and remedies are not inexorably linked.

Rather, as Professor Greabe demonstrated, the judicial withholding or adjustment of constitutional remedies is a "common practice."[147] The public interest, which includes, in appropriate cases, re-

142. Gewirtz, *supra* note 141, at 587.

143. *E.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1698-1701, 1698 n.23 (2017) (ordering, after considering the remedial alternatives, prospective invalidation of exception to physical-presence requirement for citizenship to children of unwed U.S. citizen mothers and alien fathers born abroad).

144. *E.g.*, Levin v. Commerce Energy, Inc., 560 U.S. 413, 427 (2010) (citing cases remanding remedial selection to state courts); Stanton v. Stanton, 421 U.S. 7, 18 (1975) (remanding to state court the state-law remedial question of whether to raise the age of majority for females to 21 or lower the age of majority for males to 18).

145. *See, e.g.*, Harper v. Va. Dep't of Taxation, 509 U.S. 86, 100-01 (1993) (holding states are free to craft an appropriate remedy for discriminatory taxes as long as due process requisites are satisfied); James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535 (1991) (opinion of Souter, J.) ("Subject to possible constitutional thresholds, the remedial inquiry is one governed by state law, at least where the case originates in state court." (citations omitted)).

146. *See, e.g.*, Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 381 (1997) (deferring to district court's remedial assessments); Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (plurality opinion) ("In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.").

147. John M. Greabe, *Remedial Discretion in Constitutional Adjudication*, 62 BUFF. L. REV. 881, 884 n.16 (2014).

liance interests on prior law, shapes the judicial crafting of constitutional remedies, both legal and equitable.[148]

The public interest is a well-recognized component of the judicial calculation whether to decree the specific remedies typically administered in equity, even to redress a constitutional violation.[149] Equitable remedies for constitutional transgressions must examine "the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots."[150] Although the Constitution typically necessitates at least some remedial measure to alleviate an *ongoing* constitutional infirmity,[151] the form, scope, nature, duration, and very entitlement to equitable (rather than some other type of) relief depends on a judicial case-by-case analysis of the individual and collective interests at stake.[152]

Similar considerations extend to the substitutionary remedies typically available at law for constitutional violations, such as awarding monetary damages for constitutional deprivations, granting habeas corpus to the unconstitutionally restrained, excluding constitutionally tainted evidence from trial, or reversing criminal convictions for constitutional errors.[153] Damage awards to compensate for constitutional rights violations frequently are denied as a result of absolute or qualified immunity. These immunity doctrines are based on the public policy that societal interests are better served by eliminating (via absolute immunity) or reducing (via qualified immunity) litigation threats that disincentivize public officials from performing their duties—even though, as a result, constitutional right deprivations often will not be redressed.[154] Likewise, habeas corpus remedial relief

148. *See* John M. Greabe, *Constitutional Remedies and Public Interest Balancing*, 21 WM. & MARY BILL RTS. J. 857, 863-92 (2013) [hereinafter Greabe, *Constitutional Remedies*] (detailing the role of public interest balancing in constitutional remedies).

149. *E.g.*, Salazar v. Buono, 559 U.S. 700, 714 (2010) ("Equitable relief is not granted as a matter of course, and a court should be particularly cautious when contemplating relief that implicates public interests . . . ." (citations omitted)).

150. *Lemon*, 411 U.S. at 201.

151. *Cf.* Brown v. Plata, 563 U.S. 493, 511 (2011) (recognizing judicial obligation to remedy ongoing unconstitutional prison conditions).

152. *See* North Carolina v. Covington, 137 S. Ct. 1624, 1625 (2017) (vacating district court's remedial order for failing to consider such factors).

153. *See* Greabe, *Constitutional Remedies*, *supra* note 148, at 880-85 (discussing examples of interest balancing in substitutionary remedies).

154. *See* Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 236-37 (2006) (discussing judicial development of the public policy concerns underlying immunity doctrines). Absolute immunity bars any action under any circumstances against legislators, judges, prosecutors, grand jurors, and witnesses acting in their official capacity, whereas qualified immunity provides protection for all other public officials unless their conduct violates then clearly established constitutional law. Greabe, *Constitutional Remedies*, *supra* note 148, at 881-82.

is typically only available for violations of clearly established federal law, a balance designed to encourage compliance with established constitutional standards, while respecting government interests in comity and finality.[155] The exceptions created to the exclusionary rule—a rule that presumptively requires suppression as a remedy for unconstitutionally obtained evidence—similarly balance societal interests in deterring constitutional violations and promoting the administration of justice.[156] And criminal defendants are not entitled to their preferred remedy (i.e., reversal of a criminal conviction) for constitutional errors if the government can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"—another remedial exclusion predicated on policy grounds.[157] These legal and equitable doctrines, as numerous commentators acknowledge, afford the judiciary broad discretion to fashion constitutional remedies to account for societal interests.[158]

Moreover, the relevant societal interests in certain constitutional remedial doctrines incorporate settled expectations regarding the legal consequences of the conduct under the then-existing legal framework. For instance, both official qualified immunity and habeas corpus operate specifically to limit the application of new law in ascertaining appropriate remedial relief.[159] Qualified immunity protects public officials from the specter of damages liability for decisions made in a legally uncertain environment; as the Supreme Court held in *Harlow v. Fitzgerald*, officials are immune from damages liability unless their conduct violated then-existing "clearly established"

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155. Teague v. Lane, 489 U.S. 288, 306-11 (1989); *see also supra* notes 71-76 and accompanying text.

156. Greabe, *Constitutional Remedies*, *supra* note 148, at 884-85 (discussing judicially created exceptions to the exclusionary rule, all of which entail "conclusions that the costs of exclusion would outweigh its likely deterrent effect").

157. Chapman v. California, 386 U.S. 18, 24 (1967). This statement of the rule applies only in cases where the error was adequately preserved on direct review. In collateral proceedings, an error requires reversal only if petitioner establishes "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). A "plain error" standard governs on direct appeal if the error has not been properly preserved. United States v. Olano, 507 U.S. 725, 731-35 (1993).

158. *See, e.g.*, Greabe, *Constitutional Remedies*, *supra* note 148, at 862, 887 n.30 (acknowledging "the legitimacy of broad judicial discretion in fashioning constitutional remedies" and collecting commentary from numerous scholars recognizing this discretion, including Richard Fallon, John Jeffries, Daniel Meltzer, Henry Monaghan, Gene Nichol, Martin Redish, George Rutherglen, and Walter Dellinger).

159. Fallon & Meltzer, *supra* note 19, at 1734-35. While Professors Fallon and Meltzer extended their descriptive, predictive, and normative analysis to remedial aspects of tax litigation and criminal procedure, here their descriptive and predictive analysis is harder to reconcile with subsequent Supreme Court decisions. *See id.* at 1734-37; *see also infra* notes 170-77 and accompanying text.

law.[160] This precludes any new rule after a legal transition from imposing damages liability for pretransition official conduct.[161] Similarly, *Teague*'s holding—that absent narrow exceptions, a new constitutional criminal procedural rule does not govern those cases becoming final before the announcement of the rule—serves to limit the temporal scope of legal change, based in part on society's settled expectations in past proceedings of the criminal justice system.[162] Thus, several traditional remedial doctrines already account for settled expectations in fashioning redress for constitutional violations.

Even the Court's holdings employing nonretroactivity principles in civil cases during the *Chevron Oil* era may be characterized (or, in some instances, recharacterized) as employing remedial principles considering the public interest to fashion appropriate relief mitigating societal transition costs. Some of these cases involved traditional judgment stays. For example, in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court applied its holding (which invalidated broad statutory jurisdictional grants to non-Article III bankruptcy judges) prospectively under *Chevron Oil* and also stayed its judgment for a transition period to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."[163] This stay accorded with traditional remedial discretion to account for public interests in designing appropriate relief; such judgment stays are typically afforded by federal and state courts when the public interest is served by providing an opportunity for the legislature to address the appropriate remedy in the first instance.[164] *Buckley v. Valeo* provides another example of a lim-

160. 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

161. *Cf.* Davis v. United States, 564 U.S. 229, 236-40 (2011) (denying relief under exclusionary rule for similar reasons "when the police conduct a search in objectively reasonable reliance on binding judicial precedent" that subsequently is overruled or modified).

162. Teague v. Lane, 489 U.S. 288, 306-11 (1989) (plurality opinion).

163. 458 U.S. 50, 88 (1982) (plurality opinion); *id.* at 92 (Rehnquist, J., concurring) (agreeing with the plurality "respecting retroactivity and the staying of the judgment of this Court").

164. *E.g.*, *id.* at 88 (affording Congress an opportunity to ascertain the appropriate method to cure unconstitutional jurisdictional grants to bankruptcy courts); Buckley v. Valeo, 424 U.S. 1, 142-43 (1976) (allowing Congress to reconstitute the Federal Election Commission); Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656, 676 (1964) (providing an opportunity for state legislature to adopt constitutionally valid legislative apportionment scheme); Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (staying mandate invalidating near-total ban on carrying ready-to-use guns outside the home to allow state legislature "to craft a new gun law that will impose reasonable limitations,

ited stay of judgment.[165] In *Buckley*, the Court relied on its "practice in the apportionment and voting rights cases" to support its decision to afford Congress the opportunity to reconstitute the Federal Election Commission.[166] These cases and their predecessors illuminate that the independent remedy of a judgment stay is a potential vehicle for obtaining legislative assistance in minimizing legal transition costs without employing adjudicative prospectivity.

Other cases in the *Chevron Oil* nonretroactivity line likewise correspond with certain traditional equitable remedial principles. In *Lemon v. Kurtzman*, the plurality, while citing *Chevron Oil* and other nonretroactivity decisions, highlighted traditional equitable discretion in affirming the district court's temporally restrictive grant of injunctive relief to redress an Establishment Clause violation.[167] Even *Chevron Oil* itself could be reconfigured as a remedial decision, as the controlling issue concerned limitations,[168] where federal courts have historically asserted equitable discretion to craft rules of tolling, laches, and waiver.[169] In many instances, then, the reliance costs that

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consistent with the public safety and the Second Amendment"). Similar judgment stays were also frequently encountered in early state constitutional marital equality cases to provide state legislatures the opportunity to redress the unconstitutional exclusion of same-sex couples from the benefits of marriage. *E.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970 (Mass. 2003) (staying entry of judgment for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of this opinion"); Lewis v. Harris, 908 A.2d 196, 224 (N.J. 2006) ("To bring the State into compliance . . . so that plaintiffs can exercise their full constitutional rights, the Legislature must either amend the marriage statutes or enact an appropriate statutory structure within 180 days of the date of this decision."); Baker v. State, 744 A.2d 864, 889 (Vt. 1999) ("The effect of the Court's decision is suspended, and jurisdiction is retained in this Court, to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described herein."). Nonetheless, *Northern Pipeline* did exceed such typical remedial stay principles in one respect, as the Supreme Court contemporaneously decreed adjudicative prospectivity to withdraw predecision judgments from subsequent scrutiny. *N. Pipeline*, 458 U.S. at 88.

165. 424 U.S. 1 (1976).

166. *Id.* at 142-43. The Court held that the commissioners were "officers" of the United States, necessitating their appointment under the Appointments Clause, which had not been followed. *Buckley* nonetheless upheld the past acts of the Commission, but not on the basis of *Chevron Oil*, which was not cited. Instead, *Buckley* reasoned the past actions should be upheld under *"de facto* validity, just as we have recognized should be the case with respect to legislative acts performed by legislators held to have been elected in accordance with an unconstitutional apportionment plan." *Id.* at 142.

167. Lemon v. Kurtzman, 411 U.S. 192, 197-201 (1973) (plurality opinion). The plurality reasoned that equitable remedies for constitutional transgressions must examine "the practical realities and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots." *Id.* at 201.

168. 404 U.S. 97 (1971).

169. *E.g.*, Braun v. Sauerwein, 77 U.S. (10 Wall.) 218, 223 (1870) ("It seems, therefore, to be established, that the running of a statute of limitation may be suspended by causes not mentioned in the statute itself."). Indeed, the Supreme Court in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 608 (1987), largely equated the *Chevron Oil* nonretroactivity principle with limitations concerns: *Chevron Oil* "counsels against retroactive application

motivated *Chevron Oil* are manageable under independent remedial doctrines.

This claim is necessarily limited, however; adjudicative nonretroactivity issues are not always transformable into remedial ones. As the Supreme Court explained in *Reynoldsville Casket Co. v. Hyde*: "Not all cases concerning retroactivity and remedies are of the same sort."[170] Hyde, the plaintiff in that case, originally filed suit under an Ohio limitations tolling provision that was held unconstitutional by the Supreme Court while her case was pending.[171] Although the state high court nonetheless allowed Hyde's case to proceed, the Supreme Court disagreed, following its prior determination that a legal principle applied to the parties in the law-changing decision must be afforded full retroactive effect.[172] Hyde attempted to circumvent this rule by arguing that the state high court employed remedial principles, based on her reliance on preexisting law, to allow her case to continue.[173] But the Supreme Court reasoned that her case did not fall within any doctrine operating to limit the adjudicative retroactivity of a new legal rule.[174] Instead, her argument collapsed into "simple reliance (of the sort at issue in *Chevron Oil*)," and such reliance alone did not support an exception to adjudicative retroactivity.[175]

Justice Scalia penned a concurrence urging that Hyde's case presented no remedial issue at all because a court does not provide a remedy for an unconstitutional law, but "is simply to *ignore* it."[176] In other words, once the Supreme Court declared the Ohio limitations

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of statute of limitations decisions in certain circumstances," despite the "usual rule" that cases "be decided in accordance with the law existing at the time of [the] decision." *Id.* Nevertheless, the Court has not always found that new limitations pronouncements apply only prospectively. *E.g.*, Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 352 (1991).

170. 514 U.S. 749, 755 (1995).

171. *Id.* at 751. The Supreme Court held in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 888 (1988), that this Ohio tolling statute, which effectively granted Ohio tort plaintiffs unlimited time to sue out-of-state defendants, violated the dormant Commerce Clause.

172. *Hyde*, 514 U.S. at 752 (citing Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993)).

173. *Id.* at 752-53.

174. *Id.* at 752-59. The Court examined its prior precedent on alternative tax remedies, qualified immunity, and habeas corpus, holding each distinguishable from Hyde's claim predicated solely on reliance. The tax cases, the Court reasoned, either involved an alternative way of curing the constitutional violation or a previously existing independent legal basis for denying relief, neither of which was implicated by a claim of reliance. *See id.* The Court then noted its qualified immunity and habeas corpus decisions depended upon preexisting well-established legal doctrines that limited the temporal scope of new adjudicative principles. *See id.*

175. *Id.* at 759.

176. *Id.* at 760 (Scalia, J., concurring).

tolling provision unconstitutional, it was no longer a valid law, so it could not support the continuation of Hyde's suit.[177] And in the context of this dispute, where the Supreme Court had previously invalidated the Ohio limitations period on its face, Justice Scalia's logic appears unassailable.

Nonetheless, not all successful constitutional attacks on statutes entail facial invalidation. Litigants rather are predominantly concerned with the constitutionality of a statute *as applied to them*. As Professor Fallon remarked, in this limited sense, constitutional claims against legislation at least begin as as-applied challenges.[178] The Supreme Court then must typically decide if the nature of the challenge requires that the statute be declared unconstitutional in all applications, or whether the statute is unconstitutional only in particular defined circumstances that encompass the challenger's claim.[179] The extent to which a statute may be invalidated is thus a matter of degree, depending on the judicial rationales employed in resolving the constitutional claim. The maxim that an unconstitutional statute is void, invalid, and to be ignored is thus overbroad; rather, the statute is only void in a subsequent case when the conduct at issue falls within the binding precedential scope of the earlier judicial invalidation.

The contours of the invalidation in the first instance are largely in the hands of the Supreme Court, which can consider competing public interests—including societal expectations—in fashioning the scope of its remedial decree. The Supreme Court's choice, of course, is then binding precedent on all lower courts, which do not have the discretion under *Hyde* to circumvent that choice, even under so-called remedial grounds.[180] Yet the Supreme Court itself has the discretion to fashion the appropriate scope of the statute's invalidation and may consider settled expectations in doing so, as it did in last term's decision in *Sessions v. Morales-Santana*.[181]

Morales-Santana invalidated, under the Equal Protection Clause, a shorter physical-presence requirement for unwed U.S. citizen mothers to pass their citizenship to children born outside the United States than applied to other situations involving citizen and alien parents of children born abroad.[182] But the Court fashioned this in-

177. *Id.*

178. Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CALIF. L. REV. 915, 923 (2011).

179. *Id.*

180. *See Hyde*, 514 U.S. at 752-59.

181. 137 S. Ct. 1678 (2017).

182. *Id.* at 1701.

validation to operate entirely prospectively, only applying to children thereafter born to unwed U.S. citizen mothers.[183] The Court thereby accepted the government's suggestion that a prospective remedy was appropriate;[184] the government had argued that "the important reliance interests . . . for existing U.S. citizens who obtained their citizenship by virtue" of the shorter physical-presence requirement for unwed mothers justified a prospective remedy.[185] In this manner, the Court cured the ongoing constitutional violation by invalidating the continued operation of the statute, but without withdrawing citizenship from those previously qualifying under the now-invalidated provision.

Moreover, the Supreme Court has options other than invalidation when holding a statute unconstitutional. The Court has employed at various times several means to redress an unconstitutional statute, from invalidating it entirely,[186] to striking particular language,[187] to adding language by interpretation,[188] or to modifying language by interpretation.[189] Despite the traditional claim that the judiciary is limited to invalidating an unconstitutional statute, the reality is, as Eric Fish demonstrated, the Court frequently effectively amends statutes by transitioning their meaning to ensure constitutional validity.[190] Again, in making the determination of the manner to cure the statutory infirmity, the Court should consider to some extent, as it does in most remedial contexts, the public interest, which can include reliance costs during a legal transition. Remedial doctrines thus are frequently—but not always—available in varying contexts to provide the Supreme Court some flexibility in managing settled expectations disrupted by legal changes.

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183. *See id.*

184. *Id.* (citing the government's suggestions contained in Brief for Petitioner at 12, 51; Reply Brief at 19, n.3).

185. Reply Brief for Petitioner at 19 n.3, *Sessions*, 137 S. Ct. 1678 (No. 15-1191).

186. *E.g.*, McCullen v. Coakley, 134 S. Ct. 2518, 2522 (2014) (invalidating Massachusetts law preventing speakers within 35 feet of an entrance, exit, or driveway of a reproductive health care facility).

187. *E.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012) (invalidating aspect of Patient Protection and Affordable Health Care Act that authorized withholding of all state Medicaid funding for failing to participate in the Act's expansion of the Medicaid program).

188. *E.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2588 (2015) (invalidating state laws to the extent that same-sex couples were excluded from civil marriage, essentially adding same-sex couples to some state marriage laws by interpretation).

189. *E.g.*, United States v. Booker, 543 U.S. 220, 222 (2005) (modifying Sentencing Reform Act by excising certain provisions to make the Sentencing Guidelines "effectively advisory").

190. Eric S. Fish, *Constitutional Avoidance as Interpretation and as Remedy*, 114 MICH. L. REV. 1275, 1299-1301 (2016).

C. Procedural Vehicles: Preclusion, Forfeiture, and Limitations

Procedural doctrines, such as preclusion, forfeiture, and limitations, also often mitigate the costs of legal change. But there is a key difference here: these doctrines are not designed to incorporate specific reliance considerations on old legal rules. Rather, such doctrines serve other purposes in our legal system, even though the resulting outcomes from these doctrines tend to establish background principles impacting adjudicative retroactivity. So, while procedural doctrines are often an important component in ascertaining the impact of adjudicative retroactivity, they are less manipulable than institutional or remedial strategies in achieving desired outcomes during legal transitions.

Preclusion principles bar the parties from relitigating the same claims or issues after a final judgment in order to serve vital interests in public judicial administration and private peace.[191] "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."[192] These policies apply to any subsequent claims that were or could have been raised in a prior proceeding resolved by a final judgment—even if the prior final judgment was wrong either when rendered or in light of subsequent legal developments.[193]

Preclusion thereby sometimes serves to mitigate legal transition costs by prohibiting new legal rules from being applied retroactively to controversies resolved by past final judgments. In *Chicot County Drainage District v. Baxter State Bank*, for instance, bondholders contended that a prior district court judgment was void because, after the judgment became final, the Supreme Court invalidated the underlying jurisdictional statute that was the basis for the judgment.[194] According to the bondholders, the jurisdictional statute, once declared unconstitutional, was always unconstitutional, and thus provided no jurisdictional warrant for the prior judgment.[195] But the Supreme Court cautioned that "an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."[196] Rather, the retroactive effects of an unconstitutional statute necessitate contemplation of vested rights, preclusion principles, and public policy.[197]

191. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 401 (1981).

192. Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931).

193. *Moitie*, 452 U.S. at 398.

194. 308 U.S. 371, 373-74 (1940).

195. *Id.*

196. *Id.* at 374.

197. *Id.*

Here, the fact that the prior decree became final meant that preclusion principles barred the bondholders from proceeding with their suit, although newly announced legal principles established their substantive entitlement to relief.[198] This was because even an erroneous judgment on constitutional claims, until reversed on appeal, remains "an effective and conclusive adjudication."[199] No principle supported differential treatment for a judgment comporting at its rendition with the best legal understanding of precedent, but which was later rendered erroneous in light of intervening legal developments. As a result, adjudicative retroactivity for new legal rules yields to prior final judgments.

Forfeiture principles may also limit the application of new legal propositions. A constitutional right may be forfeited, in either criminal or civil cases, by failing to assert the right in a timely manner during the proceeding.[200] Such forfeitures can occur on either direct or collateral review when the party failed to follow the applicable procedural rules necessary to litigate a constitutional claim.[201] The core purpose of forfeiture is to further judicial efficiency and adversarial fairness by ensuring that issues are timely raised and resolved rather than necessitating additional proceedings to decide such issues.[202]

These traditional forfeiture principles may operate to prevent litigants with pending cases from obtaining the benefits of new legal rules. Often litigants fail to properly and timely raise such issues precisely because the rules are new and unanticipated. While courts have some discretion in departing from forfeiture rules to serve the ends of justice, courts often, as Professor Heytens documented, employ forfeiture rules aggressively in criminal cases to limit the application of new legal principles.[203] Indeed, the Supreme Court, in some cases, has blessed the practice. As one example, in *United States v. Booker*, after holding that the Federal Sentencing Guidelines had to be interpreted in a discretionary rather than a mandatory fashion, the Court highlighted that not "every appeal will lead to a new sentencing hearing" because it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, *whether the issue was raised below* and whether it fails the 'plain-error' test."[204]

198. *Id.* at 378.

199. Rooker v. Fid. Tr. Co., 263 U.S. 413, 415 (1923).

200. Yakus v. United States, 321 U.S. 414, 444 (1944).

201. Teague v. Lane, 489 U.S. 288, 308 (1989) (plurality opinion).

202. *See* Heytens, *Transitional Moments*, *supra* note 17, at 958.

203. *Id.* at 941-71.

204. 543 U.S. 220, 268 (2005) (emphasis added)*; accord* Hankerson v. North Carolina, 432 U.S. 233, 244 n.8 (1977) (suggesting past convictions could be insulated from habeas

The rules regarding forfeiture in civil cases are likewise unforgiving.[205] The failure to timely raise a constitutional issue—even if then-existing precedent forecloses that issue—forfeits the application of a new legal rule unless the court excuses the omission.[206] Forfeiture is thus a particularly potent—and harsh—method of limiting the retroactive effects of legal change.

Another doctrine bounding the temporal scope of legal change is limitations. Limitations periods require that legal proceedings must be initiated within a set period of time after a cause of action accrues or the relevant conduct occurs.[207] The basic rationale is to promote repose and ensure fairness as the passage of time may prejudice the defense of the asserted claims.[208] Although once again not specifically designed to limit the reliance costs of legal innovation, limitations period often have this effect, as a new legal principle may be announced too late after the relevant conduct occurred to be employed as a basis of the suit.

All these procedural doctrines—preclusion, forfeiture, and limitations—thus impact the temporal scope of new legal rules, even though that is not their primary purpose. Of the three, forfeiture is the most readily subject to strategic manipulation by the judiciary to manage transitional moments. The courts control a transition period's temporal length; a longer transition period frequently entails foreshadowing of the new legal rule, providing litigants a better opportunity to preserve the issue.[209] Moreover, the courts also appraise whether to forgive forfeitures related to unanticipated and sudden legal changes.[210] While forfeiture principles have been shown by Professor Heytens to be a rather crude and inequitable instrument for ascertaining which litigants obtain the benefits of new legal rules,[211]

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review "by enforcing the normal and valid rule that failure to object . . . is a waiver of any claim or error").

205. *See* Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Cost of Legal Change*, 96 CORNELL L. REV. 203, 213-14 (2011) (discussing harshness of appellate procedure forfeiture rules).

206. *See id.* at 214.

207. *See* Daniel J. La Fave, *Remedying the Confusion Between Statutes of Limitations and Statutes of Repose in Wisconsin—A Conceptual Guide*, 88 MARQ. L. REV. 927, 928 (2005).

208. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460-82 (1997) (identifying the two most commonly asserted justifications for limitations as promoting repose and minimizing deterioration of evidence).

209. *See supra* Section III.A.

210. *See* Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *The Business of Personal Jurisdiction*, 67 CASE W. RES. L. REV. 775, 782 n.39 (2017).

211. *See* Heytens, *Transitional Moments*, *supra* note 17, at 941-71. As Professor Heytens detailed, forfeiture rules in legal transitions distinguish between those litigants with attorneys who made objections that lower courts were bound to reject and those

they nonetheless operate—along with preclusion and limitations principles—as a background framework to the institutional and remedial doctrines that are more precisely tailored to limiting a legal change's impact on settled expectations.

IV. ADJUDICATIVE RETROACTIVITY AND MARITAL EQUALITY

The interrelationship of the just-described institutional, remedial, and procedural doctrines in managing legal transitions becomes evident by examining marriage equality through the lens of adjudicative retroactivity. The Court's institutional strategies in achieving marriage equality provide the starting point before turning to the Court's remedial decrees in light of procedural principles to evaluate specific retroactivity issues confronting same-sex marriages.

Nationwide marriage equality appeared a remote future contingency when the Supreme Court held, in its 1972 summary disposition in *Baker v. Nelson*, that barring same-sex couples from marrying did not even present a substantial federal question.[212] Nor did the prospects appear to have advanced by 1986 when the Supreme Court upheld a state law criminalizing same-sex sexual conduct in *Bowers v. Hardwick*.[213] The indication of a potential legal transition to marriage equality did not occur until 2003, when *Lawrence v. Texas* overruled *Bowers* and struck down a state criminal law proscribing private same-sex sexual conduct between consenting adults.[214]

Lawrence reasoned that the challenged criminal statute sought "to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[215] The Court held that the state's intrusion into such private, consensual relationships between adults furthered "no legitimate state interest" and therefore violated due process.[216] In a touch of irony, despite the majority's fervent claims

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litigants whose attorneys did not make such futile objections, rewarding the former while punishing the latter. *See id.* at 943.

212. 409 U.S. 810 (1972), *dismissing appeal from* 191 N.W.2d 185, 185 (Minn. 1971).

213. 478 U.S. 186, 196 (1986). The Georgia law challenged in *Bowers* prohibited "sodomy" whether between same-sex or opposite-sex couples, but the Supreme Court limited its consideration to "Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy," without expressing any opinion on the validity of the statute in other contexts. *Id.* at 188 n.2.

214. 539 U.S. 558, 578 (2003). Although it could be argued that *Romer v. Evans*, 517 U.S. 620, 634 (1996), was an earlier step to marital equality, the Court's holding there was less transitional, predominantly highlighting a preexisting anti-animus interpretation of the Equal Protection Clause to invalidate the challenged Colorado state constitutional amendment depriving rights protections to gays and lesbians.

215. *Lawrence*, 539 U.S. at 567.

216. *Id.* at 578.

that its holding did not impact formal recognition of same-sex relationships, Justice Scalia's dissent foreshadowed the eventuality of marriage equality: "This case 'does not involve' the issue of homosexual marriage only if one entertains the belief that principle and logic have nothing to do with the decisions of this Court."[217]

Fulfilling this dissenting prophecy occupied the next dozen years. While marital equality developments for the next decade shifted to the state constitutional and legislative sphere, *Lawrence*'s influence was nonetheless apparent. A few months after *Lawrence*, the Massachusetts Supreme Judicial Court became the first state high court to order marital equality, holding that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[218] Although the court based its decision entirely on state constitutional grounds, the court repeatedly cited *Lawrence* as support for safeguarding the liberty and autonomy rights of consenting adults to expressions of intimacy regardless of sexual orientation.[219] And *Lawrence* continued to be relied upon in subsequent state constitutional decisions invalidating bans on same-sex marriage.[220] Without revisiting all the judicial, legislative, and political battles for marriage equality in the states (which have been well documented elsewhere[221]), the consequential notion for purposes here is that *Lawrence* represented a legal change regarding same-sex private relationships that, in the minds of some, cast doubt on whether banning same-sex couples from marriage comported with the U.S. Constitution.

This potential doubt burgeoned into nationwide legal instability exactly a decade after *Lawrence*, in *United States v. Windsor*.[222] The Supreme Court in *Windsor* invalidated the male-female federal marital definition in section 3 of the Defense of Marriage Act to the extent it denied federal recognition of lawful state same-sex marriages.[223]

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217. *Id.* at 605 (Scalia, J., dissenting). Of course, Justice Scalia was not favoring such a development, but merely predicting that the Court subsequently would employ an analogous rationale to decree "homosexual marriage." *See id.* at 604-05.

218. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

219. *E.g.*, *id. passim*.

220. *E.g.*, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Griego v. Oliver, 316 P.3d 865 (N.M. 2013).

221. *E.g.*, CHARLES W. "ROCKY" RHODES, THE TEXAS CONSTITUTION IN STATE AND NATION: COMPARATIVE STATE CONSTITUTIONAL LAW IN THE FEDERAL SYSTEM 286-311 (2014).

222. 570 U.S. 744 (2013). *Windsor* was issued on June 26, 2013—exactly one decade after *Lawrence*. *See* Josh Blackman & Howard M. Wasserman, *The Process of Marriage Equality*, 43 HASTINGS CONST. L.Q. 243, 243 n.3 (2016).

223. *Windsor*, 570 U.S. at 775.

The Court held that section 3 violated the Fifth Amendment as "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[224] Yet *Windsor*'s application was expressly limited to federal recognition of same-sex marriages in those states and the District of Columbia that, either through legislative or judicial action, voluntarily embraced marriage equality.[225] *Windsor* neither compelled states to adopt same-sex marriage nor required states to recognize lawful same-sex marriages from other states. Although the Court had granted certiorari to address the constitutionality of a state same-sex marriage ban in a companion case, the Court avoided the constitutional issue, instead holding that the appealing parties did not have standing.[226]

Windsor, in conjunction with the Court's nonmerits holding in the companion case, unleashed, as Professors Blackman and Wasserman described, "a massive campaign of parallel constitutional litigation challenging virtually identical same-sex marriage bans in thirty-seven states and two territories."[227] Relying on *Windsor*, same-sex couples across the United States in states banning marriage equality filed suits challenging the bans on federal constitutional grounds. Professors Blackman and Wasserman authored a comprehensive account of these suits and the procedural and judicial maneuvering that both advanced and hindered the progress of marital equality before the issue returned to the Supreme Court exactly two years later.[228] Their account confirmed that *Windsor* signified, at least to most jurists and even some state officials, an impending legal transition, as many of these suits successfully achieved marital equality via lower court decrees before the Supreme Court next addressed the issue.[229]

Obergefell v. Hodges then completed the transition, overruling the summary disposition in *Baker v. Nelson* and declaring marital equal-

224. *Id.*

225. *Id.* ("This opinion and its holding are confined to those lawful marriages."). The Court noted earlier in its opinion that twelve states and the District of Columbia recognized same-sex marriage at that time either through legislative or judicial actions. *Id.* at 764-66.

226. Hollingsworth v. Perry, 570 U.S. 693, 715 (2013). The Court held that the official proponents of a state constitutional amendment ballot initiative to ban same-sex marriage had no standing to appeal a federal district court's order declaring the state constitutional amendment unconstitutional. *See id.* Since state officials had not appealed, the Court's holding left the district court's judgment invalidating the amendment intact as a final judgment. *Id.* This judgment, in combination with actions by California state officials, returned same-sex marriage to California shortly after the decision. Blackman & Wasserman, *supra* note 222, at 262-64.

227. Blackman & Wasserman, *supra* note 222, at 247.

228. *Id.* at 247-334.

229. *See id.*

ity a nationwide constitutional mandate.[230] Yet despite *Obergefell*'s landmark status, the institutional development of the transition had extended over a dozen years. *Lawrence*, at least in hindsight, represented a significant initial marker, with its stated rationales encompassing principles also supporting marriage equality, as the *Lawrence* dissent and some state high courts recognized. After ten years of state legislative and judicial percolation, the Supreme Court entered the fray again with *Windsor*, which foreshadowed the likelihood of nationwide marriage equality. The final process took another two years, an interim transition to the new legal framework that disquieted the existing legal order.

Because *Obergefell* invalidated the existing same-sex marriage bans challenged by the parties,[231] the precedential value of its holding "must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule."[232] But neither adjudicative retroactivity nor constitutional invalidity entirely defines the impact of the Court's holding. As the Court previously acknowledged: "The past cannot always be erased by a new judicial declaration."[233] Rather, "rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination."[234] As a result, contemplation of remedial and procedural perspectives necessarily precedes ascertaining the holding's retroactive impact with respect to both ceremonial and common-law marriages.

A. Ceremonial Marriages

The Supreme Court considered two issues in *Obergefell*: (1) whether "the Fourteenth Amendment requires a State to license a marriage between two people of the same sex"; and (2) whether "the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that

230. 135 S. Ct. 2584, 2604-05 (2015). *Obergefell* was issued on June 26, 2015—two years to the day after *Windsor*, and twelve years to the day after *Lawrence*. Blackman & Wasserman, *supra* note 222, at 243 n.3.

231. *Obergefell*, 135 S. Ct. at 2604-08. Unless the Supreme Court reserves the question of the holding's application to the parties—which was not done in *Obergefell*—its decisions "must be 'read to hold . . . that its rule should apply retroactively to the litigants then before the Court.' " Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97-98 (1993) (quoting James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 539 (1991) (opinion of Souter, J.)).

232. *Harper*, 509 U.S. at 97.

233. Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

234. *Id.*

right."[235] Both presented issues thus addressed ceremonial marriages: marriages following established legal procedures, such as a government license and a marriage ceremony performed by an authorized official.[236] In response to these two issues, the Court delivered two separate holdings, one with respect to the *right* of same-sex couples to marry and the other concerning the *recognition* of lawful same-sex marriages from other states.[237]

The precise remedies declared in *Obergefell* for each separate holding inform its temporal impact. The Supreme Court's remedial holding in a case establishes a baseline that subsequent federal and state courts must honor in resolving future controversies. Although state courts, and to some extent federal courts, have remedial discretion among alternatively available and potential supplemental remedies, any constitutional remedial declaration by the Supreme Court must be respected.[238] Each holding, then, will be considered separately to ascertain its retroactive effect.

1. Right to Marry

Obergefell's first holding established the right of same-sex couples to marry through state licensure. Although aspects of the Court's opinion expressed broader concerns,[239] the Court's unstinting focus centered on the ability of same-sex couples to wed, a focus evident from the initial issue statement,[240] through the description and analysis of the asserted right,[241] and to the declared remedy.[242] Indeed, more than forty times during the course of the opinion, the Court referenced the "right to marry," the "marriage right," the marriage "license," "licensing" of marriage, and similar phrases fixated on a same-sex couple's legal opportunity to choose to wed.[243] The Court then

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

236. *See* 20 C.F.R. § 404.725(a) (2016) ("A valid ceremonial marriage is one that follows procedures set by law in the State or foreign country where it takes place. These procedures cover who may perform the marriage ceremony, what licenses or witnesses are needed, and similar rules.").

237. *Obergefell*, 135 S. Ct. at 2604-05, 2608.

238. *E.g.*, Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 754-58 (1995); *Harper*, 509 U.S. at 100-01; James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535 (1991).

239. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2594-95 (discussing broader "privileges and responsibilities" of marriage and "uncertainty" of unmarried status in the lives of same-sex couples).

240. *Id.* at 2593 (describing the presented issue as whether a state must "license a marriage between two people of the same sex").

241. *See id.* at 2597-2605.

242. *Id.* at 2604-05.

243. *See id.* at 2593-2608. A word search of the opinion reveals thirty-one uses of "right to marry," seven uses of "license" or "licensing" with respect to same-sex marriage, five uses of "marriage right," and two uses of "the right of same-sex couples to marry." Other

closed its discussion by declaring that "same-sex couples may exercise the fundamental right to marry," and that the challenged laws were "invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."[244]

Two notable features of this declaration deserve consideration. First, the Court did not facially invalidate the challenged marriage laws, which arguably would have voided all prior opposite-sex marriages. Instead, the Court was careful to hold the laws were invalid only "*to the extent* they exclude same-sex couples" from civil marriage.[245] The ancient dogma that "[a]n unconstitutional act is not a law" and is "as inoperative as though it had never been passed" thus has no relevance here when the laws were not "inoperative" on their face, but invalidated only as applied in a particular context.[246] These laws existed in the past and continue (with modifications) to exist—and consequences flow from their existence.

Second, the Court merely held "same-sex couples *may* exercise the fundamental right to marry."[247] The Court thus did not retroactively alter the legal status of the challengers and decree that they were already married based on their prior desire to do so, but instead provided the *future opportunity* for these same-sex couples—and other similarly situated same-sex couples—to marry. Although adjudicative retroactivity principles require "full retroactive effect" with respect "to all *events*, regardless of whether such events predate or postdate [the] announcement of the rule,"[248] the consequential event—state participation in and solemnization of the marriage ceremony—never occurred for the vast majority of same-sex couples before marital equality reached their jurisdiction.[249] *Obergefell* did not attempt to erase the

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similar descriptions include "the right to personal choice regarding marriage" and the "decision" to marry. *See id.* at 2559.

244. *Id.* at 2605.

245. *Id.* at 2591 (emphasis added). As Eric Fish observed, the true effect was essentially a judicial amendment of at least some of the challenged state laws, as it compelled the states to offer same-sex couples the right to marry on the same terms and conditions as opposite-sex couples. Eric Fish, *Judicial Amendment*, 84 GEO. WASH. L. REV. 563, 564-65 (2016).

246. *See* Norton v. Shelby Cty., 118 U.S. 425, 442 (1886). Moreover, the Supreme Court subsequently "qualif[ied]" this statement even with respect to facial invalidity, explaining a statute's prior existence "is an operative fact and may have consequences which cannot justly be ignored." Chicot Cty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

247. *Obergefell*, 135 S. Ct. at 2604 (emphasis added).

248. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) (emphasis added).

249. In a few states, though, county clerks and other public officials issued the necessary licenses to allow same-sex couples to marry before a judicial decree mandating marriage equality became effective. Nicolas, *supra* note 13, at 432-34. These marriages are entitled to recognition as of the satisfaction date of the legal requirements for ceremonial marriage, similar to the recognition afforded to lawful same-sex marriages in other states

past and fashion a remedy for the past refusals of states to marry same-sex couples, but rather prevented future impediments.

With respect to the right to marry, then, *Obergefell*'s binding precedential remedial value is somewhat limited: states must now allow same-sex couples the right to marry on the same terms and conditions as opposite-sex couples. The Court's holding required neither same-sex marriage backdating nor an associated damages remedy.[250] As a result, the provision of any remedy to those previously denied the right to marry is discretionary rather than constitutionally mandated.

In making such determinations, governmental bodies, whether judicial, legislative, or administrative, should heed the basic marital equality premise of *Obergefell*, while also taking into account settled expectations and other competing public policies. Some state legislatures and administrative agencies, as Professor Nicolas exhaustively detailed,[251] are currently undertaking such remedial discretion in particular contexts.[252] As one example, in certain states that previously had civil unions or domestic partnerships before adopting marital equality, state legislation creates a streamlined process for converting these relationships into marriage and backdates the legal date of the marriage to the date of the union or partnership.[253] But other states disagree, pronouncing that the date the relationship was

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and to common-law marriages, unless perhaps recognition is barred by a procedural doctrine, such as claim preclusion. *See id.*

250. The specter of "ruinous financial burdens" from past denials of marriage licenses, as urged by the Houston taxpayers if *Obergefell* is applied retroactively to authorize Houston's past provision of same-sex spousal benefits, is accordingly chimerical. *See supra* notes 9-12 and accompanying text.

251. Nicolas, *supra* note 13, at 404-14. Professor Nicolas maintains, though, that ceremonial marriage backdating is constitutionally required rather than discretionary. *Id.* at 399-400. But his analysis suffers from two omissions. First, he does not acknowledge the distinct temporal scopes of *Obergefell*'s holdings regarding the marriage right and marriage recognition. Second, he overlooks constitutional remedial discretion (as discussed previously in Section III.B), instead urging that victims of unconstitutional discrimination are entitled to being restored to the position that they would have occupied but for the discrimination. *Id.* at 428-30. But his cited authorities do not support a backdating remedy: while minority children denied entrance to segregated schools and women denied entrance to the Virginia Military Institute obtained the future opportunity to be made whole, courts neither backdated their admissions nor provided relief for the past admission denials. *See* Milliken v. Bradley, 433 U.S. 267, 279-88 (1977); United States v. Virginia, 518 U.S. 515, 547 (1996).

252. Federal agencies have done so as well. The Social Security Administration began, after *Windsor*, to allow same-sex spousal benefits claims based on the past formation of a state-sanctioned domestic partnership or civil union. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, GENERAL 00210.004, NON-MARITAL LEGAL RELATIONSHIPS (SUCH AS CIVIL UNIONS AND DOMESTIC PARTNERSHIPS) (2016). The Internal Revenue Service after *Windsor* authorized affected taxpayers in same-sex relationships to file amended returns for refunds within applicable limitations period. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, at 204.

253. *E.g.*, DEL. CODE ANN. tit. 13, § 218(e) (2017); 750 ILL. COMP. STAT. 75/65(b) (2017) (limiting backdating to a one-year period); WASH. REV. CODE § 26.60.100(4) (2017).

converted by law into marriage is the legal date of marriage.[254] And in other states, the resolution of this issue is either unclear or depends on the precise right at issue.[255] Despite these divergent approaches, though, all these states are comporting with the Supreme Court's decree that the right to marry must now be extended to same-sex couples. In accordance with traditional state sovereignty over marriage in the absence of a constitutional violation,[256] the states have the right—acting through the appropriate branch of government under their internal separation of powers principles—to make the public policy choice whether to backdate same-sex marriages to the prior date of civil unions. This choice necessarily entails balancing expectations of those couples and the larger public regarding matters such as property rights, creditors' rights, and taxation consequences.[257]

Some federal and state courts have also exercised discretion to fashion backward relief in certain contexts for same-sex couples previously denied the right to marry, while recognizing that such relief is not constitutionally compelled. For example, the Connecticut Supreme Court expanded the state common-law action for loss of consortium to encompass same-sex couples who were then-barred by law from marrying.[258] Although the same-sex couple in that case was in a recognized civil union when they jointly filed a medical malpractice claim, neither a civil union nor marriage was available in Connecticut when the underlying negligent medical treatment and misdiagnosis occurred.[259] While previous Connecticut decisions limited loss-of-consortium claims to those who were actually married at the time of the injury, the state supreme court broadened the availability of this remedy.[260] The court reasoned that it would be both "illogical and inequitable to require proof that the plaintiffs were actually married when the underlying tort occurred," as the plaintiffs could not have

254. *E.g.*, CONN. GEN. STAT. ANN. §§ 46b-38qq(b), 46b-38rr(a) (West 2017); N.H. REV. STAT. ANN. § 457:46(II) (2017); 15 R.I. GEN. LAWS § 15-3.1-13 (2017).

255. *E.g.*, HAW. REV. STAT. § 572-1.7 (2017).

256. United States v. Windsor, 570 U.S. 744, 766 (2013) ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons, but, subject to those guarantees, 'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.' " (citations omitted)).

257. *See, e.g.*, Carroll & Odinet, *supra* note 13, at 851 (noting possibility that marriage backdating may cause property owned and controlled by one spouse to "become subject to the rights of another spouse, and to a number of third parties"); Barbara K. Lundergan, *Love, Marriage, and the IRS: Tax Advantages of Illinois Civil Unions*, 100 ILL. B.J. 200 (2012) (discussing then-existing tax advantages in certain situations of civil unions over marriage).

258. Mueller v. Tepler, 95 A.3d 1011, 1030 (Conn. 2014).

259. *Id.* at 1015.

260. *Id.* at 1022-30.

married at that time due to a marriage ban that contravened public policy.[261] But the court cautioned that its holding was based solely on common-law policies regarding loss-of-consortium claims rather than any required state constitutional remedy for the prior inability to marry.[262] The court highlighted that, by modifying the common law rather than adopting a constitutionally mandated remedy, it avoided a conflict with an earlier Massachusetts Supreme Judicial Court decision, which had held that a state constitutional remedy in such circumstances was inappropriate.[263]

Decisions since *Obergefell* evince the same dynamic. Some state courts are extending marital *in loco parentis* standing for custody and visitation rights to encompass nonbiological parents who were unable to marry legally in the state yet intended to beget and jointly raise a child within their same-sex relationship. The Oklahoma Supreme Court, for instance, held that public policy and the best interests of the child mandated extending equitable standing to a nonbiological same-sex partner in a committed, almost decade-long relationship beginning and ending before the advent of marital equality in Oklahoma.[264] But the court did not rest its holding on constitutional grounds, instead relying on the exercise of its equitable discretion, which it recognized had been employed by other jurisdictions to reach a similar result even before *Obergefell*.[265] On the other hand, a few states have refused to exercise such discretion to afford a nonbiological partner in a same-sex, non-marital relationship equitable standing in child-custody proceedings, explaining that, while *Obergefell* mandates that states recognize prior same-sex marriages, it does not require after-the-fact remedial imposition of marriage on prior unwed couples in committed same-sex relationships.[266]

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261. *Id.* at 1022-25.

262. *See id.* at 1029-30.

263. *See id.* (citing Charron v. Amaral, 889 N.E.2d 946, 950-51 (Mass. 2008)). The Massachusetts court refused to recognize a loss-of-consortium claim under similar circumstances, fearing that doing so would entail a state constitutional remedy that would have to be applied in other contexts. *Charron*, 889 N.E.2d at 950-51. *But cf. In re* Madrone, 350 P.3d 495, 501-02 (Or. Ct. App. 2015) (adopting a state constitutional backdating remedy with respect to parentage after artificial insemination for same-sex couples who would have chosen to marry before the child's birth if not barred by state law).

264. Ramey v. Sutton, 362 P.3d 217, 218-21 (Okla. 2015).

265. *See id.* at 220-21, 221 n.13 (citing, *inter alia*, T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001)).

266. *E.g.*, Lake v. Putnam, 894 N.W.2d 62, 66 (Mich. Ct. App. 2016); *see also* Willis v. Mobley, 171 So. 3d 739 (Fla. Dist. Ct. App. 2015) (unpublished disposition), *cert. denied*, 136 S. Ct. 805 (2016). The Michigan Supreme Court also denied review in a similar child-custody proceeding over the dissent of Justice McCormack, joined by Justice Bernstein. *See* Mabry v. Mabry, 882 N.W.2d 539 (Mich. 2016). The dissent posited that, by denying the parties access to marriage and then subsequently denying access to the benefits of

A New York appellate decision similarly reasoned that *Obergefell* did not compel a retroactive declaration that a commitment ceremony between a decedent and his will executor/beneficiary was a legally valid marriage in the context of a will dispute.[267] This case, in particular, illustrates the potential dangers of constitutionally mandated marriage backdating in all contexts—the challenge was brought by the decedent's family to disqualify the executor/beneficiary under New York's estate laws on the basis that he and the decedent had been married and then dissolved their union by separation.[268]

The courts should accordingly embrace other available techniques to fashion the appropriate relief, without the straightjacket of constitutionally mandated backdating for same-sex marriages. As seen above, the common law or equitable principles can be modified to ensure justice for an injured couple who was unable to marry at the time, as the Connecticut and Oklahoma state supreme courts did. In the divorce context, Professor Tait authored a perceptive article detailing various mechanisms in existing case law—as well as potential extensions of these mechanisms—to achieve fair and equitable distributions for same-sex couples only recently allowed to marry but with long-standing relationships.[269] For example, she argued that a court should at least consider, in employing its broad discretion in dividing marital property in a divorce, the period of premarital cohabitation between a same-sex couple before they had an opportunity to wed, an argument subsequently adopted by the New Hampshire Supreme Court.[270]

Indeed, family law courts, as a rule, traditionally have broad judicial discretion in adjudicating disputes and fashioning just outcomes[271]—a discretion that can be tailored to protecting settled expectations while ensuring the promise of marital equality. A recent California case provides an illustration. The state court issued a

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marriage through the equitable-parent doctrine, the state may have violated *Obergefell*. *Id.* at 542 (McCormack, J., dissenting from denial of leave to appeal).

267. *In re* Estate of Leyton, 22 N.Y.S.3d 422, 423 (N.Y. App. Div. 2016).

268. *Id.* In addition to recognizing that *Obergefell* did not compel such a retroactive application for purposes of New York's Estate, Powers, and Trust Law, the court noted that the parties never formally ended their supposed marital relationship as also required by this law, even when they had an opportunity to do so after same-sex marriage was legalized in New York. *Id.*

269. Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1293-1308 (2015).

270. *In re* Munson, 146 A.3d 153, 158-59 (N.H. 2016).

271. *E.g.*, JOHN DEWITT GREGORY, PETER NASH SWISHER & ROBIN FRETWELL WILSON, UNDERSTANDING FAMILY LAW § 1.01, at 2-3 (4th ed. 2013) ("[F]amily court judges . . . traditionally possess very wide discretion in adjudicating many family law disputes."); Stephen C. Aldrich & Michael Cass, *Judicial Discretion: Melding Messy Facts and Pristine Law*, 70 BENCH & B. MINN. (Nov. 11, 2013) ("Family law perhaps provides the broadest venue for judicial discretion . . . .").

backdated marriage license for a same-sex couple under a statutory verified petition procedure to establish a marriage.[272] All the aspects of the state marriage law had been satisfied other than a marriage license, which the couple could not obtain at the time of their ceremony due to the then-existing legal prohibition on same-sex marriages. The state court accordingly decreed that the couple was married on the date of their ceremony (which was a day before one of the partners passed away and only nine days before same-sex marriage returned to California), an order that was accepted by a federal district court in refusing to grant the decedent's employer's motion for judgment on the pleadings in the surviving spouse's claim for pension benefits.[273] Yet although the state court employed its discretion to cure the defect in the couple's marriage, the court did not backdate the marriage to the beginning of their registered domestic partnership twelve years earlier or to the beginning of their committed relationship more than twenty-five years earlier.[274] The court accordingly appropriately fashioned the necessary relief without a constitutional remedial holding, which could hamper future efforts to ensure justice.

The Supreme Court could have exceeded the presented issues and ordered remedial backdating in *Obergefell* as a constitutional minimum—but it did not. Rather, its holding only invalidated the exclusion of same-sex couples from state civil marriage laws.[275] This leaves the states free to make their own remedial determinations, acting through their own conceptions of the appropriate powers afforded to the legislature, administrative agencies, and courts, regarding whether—and to what extent—to backdate same-sex ceremonial marriages to an earlier date. The only constitutional requirement is that the right to civil marriages must now be available to same-sex couples on the same terms and conditions as opposite-sex couples. The Supreme Court thereby provided the states the appropriate leeway, in accordance with traditional state sovereignty over marriage, to balance the expectations of same-sex couples and society while still comporting with the normative principles of adjudicative retroactivity.

272. Schuett v. FedEx Corp., 119 F. Supp. 3d 1155, 1161 (N.D. Cal. 2016) (discussing earlier state court proceedings).

273. *Id.* at 1158-66. The couple had been in a committed relationship for twenty-seven years and had been in a California domestic partnership since 2001. Their marriage ceremony, on June 19, 2013, was officiated by a local county supervisor and satisfied all marriage requisites except the license, which was obtained from the state court thereafter. *Id.*

274. *See id.*

275. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).

2. Marriage Recognition

The temporal scope, though, of *Obergefell*'s holding on marriage recognition was different. The Court held that states had to recognize lawful same-sex marriages from other states, including the pre-*Obergefell* marriages of certain challengers.[276] These same-sex couples had challenged their exclusion from the benefits associated with marriage, such as property rights, healthcare benefits, and official government records.[277] The plaintiffs obtained their desired benefits at the federal district court level before the Sixth Circuit's reversal.[278] After the Supreme Court reversed the Sixth Circuit, this reinstated the benefits awarded to the plaintiffs in the underlying suits, thereby retroactively altering their legal marital status in the prior non-recognition states.[279]

Adjudicative retroactivity principles require "full retroactive effect" with respect "to all events, regardless of whether such events predate or postdate [the] announcement of the rule."[280] In the marriage recognition context, the consequential event—a lawful same-sex marriage from another state—already occurred. So in any pending or future proceeding, the marriage must be recognized as legal for all purposes back to the date in which the marriage was solemnized.

Two recent decisions from Michigan provide a helpful illustration of the distinction between the temporal scope of the recognition of marriages and the right to marry. Both cases involved standing to seek child custody under the equitable-parent doctrine, which in Michigan is limited to married couples.[281] In the first case, *Stankevich v. Milliron*, the court held that a nonbiological same-sex spouse had standing because the parties had entered into a same-sex marriage in Canada before the birth of the child.[282] Although their marriage was not recognized in Michigan when the child was born, the court explained that *Obergefell* mandates the recognition of same-sex marriages from other jurisdictions on the same terms and conditions as opposite-sex marriages, which required the court to recognize the marriage for all purposes back to its solemnization

276. *Id.* at 2608.

277. *E.g.*, Bourke v. Beshear, 996 F. Supp. 2d 542, 546 (W.D. Ky. 2014); Henry v. Himes, 14 F. Supp. 3d 1036, 1041-43 (S.D. Ohio 2014); Obergefell v. Wymslo, 962 F. Supp. 2d 968, 976 (S.D. Ohio 2013); Tanco v. Haslam, 7 F. Supp. 3d 759, 764 (M.D. Tenn. 2014).

278. DeBoer v. Snyder, 772 F.3d 388, 389-90 (6th Cir. 2014), *rev'd*, 135 S. Ct. 2584, 2585 (2015).

279. *Obergefell*, 135 S. Ct. at 2608.

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

281. *See* Lake v. Putnam, 894 N.W.2d 62, 66-67 (Mich. Ct. App. 2016); Stankevich v. Milliron, 882 N.W.2d 194, 197 (Mich. Ct. App. 2015).

282. 882 N.W.2d at 196-99.

date.[283] Yet the court denied standing in the second case, *Lake v. Putnam*, because the parties never married in any jurisdiction.[284] The court reasoned that *Obergefell* requires states to recognize prior same-sex marriages, but does not impose marriage on same-sex couples that did not previously wed.[285]

This right-recognition dichotomy exposes the futility of the pending challenge to Houston's pre-*Obergefell* grant of same-sex spousal employee benefits.[286] Houston only extended benefits to those lawfully married in another state,[287] implicating the recognition of marriage rather than the right to wed. Since the proceeding was not final before *Obergefell* was issued, *Obergefell* governs, and, under its reasoning, the city correctly recognized its employees' lawful same-sex marriages and extended the accompanying benefits of marriage. Such a result is supported by all the existing precedent to date on same-sex marriage recognition,[288] as well as those decisions retroactively recognizing interracial marriages that had been subject to antimiscegenation laws before the Supreme Court, in *Loving v. Virginia*,[289] invalidated such laws.[290]

Admittedly, retroactive marriage recognition will impose some transition costs. Professors Carroll and Odinet have explored potential downsides of such retroactive marriage recognition on settled expectations with respect to the property rights of spouses, creditors, and transferees.[291] They correctly opined that, in some situations, retroactive marital recognition may engender "unexpected, and sometimes negative, consequences for the property rights of gay spouses."[292] Yet the extent of these costs will be mitigated—and even often eliminated—by the institutional and procedural doctrines discussed in Part III of this Article.[293]

An initial consideration is that, due to the Supreme Court's institutional incrementalism in transitioning to same-sex marriage, indi-

283. *Id.* at 197-99.

284. 894 N.W.2d at 66-67.

285. *Id.* The intermediate appellate court could not exercise discretion to extend the scope of the state's equitable-parent doctrine, which had been outlined by the state supreme court. *See id.*

286. *See supra* Part I.

287. *See* Pidgeon v. Turner, 60 TEX. SUP. CT. J. 1502, 1504 (June 30, 2017).

288. *See* Tritt, *supra* note 15, at 933-36 (discussing examples).

289. 388 U.S. 1, 12 (1967).

290. *E.g.*, Dick v. Reaves, 434 P.2d 295, 298 (Okla. 1967) (retroactively recognizing interracial marriage performed in 1939 for estate distribution of an intestate who died in 1959 but whose estate was still open when *Loving* was decided).

291. Carroll & Odinet, *supra* note 13, at 851-56.

292. *Id.* at 849.

293. *See supra* Part III.

viduals had the opportunity to order their affairs around the new legal framework. Especially after *Windsor*, the premise that a lawful same-sex marriage from one state would be recognized throughout the United States was not an unexpected legal development. And because constitutionally mandated remedial marriage backdating is limited to previously entered lawful same-sex marriages, the spouses can hardly claim surprise when they are treated equivalently to other married couples both within their relationship and with regard to outside transactions.

With respect to third parties—who might face attempts to void earlier property transfers made by one of the individual spouses whose marriage is now retroactively entitled to recognition[294]—limitations, preclusion, and other independent legal principles (such as estoppel or bona-fide, good-faith purchases) typically will protect their interests.[295] Even though states are required to retroactively recognize prior same-sex marriages from other jurisdictions, states retain the right to employ preexisting, independent legal procedural and substantive doctrines to prevent the unraveling of past transactions due to marital status.[296] So, for example, if a pre-*Obergefell* deed to a Texas marital homestead did not contain the signatures of both spouses previously married in another jurisdiction, several potential defenses may nevertheless validate the transaction.[297] If the nonsigning spouse has vacated the premises and the buyers have occupied it, the buyers can urge, as an independent legal defense, that the deed became operative after the abandonment of the homestead.[298] Or perhaps a fraud or estoppel claim may be viable in some circumstances if the purchaser was misled as to their marital status.[299] In most cases, then, reliance interests of third parties can be protected by other independent legal doctrines, as Professor Tritt exhibited in evaluating retroactivity issues for trusts and estates that will arise after *Obergefell*.[300]

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294. *See* Carroll & Odinet, *supra* note 13, at 850 (recognizing that, in community property states, alienation of real property often requires consent of both spouses).

295. *See* Tritt, *supra* note 15, at 929-33 (discussing repose and bona-fide purchaser defenses to retroactive application of *Obergefell* for trusts and estates).

296. *Cf.* Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758-59 (1995) ("[A]s courts apply 'retroactively' a new rule of law to pending cases, they will find instances where that new rule, for well-established legal reasons, does not determine the outcome of the case.").

297. TEX. FAM. CODE ANN. § 5.001 (West 1997) (requiring signatures of both spouses to convey marital homestead).

298. Trey Yates & Mike Day, *Arguments For and Against the Retroactive Application of* Obergefell *in Texas*, 54 HOUS. LAW. 10, 12 (Jan./Feb. 2017).

299. *See id.* at 12-13.

300. *See* Tritt, *supra* note 15, at 929-33.

Government agencies might be exposed to some retroactive liability for the past denial of benefits associated with recognition, but again the liability will be limited by preexisting rules of law. For example, a suit seeking damages arising from marital nonrecognition before *Obergefell* presumably would have to establish precompliance with all administrative requirements, be brought within the limitations period, and then circumvent any other available defenses the government might possess—including immunity doctrines and other limits on government liability. Litigants only seldom attempted to raise such claims after *Windsor* mandated federal recognition of same-sex marriages—and even less frequently were successful.[301] The retroactive application of *Obergefell* accordingly will not create impending financial doom; rather, it furthers the promise of marriage equality while allowing other preexisting legal doctrines to protect settled expectations.

B. Common-Law Marriages

The most difficult retroactivity questions are likely to arise in a scenario not specifically addressed in *Obergefell*: common-law or informal marriage. Eleven states and the District of Columbia still recognize common-law marriages presently formed within their jurisdictions,[302] while another four states continue to recognize common-law marriages formed within their borders before specified dates.[303] Although the precise requirements vary somewhat from state to state, a common-law marriage is formed by the conduct, statements, and intent of the parties to the marriage without official involvement or formalities.[304] Such informal marriages typically require the legal capacity and intent to marry, cohabitation, and outward manifestations of the marriage to the community.[305]

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301. *See* Horvath v. Dodaro, 160 F. Supp. 3d 32, 48 (D.D.C. 2015) (dismissing plaintiff's claim for backpay arising from pre-*Windsor* refusal to award same-sex spousal benefits as time-barred).

302. *See* Peter Nicolas, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931, 943 (2011) (recognizing Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia as common-law marriage jurisdictions). New Hampshire, however, recognizes common-law marriage only for inheritance purposes. *See* Jennifer Thomas, Comment, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. L. 151, 151 (2009).

303. GA. CODE ANN. § 19-3-1.1 (2017) (formed before 1/1/97); IDAHO CODE § 32-201(2) (2017) (formed before 1/1/96); OHIO REV. CODE ANN. § 3105.12(B)(2) (West 2017) (formed before 10/10/91); 23 PA. CONS. STAT. § 1103 (2017) (formed before 1/1/05).

304. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 712-14 (1996).

305. *See id.*

Because the government is neither involved in nor has notice of the formation of a common-law marriage, proof of its existence and duration occurs after the fact, typically in probate, divorce, or government benefit proceedings.[306] Sufficient documentary or testimonial evidence must be provided to the relevant court or administrative agency to establish both the marriage and its formation date in order to obtain the sought-after marital benefits.[307] As a result, although the government has no role in the initial right to marry, it does later recognize or acknowledge that prior marriage.

Of course, until relatively recently, common-law marriages were available only to opposite-sex couples: most of the states authorizing common-law marriages prohibited recognition of any form of same-sex marriage until forced to do so by federal court decrees during 2014 and 2015.[308] The question accordingly is now arising whether common-law marriage jurisdictions must retroactively recognize informal same-sex marriages formed in the years before same-sex couples could enter into formal marriages.

The logical precedential extension of *Obergefell*'s holding—necessitating that same-sex couples must be afforded civil marriages on the same terms and conditions as opposite-sex couples[309]—indicates that the states must do so. Because opposite-sex couples have common-law marriages recognized years or decades after the fact by an administrative or judicial body, denying similar recognition to same-sex couples imposes different terms and conditions on same-sex couples than opposite-sex couples.

The potential counter-argument is that a same-sex couple did not have the legal capacity to marry, as typically required for a common-law marriage, before the federal courts invalidated state constitutional bans on same-sex marriage. In those states that constitutionally defined marriage as existing only between a man and woman,[310] legal impediments existed to same-sex couples' ability to marry, impediments that were not removed until federal court decrees mandated marital equality. As a result, according to this argument, in-

306. *See id.*

307. Nicolas, *supra* note 302, at 933-35.

308. The four common-law marriage jurisdictions embracing marital equality before 2014 were Iowa, New Hampshire, Rhode Island, and the District of Columbia. *See* RHODES, *supra* note 221, at 308 (listing the sixteen states and the District of Columbia where same-sex couples could wed as of November 2013). But even in these states, marital equality did not have a long history: Iowa was the first one of these four states to adopt same-sex marriage, doing so in 2009. Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

309. Obergefell v. Hodges, 135 S. Ct. 2584, 2604-05 (2015).

310. *See* RHODES, *supra* note 221, at 305-06 & nn. 244-45 (listing state constitutional marriage amendments).

formal same-sex marriages should be recognized as valid only from the date the ban was lifted.

This argument, however, overlooks that same-sex couples in common-law marriage jurisdictions are entitled to government recognition of the legal consequences of past events on the same terms and conditions as opposite-sex couples. To this extent, common-law marriage recognition materially differs from the ceremonial marriage right. A ceremonial marriage necessitates official participation in its formation, and *Obergefell* neither attempted nor mandated a remedy for the states' past participation failures. In contrast, a common-law marriage merely requires the government's current recognition of the couple's past marital capacity, intent, cohabitation, and outward manifestations. Due to the retroactive application of *Obergefell*'s legal principles, states cannot, in future disputes, employ an unconstitutional exclusion to deny recognition to informal same-sex marriages while recognizing common-law marriages between opposite-sex couples.

Judicial and administrative determinations to date comport with this result. The Pennsylvania Supreme Court held that "because opposite-sex couples in Pennsylvania are permitted to establish, through a declaratory judgment action, the existence of a common law marriage prior to January 1, 2005, same-sex couples must have that same right."[311] The court reasoned that a contrary holding would violate the federal due process and equal protection rights of same-sex couples, and noted that its holding comported with several decisions from Pennsylvania courts of common pleas and from the federal courts.[312]

One of these federal court decisions, *Ranolls v. Dewling*, held that *Obergefell* could retroactively authorize standing for a spouse, in a previously unrecognized, informal same-sex marriage, to sue for the wrongful death of her partner, even though the accident predated *Obergefell*.[313] After thoroughly canvassing the Supreme Court's civil retroactivity jurisprudence, the Texas federal district court distilled that *Obergefell* must be applied to all pending proceedings open on

311. *In re* Estate of Carter, 159 A.3d 970, 977-78 (Pa. 2017) (citation omitted). Carter died in a motorcycle accident before the advent of marital equality in Pennsylvania, so his partner Hunter filed a petition seeking a declaration that the two had entered into a common-law marriage before January 1, 2005, as Pennsylvania only recognizes common-law marriages formed before that date. *Id.* at 973.

312. *Id.* at 978 & n.8.

313. 223 F. Supp. 3d 613, 621-22 (E.D. Tex. 2016). The couple lived together for eighteen years before they ceased cohabitating a year before the deadly accident, raising fact issues regarding their marital status. *Id.* at 624-25. Yet the court nevertheless rejected the defendants' claim that the surviving spouse could not, as a matter of law, have standing when the decedent was killed before same-sex marriage was legal in Texas. *See id.*

direct review to govern the legal significance of all events, including those events antedating the decision.[314]

In another case, a Texas probate court approved a settlement agreement—over the objections of the Texas Attorney General—retroactively recognizing an informal marriage between a same-sex couple who had a religious marriage ceremony, held themselves out as a married couple, and lived together as spouses until one of them passed away a year before marital equality reached Texas.[315] A South Carolina family court judge likewise recognized a common-law marriage between same-sex spouses dating all the way back to 1987 in a suit seeking spousal support and a division of property after the relationship ended.[316] In Utah, a court issued an order both retroactively recognizing an informal same-sex marriage and amending their child's birth certificate to include both spouses as parents, even though one of the spouses died before same-sex marriage became legal.[317] Finally, on the administrative level, the Texas Department of State Health Services issued revised policies and procedures for vital records requests, providing that, upon proper documentation of an informal marriage, amended birth certificates and death certificates would be retroactively issued.[318]

These determinations accord with federal court decisions retroactively recognizing common-law interracial marriages during the period before *Loving v. Virginia*.[319] In one of these cases, the district court found that, assuming one of the spouses had previously lawfully divorced, the interracial couple formed a valid common-law marriage in Texas entirely existing when Texas's antimiscegenation law was in

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314. *Id.* at 619-22. The court further noted that such a result comported with decisions of other federal and state courts and administrative agencies. *Id.* at 622-24.

315. *In re* Powell, No. C-1-PB-14-001695 (Tex. Cty. Prob. Ct. 2015); Matt Ferner, *Texas Judge Recognizes Same-Sex Common Law Marriage in Historic Ruling*, HUFFINGTON POST (Sept. 18, 2015, 9:13 PM), https://www.huffingtonpost.com/entry/texas-judge-recognizes-same-sex-common-law-marriage_us_55fc868ae4b08820d918c34d [https://perma.cc/U4LA-4GHA].

316. *See* Andrew Dys, *Same-Sex Legal Groundbreaker: Judge Says Rock Hill Couple Married in S.C. for Decades*, HERALD (Mar. 19, 2017, 7:12 PM), http://www.heraldonline.com/news/local/article139540723.html [https://perma.cc/6XTE-NJ4X].

317. *See* Jennifer Dobner, *Groundbreaking Ruling Recognizes Same-Sex Common-Law Marriage in Utah*, SALT LAKE TRIB. (Dec. 28, 2015, 8:50 AM), http://archive.sltrib.com/article.php?id=3352688&itype=CMSID [https://perma.cc/D67Z-CECQ].

318. TEX. DEP'T OF STATE HEALTH SERVS., REVISED POLICIES AND PROCEDURES: VITAL RECORDS REQUESTS FROM MARRIED SAME-SEX COUPLES (2015). The revised regulations provide that birth certificate amendments will be issued "if the parents were legally married prior to the birth," including via an informal (or common-law) marriage documented by "a properly filed informal marriage declaration or a court order establishing an informal marriage." *See id.* Similar rules apply to amended death certificates. *See id.*

319. 388 U.S. 1 (1967).

force.[320] In another case, the district court found that the state ban on interracial marriages did not necessarily preclude the formation of a common-law marriage, but that the interracial couple had not complied with all the requirements of a common-law marriage, including holding themselves out as married.[321] These holdings in the interracial common-law marriage cases similarly should apply to common-law marriages between same-sex spouses, requiring recognition back to their formation, even if the couple could not legally wed at that time.

Yet a valid concern arising from such retroactive recognition of once-illegal or unrecognized common-law marriages is the potential impact on the settled expectations of the couple and society at large. One member of the relationship may not have truly desired marriage, relying on the state's ban as a convenient excuse to continue the relationship without committing. Other persons or entities the couple dealt with may not have been aware of the marriage or considered it legally effective.

But here again, preexisting legal principles mitigate such concerns. In Texas, for example, an informal marriage requires an agreement to be married, cohabitation as spouses, and publicly holding each other out as married.[322] Moreover, the parties are presumably not informally married unless proceedings to establish their marriage are commenced within two years of their separation.[323] Such legal requirements prevent informal marriages from being unwittingly formed or extended to relationships ending long-ago.

Moreover, any reliance concerns arising from the present recognition of prior informal same-sex marriages exist to varying extents with the future recognition of any common-law marriage. Such concerns, in fact, are one of the reasons that almost four-fifths of the states have abandoned common-law marriage.[324] The minority of

320. Prudential Ins. Co. of Am. v. Lewis, 306 F. Supp. 1177, 1183-84 (N.D. Ala. 1969). This interpleader action resolved life insurance claims between the purported widow and the heirs at law. The court held that the purported widow had not obtained a valid divorce from a prior marriage, so that she could not be the common-law spouse of the decedent. But the court nonetheless reached the common-law marriage issue due to concerns about "the probability of error" with the conclusion on the validity of the divorce. *See id.*

321. Vetrano v. Gardner, 290 F. Supp. 200, 203-06 (N.D. Miss. 1968). This suit sought monthly child insurance benefits on their father's social security earnings for the period before September 1, 1965. While the court concluded that the couple could have entered into a common-law marriage during that time despite the state's anti-miscegenation law, the court held that the evidence was insufficient to meet the necessary "high degree of proof." *Id.* at 204-06.

322. TEX. FAM. CODE ANN. § 2.401(a) (West 2017).

323. *Id.* § 2.401(b).

324. Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners*, 41 ACTEC L.J. 49, 73-74 (2015) (attributing decline in common-law marriage states in part to concerns regarding fraud

states that still retain the practice cannot employ such concerns to deny recognition to common-law marriages between same-sex spouses while recognizing those between opposite-sex spouses that raise the same difficulties. Instead, the states must rely on procedural doctrines, such as limitations, forfeiture, and finality, and should carefully scrutinize cases in which the couple disputes their intentions to ensure a valid common-law marriage was indeed formed. In that way, the promise of marital equality is achieved while protecting settled expectations.

V. CONCLUSION

Obergefell's landmark equality holding within a regime of adjudicative retroactivity introduces challenges to preexisting societal legal understandings. Yet these challenges are—and have been—manageable under institutional, remedial, and procedural doctrines, which serve to balance competing reliance, fairness, and efficiency interests during a period of legal transition. At the institutional level, the Supreme Court transitioned incrementally to marital equality, providing an opportunity for individuals to begin ordering their affairs around the new legal framework. The Court's remedial declarations in *Obergefell* afforded discretion to state and federal courts to fashion appropriate relief in subsequent cases, taking into account policy considerations, settled expectations, and existing background procedural doctrines. In this manner, the benefits of marital equality are attainable while minimizing legal transition costs.

The principles explored in this Article, however, are not limited to the marital equality context. The described institutional, remedial, and procedural strategies serve to constrain a more robust adjudicative retroactivity impact during any period of legal change. The Supreme Court, therefore, does not need to return to its past adjudicative nonretroactivity experiment, which contravened the judicial function and inequitably distinguished between similarly situated litigants. The very fact that a momentous legal change, such as the transition to marital equality, can be managed under adjudicative retroactivity principles establishes that, at least in the civil context, we should cherish retroactivity.

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and perjury). While U.S. jurisdictions are moving away from marital rights in the absence of a ceremonial marriage, most European and English-speaking countries grant statutory marital rights under defined circumstances to cohabitating couples. *See id.* at 81-82; Anna Stepien-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75, 87-98 (2016).