COMMENT

Separation Equality: Retroactive Community Property Regimes for Long-Term Same-Sex Couples

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I. INTRODUCTION

The U.S. Supreme Court's holding in *Obergefell v. Hodges*, which established a fundamental marriage right for all couples regardless of sexual orientation or gender, has had profound effects throughout society during the five years since its decision.[1] By enabling LGBTQ+ couples to legally marry in all fifty states, the Court's decision affected much of the law applying to existing marriage laws.[2] The implications created by a

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1. 576 U.S. 644 (2015); *see* Andrew R. Flores et al., *The Impact of* Obergefell v. Hodges*: On the Well-Being of LGBT Adults*, WILLIAMS INST. 1 (2020) (describing the increased "happiness and life satisfaction" in the LGBTQ+ population following their recognized right to marry in 2015).

2. Mahin Aminian et al., *Legal Recognition of Same-Sex Relationships*, GEO. J. GENDER & L. 711, 730 (2017) (explaining that over twenty states "had a constitutional or statutory ban on same-sex marriage" before *Obergefell*).

fundamental right to marry are far-reaching and complex, and effects of the decision are trickling into the court system case by case.[3] This Comment addresses the specific and unique effects that the retroactive application of marriage rights could have on community property regimes through an analysis of hypothetical couples. Generally, property in a community regime is presumed to be all property created or acquired during the marriage.[4] If marriage rights are applied retroactively, property created or acquired prior to the official marriage or termination of the marriage-like relationship may be considered community property when classifying property for purposes of terminating the regime.[5]

In analyzing how a court may adjudicate this situation, the relevant legal background is considered, including an overview of community property laws generally and a discussion of the test for determining whether fundamental rights can be applied retroactively. Next, a set of comparable federal and state case laws is analyzed, including two federal cases involving wrongful death actions applying marriage rights retroactively,[6] a Pennsylvania case addressing the retroactivity of common law marriages post-*Obergefell*,[7] and a California case involving retirement benefits and domestic partnership registration after one spouse's death.[8] While community property laws differ from state to state, the laws of California and Washington provide the most relevant examples of rules that would apply to same-sex couples.[9] Therefore, the hypothetical couple here is one that held themselves out to be married in one of those states prior to the legality of same-sex marriage, acquired real property during that time, married after the marriage right was established, and

3. *See, e.g.*, Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017) (addressing the application of all marriage benefits to same-sex couples and holding that statutes preventing such benefits violate the court's precedent).

4. CAL. FAM. CODE § 760 (2021); LA. CIV. CODE art. 2338 (2020).

5. *See* CAL. FAM. CODE § 760; LA. CIV. CODE. art. 2338.

6. Hard v. Att'y Gen., Ala., 648 F. App'x 853 (11th Cir. 2016); Ranolls v. Dewling, 223 F. Supp. 3d 613, 622 (E.D. Tex. 2016).

7. *In re* Estate of Carter, 159 A.3d 970 (Pa. Super Ct. 2017).

8. Schuett v. FedEx Corp., 119 F. Supp. 3d 1155, 1160 (N.D. Cal. 2016).

9. Two community property states, Louisiana and Texas, did not recognize any rights for LGBTQ+ couples at the time of the *Obergefell* decision. Huiyi Chen, *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, 1418 n.8 (2016). Alternatively, California and Washington's more liberal policies towards same-sex couples at the time of the decision, such as the establishment of domestic partnerships, enable a more thorough analysis. *Id.* at 1418 n.5 (noting that California and Washington are community property states); Aminian et al., *supra* note 2, at 729 (listing California and Washington as two states that recognized same-sex marriage pre-*Bostock*).

subsequently faced one of three issues after their union: the death of a spouse, the partition of the community by divorce, or a claim by a third-party creditor to property that may or may not have been part of the community regime.

As mentioned, this issue is fairly specific and niche, so much of the analysis is comparative and hypothetical. However, the question of how courts might treat the property rights of same-sex couples at the *end* of marriage is equally as important as the establishment of the marriage right. Recognizing that same-sex couples who intended to be married before they were legally allowed to be are entitled to the same property regimes as heterosexual couples during that time would be significant. Further, community property, while fundamentally different from common law property rules, has influenced much of the modernization of the marital property laws in many states.[10] All marriages end in one way or another, whether by death or divorce, and the legal concepts that this Comment considers could represent real cases that, if ever addressed by the courts, would affect the long-term application of the right to marry, marital property regimes, and equal protection generally.

II. LEGAL BACKGROUND

A. Overview of Community Property

Community property, the marital property regime used in nine states, is a system of ownership in which spouses have joint ownership over all property created and acquired during the marriage while maintaining separate ownership of property owned by each individual spouse up until the time of marriage.[11] The system finds its origins in Spanish law as practiced by Visigothic tribes, where difficult living conditions required men and women to equally share responsibilities in marriages and general life.[12] As such, the community property system is based on the spouses maintaining "separate identit[ies]" but promoting the marriage as a partnership; this differs from the common law property regime, which

10. *See* Patrick N. Parkinson, *Who Needs the Uniform Marital Property Act?*, 55 U. CIN. L. REV. 677, 677-78 (1987); *see* Cyn Haueter, *"I Can't Afford to Leave Him" Divorcing a Spouse with Superior Financial Resources*, 31 HASTINGS WOMEN'S L.J. 237, 247-48 (2020) (differentiating the rules of "community property systems" from those in other states).

11. Harry M. Cross, *The Community Property Law (Revised 1985)*, 16 WASH. L. REV. 13, 17-18 (1986).

12. *See* Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 31-33 (1967).

originated with the idea of a wife being "merge[d]" into her husband's identity.[13] Essentially, "[t]he whole theory of community property is that it is obtained by the efforts of the [spouses] . . . for the benefit of the community."[14] While all states with community property laws have different nuances, certain rules are common throughout most.

In community property regimes, there are two types of property: community property and separate property. Community property comprises all property created or acquired during marriage, including income from the work of either spouse and property created by other community property unless statutorily excluded.[15] Conversely, separate property includes property owned by a spouse prior to marriage, property acquired during "marriage by gift [or] bequest," and property created by other separate property.[16] Depending on the state in question, one of three presumptions may be applied by a court in determining whether a piece of property is community, such as the "possession presumption"[17] and the "unlimited presumption."[18] For purposes of this Comment, the "acquisition presumption" will be applied, because of its similarity to the basic definition of community.[19] Property can also be classified partially as community and partially separate. For example, retirement pensions and other types of property acquired over time may be apportioned pro rata to the spouse earning the property for the time spent prior to the marriage acquiring that property and in part to the community.[20] Again, for purposes of simplicity, the hypotheticals here will consider all property acquired by the couple to have been acquired at one time, meaning it will either be community or separate depending on the couple's status at the time of acquisition.

If property is classified as community, there becomes an issue of how each spouse can use, dispose of, and control pieces of community property. Because both spouses may have an equal interest in most types of property, the management rules applying to pieces of property depend on the type of property in question. The default rule is that "either spouse

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13. *Id.* at 34.
14. Togliatti v. Robertson, 190 P.2d 575, 578 (Wash. 1948) (en banc).
15. *See, e.g.*, LA. CIV. CODE art. 2338.
16. CAL. FAM. CODE § 770 (2021).
17. This presumes that anything either spouse possesses at the time of the end of the marriage is part of the "regime of community acquets." *See* LA. CIV. CODE art. 2340.
18. This presumes that all of either spouse's property is community and places the burden of proving otherwise on the spouse asserting that claim. *See* WIS. STAT ANN. § 766.31(2) (2021).
19. *See* N.M. STAT. ANN. § 40-3-12(A) (2021).
20. *See, e.g.*, Maslen v. Maslen, 822 P.2d 982, 986-87 (Idaho 1991).

has the management and control of the community personal property."[21] This equal management structure prevents inconvenient requirements about regular use of normal, personal property. There are exceptions to the general rule when the property in question is more valuable, consequential, or significant; in those cases, dual or joint management rules are used. This management system applies to various types of property, such as real estate, furniture, donations and gifts of a significant value, and businesses where both spouses have an interest.[22] Finally, in certain circumstances, one spouse may be able to make decisions about the use of property without the concurrence of the other spouse. Sole management rules apply to the separate property of either spouse, businesses where either spouse is the only one with an interest,[23] and rare circumstances where a judicial authorization to obtain sole management rights is obtained by one spouse due to the "incapacity" of the other.[24] In any case, both spouses have a "fiduciary" duty to act in good faith with regards to community property over which they have managerial control.[25]

These management rules are important for determining what the rights of third-party creditors are with regard to community property. When one spouse incurs an obligation or debt, the presumption is that such debt was incurred for the "benefit [of] the community," making the community as a whole liable.[26] To "[r]ebut this [] [p]resumption," the spouse asserting non-liability must prove that the debt was a wholly separate obligation[27] or that the spouse incurring the debt violated the management rules applying to the property in question.[28] Depending on the state, this may be determined either by analyzing the type of property

21. CAL. FAM. CODE § 1100(a) (2021)*; accord* IDAHO CODE §32-912 (2021); LA. CIV. CODE art. 2346 (2020).

22. *See* CAL. FAM. CODE § 1100; LA. CIV. CODE art. 2349 (2020); NEV. REV. STAT. § 123.230 (2021).

23. CAL. FAM. CODE § 1100

24. LA. CIV. CODE art. 2355(2020).

25. CAL. FAM. CODE § 1100(e).

26. Cross, *supra* note 11, at 116-17.

27. *Id.* at 118.

28. *See, e.g.*, Klaas v. Haueter, 745 P.2d 870, 872-73 (Wash. App. 1987) (finding that, because the concurrence of both spouses is needed to transfer real property, a spouse may deny liability, but only in the absence of authorization, estoppel, or ratification of the transaction).

to be seized[29] or the type of debt incurred.[30] A third-party creditor may recover for nonpayment of a debt incurred by one spouse from the community property, but generally, a non-debting spouse's separate property will be protected from third parties, allowing them recovery by reimbursement of the separate property that was wrongfully seized.[31]

At the termination of the community, each spouse (or their successors) is apportioned property in a judicial dissolution. All but one of the community property states use a system of equal division, where spouses are assigned equal portions of the community, valuated at the time of divorce following other steps such as necessary reimbursements and equalizing payments.[32] The community regime could also end because of the death of one of the spouses, at which point successor rights become relevant. Often, judicial disputes occur between the deceased's children and non-parent spouses over the value of bequeathed community property that may be considered part of the surviving spouse's one-half interest in the community.[33]

Regardless of how the legal questions surrounding the community arise, the relevance of community property as a system is certain. Many of the concepts fundamental to community property have been adapted into states with so-called common law property regimes. For example, the recommendation of the Uniform Marital Property Act (UMPA) in 1983 introduced community property concepts to many states, including Wisconsin (an effective community property state), albeit using terms such as "marital" property and "'individual' property" in place of "'community' and 'separate property.'"[34] This adaptation of community

29. *See* Shel-Boze, Inc. v. Melton, 509 So. 2d 106 (La. Ct. App. 1987) (holding that a creditor could not recover from the separate property of a spouse who had not incurred the debt); Grolemund v. Cafferata, 111 P.2d 641, 689-90 (Cal. 1941).

30. *See* La Framboise v. Schmidt, 254 P.2d 485, 486 (Wash. 1953) (en banc) (establishing two scenarios in which the community can be seized to repay debts in tort: If (1) the injury occurs during the marriage or (2) the tort benefits of the community).

31. S*hel-Boze, Inc*., 509 So. 2d at 106.

32. *See* LA. STAT. ANN. § 9:2801 (2020); CAL. FAM. CODE § 2550 (2021). Texas uses an equitable distribution system allowing for the courts to adjust apportionment of assets "in a manner that the court deems just and right . . . ." TEX. FAM. CODE ANN. § 7.001 (2019).

33. *In re* Estate of Kirkes, 295 P.3d 432, 433 (Ariz. 2013) (holding that spouses "can leave more than one-half [the value] of" an asset to their heirs "as long as the surviving spouse receives . . . one-half of the community[]" as a whole when applying an item theory of dissolution).

34. William A. Reppy, Jr., *The Uniform Marital Property Act: Some Suggested Revisions for A Basically Sound Act*, 21 HOUSTON L. REV. 679, 682 (1985). In fact, the author of this article suggests that UMPA allows for "greater sharing" of property between spouses because of its treatment of rents and profits of individual and separate property as marital and community property. *Id.* at 679.

property for the purpose of progress is evidence that community property rulings in progressive states may be a useful barometer for how marital property evolves in the future.[35]

B. Retroactivity of Fundamental Rights

A fundamental right is one that, as established by judicial precedent, is "'deeply rooted in this Nation's history and tradition'. . . such that 'neither liberty nor justice would exist if they were sacrificed' . . . ."[36] In determining whether a right is fundamental for purposes of a due process analysis, the country's most inherent traditions and the evolution of the country's views on major issues must be analyzed.[37] If a right is determined to be fundamental and protected by the Fourteenth Amendment, the level of scrutiny of policies that restrict that right is heightened, and the government must be able to prove that any infringement on the right is "'narrowly tailored to serve a compelling state interest.'"[38]

The Supreme Court's holding in *Obergefell* was the culmination of a series of major cases in family law that resulted in the establishment of a fundamental right to marriage for all individuals, regardless of gender or sexual orientation.[39] The Court in its analysis included the right to marry in the category of other fundamental rights protected by the Due Process and Equal Protection Clauses of the U.S. Constitution, despite not being specifically enumerated therein.[40] In their words,

> The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[41]

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35. *See id.* at 679, 682.
36. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).
37. *See id.* at 710.
38. *Id.* at 721 (internal quotation marks omitted).
39. Obergefell v. Hodges, 576 U.S. 644, 662-65 (2015)*; cf.* Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (invalidating a state law that unnecessarily burdened the right of fathers who owe child support to obtain a marriage license because restricting a fundamental right must be narrowly tailored to meeting a compelling state interest); Loving v. Virginia, 338 U.S. 1, 12 (1967) (holding that marriage is an inherently personal, fundamental right and that state laws banning and criminalizing interracial marriage are unconstitutional).
40. *Obergefell*, 576 U.S. 644, 662-63.
41. *Id.* at 664.

Having unquestionably established that right, the question now becomes whether the right to marry is one that can be applied retroactively. The Ex Post Facto Clause of the Constitution specifically prevents the retroactive application of federal legislation.[42] However, the retroactivity of judicial decisions, especially ones related to fundamental rights, is a more complicated question that should be considered on the basis of various decisions.

Generally, judicial decisions are considered not to change or alter the law, but to "enunciate the law as it has always existed."[43] Much of the Supreme Court's analysis of its own ability to make decisions that will be applied retroactively is entrenched in the law of criminal procedure.[44] In the realm of civil cases, the Court has struggled to clarify its own standing on retroactivity. The Court laid out a three-factor analysis for determining whether a ruling in a civil case would *not* be applied retroactively in *Chevron Oil Co. v. Huson*. First, "the decision must establish a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression" that had not been foreshadowed.[45] Second, courts must consider "whether retroactive application" of the new rule would "further or retard its operation" in light of its purpose.[46] Third, a "weigh[ing" the potential for "inequity" in retroactive application, and whether "injustice or hardship" would result is also examined.[47] When applying this test to a fundamental right, one based on the idea that government restriction should be severely limited, it is almost certain that the creation of the right by a new ruling would be applied retroactively.

Chevron Oil Co.'s analysis was arguably overruled and broadened later in *Harper v. Virginia Department of Taxation*, holding that when a rule of federal law is reinterpreted by the Supreme Court, that rule is applied retroactively in both civil and criminal cases.[48] Further, while

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42. U.S. CONST. art. I, § 9, cl. 3.

43. Recent Cases, *Retroactive Effect of Judicial Decisions*, 24 IND. L.J. 103, 103 (1948).

44. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 301 (1989) (discussing retroactivity in a landmark habeas corpus case). While ostensibly a prime historical precedent for analyzing *Obergefell* retroactively, *Loving v. Virginia* has less influence than one might expect for this reason. 338 U.S. 1, 12 (1967). *See* Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of* Obergefell, 2016 WIS. L. REV. 873, 905 n.202 (2016). The primary application of *Loving* has been in the realm of criminal law, while *Obergefell* does not affect statutes criminalizing same-sex conduct, which were struck down by Lawrence v. Texas 539 U.S. 558 (2003).

45. 404 U.S. 97, 106 (1971).

46. *Id.* at 106-07.

47. *Id.* at 107.

48. 509 U.S. 86, 96-97 (1993)*; contra* Nunez-Reyes v. Holder, 646 F.3d 684, 690-92 (9th Cir. 2011) (finding that *Chevron Oil Co.*'s analysis was not overruled by *Harper*, but that it still applies in certain limited circumstances, like immigration matters).

Obergefell did not address the question of the retroactivity of the marriage right, the Court held in *Harper* that its holdings apply presumptively retroactively to both the parties before it and all other events, regardless of "temporal barriers."[49] Finding a middle ground between *Chevron Oil Co.* and *Harper*, a more recent case limits unrestricted retroactivity when the new rule "does not determine the outcome of the case."[50] In considering the retroactivity of *Obergefell*, using the rule of strict retroactivity as established by *Harper* and clarified later, a possible outcome will be that the right will be applied retroactively in most cases. This is because the fundamental right was not created by the holding, but rather revealed by the Court's interpretation.[51] Finally, one other case has further clarified the issue. In situations where the Court applies its holding retroactively to the litigants in the case, the holding should also apply retroactively to litigants in other federal courts to prevent issues of inequity and allowing parties to abuse res judicata.[52]

A potential complication in the application of the marriage right retroactively is related the timing of the incident or claim bringing rise to the suit. One author, Huiyi Chen, theorizes that there are four possible sequences for the timing of a legal incident related to a new rule established by the Supreme Court. These sequences depend on whether the new rule is made prior to the incident, between the transaction and the filing of the lawsuit, during the lawsuit and prior to closing, or after the closing of the suit.[53] In either of the first two situations, retroactivity does not create an issue, but Chen elaborates that in situations where the new rule is made during the lawsuit, whether the rule is applied will depend on if the Court follows the *Harper* rule of "pure retroactivity" for fundamental rights, including for pending cases.[54] Thus, a litigant filing suit against a same-sex couple whose lawsuit was pending at the *Obergefell* holding would have only a tenuous claim for the Court not applying the holding.[55] For simplicity's sake, though, the hypotheticals in

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

50. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758-59 (1995).

51. Chen, *supra* note 9, at 1433-34. *See also* Andrea B. Carroll & Christopher K. Odinet, *Gay Marriage and the Problem of Property*, 93 WASH. U. L. REV. 847, 850 (2016).

52. James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 539 (1991).

53. Chen, *supra* note 9, at 1422.

54. *Id.* at 1434, 1422-23.

55. Chen furthers that if the case turned on the litigant having a "significant reliance interest" on the fact that the couple was *not* married and *could not* get married at the time of

this Comment involve incidents that took place prior to the holding and lawsuits filed after the holding, in which case the right would almost certainly be retroactively applied under *Harper*.

C. Marriage-Like Regimes Prior to Marriage Equality

Another relevant legal issue to consider in the retroactive application of *Obergefell*'s marriage equality right to property rights is how the couple in question presented themselves to the public and whether they took advantage of existing legal concepts that created marriage substitutes prior to marriage equality. While this does not change the fact that, after *Obergefell*, the new rule established is that the right to marry *always* existed, it does strengthen the argument that, under the facts of a specific case, a couple would have been married if they could have been married at the time. This would help meet the evidentiary burden of establishing a marriage date and proving the inception of a community property regime. The three most relevant marriage-like regimes are committed intimate relationship rules in community property states, common law marriages, and domestic partnerships, discussed in the order of their procedural formality and similarity to actual marriage.

In the community property states of Washington and California, there is case law creating property rights for cohabiting couples who live in a committed intimate relationship without actually getting married. Cohabitation rules developed to protect people engaged in a "committed intimate relationship" not traditionally protected by marital community property laws in those states, in order to "prevent[] the unjust enrichment of one" by the other at the termination of the relationship.[56] While these laws are limited in scope, they establish rights for division of property in these types of relationships based on a set of factors depending on the state. For example, the five equally-weighted factors in determining the existence of a committed intimate relationship in Washington are: "(1) continuity of cohabitation; (2) duration of the relationship; (3) purpose of the relationship; (4) pooling of resources and services for joint projects; and (5) the intent of the parties."[57] If a court determines that such a relationship existed through a fact-dependent analysis, then the division of property at the relationship's termination will be, at least in

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Obergefell, then the factors of *Chevron* could outweigh the unlimited retroactivity of *Harper* in order to prevent injustice. *Id.* at 1434, 1443.

56. Byerley v. Cail, 334 P.3d 108, 112-13 (Wash. Ct. App. 2014).

57. *Id.* at 113 (citing *In re* Marriage of Pennington, 14 P.3d 764, 769-72 (Wash. 2000)).

part, treated like that of a couple divorcing with community property laws being applied.[58]

The seminal case for cohabitation is *Marvin v. Marvin*, which allowed recovery based on the theory that the cohabiting couple had an express or "implied contractual" agreement related to property at the core of their relationship.[59] *Marvin*'s holding explained that contracts governing property rights between unmarried, cohabiting couples are enforceable "to the extent that" they do *not* contract for sex or other "immoral or illicit services."[60] *Marvin* established a baseline allowing courts to provide property rights for couples who do not enter into a matrimonial regime when a contractual relationship exists.[61] Other cases have further explained the protections for cohabitants.[62] For example, a California appellate court allowed recovery under *Marvin* for a same-sex couple who held themselves out to the public as married, had orally agreed to share property rights and financially support one another, and where any "unenforceable" sexual portion of their contract (even when expressly stated) was "severable" from the rest of the agreement.[63] Thus, there is precedent for courts retroactively applying property regimes to unmarried couples who have a cohabiting, marriage-like relationship.[64]

The next influential marriage-adjacent regime to consider is the common law marriage doctrine practiced in several states. Common law marriage is based on a similar theory to that of meretricious relationships. Rather than simply creating a contract-based remedy, states with common law marriages actually enable a valid marriage to be created without the

58. *Id.*

59. 557 P.2d 106, 112, 123 n.26 (Cal. 1976).

60. *Id.* at 113.

61. Not all community property states recognize cohabitation as an enforceable arrangement for property purposes. *See, e.g.*, Schwegmann v. Schwegmann, 441 So. 2d 316, 323-24 (5th Cir. 1983), *cert. denied* 467 U.S. 1206 (1984) (finding that Louisiana law does not allow for sharing of property between "concubine" and "paramour," effectively barring any enforcement of marriage-like regimes without an official marriage.) The Louisiana court reasoned that the state could "discourage relationships which serve to erode the cornerstone of society, i.e., the family." *Id.* at 324.

62. *See In re* Marriage of Pennington, 14 P.3d 764, 771 (Wash. 2000) (en banc) (precluding recovery for couple whose cohabitation period was inconsistent); Connell v. Francisco, 898 P.2d 831, 836-37 (Wash. 1995) (allowing recovery of real property that would have been part of the community had the couple been married to be subject to an equal division, despite such property being held in only one partner's name).

63. Whorton v. Dillingham, 248 Cal. Rptr. 405, 406-07, 410 (Cal. Ct. App. 1988).

64. *See id.* at 407-10.

formal procedure typically required.[65] The purposes for and benefits of the doctrine are debated among the courts and the public.[66] Currently, only ten states and the District of Columbia recognize common law marriages, and Texas is the only one that also practices community property marital regimes. There, common law marriages are referred to as informal marriages and are fairly simple to prove, requiring either a written agreement or a verbal agreement with cohabitation and public representation of marriage.[67] Even still, states such as Pennsylvania that have abolished common law marriages prospectively still recognize valid common law marriages that formed before the abolition.[68]

The influence of common law marriage on the retroactivity of *Obergefell* is based on the nature of the evidentiary requirements for proving the existence of common law marriages. The requirements for a valid common-law marriage vary from state to state, but certain commonalities exist among most: (1) the couple must "treat[] each other as spouses," (2) they "hold[] themselves out as spouses to the community," and (3) there cannot be a legal impediment to the marriage, such as one spouse already being married.[69] Cohabitation may be included as a separate requirement in proving "that the community would consider the couple married."[70] When courts analyze whether a common law marriage has been formed, claimants should generally be able to prove these elements under a standard of heightened scrutiny, though other states require a lower threshold, such as a "preponderance of the evidence" standard.[71]

Theoretically, a court would analyze the factors establishing the common law marriage to determine when the marriage's community property regime commenced. For example, a couple in Texas could present evidence of the written or verbal agreement from when they

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65. *See, e.g.,* Orr v. State, 129 So. 510, 514 (Fla. 1937) (discussing how English common law establishes that verbal common law marriage contracts can be valid).

66. *See, e.g.*, Johnson v. Young, 372 A.2d 992, 995-96 (D.C. 1977) (suggesting that common law marriage is outdated due to the availability of public officials to perform marriage ceremonies). *But see In re* Estate of Hall, 588 N.E.2d 203, 208 (Ohio Ct. App. 1990) (Gray, J., concurring) (arguing that abolishing common law marriage would be detrimental to "common decency" and women's rights).

67. TEX. FAM. CODE ANN. § 2.401 (2019).

68. *See, e.g.*, *In re* Estate of Carter, 159 A.3d 970, 974 (Pa. Super. Ct. 2017); *see also* GA. CODE ANN. § 19-3-1.1 (2021).

69. Mark Strasser, *Obergefell, Retroactivity, and Common Law Marriage*, 9 NE. U. L.J. 379, 406-07 (2017).

70. *Id.* at 411-12.

71. *Id.* at 403, 407 n.180.

agreed to be married, and the retroactive marriage would commence on that date. Further, one instance in Pennsylvania offers a framework for applying the common law marriage analysis to same-sex couples, even in states where common law marriage is no longer recognized.[72]

One final method of proving a retroactive marriage regime is both more straightforward and more difficult to equate with the establishment of a marriage. Domestic partnership, in California specifically, is a legal relationship allowing "two adults who have chosen to share one another's lives" intimately, enabling marriage benefits, including property rights, for two people without entering into a traditional marriage.[73] Domestic partnership laws were utilized prior to *Obergefell* as a method for same-sex couples to benefit from marital rights, despite being legally unable to marry.[74] Prior to marriage equality, domestic partnerships were the closest to marriage that same-sex couples could enjoy for fifteen years.[75] Domestic partnerships are distinct from marital relationships in several ways. Most notably, marriage licenses in California are issued by individual counties, while domestic partnerships are regulated by the Secretary of State.[76] Still, the date of a domestic partnership is statutorily defined as "equivalent" to the date of a marriage.[77]

Couples who enter into valid domestic partnerships in one state may have that status recognized by other states,[78] meaning that this status could be used as an evidentiary claim in states without a comparable status to justify the formation of a marriage. For example, a California appellate court considered using a same-sex couple's New Jersey domestic partnership in determining the start date of their marriage for property division purposes, though it was unable to because the two states' domestic partnership laws were not "substantially equivalent."[79] The couple had "entered into a domestic partnership in New Jersey in 2004 . . . married in Connecticut in 2009," and "moved to California in 2011."[80] The court in

72. *Estate of Carter*, 159 A.3d at 970.

73. CAL. FAM. CODE §§ 297, 297.5 (2021).

74. *See* Douglas Nejaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 112 (2014).

75. Kerry Abrams, *The Rights of Marriage:* Obergefell*,* Din*, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 518 (2018).

76. *Frequently Asked Questions,* SEC'Y STATE, http://www.sos.ca.gov/registries/domestic-partners-registry/frequently-asked-questions (last visited Apr. 24, 2021).

77. CAL. FAM. CODE § 297.5.

78. *See* CAL. FAM. CODE § 299.2; NEV. REV. STAT. § 122A.500 (2021).

79. *In re* Marriage of G.C. & R.W., 232 Cal. Rptr. 3d 484, 487-88 (Cal. Ct. App. 2018).

80. *Id.* at 491-92.

that case did not consider creating a retroactive marriage, although the property in question had been acquired during the period between the domestic partnership and the official marriage. Still, if two states are found to have domestic partnership laws that are substantially similar, a court would be justified in recognizing it and could then consider whether the evidence of that relationship would be converted to a marriage.[81] The difficulty presented would be due to the broad nature of domestic partnerships and civil unions across states, narrowing the situations in which these relationships could be used for proving a retroactive marriage.

The case law regarding whether domestic partnerships could retroactively be considered marriages after *Obergefell* is limited, notably because the benefits of domestic partnerships are identical to those of marriage.[82] Thus, even if couples married formally once legally allowed to, the marital property regime would be identical to the property created and acquired during the domestic partnership.[83] As such, the largest concern regarding domestic partnerships converted to marriages would be the conferral of the federal benefits of marriage—a significant legal concept, but one that is not relevant to the state-by state regulation of property regimes.[84] Still, at least one federal court in California has retroactively applied *Obergefell* to a same-sex couple using the evidence that they were registered domestic partners (along with other factors) to prove that they had been legally married.[85]

The significance of these three types of relationships relates to the evidence potentially necessary in showing that a relationship existed beforehand to establish a community regime. When a "meretricious relationship" is established, courts strictly require that the couple cohabit for an uninterrupted period of time and have held that community property is presumed to be all property acquired during the cohabitation and while the relationship existed.[86] With common law marriage, a specific date and contractual agreement must exist; a couple who could present evidence that they privately contracted to marry would have a strong argument for

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81. *Id.* at 497 n.17 (declining to "make such a broad pronouncement" as to say that California would *never* recognize a domestic partnership from another state or deny a couple the rights created by such a relationship).

82. CAL. FAM. CODE § 297.5 ("Registered domestic partners shall have the same rights, protections, and benefits . . . as are granted to and imposed upon spouses.").

83. *See id.*

84. *See* NAT'L CTR. LESBIAN RTS., MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES 2 (2017), http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf.

85. *See* Schuett v. FedEx Corp., 119 F. Supp. 3d 1155, 1161 (N.D. Cal. 2016).

86. *See In re* Marriage of Pennington, 14 P.3d 764, 769-71 (Wash. 2000) (en banc).

proving that their valid marriage could extend back to that time.[87] Finally, domestic partnerships and civil unions, though separate and distinct from marriage, could create retroactive property rights to couples who entered into this type of relationship in one state, then moved to a community property state, if the statutes of the states in question are substantially similar.[88]

III. COMPARABLE CASE LAW

A. Hard v. Attorney General of Alabama

Some insight into marital property regimes may come from how courts have handled wrongful death actions involving LGBTQ+ couples. In 2011, Paul Hard and David Fancher married in Massachusetts, one of the states where same-sex marriage was legal at the time.[89] Upon return to their home state of Alabama, their marriage was not recognized under Alabama's law at the time.[90] When Fancher was killed in an automobile accident in 2012, his death certificate did not recognize the marriage and listed him as a single man. As a result, the wrongful death suit filed by Fancher's estate did not include Hard as a beneficiary, and Fancher's mother sought to recover any and all proceeds from the case, which reached a settlement in 2014.[91] Following a federal district court's holding that Alabama's ban on same-sex marriage was unconstitutional[92] and considering the pendency of *Obergefell* at the time, the case was stayed until after the Supreme Court released a decision.[93] When the holding in *Obergefell* was announced three months later, an amended death certificate was released by the Attorney General of Alabama and the funds from the settlement were disbursed to Hard, in accordance with state intestate succession law.[94] The Eleventh Circuit affirmed this decision and rejected the Fancher's mother's argument that *Obergefell* did not apply retroactively.[95] The court explained that "once [Alabama] recognized Hard

87. *See In re* Estate of Carter, 159 A.3d 970, 974 (Pa. Super. Ct. 2017).
88. *See* CAL. FAM. CODE § 297.5.
89. Hard v. Att'y Gen., Ala., 648 F. App'x 853, 854 (11th Cir. 2016).
90. *Id.*
91. *Id.*
92. Searcy v. Strange, 81 F. Supp. 3d 1285, 1290 (S.D. Ala. 2015).
93. *Hard*, 648 F. App'x at 854.
94. *Id.* at 855.
95. *Id.* at 856.

as the surviving spouse," the decision to treat him as such was properly made.[96]

The Eleventh Circuit's opinion here is relatively simple, but the case's complexity and its effect cannot be understated. The case's timeline represents the complex situation where a Supreme Court's decision changes a fundamental right in a separate pending case.[97] Because the court did not address the constitutionality of denying a gay couple a marriage certificate, this case does not create actual precedent for applying *Obergefell* retroactively. However, by affirming the Attorney General of Alabama's actions retroactively granting the posthumous marriage certificate and giving Hard full rights and spousal privileges in the settlement, the 11th Circuit opens the door to allowing the retroactive application of the holding.[98] As a result, *Hard*'s application of retroactive marriage rights is persuasive to other courts.[99]

In fact, the United States District Court for the Eastern District of Texas cited *Hard*'s holding in its analysis to apply *Obergefell* retroactively to both a traditional and common law marriage.[100] In the case, the decedent's mother reached a settlement for wrongful death following a motor vehicle accident. However, the decedent's same-sex partner intervened as a surviving spouse, despite the couple never having formally married. The federal district court found that the holding in *Obergefell* applied retroactively because it was both issued while the lawsuit was pending and the Supreme Court did not expressly limit *its* retroactivity to the *Obergefell* litigants.[101] In their analysis, that court further found that the retroactivity principle should apply to an informal marriage under Texas law. Sufficient evidence to support the holding included their public representation as a married couple such as wearing wedding bands, raising a son together, and referring to their relationship issues as "marital problems," despite inconsistencies in their cohabitation.[102]

B. In re Estate of Carter

The holding in *Hard* was also cited in a Pennsylvania Superior Court case that allowed a same-sex couple to establish a common law marriage

96. *Id.*
97. *Cf.* Chen, *supra* note 9, at 1422.
98. *See Hard*, 648 F. App'x at 856.
99. *See, e.g.*, Ranolls v. Dewling, 223 F. Supp. 3d 613, 622 (E.D. Tex. 2016).
100. *Id.*
101. *Id.* at 622.
102. *Id.* at 624-25. Another significant result of this case is the invalidation of Texas' informal marriage act because of the gendered language used.

retroactively after *Obergefell* despite the state's overturned common law marriage statute.[103] This decision, while a state court decision in a state that does not have community property rules, offers arguably an example of how a federal court might analyze this type of fact pattern in a manner most favorable towards applying a retroactive community property regime. Michael Hunter and Stephen Carter met in 1996 and were in a relationship for seventeen years prior to Carter's 2013 death in a motorcycle accident. The couple's relationship was marriage-like, in that they exchanged rings, had a wedding date (February 18, 1997), purchased property together with joint ownership, shared finances, and referred to each other as spouses. In 2016, Hunter filed for a declaration to have his and Carter's common law marriage retroactively recognized, uncontested by any family members or government agencies.[104]

Common law marriages as discussed in the preceding sections were once recognized as valid in Pennsylvania.[105] However, a 2005 statute established that common law marriages "contracted after January 1, 2005," were no longer "valid" in the state; however, marriages of this type validly entered into prior to this statute would still be recognized.[106] At the time of Carter's death in 2013, same-sex marriage was still not recognized in Pennsylvania, but the case striking down the Defense of Marriage Act (DOMA),[107] as well as *Obergefell*, were pendant.[108] In Pennsylvania, these decisions resulted in full recognition of same-sex marriage, a "tectonic shift" for the state.[109]

The court in *In re Estate of Carter* was tasked with determining whether these changes, both in recognition of common law marriage and recognition of same-sex marriage, should be applied to Carter and Hunter's relationship.[110] The trial court had denied Hunter's petition on the grounds that same-sex couples never had the right to enter into common-law marriages, as they were statutorily defined as being between a man

103. *In re* Estate of Carter, 159 A.3d 970, 977-78 (Pa. Super Ct. 2017).

104. *Id.* at 972-73.

105. *In re* Estate of Manfredi, 159 A.2d 697, 700 (Pa. 1960) (recognizing both ceremonial and common law marriages as valid and establishing that common law marriages require an "express agreement" by the parties).

106. 23 PA. CONS. STAT. § 1103 (2021).

107. United States v. Windsor, 570 U.S. 744, 770 (2013).

108. 576 U.S. 644 (2015).

109. Neyman v. Buckley, 153 A.3d 1010, 1018 (Pa. Super. Ct. 2016).

110. *In re* Estate of Carter, 159 A.3d 970, 977 (Pa. Super. Ct. 2017).

and a woman.[111] By considering the retroactivity of *Obergefell*, the court explicitly rejected this logic. The court agreed that *Obergefell*'s holding did not create a new right to same-sex marriage, but rather affirms a right that always existed.[112] As such, the court held that "same-sex couples have precisely the same capacity to enter marriage contracts as do opposite-sex couples, and . . . because opposite-sex couples 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."[113]

The second relevant part of the court's opinion is establishing how Hunter and Carter's relationship established a common law marriage.[114] If, in any state, a couple were to attempt to prove a retroactive marriage regime under a common law marriage theory, this type of analysis would be used. The court considered the "disfavored" nature of common law marriages in Pennsylvania, as well as the heavy burden on parties seeking to establish them.[115] It concluded that the relationship's facts, along with the present intent to be married, were sufficient to establish their marriage as legitimate to a clear and convincing evidentiary standard.[116] Thus, while other states may have higher evidentiary burdens or different standards for establishing a common law marriage, Pennsylvania courts will certainly require that a relationship be clearly genuine and factually proven. However, *Carter* establishes that, in at least one state, same-sex couples can benefit from *Obergefell* by proving a marriage regime under common law marriage doctrine, even if that type of marriage is no longer recognized by the state.[117] Further, this means that there is a relevant model for retroactively applying marriage equality to a same-sex couple based on the fact that, had the right been legally available to them at the time, they *would* have been married.

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111. *Id.* at 977.

112. *Id.* (citing Whitewood v. Wolf, 992 F. Supp. 2d 410, 423 (M.D. Pa. 2014)). *Whitewood* relates to the decision striking down DOMA, but its reasoning is analogous to *Obergefell*'s more extensive holding. 992 F. Supp. 2d at 422. The *Whitewood* court found that *Loving v. Virginia*'s establishment of a fundamental right to marry had been reaffirmed and used to include rights developing "societal norms," rather than merely historical or traditional rights. *Id.*

113. *Estate of Carter*, 159 A.3d at 977-78 (internal references omitted).

114. *Id.* at 978.

115. *Id.*

116. *Id.* at 980-81.

117. *Id.* at 978.

C. Schuett v. FedEx Corporation

One major decision in a California district court establishes federal precedent for using various pieces of evidence, including the existence of a valid domestic partnership, to establish a retroactive marriage for purposes of federal marital rights.[118] In fact, this decision may be the most important discussed in this paper, specifically because of its relevance to both *Obergefell* and marital property regimes. In *Schuett*, the plaintiff and her partner, Lesly Taboada-Hall, were together for twenty-seven years, had two children, had been in a domestic partnership under California law since 2001, and had been wed in an unofficial marriage ceremony on June 19, 2013.[119] When Taboada-Hall received a terminal cancer diagnosis, the couple married because her employer, FedEx, informed her that only a spouse could inherit her pension benefits.[120] While the wedding took place prior to California generated same-sex marriage licenses, the ceremony was still witnessed by their family and friends and officiated by a county official.[121] Taboada-Hall died the following day.[122]

Just six days after their wedding, DOMA was struck down by the Supreme Court.[123] Following an expedited hearing, Schuett filed a petition to have the date of their marriage declared as June 19, 2013, and a delayed marriage certificate was issued.[124] However, when she attempted to submit a claim for surviving spousal benefits under her wife's retirement plan, FedEx denied it on the basis of the strict definition of spouses being opposite-sex partners.[125] Schuett then filed with the district court, seeking either payment of the benefits or equitable relief for the FedEx's failure to pay her benefits appropriately.[126] Taboada-Hall's pension benefits through FedEx were governed by the Employee Retirement Income Security Act of 1974 (ERISA),[127] meaning that the federal law pre-empted conflicting application of state community property laws.[128]

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118. Schuett v. FedEx Corp., 119 F. Supp. 3d 1155, 1160 (N.D. Cal. 2016).
119. *Id.* at 1157.
120. *Id.* at 1158.
121. *Id.*
122. *Id.*
123. *See* United States v. Windsor, 570 U.S. 744, 770 (2013).
124. Schuett v. FedEx Corp., 119 F. Supp. 3d 1155, 1158 (N.D. Cal. 2016).
125. *Id*. at 1158-59.
126. *Id.* at 1159.
127. 29 U.S.C. §§ 1001 *et. seq.*
128. *See* Boggs v. Boggs, 520 U.S. 833, 844 (1997) (holding that, when conflicts arise between state law and ERISA in cases where the spouse receiving the pension has died, the federal law preempts the state law.)

The court considered the relevant factors for a valid marriage under California law: "the consent of the parties; the issuance of a license; solemnization; and authentication by returning the license to the county recorder[.]"[129] Despite the fact that the marriage license was not issued at the time of the wedding, the court found that the retroactive issuance of the marriage license, along with the fact that the couple were registered domestic partners, had the intent to marry, had consented to be married, and did everything they could to marry formally proved that their marriage was valid.[130] The court reasoned that "[w]ere it not for California's application of the unconstitutional law prohibiting same-sex marriage, there would be no question that plaintiff and Ms. Taboada-Hall were married[.]"[131] In the end, the court found that the case striking down DOMA could be applied retroactively[132] and that Schuett had standing to recover for a breach of FedEx's fiduciary duty to pay her benefits under ERISA.[133]

While the court in *Schuett* only briefly mentioned *Obergefell*'s effect on the retroactivity of the case's marriage,[134] their application of the case striking down DOMA is analogous to what a court would consider when applying *Obergerfell* retroactively.[135] Some limits do apply to *Schuett*, including the fact that at least one court has declined to extend its rule[136] and the fact that the couple's marital regime was found to start in 2013, not in 2001, when their relationship was first formalized by their domestic partnership.[137] Still, the district court's holding is persuasive and proves that retroactivity is a possible remedy for these couples. Overall, these three lines of cases make a strong argument for applying the marriage right retroactively to actions involving wrongful death and surviving spousal remedies, so it naturally follows that the holdings are also persuasive in applying the reasoning to property issues.

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129. *Schuett*, 119 F. Supp. at 1160 (internal references omitted).

130. *Id.* at 1161.

131. *Id.*

132. *Id.* at 1166.

133. *Id.* at 1167.

134. The court implied that *Obergefell's* establishment of marriage as "a fundamental right" was persuasive. *See id.* at 1165 n.5.

135. United States v. Windsor, 570 U.S. 744, 770 (2013). The Court in *Windsor* found that DOMA violated the Fifth Amendment right to due process, but did not strike down all state statutes banning same-sex marriage. *Id.* at 774-75.

136. *See, e.g.*, Anderson v. S.D. Ret. Sys., 924 N.W.2d 146 (S.D. 2019) (holding that a surviving spouse was not entitled to spousal benefits when the marriage occurred after *Obergefell* and after the deceased spouse had retired.)

137. Schuett v. FedEx Corp., 119 F. Supp. 3d 1155, 1157 (N.D. Cal. 2016).

IV. HYPOTHETICAL APPLICATION

For the remainder of this Comment, several assumptions are made based on the information discussed above. First, *Obergefell* is considered to have created a retroactively applicable right to marry under the Fourteenth Amendment, based on the theory that fundamental rights apply retroactively when revealed by a Supreme Court decision.[138] Second, as mentioned, these cases involve situations where the couple attempts to get married *prior* to 2015 and the event from which the legal controversy arises takes place *after* marriage equality became the law of the land. Third, of the three marriage-like regimes discussed above, it should be assumed that these couples entered into a meretricious contractual relationship and presented themselves to the public as being a married couple, though they may not have entered into a common law marriage. Finally, these situations take place *certeris paribus*, so other relevant factors affecting the outcome of a court's decision[139] not discussed explicitly should be disregarded.

While a community property issue could appear before a court for several reasons, including a contested estate/succession or a divorce, the most likely situation involves creditors' rights. This is due to the fact that a third-party adversary is present. In succession issues, children and step-parents are less likely to sue one another; in divorces, couples are incentivized to settle out-of-court to avoid costly litigation.[140] On the other hand, the creditors' rights to community property are heavily litigated, even when compared to similar issues in separate property states.[141] As such, the effect of applying a community property regime would be substantial to both the couple and the creditors seeking to enforce the debt.[142]

Consider a same-sex couple, Harold and Henry, who begin dating in 2007 in a community property state. Harold works as a lawyer and Henry

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138. Chen, *supra* note 9, at 1434.

139. For example, the existence of other creditors should be ignored for the sake of simplicity; the hypothetical would thus exist in a world where only that creditor's rights are affected. Further, it should be assumed that other laws that may exist in the state in question other than the relevant laws mentioned will not interfere with the outcome.

140. Amy Farmer & Jill Tiefenthaler, *Conflict in Divorce Disputes: The Determinants of Pretrial Settlement*, 21 INT'L REV. L. & ECON. 157, 158-59 (2001).

141. *See* Carroll & Odinet, *supra* note 51, at 854-55.

142. *See id.* Carroll and Odinet theorize that the result of creating a community property regime would be a "windfall" to creditors, allowing them more substantial resources from which to recover for an unpaid debt. *Id.* at 855.

as a teacher. After three years of dating, they decide to get married, though same-sex marriage was not recognized at the time. They have a private ceremony with all their closest relatives and friends, its officiated by an ordained minister, they exchange rings, vow to support each other emotionally and financially, and celebrate their anniversary every year. They establish a joint checking account and agree to make mutual decisions about how to use their property during their marriage, though none of these agreements are in writing or officially recognized. On their first anniversary, they put a down payment on a house, but with only Harold's name on the mortgage because Henry's credit was not as high as his. When *Obergefell* was decided in 2015, the couple officially get a marriage license and renew their vows. They live there happily for ten years, make payments on the mortgage from their joint account, and both contribute to the relationship in their own ways. During 2020's pandemic-based recession, however, both Harold and Henry lose their jobs and become delinquent on their mortgage. Their bank subsequently files a lawsuit in federal court under applicable state law to seize their assets.

Whose assets can the bank now recover from? Under the managerial system of determining creditors' rights, the property must first be classified to determine which assets can be seized. If the property is determined to be under the sole managerial control or separate property of one spouse, then the separate property of the non-debting spouse will be protected.[143] Thus, Harold and Henry will argue that the property is Harold's separate property and the bank will argue that the house is community property and subject to dual or joint management. Ironically, the most beneficial legal argument for the couple is that their own marriage cannot be retroactively recognized.

The couple's argument is based on the fact that no court until this point has fully applied a community property regime retroactively. Their wedding in 2010 was not legal because there was no marriage license issued or recorded, and the house was purchased in one spouse's name. Further, their marriage became official in 2015, and at that point they did not add Henry's name to the deed. This demonstrated their intent to keep the house as Harold's separate property. Additionally, there is precedent to support a court rejecting *Obergefell* retroactive application. This is particularly true in cases where there are no official common law marriage or domestic partnership,[144] and doing so can have unintended

143. *See* Shel-Boze, Inc. v. Melton, 509 So. 2d 106, 110. (La. Ct. App. 1987).
144. *See* Anderson v. S.D. Ret. Sys., 924 N.W.2d 146, 150-51 (S.D. 2019).

consequences for couples who do not wish to have their relationship statuses changed by a legal mechanism.[145] Harold and Henry can proactively argue that their intent in 2010 was not to be married at all. They did not attempt to have their marriage retroactively applied when they made it official and, moreover, only Harold's name was on the mortgage.

The bank will argue several theories in the alternative. First, Harold and Henry may have entered into a common law marriage (depending on the requirements of the state in question) based on their verbal marriage contract, the fact that they consented to be married, and the solemnification of the marriage in a ceremony.[146] Even if common law marriage may not be recognized currently, if the state in question recognized it at the time the marriage was formed, there is precedent for the marriage being legally enforceable.[147] Further, *Schuett* is persuasive in showing that *Obergefell* can apply retroactively, even to couples entering into unofficial marriages where no marriage license is filed.[148] Though Harold and Henry are now arguing against the validity of their own marriage, their intent at the time of their first wedding was clearly to be married while in other circumstances it would be favorable to them for the marriage to become retroactive. Finally, their conduct throughout the relationship, like treating the house as a community domicile, strengthens the bank's argument by showing that the couple was, indeed, married.

This hypothetical presents some unique complications that would certainly affect how a court would decide on this issue. The valid interests of the creditor must be balanced with the freedom of the couple to choose the status of their own relationship. After all, the freedom to marry also means a couple can choose *not* to marry. Such a unique dichotomy between rights makes it unclear what a court would decide. If the court were to find in favor of the bank, the house would be classified as community property under both spouses' ownership, along with all other property created or acquired during their marriage. This would result in Henry's separate property being liable for the default. However, if the

145. *See* Carroll & Odinet, *supra* note 51, at 855-56; Strasser, *supra* note 69, at 423-24.

146. *See* Strasser, *supra* note 69, at 406-07. If this argument fails, their relationship may also have been a meretricious relationship, wherein other factors such as their cohabitation and their pooled resources would be considered, creating a contractual quasi-marriage that would be enforceable under equitable theories. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 112 (Cal. 1976).

147. *See In re* Estate of Carter, 159 A.3d 970, 977 (Pa. Super. Ct. 2017).

148. Schuett v. FedEx Corp., 119 F. Supp. 3d 1155, 1160 (N.D. Cal. 2016).

court found in favor of the couple, the bank would likely be unable to recover from Henry's separate property, barring extreme circumstances.

V. CONCLUSION

The difficulty of the question presented by this Comment arises from the complexity and uniqueness of the issues it brings up. Community property is a concept that is limited in an official capacity, but influential in the effect it has on the developing rules of family law. The situations where a marriage would need to be applied retroactively are more common in questions of wrongful death actions and spousal benefits; property questions arise in fairly specific situations. While the hypothetical discussed is ambiguous for purposes of analyzing both sides of the argument, there is significant precedent suggesting that, in a less complicated situation where the couple *wants* to be recognized as married, the court could find in favor of applying the community regime retroactively. At the issue's core, the fact that *Obergefell* established a fundamental right to marriage makes the question of retroactivity fairly simple. The complications arise when considering the countless other factors that could affect a court's decision. Still, one case with the right elements could change the way marriage equality is viewed—affecting property law, constitutional law, and family law significantly.