

CATCHING THE GOLD AT THE END OF THE RAINBOW: THE IMPACTS OF RETROACTIVE RECOGNITION OF SAME-SEX MARRIAGE ON COMMUNITY PROPERTY DIVISION

Comment

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I. INTRODUCTION

Picture a couple walking into their local county clerk's office to obtain a marriage license. While this mental image will vary from person to person, many individuals would likely imagine beaming smiles from a happy couple. Perhaps others would see the pair holding hands and excitedly walking away from the clerk's office, marriage license in hand. Someone else might visualize the couple taking a photo to remember the important milestone in their relationship. Most people who picture this scene would not envision a man posing as a woman while wearing a sequin dress, makeup, and a blonde wig. As crazy as this mental image may seem, this event actually occurred in Wharton County, Texas over forty-two years ago.¹ One male couple resorted to the extreme measure of cross-dressing in hopes of tricking court officials into granting them a marriage license.² Despite walking away with the document, the couple ultimately lost the legal battle to record the license.³ The following year, Texas enacted its first legal ban on same-sex marriage.⁴ Since Texas's Legislature initiated the ban, many Texans have taken remarkable steps to fight for same-sex couples' freedom, rights, and love.⁵

Recognized as the strongest Republican state in the nation, Texas is also known for its staunch conservative values.⁶ Historically, Texas has purposely taken actions to ensure that state law did not permit same-sex marriage.⁷ The state's lawmakers and citizens alike have steadfastly opposed progressive actions favoring same-sex marriage within its borders.⁸ In fact, Texas's laws have been amended several times to strictly prohibit the marriage of same-sex couples—the general public, who voted against permitting these unions, passed some of these amendments.⁹

1. See John Wright, *Gay Texas Couple Was First To Obtain Marriage License 42 Years Ago, But Did They Help Or Hurt the Movement?* TOWLEROAD (Nov. 29, 2014), <http://www.towleroad.com/2014/11/texas-men-became-1st-gay-couple-to-obtain-marriage-license-42-years-ago-but-did-they-help-or-hurt-th/> [https://perma.cc/YX3A-H9NQ].

2. See *id.*

3. See *id.*

4. See *id.*

5. See *A timeline of same-sex marriage in the US*, BOS. GLOBE (Jan. 9, 2016), <https://www.bostonglobe.com/2016/01/09/same-sex-marriage-over-time/mbVFMQPyxZCpM2eSQMUsZK/story.html> [https://perma.cc/JVC5-SETC] [hereinafter BOS. GLOBE].

6. See *Overview and History*, REPUBLICAN PARTY OF TEX., <https://www.texasgop.org/about-the-party/overview-and-history/> [https://perma.cc/W7M9-Z3VK] (last visited Jan. 9, 2017).

7. See BOS. GLOBE, *supra* note 5.

8. See *id.*

9. See *id.*

Many Texans, including some prominent public figures, tend to be socially conservative and exhibit a general reluctance to accept same-sex marriage.¹⁰ In 2016, the State Bar of Texas investigated Texas Attorney General Ken Paxton after he released a statement permitting Texas officials to refuse granting marriage licenses to same-sex couples if it violated their religious beliefs.¹¹ In his statement, Paxton noted that the Supreme Court had not overruled the First Amendment and that he believed same-sex marriage could co-exist with other constitutional rights, such as the free exercise of speech and religion.¹² Similarly, when same-sex marriage became legal nationwide, Texas Governor Greg Abbott issued a statement expressing his disapproval of the new federal law.¹³ Governor Abbott wrote, “[d]espite the Supreme Court’s rulings, Texans’ fundamental right to religious liberty remains protected. No Texan is required by the Supreme Court’s decision to act contrary to his or her religious beliefs regarding marriage.”¹⁴ Both Paxton and Abbott felt so strongly about same-sex marriage that they attempted to circumvent the United States Constitution and resist change to Texas law.¹⁵

This Comment begins by presenting two hypothetical questions that have become relevant in Texas post-*Obergefell*.¹⁶ Specific legal questions raised in this Comment include: (1) if a same-sex couple currently living in Texas was legally married in another state pre-*Obergefell*, what date should Texas use as the date from when they started accumulating community property; and (2) when does a same-sex couple who met the requirements of a valid common-law marriage in Texas pre-*Obergefell* begin to acquire community property?¹⁷ Second, this Comment provides a brief history of same-sex marriage in both the United States and Texas, as well as a background of the recent seminal United States Supreme Court case, *Obergefell v. Hodges*.¹⁸ Third, this Comment discusses marital rights for heterosexual couples in Texas, including the types of marriage the state recognizes.¹⁹ Next, the Comment explains available marriage alternatives for

10. See Patrick Tolbert, *Texas Attorney General will be investigated for same-sex marriage orders*, KXAN (Feb. 10, 2016), <http://kxan.com/2016/02/10/texas-attorney-general-will-be-investigated-for-same-sex-marriage-orders/> [https://perma.cc/3Z2K-QUEG].

11. See *id.*

12. See William Malm, *Attorney General Ken Paxton: Public officials may deny same-sex marriage licenses*, KXAN (June 29, 2015), <http://kxan.com/2015/06/28/attorney-general-ken-paxton-public-officials-may-deny-same-sex-marriage-licenses/> [https://perma.cc/WN7T-QARN] (The State Bar of Texas ultimately concluded that Paxton’s actions were not a sign of “professional misconduct” and dismissed the complaint).

13. See *Governor Abbott Statement On Supreme Court Ruling on Same-Sex Marriage*, OFFICE OF THE GOVERNOR GREG ABBOTT (June 26, 2015), <http://gov.texas.gov/news/press-release/21131> [https://perma.cc/N3SD-HK8S].

14. See *id.*

15. See *id.*

16. See *infra* Part II.

17. See *infra* Part II.

18. See *infra* Part III.

19. See *infra* Part IV.

same-sex couples pre-*Obergefell*, namely civil unions and domestic partnerships.²⁰ Fifth, this Comment addresses spousal property rights and property division for both opposite-sex and same-sex couples in Texas.²¹ Next, the Retroactivity Doctrine is described and applied generally to same-sex marriages in Texas.²² This comment then revisits hypothetical questions raised in Section II and analyzes potential outcomes of the two legal questions.²³ Finally, the Comment suggests amendments to Texas's statutes that are currently written to reflect a limitation of marriage in the state to opposite-sex couples.²⁴

II. TWO HYPOTHETICAL QUESTIONS ARISING IN TEXAS POST-*OBERGEFELL*

Since the Supreme Court of the United States decided *Obergefell*, new legal scenarios have emerged in Texas.²⁵ This comment will explore two specific legal questions to properly emphasize the complicated situation that *Obergefell* created for Texas courts.²⁶ Specifically, troubles will arise for courts when deciding how to distribute a couple's community property.²⁷ The first hypothetical question involves retroactively applying *Obergefell* to a same-sex marriage from a different state when dividing the couple's community property.²⁸ The second hypothetical question discusses dividing community property among a same-sex couple that was common-law married pre-*Obergefell*.²⁹

A. A Hypothetical Question Involving Same-Sex Marriages Across Jurisdictions

Consider a male couple who got married in 2008.³⁰ The ceremony was performed in California, where, at that time, same-sex marriage was legal. Although they exchanged vows in California, the couple's permanent address was in Texas where they returned to live after the wedding and remained for the entirety of their relationship. Because *Obergefell* required all fifty states to recognize same-sex marriages performed in other jurisdictions, the couple's marriage became valid in Texas on June 26, 2015.³¹ The couple

20. See *infra* Section IV.B.

21. See *infra* Parts V–VI.

22. See *infra* Part VII.

23. See *infra* Sections VIII.A–B.

24. See *infra* Section VIII.C.

25. See *supra* Part I.

26. See *supra* Part I.

27. See *infra* Sections VIII.A–B.

28. See *infra* Section VIII.A.

29. See *infra* Section VIII.B (possible solutions and outcomes to these hypotheticals will be discussed in Section VIII of the Comment).

30. This hypothetical was created by the author for purposes of this Comment.

31. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

remained happily married in Texas until 2016 when, after many heated quarrels, they determined a divorce would best suit both parties. A divorce requires distribution of the couple's assets, which forces courts to identify an official marriage date.³² This date determines when the couple began acquiring community property in Texas.³³

This scenario presents two hypothetical avenues for property distribution in Texas. First, if *Obergefell* is applied retroactively to the date of the marriage that took place in California, the couple began acquiring community property on their wedding day in 2008. If *Obergefell* is applied in this manner, it would give the couple the largest amount of community property to divide. However, if *Obergefell* is not applied retroactively, the couple would begin acquiring community property on the date Texas was forced to recognize same-sex marriage, June 26, 2015. The discrepancy in the wedding date significantly affects community property distribution.

B. A Hypothetical Question Involving Common-Law Marriage

The second hypothetical situation is especially troubling as Texas is the only state that recognizes common-law marriage and uses the community property marital property system.³⁴ Imagine a situation in which a female couple met all of the requirements for a valid common-law marriage before *Obergefell* was decided on June 26, 2015.³⁵ Subsequently, one of the women died intestate after June 26, 2015, terminating the common-law marriage.³⁶ Because same-sex marriage was legal at the date of death, a question regarding community property division arises from this hypothetical situation.³⁷ When did the couple begin to acquire community property?³⁸ Was it June 26, 2015, or when the couple successfully satisfied the requirements of a common-law marriage?

32. See TEX. FAM. CODE ANN. § 3.002 (West 2015).

33. See *id.*

34. See Gerry W. Beyer, *Estate Planning Ramifications of Obergefell v. Hodges* (July 2016), EST. PLAN. DEVS. FOR TEX. PROFS., FORTHCOMING, <http://ssrn.com/abstract=2807101> [<https://perma.cc/L263-CBKA>].

35. See generally TEX. FAM. CODE ANN. § 2.401 (West 2015) (identifying that to be common-law married the two women (1) have agreed to be married as wife and wife; (2) the couple lives together in Texas as wife and wife; and (3) the couple publicly represents to others that they are married. Although the language of the Texas Family Code reads "husband and wife," when applying *Obergefell*, this is unconstitutional. See *id.* It will be assumed for the purposes of this Comment that the Code now is read to include same-sex partners).

36. See Beyer, *supra* note 34. (As the deceased partner passed away without a will, if the surviving spouse is legally considered the deceased spouse's wife, it would seriously affect the inheritance rights of the deceased spouse's family. *Id.* The family would likely be unable to inherit the deceased's community property and it would pass to the widow. See *id.*).

37. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

38. See Beyer, *supra* note 34.

III. A HISTORY OF SAME-SEX MARRIAGE

The significance of the *Obergefell* decision cannot be overemphasized, especially with respect to its application to Texas's statutory law.³⁹ However, to better understand this case's cascading impact, a brief history of same-sex marriage in both the United States and Texas is discussed below.⁴⁰

A. A Background of Same-Sex Marriage in the United States

Same-sex marriage disputes are relatively new to the legal profession as questions involving this controversial issue only began to emerge a few decades ago.⁴¹ Legal debates surrounding same-sex marriage in the United States started in the 1970s when Maryland became the first state to ban gay marriage in 1973.⁴² In May 1993, Hawaii's Supreme Court tackled the issue of same-sex marriage in *Baehr v. Lewin*, where a same-sex couple was denied a marriage license under a Hawaii statute.⁴³ The two women challenged the law, but the Hawaiian Supreme Court ultimately remanded the case back to the trial court to determine whether the state had compelling reasons to ban same-sex marriage and whether the ban violated the state's constitution.⁴⁴ Since *Baehr*, Hawaii revised this statute to eliminate language limiting marriage to only opposite-sex couples.⁴⁵ Further, Massachusetts was the first state to legalize same-sex marriage in May 1994.⁴⁶ But in September 1996, President Clinton signed the Defense of Marriage Act (DOMA), which banned the federal recognition of same-sex marriage by defining marriage as "a legal union between one man and one woman as husband and wife."⁴⁷ Eventually, the Supreme Court of the United States rejected DOMA in part.⁴⁸ President Obama was the first president to publicly endorse same-sex marriage in 2012—a full sixteen years after President Clinton signed DOMA into law.⁴⁹ Later, in 2012, the Supreme Court announced it would hear cases involving the constitutionality of same-sex couples' ability to wed.⁵⁰ Finally,

39. *See id.*

40. *See infra* Part III.

41. *See Gay Marriage Timeline History of the Same-Sex Marriage Debate*, PROCON.ORG, <http://gaymarriage.procon.org/view.timeline.php?timelineID=000030> [https://perma.cc/WJ85-AAFX] (last updated Oct. 6, 2014) [hereinafter PROCON.ORG].

42. *Id.* (Before Maryland passed this statute, legal debates involving same-sex marriage had begun making headlines in the United States. *See id.* In 1970, two Minnesota men were denied a marriage license due to their gender. *Id.* This case was used as a precedent in other states to block same-sex marriage. *Id.*).

43. *See Baehr v. Lewin*, 74 Haw. 530, 544 (1993).

44. *See id.* at 583.

45. *See HAW. REV. STAT. ANN.* § 572-1 (West 2015).

46. *See Same-Sex Marriage Fast Facts*, CNN, <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/> [https://perma.cc/q9ha-69r6] (last updated July 27, 2016).

47. *See id.*

48. *See id.*

49. *See id.*

50. *See id.*

on June 26, 2015, the Supreme Court of the United States ruled that same-sex couples could legally marry nationwide.⁵¹

Over the past few decades, many individuals advocated for same-sex marriage with a goal of securing same-sex couples the same legal rights granted to heterosexual couples.⁵² After the Supreme Court announced it would hear arguments for *Obergefell*, non-litigants with a strong interest in the case filed 148 amicus briefs in support of same-sex marriage.⁵³ This number is now the record for the most amicus briefs filed for any Supreme Court case.⁵⁴ Further, four days before *Obergefell*'s oral arguments commenced, individuals who wished to witness the proceedings camped out on a sidewalk near the Court in hopes of capturing a seat.⁵⁵ The amount of interest expressed in this case emphasizes this topic's importance and relevance in the lives of many Americans.⁵⁶

B. A Background of Same-Sex Marriage in Texas

Texas has traditionally created laws to prevent same-sex marriage, which includes placing a ban on the recognition of same-sex marriages from another state.⁵⁷ In 1997, Texas passed a statute that restricted marriage in the state to opposite-sex couples only.⁵⁸ In 2005, Texas citizens who opposed same-sex marriage voted in favor of Proposition 2, which amended the Texas Constitution to forbid the legal recognition of same-sex marriage in the state and prohibited those couples from obtaining any other legal family status.⁵⁹ The state's first same-sex marriage license was issued in Austin—a Texas city known for its liberal atmosphere—in 2015.⁶⁰ As previously noted, June 2015 marked the end of an era of discrimination in Texas when the Supreme Court of the United States ruled in favor of same-sex marriage.⁶¹

As this brief timeline illustrates, Texas has been slow to embrace same-sex marriage.⁶² Even though some liberal-minded Texans accepted

51. See *id.* (This brief timeline of relevant events involving same-sex couples is not exhaustive, but it is intended to highlight the enormous debate that has surrounded this subject matter for many years. See *id.*).

52. See PROCON.ORG, *supra* note 41.

53. See *id.*

54. See *id.*

55. See *id.*

56. See *id.*

57. See TEX. FAM. CODE ANN. § 2.401 (West 2015).

58. See *The Freedom to Marry in Texas*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/texas> [https://perma.cc/9AFZ-2MHQ] (last visited Jan. 24, 2017).

59. See *id.*

60. See *id.*

61. See *id.*

62. See *id.*

same-sex marriage pre-*Obergefell*, the state's laws reflected an opposition to these unions prior to the change in federal law.⁶³

C. A Background of *Obergefell v. Hodges*

On June 26, 2015, history was made in the United States when the Supreme Court decided the case of *Obergefell v. Hodges*.⁶⁴ In a 5-4 decision, the Court vacated a concept rooted in the nation's Constitution and ended the prohibition of same-sex marriage.⁶⁵ Legal questions decided in *Obergefell* included: (1) whether the Fourteenth Amendment to the United States Constitution requires states 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 another jurisdiction that does not permit same-sex couples to marry.⁶⁶ Under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Court found the fundamental right to marry applied to same-sex couples.⁶⁷ As a result, same-sex marriage officially became legal nationwide, which also required the recognition of same-sex marriages that previously took place in other states.⁶⁸ States now must recognize same-sex marriages from other jurisdictions because it is unconstitutional post-*Obergefell* for states to forbid same-sex marriage or create statutory laws blocking the union.⁶⁹ When the Supreme Court heard arguments for *Obergefell*, thirteen states, including Texas, still had yet to recognize same-sex marriage as legal.⁷⁰

IV. MARRIAGE IN TEXAS

According to the plain language of the Texas Constitution, marriage within the state was previously only recognized as a union between a man and a woman.⁷¹ Before *Obergefell*, the only permitted legal unions for heterosexual couples in Texas were ceremonial and common-law marriages.⁷² However, despite traditional laws in Texas, the state was forced

63. *See id.*

64. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

65. *See id.*

66. *See id.* at 2593.

67. *See id.* at 2604.

68. *See id.* at 2607.

69. *See id.*

70. *See* Faith Karimi & Michael Pearson, *The 13 States that still ban same-sex marriage*, CNN, <http://www.cnn.com/2015/02/13/us/states-same-sex-marriage-ban/> [<https://perma.cc/2H8T-UWV8>] (last updated Feb. 13, 2015).

71. *See* TEX. CONST. art. I § 32.

72. *See* J. Thomas Oldham, *Texas Marital Property Rights* 11–12 (Carolina Academic Press, 6th ed. 2016).

to accept same-sex unions when the Supreme Court redefined marriage in the United States.⁷³

A. Heterosexual Couples' Marital Rights in Texas

1. Ceremonial Marriage

Ceremonial marriage, also referred to as formal or licensed marriage, is the most common form of matrimonial union in Texas.⁷⁴ A couple enters into a ceremonial marriage when they obtain the required license and participate in a ceremony that an authorized individual officiates.⁷⁵ Married individuals in Texas receive certain benefits due to their relationship status, many of which also come with obligations to one another.⁷⁶ These benefits or obligations can include: (1) the duty to support each other; (2) spousal privilege against testifying in a criminal case; (3) the ability to receive Social Security benefits; and (4) the potential to inherit community and separate property as an heir.⁷⁷ A valid marriage in Texas requires that both parties must be of proper mental capacity, at least eighteen years of age, and not under the influence of drugs or alcohol at the time of marriage.⁷⁸ Also, neither spouse may already be married; therefore, if one spouse is married at the time of the ceremony, the marriage is declared void.⁷⁹

2. Common-Law Marriage

Informal marriage, also known as common-law marriage, is also recognized in Texas.⁸⁰ A common-law marriage is valid when the marriage meets three requirements: (1) the couple has agreed to be married as husband and wife; (2) the couple lives together in Texas as husband and wife; and (3) the couple publicly represents to others that they are married.⁸¹ While these elements may also be successfully met in other states, Texas requires a couple meet these requirements within the state's borders to constitute a valid common-law marriage in the jurisdiction.⁸² Further, parties may not simply cohabitate and refer to themselves as married.⁸³ To provide more evidence

73. *See id.*

74. *See id.* at 11.

75. *See id.*

76. *See* Beyer, *supra* note 34.

77. *See id.*

78. *See* Oldham, *supra* note 72, at 16.

79. *See id.*

80. *See* TEX. FAM. CODE ANN. § 2.401 (West 2015).

81. *See* TEX. FAM. CODE ANN. § 2.401(b) (West 2015) (showing this statutory language is now unconstitutional post-*Obergefell*); *see* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

82. *See* Oldham, *supra* note 72, at 14.

83. *See id.*

that a marriage exists, couples may also obtain a written declaration to prove common-law marriage.⁸⁴

It is important to note that while most common-law marriages exist between heterosexual couples, it is now possible for same-sex couples to meet the requirements of common-law marriage post-*Obergefell*.⁸⁵ In 2015, for the first time in Texas's history, a Travis County judge ruled a same-sex couple met the requirements of a valid common-law marriage.⁸⁶ The legal dispute was centered around the estate of a deceased partner in a same-sex relationship.⁸⁷ The deceased's family argued the two women were not legally married; and therefore, the widow had no legal right to her partner's estate.⁸⁸ The presiding judge essentially applied *Obergefell* retroactively to recognize that a common-law marriage existed even though the deceased partner passed away pre-*Obergefell*, marked "single" as her status on legal documents, and a same-sex, common-law marriage had yet to be validated in the state of Texas.⁸⁹ This decision ignited controversy among Texas leaders as many were concerned this ruling would re-open finalized probate cases and permit a surviving partner to claim property.⁹⁰ However, after *Obergefell*, Texas courts must interpret the United States Constitution to permit same-sex marriage.⁹¹ This couple met the necessary requirements to end the probate battle and win under the Constitution.⁹²

B. Marriage Alternatives for Same-Sex Couples

Prior to *Obergefell*, many states prohibited same-sex couples from marrying, which required these couples to seek alternative methods of achieving a quasi-marriage status.⁹³ Historically, Texas was not very welcoming to the concept of same-sex couples, so lawmakers did not provide or acknowledge a marriage alternative for these couples.⁹⁴ In fact, the

84. See TEX. FAM. CODE ANN. § 2.401 (West 2015) (The Texas Family Code asserts that a signed document stating that a man and woman are married is proof of informal marriage in a judicial proceeding. *Id.*).

85. See Matt Ferner, *Texas Judge Recognizes Same-Sex Common-Law Marriage in Historic Ruling: A widow will now be allowed to inherit some of the assets of her late wife*, HUFFINGTON POST, http://www.huffingtonpost.com/entry/texas-judge-recognizes-same-sex-common-law-marriage_us_55fc868ae4b08820d918c34d [<https://perma.cc/2XDZ-J5XR>] (last updated Sept. 21, 2015).

86. See *id.*

87. See *id.*

88. See *id.*

89. See *id.* (The couple married in 2008, the deceased passed away in 2014, the legal fight over the estate also commenced in 2014, and *Obergefell* was decided in 2015. See *id.*).

90. See *id.*

91. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

92. See Ferner, *supra* note 85.

93. See Karimi & Pearson, *supra* note 70.

94. See *Marriage, Domestic Partnerships, and Civil Unions: Same-Sex Couples Within the United States*, NAT'L CTR. FOR LESBIAN RIGHTS (Nov. 2015), http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf [<https://perma.cc/DVS8-7YKD>] (While Texas does not

language of Texas Family Code section 2.001(b) says: “a [marriage] license may not be issued for the marriage of persons of the same sex.”⁹⁵ Other states do, however, legally permit quasi-marriages.⁹⁶ These “marriages” were previously classified by utilizing the terms “union” or “partnerships” in lieu of “marriage.”⁹⁷ Marriage alternatives typically come with legal protections, spousal responsibilities, and benefits similar to those of a heterosexual marriage.⁹⁸ While quasi-marriage unions are still available nationwide post-*Obergefell*, many couples have opted to marry since being granted the legal right to do so.⁹⁹

While these other relationship titles were not “marriage” per se, they served to provide a great deal of progress in a movement toward equal treatment of same-sex couples.¹⁰⁰ However, these titles did not bestow upon same-sex couples the same rights and privileges that heterosexual couple received upon entering into a valid marriage.¹⁰¹ Because most civil unions or domestic partnerships exist under state law, these available marriage alternatives denied the parties federal responsibilities, benefits, and rights of marriage.¹⁰² For example, same-sex couples who choose a domestic partnership or civil union are barred from jointly filing a tax return; and therefore, the couple may not receive a marriage deduction.¹⁰³ While state laws varied greatly, many states permitted same-sex couples to receive state benefits, such as the ability to inherit property, and allowed these couples to escape a federal marriage tax penalty.¹⁰⁴

1. Civil Union

A civil union is a legal status that is available to same-sex couples under some state laws that delineates specific responsibilities and rights of the couple.¹⁰⁵ As the Family Code is currently written, this marriage alternative

recognize Civil Unions or Domestic Partnerships, homosexual couples would likely be declared common-law married as an alternative to marriage. *Id.*).

95. See TEX. FAM. CODE ANN. § 2.001(b) (West 2015).

96. See *id.* § 6.204.

97. See *id.*

98. See *id.*

99. See G.M. Filisko, *After Obergefell: How the Supreme Court ruling on same-sex marriage has affected other areas of law*, ABA JOURNAL (June 1, 2016), http://www.abajournal.com/magazine/article/after_obergefell_how_the_supreme_court_ruling_on_same_sex_marriage_has_affe/ [https://perma.cc/459R-PRYT].

100. See Beyer, *supra* note 34.

101. See *id.*

102. See *id.*

103. See Howard Gleckman, *Are Domestic Partnerships a Way for Heterosexual Couples to Avoid the Marriage Tax Penalty?*, FORBES (June 5, 2014), <http://www.forbes.com/sites/beltway/2014/06/05/are-domestic-partnerships-a-way-for-heterosexual-couples-to-avoid-the-marriage-tax-penalty/#23440ed77619>.

104. See *id.*

105. See Beyer, *supra* note 34.

is not recognized in Texas.¹⁰⁶ According to the Code, a “civil union” is defined as:

- (a) . . . any relationship status other than marriage that:
 - (1) is intended as an alternative to marriage or applies primarily to cohabitating persons; and
 - (2) grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.
- (b) A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state.¹⁰⁷

Section (b) of the statute highlights that the acknowledgment of this union is explicitly against the state’s public policy.¹⁰⁸ “Void” as used in Section (b) means “having no legal effect,” which indicates that same-sex marriages and civil unions have no legal effect in the state of Texas.¹⁰⁹ Therefore, even if a same-sex couple obtained this legal classification in another jurisdiction, Texas would not recognize their relationship status.¹¹⁰ However, *Obergefell*’s legalization of same-sex marriage declared this statute *void ab initio*.¹¹¹

Although Texas does not recognize this marriage alternative, other states—such as Colorado, Hawaii, Illinois, and New Jersey—chose to grant civil unions prior to the *Obergefell* decision.¹¹² The first state to legally recognize civil unions was Vermont in the year 2000.¹¹³ Typically, these partnerships are not acknowledged outside of the state in which they are created.¹¹⁴ Because neither federal law nor all state laws uniformly recognized these unions, legal implications stemmed from the relationship.¹¹⁵ For example, if a couple encountered a medical emergency in another state, it is possible a partner may not be permitted to make crucial medical decisions on the other partner’s behalf if the union is not recognized.¹¹⁶ Civil unions are the only marriage alternative which automatically grant some legal

106. See TEX. FAM. CODE ANN. § 6.204 (West 2015).

107. See *id.*

108. See *id.*

109. See Lea Brilmeyer, *et al.*, CONFLICT OF LAWS CASES AND MATERIALS 75 (Wolters Kluwer 7th ed., 2015).

110. See *id.*

111. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (The concept of *void ab initio* is discussed further in Part VII of this Comment. See *infra* Part VII.).

112. See *Civil Unions & Domestic Partnership Statutes*, NAT’L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last visited Nov. 11, 2016) [<https://perma.cc/9GK8-U588>].

113. See *Marriage, Civil Unions, and Domestic Partnerships: A Comparison*, EQUALITY ME., <http://equalitymaine.org/marriage-civil-unions-and-domestic-partnerships-comparison> [<https://perma.cc/5ZXC-EBDD>].

114. See *id.*

115. See *id.*

116. See *id.*

protections and responsibilities to same-sex couples.¹¹⁷ While a civil union came with more benefits than a domestic partnership, it still failed to afford same-sex couples the same advantages of being legally married under federal law.¹¹⁸

2. Domestic Partnership

A domestic partnership is arguably the most basic form of relationship recognition for same-sex couples.¹¹⁹ Unlike a civil union, a domestic partnership is a written agreement that describes the legal responsibilities and rights of couples in a long-term relationship and is applicable to any gender.¹²⁰ To enter into this relationship, both parties must sign a domestic partnership agreement and file it with the county clerk.¹²¹ A typical domestic partnership agreement requires basic information, such as the date the partnership began, an expression of the couples' intent to indefinitely remain partners, an affirmation that neither party is married, an explanation of the partnership's legal consequences, and an expression of the couples' intent to cohabitate.¹²² Courts do not recognize domestic partnerships outside the borders of the state where it is registered.¹²³ The definition of a domestic partnership also varies widely among states.¹²⁴

A same-sex couple in a domestic partnership must take affirmative steps to obtain some legal protections and benefits due to their relationship status.¹²⁵ For example, individuals in domestic partnership can choose to enter into a binding legal agreement protecting their property assets or finances.¹²⁶ Some partners are also able to receive benefits, such as health insurance, for both parties pursuant to their employment agreement.¹²⁷ Another option for the couple is to seek benefits for a partner's family, such as time for bereavement or parenting purposes.¹²⁸ The possibilities for these assistances vary based on the employer and available benefits.¹²⁹ If the couple does not opt to take formal steps to recognize their partnership, the

117. See *Domestic Partnership Benefits*, GLAD (Mar. 2014), <https://www.glad.org/wp-content/uploads/2017/01/domestic-partnership-overview.pdf> [https://perma.cc/5GV7-EF84].

118. See EQUALITY MAINE, *supra* note 113.

119. See *id.*

120. See *Domestic Partnerships*, DANA DEBEAUVOIR TRAVIS COUNTY CLERK, <http://traviscountyclerk.org/eclerk/Content.do?code=R.29> (last visited Nov. 11, 2016). [https://perma.cc/89SK-PDNX] [hereinafter TRAVIS COUNTY CLERK].

121. See *id.*

122. See *Affidavit of Domestic Partnership*, BCBSTX, <https://www.bcbstx.com/pdf/forms/grp-affidavit-domestic-tx.pdf> [https://perma.cc/8AUL-WN8H] (last visited Apr. 19, 2017).

123. See TRAVIS COUNTY CLERK, *supra* note 120.

124. See EQUALITY MAINE, *supra* note 113.

125. See GLAD, *supra* note 117.

126. See *id.*

127. See *id.*

128. See *id.*

129. See *id.*

law can essentially treat the partners as strangers; therefore, not affording either individual any legal protections.¹³⁰

Only six states, excluding Texas, recognized domestic partnerships pre-*Obergefell*.¹³¹ Despite the state's general prohibition of domestic partnerships, the Travis County Clerk has accepted and filed Domestic Partnership Agreements since 1993.¹³² Domestic partnerships are most common among same-sex couples; however, this marriage alternative is also available to heterosexual couples.¹³³

3. Texas's Lack of Marriage Alternative

As previously noted, Texas does not recognize civil unions or domestic partnerships.¹³⁴ The lack of marriage alternatives for same-sex couples provides helpful insight into the legal landscape surrounding same-sex marriages in Texas.¹³⁵ Further, it sheds light on the significance in applying *Obergefell* in such a conventional state.¹³⁶ Some individuals consider Texas to be one of the states that is least accepting of same-sex couples and same-sex marriage.¹³⁷ The state's conservative mentality and general disapproval of this sexual disposition are incompatible with the progressive strides the nation has taken toward marriage equality.¹³⁸ Because of this mentality, Texas lawmakers and judges will also have reservations with applying *Obergefell* because it requires states to recognize same-sex marriage.¹³⁹ Despite the Supreme Court's preemption of state law, some members of Texas's judiciary tried to halt the state's implementation of the *Obergefell* rule.¹⁴⁰ This hesitancy to accept the new federal law may continue to affect Texas's execution of *Obergefell* in the future.¹⁴¹ *Obergefell*'s legal ramifications will undoubtedly continue to surface as time elapses, thus forcing Texas to continue expanding its traditional views to incorporate the legalization of same-sex marriage.¹⁴²

130. See *id.*

131. See EQUALITY MAINE, *supra* note 113.

132. See TRAVIS COUNTY CLERK, *supra* note 120.

133. See GLAD, *supra* note 117.

134. See NAT'L CTR. FOR LESBIAN RIGHTS *supra* note 94.

135. See Nico Long, *The 5 Worst States for LGBT People*, ROLLING STONE (Nov. 24, 2014), <http://www.rollingstone.com/politics/news/the-5-worst-states-for-lgbt-people-20141124> [https://perma.cc/XX26-XX99].

136. See *id.*

137. See *id.*

138. See *id.*

139. See generally *id.* (discussing that Texas did not provide a marriage alternative for same-sex couples and failed to legalize same-sex marriage before pre-*Obergefell*).

140. See Christopher Connelly, *How Texas Does, Or Doesn't, Deal With LGBT Hate Crimes*, KERA NEWS (June 20, 2016), <http://keranews.org/post/how-texas-does-or-doesnt-deal-lgbt-hate-crimes> [https://perma.cc/H3J8-9GYS].

141. See Beyer, *supra* note 34.

142. See *id.*

V. SPOUSAL PROPERTY RIGHTS IN TEXAS

In the United States, marital property laws have formed two different methods for courts to address property rights.¹⁴³ Property is managed through a common-law system or a community property system.¹⁴⁴ Both of these property systems are coupled with different rights, legal implications, and legal liabilities.¹⁴⁵ Under a common-law system, each spouse is treated as a separate individual who has distinct legal and property rights.¹⁴⁶ Accordingly, each spouse is taxed separately on individual earnings.¹⁴⁷ Conversely, in a community property system, the marriage is treated as a partnership, so each spouse shares equally in the property, income, and earnings throughout the marriage.¹⁴⁸ Nine states, including Texas, have adopted the community property system.¹⁴⁹ Although the majority of states utilize the common-law system, no two states have implemented this system in the exact same way.¹⁵⁰

Texas classifies property as community or separate.¹⁵¹ When classifying property, courts look to the time and means of the property acquisition.¹⁵² Acquisition occurs when a party to the marriage first has a claim of right to the property through a vested title.¹⁵³ Couples may also choose to classify property in a premarital agreement without a court's assistance.¹⁵⁴ Normally, the laws of the state in which a couple resides governs their marital agreement and property classification.¹⁵⁵

A. Community Property

Community property consists of the property, not including separate property, which is acquired by either spouse during marriage.¹⁵⁶ "Property" is defined as "an interest, present or future, legal or equitable, vested or

143. See *Internal Revenue Manual – 25.18.1 Basic Principles of Community Property Law*, INTERNAL REVENUE SERV., https://www.irs.gov/irm/part25/irm_25-018-001.html [<https://perma.cc/HYU8-QNGZ>] [hereinafter *Manual*] (last visited Apr. 19, 2017).

144. See *id.*

145. See TEX. FAM. CODE ANN. §§ 3.101, 3.102 (West 2015).

146. See *Manual*, *supra* note 143.

147. See *id.*

148. See *id.*

149. See *id.*

150. See *U.S. v. Yazell*, 382 U.S. 341, 352 (1966).

151. See TEX. FAM. CODE ANN. §§ 3.101, 3.102 (West 2015).

152. See Caroline B. Newcombe, *The Origin and Civil Law Foundation of the Community Property System, Why California Adopted It and Why Community Property Principles Benefit Women*, 11 U. MD. L.J. RACE RELIG. GENDER & CLASS 1 (2011), <http://digitalcommons.law.umaryland.edu/rrgc/vol11/iss1/2> [<https://perma.cc/JCX6-NAVD>].

153. See Oldham, *supra* note 72, at 225.

154. See TEX. FAM. CODE ANN. § 4.003(a)(7).

155. See *id.* § 4.002(a)(7).

156. See *id.* § 3.002.

contingent, in real or personal property, including income and earnings.”¹⁵⁷ The law presumes that all property possessed by either spouse during or upon dissolution of the marriage is community property.¹⁵⁸ If a spouse wishes to assert that a specific asset is separate property, that spouse has the burden of proving, by clear and convincing evidence, that it is separate property.¹⁵⁹ Through the practice of “tracing,” a spouse may rebut an asset’s presumed classification as community property.¹⁶⁰ Property acquired via the labor and talent of either spouse during a marriage is community property.¹⁶¹ Further, each spouse has the right to the management, control, and disposition of any community property that spouse would have owned if he or she is single.¹⁶² The process of tracing includes the right to control personal earnings, revenue from separate property, and recovery from personal injury lawsuits.¹⁶³

The community property system largely originated on the basis of gender equality.¹⁶⁴ Once states began recognizing men and women as equal, the idea that they should equally own property surfaced.¹⁶⁵ Thus, in a community property state, spouses are treated as equal partners.¹⁶⁶ Within the community property system, a man and woman own equal shares of property acquired in the marriage, despite each spouse’s actual economic contribution.¹⁶⁷

A second basis of the community property system is property classification, which arises out of the operation of law.¹⁶⁸ Therefore, parties typically do not classify property as community through contract or agreement; instead, the state mandates the classification by reason of the marriage itself.¹⁶⁹ Parties to a marriage may, however, choose to agree in writing that all or part of their own separate property becomes community property upon marriage.¹⁷⁰ Community property is managed jointly unless a spouse provides otherwise in a written agreement.¹⁷¹ In community property states, title alone does not determine property ownership.¹⁷² Courts may classify an asset as either community property or separate property even if

157. *See id.* § 4.001(2).

158. *See id.* § 3.003(a).

159. *See id.* § 3.003(b).

160. *See* Oldham, *supra* note 72, at 233.

161. *See* Newcombe, *supra* note 152.

162. *See* TEX. FAM. CODE ANN. § 3.102(a).

163. *See id.* § 3.102(a)(1–3).

164. *See* Newcombe, *supra* note 152.

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. *See* Newcombe, *supra* note 152.

170. *See* TEX. CONST. art. XVI, § 15.

171. *See* TEX. FAM. CODE ANN. § 3.102(c) (West 2015).

172. *See* Thomas M. Featherston, Jr., *His, Her or Their Property: A Primer on Marital Property Law in the Community Property States*, <http://www.baylor.edu/law/facultystaff/doc.php/205011.pdf> [<https://perma.cc/BSH9-9APL>].

the asset's title only names one spouse. If a marriage dissolves, separating and classifying the property can be difficult because both spouses equally share community property.¹⁷³ Each spouse has an undivided one-half interest in a community asset, regardless of whether the title is in one spouse's name or in the name of both spouses.¹⁷⁴

B. Separate Property

Spouses individually own separate property within a marriage.¹⁷⁵ A spouse's separate property consists of real or personal: (1) property the spouse owned or claimed before marriage; (2) property the spouse acquired during marriage by gift, devise, or descent; and (3) the recovery for personal injuries the spouse sustained during marriage.¹⁷⁶ Courts may classify property jointly held by a married couple as separate property.¹⁷⁷ Each spouse has a one-half separate property interest in the gifts given to the spouses jointly, such as wedding gifts.¹⁷⁸ Also, a gift given from one spouse to the other is considered separate property.¹⁷⁹ Property acquired with separate funds is also separate property.¹⁸⁰

Classifying separate property was historically based on the principle that a wife's separate property was vested to her husband or was declared common property upon marriage.¹⁸¹ Since its revision in the 1840s, the Texas Constitution has expanded women's property rights and now recognizes a wife's separate estate.¹⁸² The Texas Constitution allows all property owned by a woman before marriage to be her own separate property.¹⁸³ When the legislature made this change, the law functioned to limit a husband's ability to control his wife's estate even though men historically had this power.¹⁸⁴

173. See Newcombe, *supra* note 152.

174. See Featherston, *supra* note 172.

175. See TEX. FAM. CODE ANN. § 3.001.

176. See *id.*

177. See Featherston, *supra* note 172.

178. See *Roosth v. Roosth*, 899 S.W.2d 445, 457 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

179. See TEX. CONST. art. XVI § 15.

180. See *Dixon v. Sanderson*, 10 S.W. 535, 536 (1888).

181. See Joseph W. McKnight, *Separate Property*, TEXAS STATE HISTORICAL ASSOCIATION: HANDBOOK OF TEXAS ONLINE, <http://www.tshaonline.org/handbook/online/articles/mls01> [https://perma.cc/8R2Y-NXDN] (last visited Oct. 23, 2016).

182. See Oldham, *supra* note 72, at 328.

183. See *id.*

184. See *id.*

C. Same-Sex Couples' Property Rights in Texas Pre-Obergefell

Before the *Obergefell* decision, same-sex couples had limited abilities to own property together.¹⁸⁵ In states that did not recognize same-sex marriage, the couples were able to own property through a tenancy in common or through joint rights of tenancy with rights of survivorship.¹⁸⁶ A tenancy in common allows each partner to own an undivided fifty-percent of the property.¹⁸⁷ When one partner dies, that person's property stake goes to the deceased's heirs, instead of the other property owner.¹⁸⁸ Under joint rights of tenancy, when one of the two partners passes away, the surviving partner subsequently owns all property.¹⁸⁹ The couple's underlying relationship or marital status is irrelevant when employing these methods of property ownership, therefore allowing same-sex couples to own property.¹⁹⁰ Further, couples were also able to contractually define their property rights in some jurisdictions.¹⁹¹

VI. PROPERTY DIVISION IN TEXAS UPON MARRIAGE DISSOLUTION

In Texas, when a couple chooses to terminate their valid marriage, a court's help is often needed to equitably distribute the community property acquired during the marriage.¹⁹² However, if the courts do not recognize the marriage as lawful, it is unlikely there is any marital property to distribute.¹⁹³ Texas couples only begin to acquire community property upon marriage.¹⁹⁴ Therefore, if a couple is not married, the property is likely classified as separate property, leaving little need for court involvement.¹⁹⁵

A. Marriage Dissolution

Upon marriage dissolution, courts attempt to divide the couple's property in a reasonable manner.¹⁹⁶ To dissolve the marriage, either spouse

185. See Janna Heron, *Gay marriage and real estate: What changed because of the Supreme Court's ruling?*, BANKRATE, (June 30, 2015), <http://www.bankrate.com/finance/real-estate/same-sex-couples-real-estate-law-1.aspx> [https://perma.cc/N58S-JU9N].

186. See *id.*

187. See *id.*

188. See *id.*

189. See *id.*

190. See *id.*

191. See NOELKE, MAPLES, ST. LEGER, BRYANT, LLP, *Married, Unmarried, Same-Sex, Heterosexual? We Can Help, But In Different Ways*, <http://www.nems-law.com/ServiceEnews>, <https://perma.cc/EG7R-XU3L>.

192. See TEX. FAM. CODE ANN. § 3.003 (West 2015).

193. See § 3.002.

194. See *id.*

195. See *id.* at § 3.001.

196. See Oldham, *supra* note 72, at 409.

may petition the court seeking a divorce.¹⁹⁷ A court may terminate a marriage without regard to fault if the marriage has become insupportable by a conflict or a situation that prevents reconciliation.¹⁹⁸ A judgment concerning the dissolution of a marriage is rendered when the court makes its official announcement, which is commonly in the form of an in-court oral statement or in writing.¹⁹⁹ Once the couple is divorced, a court will then separate the couple's estate.²⁰⁰

B. Dividing Community Property

Courts are not required to split community property equally.²⁰¹ Accordingly, it is an abuse of discretion for courts to simply split a couple's community property in half.²⁰² Depending on the circumstances surrounding the marriage and divorce, it is permissible for courts to split property disproportionately.²⁰³ Courts do, however, consider dividing the marital estate in a way that is "just and right," which includes evaluating the rights of each party and any children from the marriage.²⁰⁴ Community assets and liabilities can be identified, characterized, and labeled, which facilitates the court's division of property.²⁰⁵

It is a formidable task for courts to fairly divide marital property and consider factors necessary to render a decision.²⁰⁶ While a court is granted broad discretion when dividing a community estate, the circumstances of each marriage dictate what a court should consider when reasonably dividing the community property.²⁰⁷ Factors a court generally contemplates include: (1) need for support; (2) a spouse's wrong doing; (3) finances; and (4) any other consideration a court deems relevant.²⁰⁸ A couple's need for financial support may also be considered and encompasses a variety of elements.²⁰⁹ For example, a court may consider a spouse's custody of children when determining financial need.²¹⁰ The disparity among the earning capacities of each spouse may also be considered, in addition to each spouse's level of education, prospective business opportunities, or future employability.²¹¹

197. See TEX. FAM. CODE ANN. § 6.001.

198. See *id.*

199. See *James v. Hubbard*, 21 S.W.3d 558, 561 (Tex. App.—San Antonio 2000, no pet.).

200. See TEX. FAM. CODE ANN. § 7.001.

201. See *Walston v. Walston*, 971 S.W.2d 687, 693 (Tex. App.—Waco 1998, writ denied).

202. See *id.*

203. See *Tarin v. Tarin*, 605 S.W.2d 392, 394 (Tex. App.—El Paso 1980, no writ).

204. See TEX. FAM. CODE ANN. § 7.001.

205. See *id.*

206. See *In re Marriage of C.A.S.*, 405 S.W.3d 373, 384 (Tex. App.—Dallas, 2013, no pet.).

207. See *Young v. Young*, 609 S.W.2d 758, 761 (Tex. 1980).

208. See *Twyman v. Twyman*, 855 S.W.2d 619, 625 (Tex. 1993).

209. See *Simpson v. Simpson*, 727 S.W.2d 662, 664 (Tex. App.—Dallas, 1987, no writ).

210. See *id.*

211. See *Murff v. Murff*, 615 S.W.2d 696, 699 (Tex. 1981).

Other financial considerations a court will contemplate include the expenses paid by a spouse to maintain community property; the attorney fees paid to litigate the dissolution of marriage lawsuit; the tax consequences of dividing the community property; and the capital gains or losses from the community property asset.²¹² Information regarding a spouse's age, physical condition, and overall health may also be presented to help courts divide community property.²¹³ Courts do not have the power to punish a spouse when dividing property, but evidence of each spouse's fault that contributed to the divorce is permissible.²¹⁴ Further, a court may also request information regarding marriage duration and the nature of community property needing divided.²¹⁵ Courts also commonly consider each spouse's contribution to the marriage, including each individual's talents.²¹⁶

C. Dividing Separate Property

The Texas Family Code gives each spouse the sole management and control of that individual's separate property.²¹⁷ Therefore, dividing a couple's separate property when the marriage dissolves is generally not a task for the courts.²¹⁸ A court will likely only interfere with a person's separate property when it determines there is a need to intervene.²¹⁹ In doing so, courts must consider fairness to both parties.²²⁰ However, some Texas courts acknowledge a general rule that separate property should be granted to its original owner and community property split in a "just and right" way among the divorcing individuals.²²¹

D. Dividing Same-Sex Couples' Property

Because same-sex marriages were previously unrecognized in Texas, courts also did not acknowledge the dissolution of a same-sex marriage.²²² In the case *In re J.B. and H.B.*, the Texas Court of Appeals in Dallas ruled

212. See *LafRensen v. LafRensen*, 106 S.W.3d 876, 880 (Tex. App.—Dallas 2003, no pet.); Murff, 615 S.W.2d at 699–700; TEX. FAM. CODE ANN. § 7.008 (West 2015); I.R.C. § 1041(a)(2).

213. See *id.* at 699–700.

214. See *Young v. Young*, 609 S.W.2d 758, 761 (Tex. 1980).

215. See *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 843 (Tex. App.—Texarkana 1996); Murff, 615 S.W. 2d at 699–700.

216. See Oldham, *supra* note 72, at 409.

217. See TEX. FAM. CODE ANN. § 3.101.

218. See Oldham, *supra* note 72, at 337.

219. See TEX. FAM. CODE ANN. § 3.101.

220. See TEX. FAM. CODE ANN. § 3.101.; see TEX. FAM. CODE ANN. § 7.001 (stating that “in a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.”).

221. See Oldham, *supra* note 72, at 337; see *Young v. Young*, 609 S.W.2d 758, 761 (Tex. 1980).

222. See TEX. FAM. CODE ANN. § 6.204.

that Texas does not have jurisdiction to address same-sex divorces.²²³ This decision was based on language in the Texas Constitution that strictly prohibits courts from recognizing same-sex marriages.²²⁴ Therefore, if Texas does not recognize a person as married under the Family Code, that individual is unable to consult Texas law for assistance with property division.²²⁵ However, it is possible that same-sex couples may be able to divide their property under other areas of the law, such as contract or property law.²²⁶

VII. THE RETROACTIVITY DOCTRINE AND *OBERGEFELL*

Retroactivity is a “process by which courts determine whether a new judge-made rule [] should be applied to events arising before the new law was promulgated.”²²⁷ The Supreme Court of the United States has addressed retroactivity in a number of cases, both criminal and civil.²²⁸ Courts generally favor applying a rule prospectively; however, depending on the situation, retroactive rules may be necessary to facilitate fairness.²²⁹ Moreover, courts have many considerations to balance when evaluating how a new rule of law should be applied.²³⁰ Some of the competing interests a court must contemplate include depriving parties of justice, ensuring fairness, opening litigation floodgates, and creating potential due process issues.²³¹ The Court has held that state courts must apply decisions of federal law retroactively, but there can be instances in which employing the new rule does not ultimately determine the outcome of the case.²³²

When a state or federal statute is declared unconstitutional, it is subsequently *void ab initio*.²³³ In English, this Latin phrase translates to “void from the beginning,” meaning the statute is essentially of no use to courts after it is ruled unconstitutional.²³⁴ A statute is unconstitutional from its inception, not from the date on which a new decision changed its rule.²³⁵

223. See *In re J.B.*, 326 S.W.3d 654, 701 (Tex. App.—Dallas 2010, no pet. h.).

224. See *id.*

225. See TEX. FAM. CODE ANN. § 6.204.

226. See *In re J.B.*, 326 S.W.3d at 701.

227. See John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine “As Applied,”* 61 N.C.L. REV. 745, 745 (1983).

228. See *id.*

229. Richard J. Wolf, *Judicial Review of Retroactive Rulemaking: Has Georgetown Neglected the Plastic Remedies?*, 68 WASH. U. L. R. 157, 162 (1990).

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

231. See Lee-Ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of Obergefell*, 2016 WIS. L. REV. (forthcoming 2016), available at <https://ssrn.com/abstract=2884274> [<https://perma.cc/LRV6-VPLL>].

232. See *id.*

233. See *Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886).

234. *Void ab initio*, MERRIAM WEBSTER DICTIONARY, <https://www.merriamwebster.com/dictionary/ab%20initio>, (last visited Jan. 25, 2017) [<https://perma.cc/JKE9-KCZR>].

235. See Tritt, *supra* note 231.

The Supreme Court previously held, “[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”²³⁶ Courts may only apply the principle to those statutes that are unconstitutional in all of its plausible applications, not just when a court applies the statute to one particular set of facts.²³⁷ Generally, when a court discovers a statute is *void ab initio*, the new statute should be applied retroactively.²³⁸ Prohibiting same-sex marriage is now unconstitutional, so statutory law blocking same-sex marriage is now *void ab initio* and is to be treated as if it never existed, ceasing all of its application.²³⁹ Consequently, portions of the Texas Family Code are now *void ab initio* because the Code contains language that limits marriage to opposite-sex couples.²⁴⁰ Texas courts must interpret the state’s statutory laws that are unconstitutional post-*Obergefell* to incorporate the legalization of same-sex marriage even legislators elect not to change the way the law is currently written.²⁴¹

While *Obergefell* came with answers for many same-sex couples in the United States, the Court also left a plethora of questions unanswered.²⁴² Further, *Obergefell* did not provide a suggestion as to how to manage its retroactive application.²⁴³ The new queries presented may prove to be a challenge to lawmakers, judges, and interested citizens alike.²⁴⁴ Over time, the Court has created an analysis that is intended to assist judges in deciding whether retroactive application of a rule would be appropriate to the case in question.²⁴⁵ When the concept of retroactivity was first presented, the Supreme Court declared that it was necessary to “weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation.”²⁴⁶ The Court has grappled with determining the most important factors to consider when deciding how and when retroactivity suitably applies to a rule.²⁴⁷ Courts traditionally consider three factors when applying the Retroactivity Doctrine.²⁴⁸ First, the decision must establish a

236. See Norton, 118 U.S. at 442.

237. See Tritt, *supra* note 231.

238. See *id.*

239. See Norton, 118 U.S. at 442.

240. See *id.*

241. See generally Norton, 118 U.S. 442 (In applying Norton’s analysis for *void ab initio* statutes, one can infer portions of the Texas Family Code to be unconstitutional as currently written).

242. See generally Norton, 118 U.S. 442 (Texas lawmakers can choose to not amend the wording of the Family Code that is unconstitutional post-*Obergefell*, but the statutes must be interpreted to consider the new rule permitting same-sex marriage in all fifty states).

243. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

244. See *id.*

245. See Beyer, *supra* note 32.

246. See Corr, *supra* note 227.

247. See *id.*

248. See *id.*

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

new principle of law.²⁴⁹ If it is a new principle of law, the court then considers whether litigants have relied upon the old principle of law.²⁵⁰ Specifically, courts should look to see if retroactive application would unjustly impede the litigant's reliance upon the old principle of law.²⁵¹ Second, the court shall consider the prior history of the rule, including its purpose and effect.²⁵² The court pays special attention to whether retroactive operation will further or hinder the rule's intended purposes.²⁵³ Finally, the court deliberates the inequality imposed by retroactive application of a new rule.

VIII. APPLYING THE RETROACTIVITY DOCTRINE TO SAME-SEX MARRIAGE IN TEXAS

It is necessary for members of the judiciary in Texas to apply *Obergefell* retroactively because many of the state's statutes are now *void ab initio*. Below is an analysis as to how Texas courts can best apply *Obergefell* in Texas and the impact retroactive application would have on hypothetical situations involving community property division. The analytical framework for the two hypothetical questions is largely the same as they both employ the same new rule of law.

Upon considering the hypothetical situations presented previously in Part II of this Comment, the Retroactivity Doctrine tasks Texas courts with determining a valid marriage date.²⁵⁴ When determining a marriage date, courts must balance many significant factors to ensure optimal fairness for divorcing parties.²⁵⁵ Courts often consider the prior history of the pre-existing rule, its purpose, its effect, how retroactive application will impact litigants, and fairness that will result from applying the rule in any manner.²⁵⁶

The first factor to consider is whether the decision established a new principle of law.²⁵⁷ It is clear that *Obergefell* is new principle of law and, therefore, courts need to evaluate further whether litigants have relied on the old principle of law.²⁵⁸ *Obergefell* did not overrule a pre-existing rule of law; however, it did declare the prohibition of same-sex marriage unconstitutional.²⁵⁹ Litigants previously relied on opposite-sex couples' ability to marry, but applying the *Obergefell* rule retroactively will not cause

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.*

253. *See id.*

254. *See supra* Part II.

255. *See Chevron Oil Co.*, 404 U.S. at 106–07.

256. *See id.*

257. *See id.*

258. *See id.*

259. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

any parties significant harm as the right to marry will remain intact for heterosexual couples.²⁶⁰ Applying *Obergefell* retroactively does not take away any rights of previous litigants who had the freedom to marry, it simply disallows the blocking of same-sex marriage, which has hindered many other litigants over time.²⁶¹ Retroactive application increases the number of individuals that can benefit from the rule while also expanding the freedoms of new litigants.²⁶² The new litigants advocating for a change in the law suffered from the prohibition of same-sex marriage more so than any prior litigants would suffer from retroactive application.²⁶³

The number of individuals who instantaneously relied on the new rule after its inception is also significant.²⁶⁴ When the Justices rendered the decision legalizing same-sex marriage, same-sex couples whom the law previously denied the right to marry undoubtedly depended on the new freedom to do so.²⁶⁵ Same-sex couples quickly placed their trust in the new rule, as many couples chose to marry or apply for a marriage license within hours of the Court's decision.²⁶⁶ Over 96,000 same-sex couples in the United States married within the first four months same-sex marriage was legalized, taking the number of these marriage unions to a new high.²⁶⁷ Nationwide, more than 468,000 same-sex couples entered into marriage by October 2015, which accounts for forty-five percent of all same-sex couples.²⁶⁸ In Dallas County, Texas, the first same-sex couple married just a few hours after the Supreme Court announced its decision.²⁶⁹ The couple, Jack Evans and George Harris, were together for more than fifty-four years before they could legally wed.²⁷⁰ In addition to Evans and Harris, 169 other same-sex couples were married in Dallas County on the day of the Court's decision.²⁷¹ In ten of Texas's largest counties more than 465 same-sex couples also chose to marry on the day the Court handed down its decision.²⁷² These couples were

260. See *Chevron Oil Co.*, 404 U.S. at 106–07.

261. See *Obergefell*, 135 S. Ct. at 2604.

262. See *id.*

263. See *id.*

264. See Dominique Mosbergen, *After 54 Years Together, Jack Evans and George Harris Become First Same-Sex Couple to Marry In Dallas*, HUFFINGTON POST, (June 29, 2015, 1:12 AM), http://www.huffingtonpost.com/2015/06/29/first-same-sex-couple-dallas-jack-evans-george-harris_n_7684464.html [https://perma.cc/49AG-WT3K].

265. See *Obergefell*, 135 S. Ct. at 2604.

266. See Mosbergen, *supra* note 264.

267. See Filisko, *supra* note 99.

268. See Gary J. Gates and Taylor N.T. Brown, *Marriage and Same-Sex Couples after Obergefell*, THE WILLIAMS INSTITUTE, (Nov. 2015), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Marriage-and-Same-sex-Couples-after-Obergefell-November-2015.pdf> [https://perma.cc/GC87-7NA7].

269. See Mosbergen, *supra* note 264.

270. See *id.*

271. See *id.*

272. See Aman Batheja & Jolie McCullough, *State Won't Track Gay Marriage Numbers*, THE TEX. TRIB., (June 30, 2015, 6:00 AM), <https://www.texastribune.org/2015/06/30/same-sex-marriage-licenses-wont-be-tracked/> [https://perma.cc/NFF7-EDRP].

so excited to have been given this right; it seems as if they dropped everything and went straight to the courthouse to exchange vows—no wedding planning or save-the-dates, just love and a newfound legal right that these couples were eager to exercise.²⁷³

Since *Obergefell*, married, same-sex couples have continued to rely on the rule and its implications.²⁷⁴ For example, post-*Obergefell*, health benefits granted to an employee's same-sex spouse are no longer subject to any state taxes.²⁷⁵ Further, retirement plans that are administered by federal laws now must include language that does not exclude same-sex spouses.²⁷⁶

The next consideration for retroactive rule application involves examining the purpose and effect of the law, including its prior history.²⁷⁷ The purpose of prohibiting same-sex marriage was to protect the sanctity of marriage in the United States.²⁷⁸ Lawmakers and judges were concerned with altering a principle of law that was deeply rooted in the nation's framework.²⁷⁹ However, the Court ultimately concluded banning same-sex marriage was unconstitutional because it deprived many of the country's citizens of liberties granted to them by the Constitution.²⁸⁰ The fundamental rights of all Americans were the Court's main priority when deciding *Obergefell*.²⁸¹ The Court largely based its decision on the Due Process and Equal Protection Clauses of the Fourteenth Amendment; therefore, its purpose was to protect Americans' liberties.²⁸² The Court majority read "liberty" to encompass the right to marry, but dissenting judges urged that "liberty" only meant those that are "deeply rooted in this Nation's history and tradition."²⁸³ *Obergefell*'s opinion also noted that at the time the Fourteenth Amendment was ratified, marriage was only recognized as being between a man and a woman, and the legality of the union had never been questioned.²⁸⁴

The Constitution's purpose is to provide all Americans the same protections and freedoms.²⁸⁵ When the Framers wrote this document as the foundation of the country, they did not intend to exclude certain parties or diminish anyone's rights.²⁸⁶ The language of the Constitution contains

273. See Mosbergen, *supra* note 264.

274. See Stephen Miller, *Marriage Equality Nationwide Changes Benefits of Landscape*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (June 30, 2015), <https://www.shrm.org/hr-today/news/hr-news/pages/marriage-equality-nationwide-changes-benefits-landscape.aspx> [<https://perma.cc/E4L6-LV3X>].

275. See *id.*

276. See *id.*

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

278. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

279. See *id.* at 2604.

280. See *id.* at 2595.

281. See *id.* at 2604.

282. See *id.*

283. See *id.* at 2640.

284. See *id.* at 2612–15.

285. See *id.*

286. See *id.*

ambiguous phrases such as “equal protection of the laws” and “due process of law” that should be applied to encompass potential issues that were unforeseeable to the Framers.²⁸⁷ Therefore, the application of the Constitution should not be read to misconstrue the writers’ intent, but instead to evolve over time and continue to afford all citizens the freedoms and privileges that other countries envy.²⁸⁸

In determining whether retroactive operation of a rule will further or hinder the rule’s intended purpose, it is evident that *Obergefell*’s objective was to remove the prohibition on same-sex marriage that has restricted many Americans’ freedom for decades.²⁸⁹ If the Court’s goal in deciding *Obergefell* was to afford every American the ability to enjoy the rights and freedoms provided by the Constitution, retroactively applying *Obergefell* would advance the rule’s intended purpose.²⁹⁰

Finally, the Court has suggested deliberating the inequality imposed by the retroactive application of a rule.²⁹¹ As applied to same-sex marriage cases, more inequality results from courts’ failure to apply *Obergefell* retroactively.²⁹² Applying the *Obergefell* rule retroactively appears to be the only way to remedy the wrong that so many same-sex couples have experienced throughout our nation’s history.²⁹³ Declining to apply *Obergefell* retroactively would continue to deprive same-sex couples of rights that heterosexual couples have had for quite some time.²⁹⁴ Opposite-sex couples have been able to enjoy marital benefits for many years because the freedom to marry allowed them to take advantage of different areas of the law, including property and family law.²⁹⁵ Justice is granted to same-sex couples only if *Obergefell* is applied retroactively to legal disputes, giving these couples a chance to possess the valuable rights and liberties for which they have fought so zealously.²⁹⁶

A. Applying *Obergefell* Retroactively to Same-Sex Marriages Across Jurisdictions

Once a court determines the rule should be applied retroactively, it then has to decide when a marriage became valid.²⁹⁷ Knowing a marriage’s valid commencement date is important because that date significantly impacts a

287. See *id.* at 2628.

288. See *id.* at 2629.

289. See *id.* at 2597–98.

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

291. See *id.*

292. See *Obergefell*, 135 S. Ct. at 2640.

293. See *id.* at 2604.

294. See *supra* note 275.

295. See Beyer, *supra* note 34.

296. See *Obergefell*, 135 S. Ct. at 2604.

297. See Tritt, *supra* note 231.

couple's community property division and what portions of the estate each divorcee is entitled to receive.²⁹⁸ As discussed in the first hypothetical presented in this Comment, dividing the couple's community property could have two possibilities—one that applies *Obergefell* retroactively and one that does not.²⁹⁹ Recall that in one situation, a same-sex couple's community property acquisition began in 2008 with their valid California marriage. The couple subsequently continued to live in Texas.³⁰⁰ In the other case, community property acquisition commenced in 2015 when the Court decided *Obergefell* and states were required to recognize same-sex marriages from a different jurisdiction.³⁰¹ Because state statutes preventing same-sex marriage are unconstitutional from inception, Texas should apply *Obergefell* retroactively beginning with the couple's wedding in 2008.³⁰² If a court employs this date for classifying a couple's community property, this allows the couple to divide every asset they had acquired together since 2008 when they were married.³⁰³ This decision would be fair for both individuals because the property the couple accumulated throughout the entirety of their marriage would be divided equally.³⁰⁴

Further, consider that if the couple were heterosexual and married in 2008, they would have collected property together in Texas for eight years before their divorce proceedings.³⁰⁵ While validating the marriage beginning in 2015 would also result in the equal division of property, it excludes property acquired from at least seven of eight total years of their marriage.³⁰⁶ If Texas courts are concerned with a "just and right" division of property, it is most sensible to divide all marital property, not just marital property acquired in one year's time.³⁰⁷

B. Applying Obergefell Retroactively to Texas's Common-Law Marriages

The second hypothetical discussed in Section II of this Comment presented a question concerning common-law marriage post-*Obergefell*.³⁰⁸ Recall that the situation involved two females in a relationship who met the requirements of a common-law marriage in Texas pre-*Obergefell* and the death of one of the women thereafter.³⁰⁹ This situation

298. See *supra* Part II.

299. See *supra* Section II.A.

300. See *supra* Section II.A.

301. See *supra* Section II.A.

302. See *supra* Section II.A.

303. See *supra* Section II.A.

304. See *supra* Section II.A.

305. See *supra* Part II.

306. See *supra* Part II.

307. See *supra* Part II.

308. See *supra* Section II.B.

309. See *supra* Section II.B.

poses another question regarding proper community property division.³¹⁰ Did the couple begin to acquire community property on the day they met the common-law marriage requirements or on June 26, 2015?³¹¹

In this situation, Texas courts would be required to determine a valid marriage date to divide the couple's assets.³¹² The widow in the question would either receive one-half her partner's estate beginning as of the day common-law marriage was valid or the date of *Obergefell*'s decision.³¹³ Once again, the marriage date determines how much community property they acquired.³¹⁴ Because a couple can be common-law married without realizing they were married, it may be best in this situation for the court to apply the latter date.³¹⁵ The same-sex couple was most likely keenly aware of their inability to marry in Texas pre-*Obergefell*; and consequently, may not have considered themselves to be common-law married.³¹⁶ It is also entirely possible they did not know of common-law marriage, its requirements, or that it is valid in Texas.³¹⁷ Under those facts, the couple likely would not think that they were married. Therefore, perhaps the women did not have any intent or desire to be married and would not have wished to acquire community property. The court will ultimately have discretion as to how to best divide any assets; however, the goal should always remain to carry out the parties' wishes while remaining in compliance with Texas statutory law.³¹⁸

Another question arises out of a small variation of the above common-law fact pattern.³¹⁹ While a Texas court has not yet considered this particular legal question; courts and state agencies are becoming more progressive in their application of *Obergefell*. A few Texas courts have applied *Obergefell* retroactively in various legal contexts since it became law in 2015.³²⁰ Recall that in Section IV of this Comment, a Travis County court retroactively recognized a same-sex couple as being common-law married in order for a widow to obtain the rights to her deceased partner's estate.³²¹ Further, a district court in the Eastern District of Texas held that *Obergefell* applied retroactively in a wrongful death action.³²² Similarly, in September 2015, a

310. See *supra* Section II.B.

311. See *supra* Section II.B.

312. See *supra* Section II.B.

313. See *supra* Section II.B.

314. See *supra* Section II.B.

315. See *supra* Section II.B.

316. See Beyer, *supra* note 34.

317. See Beyer, *supra* note 34.

318. See TEX. FAM. CODE ANN. § 7.001 (West 2015).

319. See *supra* Section II.B.

320. See *Ferner*, *supra* note 85; see also *Ranolls v. Dewling*, 2016 WL 7726597 (E.D. Tex. 2016) (showing retroactive application).

321. See *Ferner*, *supra* note 85; see also *Ranolls v. Dewling*, 2016 WL 7726597 (E.D. Tex. 2016) (showing retroactive application).

322. See *Ranolls v. Dewling*, 2016 WL 7726597 (E.D. Tex. 2016).

Tarrant County Clerk permitted her office to receive common-law marriage affidavits that predated June 26, 2015, which allowed one male couple to validate their twenty-three-year-old relationship.³²³ Although the Supreme Court did not specify how to implement the *Obergefell* rule, many courts nationwide are applying it retroactively.³²⁴ Regardless of how a court would choose to rule on the above issue, it would need to exercise caution in this situation as *Obergefell* largely complicated many issues surrounding estate planning, particularly in community property states.³²⁵

C. Suggested Amendments to Texas Statutes

As previously discussed, many of Texas's statutes are likely *void ab initio*.³²⁶ The language should be amended to incorporate the *Obergefell* rule. Amending the statutes would remove any question about to whom Texas law applies. For example, the Texas Constitution says, "Marriage in this state shall consist only of the union of one man and one woman."³²⁷ This wording is now unconstitutional, but still must be applied in compliance with *Obergefell*.³²⁸ If the language were amended to no longer limit Texas marriages to one man and one woman, the courts could resolve many post-*Obergefell* ambiguities concerning Texas statutory law.³²⁹ For example, the new language could read, "Marriage in this state shall consist of the union between two people."³³⁰ This revision of the statutory language articulates individuals of any gender are permitted to marry in Texas and, more importantly, is now consistent with the Constitution.³³¹ Further, sections of the Texas Family Code also include unconstitutional language.³³² Section 2.001 states, "(a) [a] man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state, and (b) [a] license may not be issued for the marriage of persons of the same sex."³³³ This language should also be amended to reflect *Obergefell*'s required application to the Texas Family Code.³³⁴ This statute

323. See Tammy E. Nash, *Update: Tarrant County Clerk Says Her Office Will Accept Common-Law Marriage Affidavit*, DALLASVOICE.COM (Sept. 25, 2015), <http://www.dallasvoice.com/update-tarrant-county-clerk-office-accept-common-law-marriage-affidavit-10205158.html> [<https://perma.cc/C2AR-HURU>].

324. See *Ranolls v. Dewling*, 2016 WL 7726597 (E.D. Tex. 2016).

325. See Beyer, *supra* note 34.

326. See *supra* Part VII.

327. See TEX. CONST. art. I § 32.

328. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

329. See TEX. CONST. art. I § 32.

330. See generally TEX. CONST. art. I § 32 (This is a proposed revision to the Texas Constitution based on its unconstitutional language and *Obergefell*'s mandatory interpretation).

331. See TEX. CONST. art. I § 32.

332. See TEX. FAM. CODE ANN. § 2.001 (West 2015).

333. See *id.*

334. See *id.*

could be amended to read, “(a) [i]ndividuals wishing to enter a ceremonial marriage must obtain a marriage license from the county clerk of any county in this state, and (b) [a] marriage license may be issued to for the marriage of persons of the same sex.”³³⁵ This proposed revision will increase understanding of the Texas Family Code.³³⁶ Texas’s legislators could improve the application and interpretation of valid state law by amending relevant portions of the statute that still reflect a prohibition of same-sex marriage.³³⁷

IX. CONCLUSION

While the *Obergefell* decision settled an on-going national debate regarding the legalization of same-sex marriage, it also forever transformed the legal landscape.³³⁸ This new rule of law will continue to create new, fundamental questions in many different areas of American jurisprudence.³³⁹ Because *Obergefell* did not provide courts with instructions regarding its retroactive application, judges should be prepared to determine when it is appropriate to apply the Retroactivity Doctrine.³⁴⁰ Courts must also understand the full legal impacts of choosing to apply or not apply the rule of law retroactively.³⁴¹ All individuals are entitled to a fair ruling in their case and employing the Supreme Court’s suggested retroactivity analysis will help promote justice for litigants.³⁴²

Texas’s legislators should amend Texas statutory law that utilizes language limiting marriage in the state to only one man and one woman.³⁴³ Although many individuals who interpret the Texas Family Code have knowledge of *Obergefell*’s rule, clarifying the language will eliminate any question regarding the statute’s applicability to same-sex couples.³⁴⁴ Applying *Obergefell* accurately is vital to not only the rights of many Americans but also to the success of the American legal system.³⁴⁵ Therefore, questions surrounding *Obergefell* must be decided uniformly and in compliance with the United States Constitution.³⁴⁶

335. See generally *id.* (This is a proposed revision to the statute based on the unconstitutional language in the Texas Family Code and *Obergefell*’s mandatory interpretation).

336. See *id.*

337. See *id.*

338. See Tritt, *supra* note 231.

339. See *id.*

340. See *supra* Part VII.

341. See *supra* Part VII.

342. See *supra* Part VII.

343. See *supra* Part IV.

344. See *supra* Part IV.

345. See *supra* Part VIII.

346. See *supra* Part VIII.