

RETROACTIVE RECOGNITION OF SAME-SEX MARRIAGE FOR THE PURPOSES OF THE CONFIDENTIAL MARITAL COMMUNICATIONS PRIVILEGE

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*Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.*¹

INTRODUCTION

Imagine two Georgians, Pat and Chris, who met and fell in love. In 2010 they exchanged vows in a ceremony attended by friends and family, even though the State of Georgia would not legally recognize their same-sex marriage. Five years later, Pat and Chris celebrated with their friends when *Obergefell* was announced, and the two were the first in line to receive their marriage license.

Just a few weeks later, Pat and Chris's jubilation was cut short when Pat was arrested and charged with criminal conspiracy. The prosecution called Chris to the stand to testify as to a confession Pat made to Chris a year before. Pat's lawyer objected and claimed the statement was privileged as a confidential marital communication, but the judge overruled the objection. Caught between the law and love, Chris refused to testify and, although Pat went free, Chris was thrown in jail for contempt of court.²

* * *

Although the story of Pat and Chris is entirely fictitious, it is not without real-world precedent. In 2006 one of the first targets of the Enron investigation was William Dodson, the same-sex partner of an Enron executive who could not claim the spousal privilege of not testifying in court.³ In 2013 a Kentucky court found that a defendant's same-sex partner could not invoke marital privileges despite the couple's Vermont civil union, sinking the defendant's hopes of

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

2. One of the defining features of the opinion in *Obergefell* is its narrative depiction of the plaintiffs' lives. See, e.g., Kate Huddleston, *Essay, Depicting Minority Petitioners' Lives in Appellate Opinions*, 164 U. PA. L. REV. ONLINE 87, 88-89 (2016), <http://www.pennlawreview.com/online/164-U-Pa-L-Rev-Online-87.pdf> [<https://perma.cc/38RX-V4VX>]; see also Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 432-34 (2016). The author of this Note kindly asks the reader's patience in replicating a similar narrative.

3. I. Bennett Capers, *Enron, DOMA, and Spousal Privileges: Rethinking the Marriage Plot*, 81 FORDHAM L. REV. 715, 716-18 (2012).

being acquitted.⁴ Indeed, arguments for same-sex marital privileges have been laughed out of court since at least 1997, when the Appellate Division of the Supreme Court of New York rejected the notion that the privilege would extend to “homosexuals in a spousal relationship.”⁵ Beyond these examples, many, many more would probably exist were it not for the “settled law” that the marital communications privilege does not, and has never been expanded to, include nonmarried couples.⁶

On the day the Supreme Court rendered its decision in *Obergefell v. Hodges*, it seemed as though the decision rendered questions associated with same-sex spousal privilege moot: the Court declared that the Constitution requires the recognition of same-sex marriages on the same footing as opposite-sex marriages, with the same rights, privileges, and benefits.⁷ Those rights, privileges, and benefits number more than one thousand on the federal level and many more on the state level.⁸

Although advocates of same-sex marriage would disagree,⁹ many see the decision in *Obergefell* as fundamentally redefining marriage.¹⁰ Leaving that debate aside, it is a fact that the rights,

4. Katharine T. Schaffzin, *Beyond Bobby Jo Clary: The Unavailability of Same-Sex Marital Privileges Infringes the Rights of So Many More than Criminal Defendants*, 63 U. KAN. L. REV. 103, 104-05 (2014).

5. Greenwald v. H & P 29th St. Assocs., 659 N.Y.S.2d 473, 474 (App. Div. 1997).

6. See *infra* Part I.B.

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

8. See U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004) (identifying “1,138 federal statutory provisions ... in which marital status is a factor in determining or receiving benefits, rights, and privileges”). The most commonly invoked marital benefits are given by the states, as “[t]he whole subject of domestic relations of husband and wife ... belongs to the laws of the States and not to the laws of the United States.” *In re Burrus*, 136 U.S. 586, 593-94 (1890); *see also*, e.g., *Varnum v. Brien*, 763 N.W.2d 862, 902 n.28 (Iowa 2009) (cataloging over 200 Iowa state statutes affected by marital status); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954-57 (Mass. 2003) (discussing the fact that a fraction of the “benefits ... [that] attach to civil marriage ... are set by the Commonwealth”).

9. See, e.g., Zack Ford, *No, the Supreme Court Did Not Just ‘Redefine’ Marriage*, THINK PROGRESS (June 26, 2015, 3:20 PM), <https://thinkprogress.org/lgbt/2015/06/26/3674590/kennedy-marriage-definition/> [<https://perma.cc/DU73-KG4J>].

10. See, e.g., Helen M. Alvaré, *Marriage and Family as the New Property: Obergefell, Marriage and the Hand of the State*, 28 REGENT U. L. REV. 49, 58 (2016) (lamenting the changes to the definition of marriage emanating from the *Obergefell* decision); *National Organization for Marriage (NOM) Issues Statement Following US Supreme Court Decision on Marriage*, NAT'L ORG. MARRIAGE: NOM BLOG (June 26, 2015), <http://www.nomblog.com/40488/>

benefits, and privileges of marriage have changed dramatically over the past century: many of the privileges of marriage, such as immunity from antifornication statutes, have been expanded to unmarried couples.¹¹ In fact, some argue, the importance of marriage for same-sex couples is entirely overstated: most of the benefits of marriage can be contracted privately,¹² and those that cannot are positive benefits the state can dispense as it sees fit.¹³ However, there are a few benefits that can neither be replicated by contract nor dismissed as a gratuitous benefit, and chief among them are the spousal evidentiary privileges.¹⁴

The two spousal privileges—the spousal testimonial privilege and the confidential marital communications privilege¹⁵—had been unavailable in federal court to legally married same-sex couples until *United States v. Windsor*,¹⁶ and completely unavailable to same-sex couples that were barred from marriage by state law until *Obergefell*.¹⁷ Although *Obergefell* makes the privileges prospectively

[<https://perma.cc/HCC4-E7AU>] (declaring the *Obergefell* decision to be “completely illegitimate” and lacking in “both constitutional and moral authority”).

11. See James G. Dwyer, *Same-Sex Cynicism and the Self-Defeating Pursuit of Social Acceptance Through Litigation*, 68 SMU L. REV. 3, 12 (2015).

12. For example, the passing of a deceased spouse’s property to the surviving spouse and hospital visitation rights. These benefits are assignable by contracts outside the marriage contract. See Mary Bonauto et al., *Property Division Issues in Non-Marital Relationships*, GLAD 1 (Dec. 2008), <http://www.glad.org/uploads/docs/publications/property-division-index.pdf> [<https://perma.cc/G5ND-2ALJ>]; *Hospital Rights*, UNMARRIED EQUALITY, <http://www.unmarried.org/health-care/hospital-rights/> [<https://perma.cc/M7NK-5BU9>].

13. See Alvaré, *supra* note 10, at 49-50 (arguing that *Obergefell* transformed marriage into a government entitlement); Dwyer, *supra* note 11, at 17-18 (quoting the rule from *Deshaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989), that “the Due Process Clauses generally confer no affirmative right to governmental aid” to benefits such as joint tax returns).

14. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 8.

15. 98 C.J.S. *Witnesses* § 301 (2015).

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

17. See, e.g., Lisa Yurwit Bergstrom & W. James Denvil, *Availability of Spousal Privileges for Same-Sex Couples*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 224, 227-28 (2011); Elizabeth Kimberly (Kyhm) Penfil, *In the Light of Reason and Experience: Should Federal Evidence Law Protect Confidential Communications Between Same-Sex Partners?*, 88 MARQ. L. REV. 815, 815-16 (2005); Schaffzin, *supra* note 4, at 106; John Bergstresser, Note, *When Evidentiary Rules Enforce Substantive Policies: Same-Sex Marital Privilege Under Federal Rule of Evidence 501 in Diversity Cases*, 46 NEW ENG. L. REV. 303, 306 (2012) (noting that at that point in time the marital privileges were not available to same-sex couples in federal court); Jennifer R. Brannen, Note, *Unmarried with Privileges? Extending the Evidentiary Privilege to Same-Sex Couples*, 17 REV. LITIG. 311, 341 (1998).

available to same-sex spouses today,¹⁸ there exists a strange twilight zone for the couples like Pat and Chris in this Note's opening fantasia. Because the confidential marital communications privilege applies only to couples who were *legally* married at the time of the communication,¹⁹ same-sex couples who were barred from marrying in their home states can be compelled to share pre-*Obergefell* marital secrets on the stand.²⁰ The confidential marital communications privilege is of particular concern as it protects the communications between spouses regardless of their marital state at the time of trial.²¹ The spousal testimonial privilege, on the other hand, requires that the spouses be married at the time of trial.²² Although it may be fair to insist that post-*Obergefell* couples actually obtain marriage licenses in order to invoke the spousal testimonial privilege, no remedy currently exists for same-sex couples to avoid the inequities forced upon them by being forced to disclose confidential marital communications.

This Note argues that the promise of liberty enshrined in *Obergefell* requires a modification of the confidential marital communications privilege vis-à-vis those couples unfairly prejudiced by now-unconstitutional laws. This Note presents this argument in four parts.

Part I provides general background necessary for understanding the following Parts. It first presents a brief synopsis of the battle for same-sex marriages from the first attempt to have a state recognize a gay marriage in the 1970s up to the Supreme Court's ruling in *Obergefell v. Hodges*. It then presents an overview of the two marital privileges before going into greater detail of the confidential marital communication privilege and its unique nature among the broader evidentiary privileges.

Part II analyzes the language of *Obergefell* to determine whether the Court intended for the rights of marriage to be applied

18. See *infra* Part II.

19. 98 C.J.S. *Witnesses* § 301 (2015).

20. See *infra* notes 40-46 and accompanying text (discussion of the case of Bobbie Jo Clary).

21. 98 C.J.S. *Witnesses* § 301 (2015).

22. *Id.*

retroactively to same-sex marriages.²³ The alternative—that the decision only prospectively allows same-sex couples to get marriage licenses—would preclude the rest of this Note’s argument. Happily, not only does the analysis in this Part demonstrate that the Court intended for retroactive recognition of same-sex marriages, but the examples in the following Parts bolster the analysis.

Part III presents one way in which same-sex marriages can achieve retroactive recognition: through common-law marriage. After providing a brief background of common-law marriage doctrine, this Part presents, for the first time in the scholarly literature, several examples of this method of retroactive recognition achieving success in Texas and Pennsylvania.

Part IV provides an argument for the retroactive recognition of same-sex marriages in states that do not recognize common-law marriage. This Part focuses on the traditional rationales for changes in evidentiary privileges in the federal courts. It argues that public policy and issues of equity mandate the recognition of the confidential marital communications privilege for couples that would have been married but for unconstitutional state limitations on marriage. Building on the elements of common-law marriage, this Part concludes by presenting elements of a test that the courts can apply in deciding whether to expand the privilege in any given case. The end result of the analysis presented in this Note is a method for the future application of the retroactivity of same-sex marriages beyond the scope of the marital communications privilege.

23. This Note does not, however, take the position that *Obergefell* should retroactively apply the spousal privilege to *opposite-sex* couples that had been engaged to be married or considered themselves married without legal recognition. Such couples had the capacity to legally marry and suffered no governmental prejudice; same-sex couples were prejudicially denied that capacity.

I. BACKGROUND: SAME-SEX MARRIAGES AND THE SPOUSAL PRIVILEGES

A. Same-Sex Marriages

Two people of the same sex have been entering into marriage-like relationships throughout history.²⁴ Beginning in the 1960s, the Metropolitan Community Church began performing religious marriages of same-sex couples—performing an estimated 85,000 by the early twenty-first century.²⁵ Whether informal arrangements or religiously sanctified unions, the marriages had no legal status.²⁶

This lack of legal status rubbed many the wrong way—not only for reasons of “dignity,”²⁷ but also for the lack of the many rights, benefits, and privileges that came with legal recognition of marriage.²⁸ Many same-sex couples instead turned to contractual arrangements to gain some of the property,²⁹ hospital visitation,³⁰ and parenting rights³¹ of legally recognized marriages.

The fight for governmental recognition of same-sex marriages dates back to the 1970s when the first gay couple attempted to marry in the state of Minnesota.³² That attempt—and many others

24. See generally JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994) (focusing specifically on the acceptance of same-sex unions in early Christianity); LOUIS CROMPTON, HOMOSEXUALITY AND CIVILIZATION (2003) (identifying celebrated same-sex relationships in European and Asian history from Ancient Greece to the seventeenth century). For specific examples of more modern American same-sex “marriages,” see generally RODGER STREITMATTER, OUTLAW MARRIAGES: THE HIDDEN HISTORIES OF FIFTEEN EXTRAORDINARY SAME-SEX COUPLES (2012).

25. See MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE 22 (2013).

26. See generally LILLIAN FADERMAN, THE GAY REVOLUTION: THE STORY OF THE STRUGGLE (2015).

27. Dignity is, according to some, “what LGBT persons seem to want most.” Dwyer, *supra* note 11, at 7.

28. See *supra* note 8 and accompanying text.

29. See Bonauto et al., *supra* note 12, at 1.

30. See *Hospital Rights*, *supra* note 12.

31. See *Davis v. Kania*, 836 A.2d 480, 481, 484 (Conn. Super. Ct. 2003) (enjoining a former member of a same-sex relationship from contesting his parental status after signing a contract establishing himself as a co-parent with the other half of the former same-sex relationship).

32. See *Gay Marriage Timeline*, PROCON.ORG, <http://gaymarriage.procon.org/view.timeline.php?timelineID=000030> [<https://perma.cc/PJ6A-Z6FV>] (last updated Oct. 6, 2014, 10:27 AM).

thereafter—failed miserably.³³ In 1993 Hawaii nearly legalized same-sex marriage,³⁴ prompting Congress to pass the Defense of Marriage Act (DOMA).³⁵ DOMA was passed to ensure that the federal government would never have to recognize a same-sex marriage.³⁶

In 1999 some states began recognizing marriage-like statuses for same-sex couples under the titles of domestic partnerships and civil unions.³⁷ The marital evidentiary privileges did not necessarily attach to those legal constructs. Although they were discussed in early drafts of California's domestic partnership laws,³⁸ no mention appears in the final bill as chaptered.³⁹ Domestic partnership laws in Hawaii, Maine, and New Jersey were silent as to the evidentiary privileges.⁴⁰ Vermont alone specifically extended the marital privileges to civil unions,⁴¹ but even there, the privileges did not necessarily follow.

In 2013 Kentucky brought murder charges against Bobbie Jo Clary and sought to have her same-sex spouse, Geneva Case, testify

33. *See id.*

34. *See id.*

35. The Defense of Marriage Act, 28 U.S.C. § 1738C (2012) (invalidated by *Obergefell* and *Windsor*). For background of the bill and reaction at the time, see David W. Dunlap, *Congressional Bills Withhold Sanction of Same-Sex Unions*, N.Y. TIMES (May 9, 1996), <http://www.nytimes.com/1996/05/09/us/congressional-bills-withhold-sanction-of-same-sex-unions.html> [<https://perma.cc/7KS7-NH4E>].

36. *See* Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 3 (1997).

37. Domestic partnerships were made available in California, beginning September 22, 1999; Washington state, beginning July 22, 2007; Oregon, beginning January 1, 2008; and Maryland, beginning July 1, 2008. *See Civil Unions & Domestic Partnership Statutes*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/humanservices/civilunionsanddomesticpartnershipstatutes.aspx> [<https://perma.cc/2DGP-XBVU>] (last updated Nov. 18, 2014). Civil unions were made available in Vermont on July 1, 2000; in Connecticut on October 1, 2005; in New Hampshire on February 1, 2008; and in Illinois, Hawaii, Delaware, and Rhode Island in 2011. *See id.*

38. *See* Assemb. B. 205, 2003-2004 Leg., Reg. Sess. § 1(b)(8)(A) (Cal. as introduced Jan. 28, 2003), http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030128_introduced.pdf [<https://perma.cc/ZJ46-ZR5Q>].

39. *See* Assemb. B. 205, 2003-04 Leg., Reg. Sess. § 1 (Cal. as chaptered 2003), http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0201-0250/ab_205_bill_20030922_chaptered.pdf [<https://perma.cc/GP7G-P7WR>].

40. *See* Penfil, *supra* note 17, at 835.

41. Vt. STAT. ANN. tit. 15, § 1204(e)(15) (2015).

against her.⁴² Before moving to Kentucky, Ms. Case and Ms. Clary lived in Vermont and entered into a civil union under Vermont law.⁴³ Regardless of the Vermont legislature's intent to extend the privileges to Ms. Case and Ms. Clary,⁴⁴ the Kentucky court refused to do the same:

At a minimum, the privilege granted by the Commonwealth of Kentucky would require that the parties be *actually married*. Ms. Case and [Ms. Clary] are not, under the law of either Kentucky or Vermont. The fact that Vermont may extend the marital privilege to couples who have entered into a civil union does not require Kentucky to do so.⁴⁵

The Kentucky court's distinction between marriage and civil union speaks to a larger understanding of their unequal footing. With civil unions receiving neither the legal nor social recognition of marriages, many same-sex couples opted to forego civil unions.⁴⁶

In 2004 Massachusetts became the first state to give full recognition to same-sex marriages,⁴⁷ and over the next eleven years many states followed Massachusetts's lead.⁴⁸ Many of the state court cases that mandated recognition of same-sex unions specifically brought attention to the question of the spousal privileges.⁴⁹ As a result of

42. Commonwealth v. Clary, No. 11-CR-3329, at 1 (Ky. Cir. Ct. Sept. 23, 2013) (order denying the invocation of marital privilege).

43. *See id.*

44. *See* VT. STAT. ANN. tit. 15, § 1204(e)(15).

45. *Clary*, No. 11-CR-3329, at 6 (emphasis added).

46. *See* GARY J. GATES ET AL., WILLIAMS INST., MARRIAGE, REGISTRATION AND DISSOLUTION BY SAME-SEX COUPLES IN THE U.S. 2 (2008), <http://williamsinstitute.law.ucla.edu/research/marriage-and-couples-rights/marriage-registration-and-dissolution-by-same-sex-couples-in-the-u-s/> [<https://perma.cc/K6JJ-PLUW>] (noting the disparity in rates of adoption of marriage and civil unions and attributing that gap to a "lack of enthusiasm for non-marital forms of recognition").

47. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969-70 (Mass. 2003).

48. *See History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY (June 26, 2015), <https://perma.cc/5V6Y-9A8L>.

49. *See, e.g.*, Varnum v. Brien, 763 N.W.2d 862, 902 n.28 (Iowa 2009) (identifying "restriction of testimony of communication between husband and wife" as one of the more than 200 Iowa statutes affected by marital status); *Goodridge*, 798 N.E.2d at 956 ("Exclusive marital benefits that are not directly tied to property rights include ... evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations."); *Lewis v. Harris*, 908 A.2d 196, 215 (N.J. 2006) ("Among the rights afforded to married couples but denied to committed same-sex couples [is] the right to ... the

these changes in state policy, the courts in those states were mandated to give same-sex couples the same evidentiary privileges as opposite-sex couples.⁵⁰

In 2013 the Supreme Court struck down the DOMA provision that prevented the federal government from recognizing same-sex marriages legally contracted in the states.⁵¹ In response, Attorney General Eric Holder directed all U.S. Department of Justice lawyers to recognize the marital privileges of same-sex couples and to not object if those privileges were raised.⁵² Holder's policy went beyond the basic requirements of *Windsor* and ordered recognition of the marital privilege of same-sex couples even if the marriage was not recognized as legal in the forum state.⁵³ The order stood in sharp contrast to the requirement that state law govern privileges.⁵⁴

However, Holder's guidance contained a very large loophole: it explicitly applied only to individuals in valid marriages and not to "similar relationship[s], such as a domestic partnership or civil union, recognized under state law that is not denominated as a marriage under the laws of that state."⁵⁵

Two years later in *Obergefell*, the Court ruled that "same-sex couples may exercise the fundamental right to marry."⁵⁶ Despite localized acts of defiance by county clerks,⁵⁷ same-sex couples can marry in any U.S. jurisdiction and same-sex spouses will be able to invoke the spousal testimonial privilege in any proceedings where

testimonial privilege." (citing N.J. STAT. ANN. § 2A:84A-17(2) (West 2016))).

50. See Bergstrom & Denvil, *supra* note 17, at 226-27.

51. United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) ("[DOMA] is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

52. Memorandum from Eric H. Holder, Jr., Att'y Gen., to All Department Employees, U.S. Dep't of Justice, Department Policy on Ensuring Equal Treatment for Same-Sex Married Couples 3 (Feb. 10, 2014), <https://www.justice.gov/iso/opa/resources/ss-married-couples-ag-memo.pdf> [<https://perma.cc/84KG-HYCU>].

53. *Id.* at 4.

54. FED. R. EVID. 501.

55. Memorandum from Eric H. Holder, Jr., *supra* note 52, at 1 n.1; see also Mike Dorf, *What Is the Theory Behind the Latest Holder Memo on SSM—And Does It Go Far Enough?*, DORF ON L. (Feb. 11, 2014), <http://www.dorfonlaw.org/2014/02/what-is-theory-behind-latest-holder.html> [<https://perma.cc/93TX-CSCV>].

56. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

57. Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html> [<https://perma.cc/27FC-3AJE>].

applicable.⁵⁸ In other words, same-sex marriages are on the same footing as opposite-sex marriages when it comes to the spousal testimonial privilege.

The relationship of same-sex couples in regards to the confidential marital communications privilege, however, is different.

B. The Confidential Marital Communications Privilege

An evidentiary privilege has long been attached to the relationship between husband and wife.⁵⁹ The ancient privilege developed from the notion that a woman had no legal identity separate from her husband, and thus she was incompetent to stand witness against him in any proceeding.⁶⁰ With the expansion of the recognition of women's personhood, the original privilege expanded to keep either spouse from testifying.⁶¹ The expansiveness of that privilege caused many to question its usefulness and resulted in the creation of a separate privilege attached solely to confidential communications made between two spouses.⁶² Those privileges are now viewed as separate sub-privileges under the aegis of the spousal privileges: the spousal testimonial privilege bars spouses from adversely testifying at all against one another, and the confidential marital communications privilege bars the admission into evidence of statements made between two spouses.⁶³ Every U.S. jurisdiction recognizes one or both of the two spousal privileges.⁶⁴

58. See *Obergefell*, 135 S. Ct. at 2606.

59. See *Trammel v. United States*, 445 U.S. 40, 43-44 (1980) (citing 1 E. COKE, A COMMENTARIE UPON LITTLETON 6b (1628)). Much like other privileges, the spousal privilege has been controversial. For an old argument that the spousal privilege needlessly hampers justice, see 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 338 (Rothman & Co. 1995) (1827). For a modern attack on the marital privileges, see generally David Medine, *The Adverse Testimony Privilege: Time to Dispose of a "Sentimental Relic,"* 67 OR. L. REV. 519 (1988). Arguments for and against the marital privileges, in general, play an important role in the analysis of Part IV, *infra*.

60. See Bergstrom & Denvil, *supra* note 17, at 230.

61. See *id.*

62. See *Trammel*, 445 U.S. at 44-45.

63. See 98 C.J.S. Witnesses § 301 (2015).

64. See Bergstrom & Denvil, *supra* note 17, at 225. Federal law since *Trammel* has recognized only the marital communications privilege, and not the spousal testimonial privilege. See *Trammel*, 445 U.S. at 53. However, Proposed Federal Rule of Evidence 505 included only the spousal testimonial privilege, and even then only included the privilege in criminal proceedings. See Proposed Fed. R. Evid. 505, 56 F.R.D. 183, 244-45 (1972); see also

The confidential marital communications privilege renders inadmissible the contents of a (1) confidential (2) communication (3) between two spouses.⁶⁵ Both spouses hold the privilege vis-à-vis any communication made during the course of their marriage.⁶⁶ Just like any other privilege, the confidential marital communications privilege is narrowly construed “to the very limited extent that ... excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.”⁶⁷ In most jurisdictions, however, confidentiality is a rebuttable presumption for any communication between spouses.⁶⁸ In those cases, the burden of proving that the privilege does not apply rests with the party seeking to introduce the privileged information.⁶⁹ Importantly, the confidential marital communications privilege also applies to couples that are no longer married, as long as the communication in question occurred during marriage.⁷⁰

Federal courts recognize the confidential marital communications privilege.⁷¹ The confidential marital communications privilege is also recognized in criminal and civil proceedings in the District of Columbia and all fifty states except for Arkansas, where the privilege applies solely to criminal proceedings.⁷²

For the purposes of this Note, it is critically important that the privilege requires “spouses,” meaning the two parties must be married at the time the communication was made.⁷³ In most cases

Thomas G. Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 GEO. L.J. 61, 67-68 (1973) (describing how “the husband and wife privilege has pretty generally been eliminated” in Proposed Rule 505).

65. 98 C.J.S. *Witnesses* § 309 (2015).

66. *Id.* § 306; see also, e.g., *Merlin v. Aetna Life Ins. Co.*, 180 F. Supp. 90, 91 (S.D.N.Y. 1960) (“[T]he privilege may be invoked by either party.”).

67. *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

68. See *Merlin*, 180 F. Supp. at 91 (“Confidence and privacy are presumed to have been intended in conversations held between husband and wife.”).

69. 98 C.J.S. *Witnesses* § 309 (2015).

70. See *Pereira v. United States*, 347 U.S. 1, 6 (1954) (“[D]ivorce ... does not terminate the privilege for confidential marital communications.”); Medine, *supra* note 59, at 521 (“The [confidential marital communications] privilege survives the marriage.”).

71. See *United States v. Hamilton*, 778 F. Supp. 2d 651, 654-55 (E.D. Va. 2011).

72. See *Bergstrom & Denvil*, *supra* note 17, at 225 n.4. Arkansas alone limits the confidential communications privilege to criminal proceedings. ARK. R. EVID. 504(b).

73. Steven N. Gofman, Note, “*Honey, the Judge Says We’re History*”: Abrogating the Marital Privileges via Modern Doctrines of Marital Worthiness, 77 CORNELL L. REV. 843, 848

this is a simple question of governmental licensure,⁷⁴ but in cases in which the marriage is by common law, the party invoking the privilege must prove the existence of the marriage by a preponderance of the evidence.⁷⁵ No U.S. court has recognized an evidentiary privilege between two unmarried people regardless of the nature of their relationship.⁷⁶

Now that same-sex couples can legally marry in all U.S. jurisdictions, those couples can rest assured that their communications made after *Obergefell* will be privileged throughout the United States. However, because the confidential marital communications privilege requires that the couple be married when the communication was made, those couples who were not allowed to marry before *Obergefell* cannot invoke the privilege for communications made before *Obergefell* regardless of their current marital state under the current understanding of the privilege. The precedent in *Obergefell*, and in regard to privileges, mandates a change in this understanding.

In calling into question the validity of the litigation strategy embraced by the gay rights movement, Professor James Dwyer made the case that marriage is no longer a fundamental right.⁷⁷ The cornerstone of Professor Dwyer's argument is that marriage was a fundamental right when it protected its participants from anti-fornication laws, among other criminal penalties, such that denying a couple a marriage license would leave them in jeopardy.⁷⁸ Because

(1992). The Seventh Circuit, however, has found that communications made where a marriage exists under law but where the spouses have permanently separated do not merit the protections of the marital communications privilege. *See United States v. Byrd*, 750 F.2d 585, 593 (7th Cir. 1984) ("[T]he fact of separation at the time of the communications rebuts the presumption of confidentiality that is a requirement of the exercise of the privilege.").

74. Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 648 (noting that the marital privilege is easy to apply because of the "relatively unambiguous legal tests" to identify those to whom the privileges apply).

75. *See Mesa v. United States*, 875 A.2d 79, 82 (D.C. 2005).

76. *See, e.g., United States v. Neely*, 475 F.2d 1136, 1137-38 (4th Cir. 1973) (declining to apply the privilege when the defendant had not divorced his previous wife and thus was in an invalid, bigamous marriage with the testifying putative spouse); *United States v. Boatwright*, 446 F.2d 913, 915 (5th Cir. 1971) (stating there is no privilege where common-law marriage is not proven).

77. Dwyer, *supra* note 11, at 8.

78. *Id.* at 11 ("Denying a marriage license to a couple was therefore in the past an infringement of a negative liberty, a right to the freedom to fulfill basic human needs and desires.").

sexual intimacy is a basic human need, denying someone the opportunity to marry—and thus have sex without criminal penalty—would be in violation of his or her *negative right*.⁷⁹ That negative right has been recognized beyond the marital relationship through the expansion of privacy rights, and therefore marriage itself is no longer a necessary prerequisite to have one's privacy rights respected.⁸⁰ The other benefits provided by the state to married couples, Dwyer argues, amount to the sort of gratuitous benefits that can never rise to the level of a fundamental constitutional right.⁸¹

What Professor Dwyer misses is the unique position of the spousal evidentiary privileges.⁸² Although it is true that the privileges do not derive directly from the Constitution,⁸³ in form they amount to a negative right—the right to maintain privacy in one's most intimate relationship.⁸⁴ This is vastly different from the gratuitous benefits that Dwyer writes about.⁸⁵ Couples exercising the privilege do not get anything—they are instead being left free from government intervention, much like the decision in *Griswold* left Connecticut couples free from government intervention in their sex lives.⁸⁶

The confidential marital communications privilege, in particular, is an important and unique benefit of marriage. After *Obergefell*,

79. *Id.*

80. *Id.* at 11-14.

81. *Id.* at 17-18.

82. See *United States v. Morris*, 988 F.2d 1335, 1339 (4th Cir. 1993) (“[T]he marital privilege is one that remains vital in modern jurisprudence and has been sanctioned by Congress and the Supreme Court.”).

83. See *id.* at 1338 (“The marital privilege is conferred upon witnesses by the Congress and not by the Constitution.”); cf. Edward J. Imwinkelried, *The Dangerous Trend Blurring the Distinction Between a Reasonable Expectation of Confidentiality in Privilege Law and a Reasonable Expectation of Privacy in Fourth Amendment Jurisprudence*, 57 LOY. L. REV. 1, 17 (2011) (noting the differences between constitutional rights to privacy and the evidentiary privilege’s recognition of special relationships).

84. See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 168-69 (2015) (“[M]arriage is a negative right in that it creates a zone of privacy into which the state cannot intrude, as we see ... in the testimonial privileges that permit spouses to refuse to testify against each other.”).

85. See Levinson, *supra* note 74, at 636 n.16 (referring to testimonial privileges not as an option, but as “entitlements” held by individuals to refuse to testify). By recognizing that the privileges are, in fact, “entitlements,” Professor Levinson hints at the notion that the privileges are indeed rights rather than mere options. *See id.*

86. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

same-sex couples that had been previously unable to legally marry were suddenly able to do so. For the purposes of the spousal testimonial privilege, those same-sex couples were on the exact same footing as any opposite-sex couple that had yet to marry: though at that time they would not be able to invoke the privilege where available, that deficiency is easily remedied by marriage. As far as the confidential marital communications privilege was concerned, however, same-sex couples were not put on exactly the same footing. Yes, once they marry, a same-sex couple will be able to exercise the privilege over any *future* communications, just like a straight couple; but unlike straight couples, if a previous communication from a same-sex couple were to be brought up in court, they would not have previously had any recourse to make their communications privileged.

II. THE RETROACTIVITY OF *OBERGEFELL*

This Note is not the first entry in the literature of expanding the marital privileges,⁸⁷ even in the realm of same-sex unions.⁸⁸ That literature constitutes a compelling body of argument for a same-sex marital privilege in the absence of a national ruling on marriage equality. Although the arguments in those works remain compelling, *Obergefell* has rendered them largely moot. This Note builds on the earlier work of those scholars in identifying the importance of the marital privileges for same-sex couples, but goes beyond their scope by exploring how that privilege must be construed now that same-sex marriage is a reality. Given the *Obergefell* decision, the analysis must turn to whether that decision prospectively gives same-sex couples the option to marry or if it declares that the marital rights of same-sex couples must be recognized by the government. Under both logical analyses of the decision and application of the Court's precedents, the answer to that question is that *Obergefell* gives access to marital *rights*, not just the marital *rite*.

Although the case obviously stands for the proposition that laws retaining exclusive marriage rights for opposite-sex couples are

87. See, e.g., Levinson, *supra* note 74, at 648.

88. See *supra* note 17 and accompanying text.

unconstitutional,⁸⁹ and regardless of debates about the quality of the Court's reasoning,⁹⁰ the exact scope of the holding calls for scrutiny. Did *Obergefell* give same-sex couples the right to wed, or did it give same-sex couples the right to marriage and the benefits thereof? In most circumstances, this is a distinction without a difference: one naturally follows the other. But in circumstances where a marriage existed in fact, but not in law due to unconstitutional state proscriptions, the meaning is slightly less clear. If *Obergefell* gave nothing more than the right to wed, a same-sex couple in that situation would essentially have to re-marry. If, however, *Obergefell* gives same-sex couples the right to marriage, then denying them all of the privileges of marriage in the present-tense would be unconstitutional.

Although the bulk of the decision speaks specifically to "the right to marry,"⁹¹ terminology which most likely tips towards the right to obtain a marriage license, the greater proposition supported by the holding is that same-sex couples' marriages are constitutionally mandated to be at the same level as opposite-sex couples. Indeed, the narrowest holding of the majority is that "the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples."⁹² In favor of the notion that *Obergefell* calls for the expansion of marital rights, Justice Kennedy specifically called attention to the "significant material costs" same-sex couples faced without the benefits of marriage.⁹³

The true aim of *Obergefell* is to level the playing field and ensure the equal treatment of same-sex and opposite-sex couples.⁹⁴ Indeed,

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

90. See *id.* at 2611, 2616-18 (Roberts, C.J., dissenting) (referring to "the majority's decision [as] an act of will, not legal judgment" and likening it to the now-ridiculed *Lochner* and *Dred Scott* decisions); Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 23 (2015) (expressing discontent with the Court's reasoning for not going far enough in supporting same-sex couples).

91. The phrase "right to marry" appears thirty-one times in the majority opinion. See *Obergefell*, 135 S. Ct. 2584 *passim*.

92. *Id.* at 2605.

93. *Id.* at 2590.

94. See *id.* at 2604 ("It is now clear that the challenged laws [that limit marriage to opposite-sex couples] burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality."); Serena Mayeri, *Marriage*

the opinion goes so far to say that “the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage,”⁹⁵ suggesting that deficiencies in equality can, *and should*, be ameliorated. In fact, some scholars have noted that *Obergefell’s* lack of a classification of heightened scrutiny limits the decision’s holding to marriage.⁹⁶ If *Obergefell* was calculated to focus solely on the marriage question, the importance of an equitable expansion of the spousal evidentiary privileges is even more appropriate. Indeed, Justice Kennedy specifically understood that the issue is not obtaining a license, but rather same-sex couples’ “need [] for [marriage’s] privileges and responsibilities.”⁹⁷ Furthermore, although the opinion paid lip-service to the Equal Protection Clause, its focus on the Due Process Clause intimates that the right to marriage is a right to the institution’s benefits and protections—as the Due Process Clause is instrumental in carrying out justice rather than the broader, person-focused Equal Protection Clause.⁹⁸

What exactly does the majority mean in the statement that “laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter”?⁹⁹ It is a strange construction: *right* is in the singular. In spoken English, a “marriage rite” refers to a wedding ceremony.¹⁰⁰ But the majority explicitly writes “right,” which itself is troubling because of the Court’s references to the *multiple* rights that come with marriage.¹⁰¹

The opinion is rather clear that the petitioners sought not just the ability to obtain a marriage license, but to enjoy the rights of

(*In*)equality and the Historical Legacies of Feminism, 6 CALIF. L. REV. 126, 126 (2015) (noting that *Obergefell* “vanquish[ed] the material and dignitary harms that same-sex marriage bans visited upon individuals and families”).

95. *Obergefell*, 135 S. Ct. at 2604.

96. Mayeri, *supra* note 94, at 131 (echoing feminist disappointment that “without a declaration that heightened scrutiny should apply to all sexual orientation-based classifications, it seemed possible to confine *Obergefell’s* analysis to marriage and leave other injustices untouched”).

97. *Obergefell*, 135 S. Ct. at 2594.

98. Professor Russell K. Robinson has put forth a similar argument. See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 154-55 (2016). Professor Robinson argues that the Court’s eschewing of Equal Protection is a method of providing same-sex couples more avenues for legal redress. *Id.*

99. *Obergefell*, 135 S. Ct. at 2602.

100. See *Rite*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/rite> [<https://perma.cc/2MKP-D89S>].

101. *Obergefell*, 135 S. Ct. at 2600, 2602.

marriage, and thus the right to *be married*: “same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.”¹⁰² That legal treatment includes the “spousal privilege in the law of evidence” among “the constellation of benefits that the States have linked to marriage.”¹⁰³

Although the Court does not explicitly state that same-sex couples affected by pre-*Obergefell* law are entitled to retroactive application of post-*Obergefell* law, it is the logical result of the ruling.¹⁰⁴ Professor Eric Berger identified such “stealth determinations” in Justice Kennedy’s *Lawrence* decision.¹⁰⁵ In 2013 Professor Berger noted that the clarity of *Lawrence*’s holding belied its complicated implications in other areas of the law and accurately predicted its sub-doctrinal importance to the eventual decision in *Windsor*, which had just been granted certiorari.¹⁰⁶ The same indeterminacy Professor Berger identified in *Lawrence*’s “stealth determinations” exists in spades in *Obergefell*, giving lower courts the flexibility to apply it beyond the most general level.¹⁰⁷

Although the Court does not explicitly state that same-sex couples who were denied the opportunity to obtain civil marriages have recourse to have some of the rights of marriage retroactively applied to their pre-*Obergefell* relationships, it is the logical result of the ruling. If the post-decision history of the Justice Kennedy-penned decisions in *Lawrence* and *Windsor* are any guidance, it seems nearly a foregone conclusion that the retroactive recognition of same-sex marriage rights will be a lasting result of the decision. In those cases, although the majority limited their rulings to the question of the criminalization of same-sex sodomy and the federal recognition of state-sanctioned marriages, and explicitly stayed clear of the

102. *Id.* at 2602.

103. *Id.* at 2601.

104. See generally Eric Berger, Lawrence’s Stealth Constitutionalism and Same-Sex Marriage Litigation, 21 WM. & MARY BILL RTS. J. 765 (2013).

105. *Id.* at 767.

106. See *id.* at 787-89; see also, United States v. Windsor, 133 S. Ct. 2676 (2013).

107. Berger, *supra* note 104, at 767-68.

larger question of the rights of same-sex couples,¹⁰⁸ lower courts readily extracted larger lessons about LGBT rights.¹⁰⁹

Since the Court's decision a handful of cases have applied its ruling. The Court of Appeals of South Carolina recently remanded to family court a case involving child support payments between two women who had previously been in a relationship.¹¹⁰ The one-page order instructed the family court to consider the implications of *Obergefell* on its May 5, 2014, dismissal under the authority of South Carolina's then-in-force same-sex marriage ban, clearly implying the earlier decision should be modified retroactively.¹¹¹ The Appellate Division of the Supreme Court of New York disagrees.¹¹² In a probate case, that court stated *Obergefell* did "not compel a retroactive declaration that the 'Commitment Ceremony' entered into by decedent and [his putative husband] in 2002 ... was a legally valid marriage."¹¹³ The court also noted the couple had an "understanding that they had never been legally married,"¹¹⁴ suggesting that instead of denying the retroactivity of *Obergefell* in all cases the court was simply tailoring the decision to the facts at hand against the petitioner. Some courts have even directly dodged the retroactivity question when it was raised.¹¹⁵ There is one area of marriage law that has, however, embraced the retroactivity of *Obergefell* without hesitation: common law marriage.

108. *Windsor*, 133 S. Ct. at 2696 (confining the holding and opinion "to those lawful marriages" conducted under state law but unrecognized under DOMA); *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("[This case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.").

109. See, e.g., *Baskin v. Bogan*, 766 F.3d 648, 659, 670 (7th Cir. 2014) (striking down an Indiana statute and a Wisconsin constitutional amendment limiting marriage to opposite-sex couples; noting that the arguments against DOMA in *Windsor* "apply with even greater force to Indiana's law" and that *Lawrence* may "rule[] out moral objections to homosexuality as legitimate grounds for discrimination"), cert. denied, 135 S. Ct. 316 (2014); *Bostic v. Schaefer*, 760 F.3d 352, 374 (4th Cir. 2014) (striking down Virginia's constitutional amendment banning gay marriage and noting that *Lawrence* and *Windsor* "firmly position same-sex relationships within the ambit of the Due Process Clauses' protection"), cert. denied, 135 S. Ct. 308 (2014).

110. *Swicegood v. Thompson*, No. 2016-UP-013, 2016 WL 192045 (S.C. Ct. App. Jan. 13, 2016).

111. *Id.*

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

113. *Id.*

114. *Id.*

115. See *MacDougall v. Levick*, 782 S.E.2d 182, 194 n.12 (Va. Ct. App. 2016) (explicitly rejecting the opportunity to determine if Virginia must "retroactively ratify same-sex marriages that were entered into prior to the Supreme Court's decision in *Obergefell*").

III. RETROACTIVITY THROUGH COMMON-LAW MARRIAGE

Common-law marriages are “marriages without formal solemnization or ... formalities.”¹¹⁶ Although once available in more states, today common-law marriages can be contracted in only twelve jurisdictions.¹¹⁷ A few states that have abolished common-law marriage still recognize marriages contracted before the abolition.¹¹⁸ Beyond this small group, only a handful of other states¹¹⁹ and the federal system¹²⁰ recognize the validity of a common-law marriage contracted in one of those states.¹²¹

In general, a common-law marriage requires an “actual and mutual agreement” between two people capable of being married¹²² and that the couple live together or openly assume normal “marital duties and obligations.”¹²³ Common-law marriages need not be

116. See 55 C.J.S. *Marriage* § 10 (2015). Some make a point of distinguishing “common-law marriages” from “informal marriages”—the latter referring to marriages in states where requirements are spelled out in a statute, and the former referring to those that are based solely in the common law. See Kathryn S. Vaughn, Comment, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?*, 28 Hous. L. Rev. 1131, 1150, 1152 (1991) (noting that by passing an informal marriage statute the Texas legislature “effectively abolished common-law marriage” in that state). This Note will use the term “common-law marriage” throughout.

117. They are Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas, and Utah. SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM, GN 00305.075, STATE LAWS ON VALIDITY OF COMMON-LAW (NON-CEREMONIAL MARRIAGES) (2013), <http://policy.ssa.gov/poms.nsf/lnx/0200305075> [<https://perma.cc/243B-ZXF8>].

118. Pennsylvania, for example, recognizes common-law marriages contracted in the state on or before January 1, 2005. *Id.*

119. Illinois, Louisiana, Minnesota, New York, North Dakota, Ohio, Oregon, South Dakota, Washington, and Wyoming (ten states in total) recognize common-law marriages validly contracted in other states. *Id.*

120. See, e.g., *In re Frawley*, 112 B.R. 32, 33 (D. Colo. 1990) (acknowledging that a common-law marriage would count as a valid marriage for purposes of federal tax law).

121. It remains to be seen if the Court’s ruling on the second question in *Obergefell*—whether “the Constitution requires States to recognize same-sex marriages validly performed out of State”—may in fact mean that states are constitutionally required to recognize common-law marriages contracted in other states. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).

122. See 55 C.J.S. *Marriage* § 10 (2015).

123. *Id.*

solemnized, but evidence of a ceremony can prove one of the elements.¹²⁴

Interesting things happen when same-sex marriage and common-law marriage are put next to one another. On the one hand, as same-sex marriages came to be recognized in more states at least one court expected disenchanted heterosexuals to turn to common-law marriage “because they no longer wish to be associated with the civil institution as redefined.”¹²⁵ On the other hand, common-law marriage could be a refuge for same-sex couples that seek the benefits of marriage without having to register their relationship with a less-than-supportive state government.¹²⁶ The most interesting possible interaction between same-sex marriage and common law marriage is one that has not actually been discussed in the academic literature or in any published opinions. The cases explored in the following subparts demonstrate how two states’ treatment of common-law marriage have redeemed same-sex unions that suffered from a lack of recognition at the time of their original contracting.

A. Pennsylvania

In December 2014, Sabrina Maurer petitioned the Orphans’ Court of Bucks County, Pennsylvania, for a declaration of common-law marriage between her and her spouse, who had died earlier that year.¹²⁷ In theory, it was simple enough. Although Pennsylvania had long recognized common-law marriages,¹²⁸ the legislature passed a bill in 2004 prospectively proscribing common-law marriages beginning January 1, 2005.¹²⁹ However, a couple could

124. *Id.*

125. *Sevcik v. Sandoval*, 911 F. Supp. 2d 996, 1016 (D. Nev. 2012), *rev’d sub nom. Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014).

126. See, e.g., Peter Nicolas, *Essay, Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931 (2011).

127. See Verified Declaratory Judgment Complaint and Amended Petition for Declaration of Common Law Marriage, Maurer v. United of Omaha Life Ins. Co., No. 2014-E0681-29 (C.P. Bucks Cty., Pa., Orphans’ Ct. Dec. 29, 2014) [hereinafter *Declaratory Judgment*].

128. See Ryan P. Newell, Comment, “*To Be Sure He Is My Husband Good Enough, or Is He? An Analysis of Common Law Marriage in Pennsylvania*,” 109 PENN. ST. L. REV. 337, 341-48 (2004) (chronicling the case history of common-law marriage in Pennsylvania from 1814 to present day).

129. See 23 PA. CONS. STAT. § 1103 (2004).

effectively contract a common-law marriage prior to that date by exchanging vows, living together, and maintaining a reputation as being married.¹³⁰ Thus, although Pennsylvania no longer allowed new common-law marriages to be contracted, Maurer could have her relationship—which fit *all* of those requirements—recognized as a common-law marriage if those criteria had been met before 2005.¹³¹ According to judicial precedent setting out the requirements to contract a common-law marriage, “a common law marriage can only be created by the exchange of words in the present tense [*verba in praesenti*], spoken with the specific purpose that the legal relationship of husband and wife is created by that.”¹³²

All in all, everything seemed to be in place. Since a 2001 ceremony,¹³³ Ms. Maurer and her spouse had considered themselves married and held themselves out to family and friends as a married couple.¹³⁴ They had lived together in Pennsylvania from 2002 until Ms. Maurer’s spouse’s death in 2013.¹³⁵

What made this petition for recognition unusual was that both Ms. Maurer and her spouse, Kim Underwood, were women.¹³⁶ Pennsylvania did not recognize same-sex marriage until ordered to do so by the federal courts.¹³⁷ Although the motion was filed after the Federal District Court invalidated Pennsylvania’s marriage laws, it was filed before the decision was rendered in *Obergefell*.¹³⁸ It was only after filing a Notice of Supplemental Authority,

130. See *Sullivan v. Am. Bridge Co.*, 176 A. 24, 25-26 (Pa. Super. Ct. 1935) (citing *Travers v. Reinhardt*, 205 U.S. 423 (1907)) (adopting the then-federal standard for a finding of a common-law marriage as the law in Pennsylvania).

131. See *Declaratory Judgment*, *supra* note 127, at para. 10.

132. PNC Bank Corp. v. Workers’ Comp. Appeal Bd. (Stamos), 831 A.2d 1269, 1272 (Pa. Commw. Ct. 2003) (quoting *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1020 (Pa. 1998)) (addition in brackets and emphasis in original).

133. Although they serve as an opportunity for the exchange of *verbae de praesenti*, ceremonies are unnecessary to a marriage in Pennsylvania. See *Sullivan*, 176 A. at 25 (“[C]ommon-law marriages, without any ceremony, are valid in New Jersey and Pennsylvania.”).

134. See *Declaratory Judgment*, *supra* note 127, at para. 4.

135. See *id.* at para. 15.

136. See *id.* at para. 14.

137. See *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (holding that Pennsylvania’s laws limiting marriage to opposite-sex couples violate both the Due Process and Equal Protection Clauses).

138. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Declaratory Judgment*, *supra* note 127.

including the *Obergefell* decision, that the court finally granted an order recognizing Ms. Maurer and Ms. Underwood's marriage.¹³⁹

Ms. Maurer's case has been cited as the first example of common-law marriage being applied to a same-sex couple.¹⁴⁰ How that court-ordered recognition affects Ms. Maurer's life is a different question: Ms. Maurer's petition sought only recognition without seeking any relief from, among others, the Pennsylvania Department of Revenue for a refund of estate taxes or the life insurance company that denied Ms. Maurer benefits upon the death of Ms. Underwood.¹⁴¹ In fact, Ms. Maurer's petition was entirely uncontested by an adverse party.¹⁴²

B. Texas

Meanwhile, in Texas—a state with far more conservative tendencies than Pennsylvania—gay couples have been called upon to get “no-nup” agreements to foreclose the possibility of nasty divorce proceedings after a break-up.¹⁴³ Although Ms. Maurer was able to have her petition fly through the courts without intervention, even by parties she invited, a similar case saw the Attorney General of Texas actively seek to intervene.¹⁴⁴

In June 2014 Stella Powell passed away without leaving a will, and her surviving blood relatives filed a motion to have themselves declared Ms. Powell's only heirs.¹⁴⁵ One person was conspicuously

139. See Notice of Supplemental Authority, Maurer v. United of Omaha Life Ins. Co., No. 2014-E0681-29 (C.P. Bucks Cty., Pa., Orphans' Ct. June 30, 2014).

140. Maryclare Dale, *Judge Deems Gay Couple as Spouses After 1 Partner's Death*, AP (July 31, 2015, 5:29 PM), <http://bigstory.ap.org/article/7bbc532eb76d4539bfde58d54c2b088a/judge-deems-gay-couple-spouses-after-1-partners-death> [https://perma.cc/PT6C-5QNT].

141. Motion to Grant Relief Requested in Petition or to Schedule a Hearing, Maurer v. United of Omaha Life Ins. Co., No. 2014-E0681-29 (C.P. Bucks Cty., Pa., Orphans' Ct. May 20, 2015).

142. See *id.* at Exhibit K. The Pennsylvania Department of Revenue specifically stated that it did not intend to enter an appearance in the matter. *Id.*

143. See Christina Pesoli, *Gay and Cohabitating in Texas?: You Just Might Need a No-Nup.*, 78 TEX. B.J. 902, 902 (2015).

144. Mark Joseph Stern, *Texas' Law-Breaking Attorney General Is Denying Gay People Equal Rights—Again*, SLATE: OUTWARD (Sept. 11, 2015, 3:36 PM), http://www.slate.com/blogs/outward/2015/09/11/ken_paxton_texas_attorney_general_discriminates_against_gay_widows.html [https://perma.cc/NR67-TFDY].

145. See Sonemaly Phrasavath's Response to Special Exceptions and Motion to Dismiss and Motion for Continuance at 3, *In re Estate of Powell*, No. C-1-PB-14-001695 (Prob. Ct. Travis

absent from the declaration of heirship: Ms. Powell's same-sex spouse, Sonemaly Phrasavath.¹⁴⁶ Ms. Powell and Ms. Phrasavath had lived together for eight years, celebrated their union in front of family and friends at a religious ceremony, and held themselves out to the community as a married couple.¹⁴⁷ In seeking to have her heirship recognized by the state, Ms. Phrasavath argued based on the precedent in *United States v. Windsor* and *DeLeon v. Perry* that the state's ban on same-sex marriage should be overturned and that her relationship with Ms. Powell should be recognized as a common-law marriage under Texas statute.¹⁴⁸ To say that the administration in Austin balked at such a notion is an understatement: in a motion filed in early 2015, the Attorney General of Texas sought to intervene in the case in order to defend the validity of the then-enforced ban on same-sex marriages.¹⁴⁹ The Attorney General's office then went on to argue that the courts lacked the authority to validate a "purported" marriage that was invalid for its entire length.¹⁵⁰ Even citing to *Chevron* deference, the state argued that retroactive recognition of such marriages should not be allowed in light of "the hardship involved with altering distributions under state law."¹⁵¹ The Travis County Probate Court overruled the state's objections and ordered that Sonemaly Phrasavath be recognized as Stella Powell's common-law spouse and receive her fair share of Ms. Powell's estate.¹⁵²

These cases illustrate the simplest way for same-sex couples to invoke the marital privilege to cover communications made before they could legally marry. In those states where common-law marriages can still be contracted, couples' counsel need only establish that they were married *under common law*. As seen in Part I, the

Cty., Tex. Nov. 6, 2014).

146. *See id.*

147. *See id.* at 1.

148. *See id.* at 6-13; *see also United States v. Windsor*, 133 S. Ct. 2675 (2013); *DeLeon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014) (finding Texas's ban on same-sex marriage unconstitutional), *aff'd sub nom. DeLeon v. Abbott*, 791 F.3d 619 (5th Cir. 2015).

149. *See Plea in Intervention of the State of Texas at 2*, *In re Estate of Powell*, No. C-1-PB-14-001695 (Prob. Ct. Travis Cty., Tex. Feb. 18, 2015).

150. *See Traditional and No-Evidence Motion for Summary Judgment of the State of Texas at 4*, *In re Estate of Powell*, No. C-1-PB-14-001695 (Prob. Ct. Travis Cty., Tex. Aug. 25, 2015).

151. *Id.* at 5 n.1.

152. *See Interlocutory Judgment Declaring Heirs*, *In re Estate of Powell*, No. C-1-PB-14-001695 (Prob. Ct. Travis Cty., Tex. Oct. 5, 2015).

marital privileges do apply to common-law marriages even though the party raising the privilege bears the burden of proving the marriage.¹⁵³ Furthermore, after being tested in both Texas and Pennsylvania, the *Obergefell*-based arguments for retroactive recognition of same-sex marriages put forward in Part II should hold water if tested in the states that still recognize common-law marriages.¹⁵⁴

IV. RETROACTIVITY THROUGH A MODIFICATION OF THE CONFIDENTIAL MARITAL COMMUNICATIONS PRIVILEGE

Although common-law marriage is one way for same-sex marriages to be recognized *ex post facto* for the purposes of the confidential marital communications privilege, that route is available in only a handful of states.¹⁵⁵ This Part proceeds through a discussion of how the federal courts construe evidentiary privileges in general before applying a four-part analysis to the creation of an entirely new evidentiary privilege to address the position of unduly burdened same-sex couples. Finally, this Part puts forward a multi-factor test for the courts to apply when confronted with a question of the retroactive recognition of same-sex marriages for the purpose of the marital communications privilege.

A. The Privileges in Federal Court

Under Federal Rule of Evidence 501, “[t]he common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege.”¹⁵⁶ Thus, the spousal privileges are determined not by statute, but by the federal common law.¹⁵⁷ In fact, the courts are willing to reexamine and cautiously change privileges.¹⁵⁸ In the case of this Note’s proposal, the change to the privilege would be of very limited scope.

153. See *supra* note 75 and accompanying text.

154. See *supra* Part II.

155. See *supra* notes 117-18.

156. FED. R. EVID. 501.

157. *Id.*

158. *United States v. Morris*, 988 F.2d 1335, 1339 (4th Cir. 1993) (stating that the courts “should guard against turning the privilege into an empty promise” and “that trial practices which undermine the privilege should be reviewed with a careful eye”).

The question that this Note seeks to address could only arise in a small number of cases in which a member of a same-sex relationship is asked to testify as to what his or her then-partner said *before same-sex marriage was legalized in their state of residence.*

Thus, the scope is limited first and foremost by the characteristics of the people that could raise the issue. Based on the 2013 National Health Interview Survey, the U.S. Department of Health and Human Services estimates that 96.6 percent of Americans identify as heterosexual—leaving just 3.4 percent of the population in the pool of those that could possibly have had a same-sex union that would give rise to this issue.¹⁵⁹

Time also limits the scope of this change. The nature of litigation—and the imposition of statutes of limitations—makes such occurrences increasingly unlikely as time goes by.

Although the limited scope of the privilege's change does not extend far enough to warrant the recognition of a *new* privilege, under current privilege jurisprudence the courts would be justified in recognizing one as such. *A fortiori*, the following argument would merit the lesser measure of recognizing a small change in the privilege as it stands rather than a new privilege entirely.

B. The Courts Would Be Justified in Creating an Entirely New Privilege

The Supreme Court established the test for recognizing a new privilege when it recognized the psychotherapist privilege in *Jaffee v. Redmond*.¹⁶⁰ Under the *Jaffee* test, courts conduct a multifactor analysis, considering whether the new privilege is: (1) supported by federal policy; (2) supported by the policy goals of privileges in general; (3) recognized by the states; and (4) advocated by scholars.¹⁶¹

159. Brian W. Ward et al., U.S. Dep't of Health & Human Servs., *Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013*, NAT'L HEALTH STAT. REP., July 15, 2014, at 1, <http://www.cdc.gov/nchs/data/nhsr/nhsr077.pdf> [<https://perma.cc/4V9Q-LFUK>].

160. *Jaffee v. Redmond*, 518 U.S. 1, 10-16 (1996); *see also* Penfil, *supra* note 17, at 828-31.

161. *See* Penfil, *supra* note 17, at 828.

Save for one of these factors, the multifactor analysis shows that an expansion of the confidential marital communications privilege would be within the “light of reason.”¹⁶²

First, the only factor that weighs heavily against the recognition of a new privilege is that, strictly speaking, no state has adopted a version of the confidential marital communications privilege that applies retroactive recognition of the marital communications privilege.¹⁶³ However, there are analogous situations that support the new privilege. First, by specifically including the spousal privileges when creating civil unions, Vermont implicitly sanctioned the idea of unmarried couples benefiting from the privilege.¹⁶⁴ Second, the retroactive recognition of same-sex, common-law marriages in Pennsylvania and Texas implicitly supports an expansion of the privilege.¹⁶⁵ Although it is true that in both of those situations surviving spouses sought to have their marriages recognized after their spouses’ deaths,¹⁶⁶ the same reasoning would apply to recognize a common-law marriage between two living same-sex spouses. In such a case, the confidential marital communications privilege would attach.¹⁶⁷ These two instances by themselves should be seen as supporting an expansion of the marital communications privilege.

Second, the new privilege is supported by federal policy. In recognizing the psychotherapist privilege in *Jaffee*, the Court specifically pointed to that privilege’s inclusion in the Proposed Federal Rules of Evidence in support of the privilege’s adoption.¹⁶⁸ Although the Proposed Rules of Evidence did not contain a privilege the likes of which is discussed here,¹⁶⁹ federal policy nonetheless points clearly to the inclusion of such a privilege. The Court’s holding in *Obergefell* as discussed above is clearly in support of the recognition of a pre-*Obergefell* privilege for those couples legally barred from

162. FED. R. EVID. 501.

163. See *supra* Part I.B.

164. See *supra* note 41 and accompanying text.

165. See *supra* Part III.

166. See *supra* Parts III.A-B.

167. Assuming, of course, that all of the requirements of the privilege were satisfied. See 98 C.J.S. *Witnesses* § 301 (2015).

168. *Jaffee v. Redmond*, 518 U.S. 1, 14-15 (1996); see also Proposed Fed. R. Evid. 504, 56 F.R.D. 183, 240-41 (1972).

169. Proposed Fed. R. Evid. 505, 56 F.R.D. 183, 244-45 (1972).

marriage.¹⁷⁰ Additionally, the policies of the Obama administration have very clearly been in favor of the expansion of rights for LGBT people.¹⁷¹ In particular, the Department of Justice's policy to recognize the spousal privilege for same-sex couples clearly points in the same direction.¹⁷²

Third, the new privilege is supported by the traditional rationales for evidentiary privileges. The goals of the development of privileges extend to both humanistic and instrumental concerns.¹⁷³ Instrumental concerns cover the effect of forcing testimony on the relationship.¹⁷⁴ Humanistic concerns are those fundamental concerns about morality and fairness.¹⁷⁵ In this case, the basis would be mostly humanistic—treating same-sex couples as equals.¹⁷⁶ The instrumental basis is less successful: married same-sex couples cannot be forced to testify against each other going forward, but forcing a spouse to share communications could have a lingering effect as well. The damage is less significant than if married same-sex spouses would not have the general privilege going forward, but it is damage nonetheless.

Finally, the new privilege is supported by scholars. The modification of the confidential marital communications privilege suggested in this Note is entirely novel, and thus has not been directly addressed in the literature. Analogies can be drawn to Professor Levinson's argument for the extension of the privilege far beyond simple marriage to include general close relationships as well.¹⁷⁷ Before the Court's decision in *Obergefell*, other scholars made arguments for the expansion of the spousal privileges to same-sex marriages unrecognized by the state.¹⁷⁸ The one caveat to this

170. See *supra* Part II.

171. HUMAN RIGHTS CAMPAIGN, OBAMA ADMINISTRATION POLICY ADVANCEMENT ON BEHALF OF LGBTQ AMERICANS (2015), <http://hrc.org/resources/obama-administration-policy-legislative-and-other-advancements-on-behalf-of> [https://perma.cc/F5VZ-RDWG].

172. See *supra* notes 51-54 and accompanying text.

173. See Penfil, *supra* note 17, at 819.

174. See *id.* at 820-21.

175. See *id.* at 819-20 (noting that the humanistic rationale underlies the "natural repugnance" that early courts felt towards the idea of spouses being forced to testify against one another); see also EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES § 2.3 (Westlaw 2015).

176. See Penfil, *supra* note 17, at 819-20.

177. See Levinson, *supra* note 74, at 651.

178. See Brannen, *supra* note 17, at 314.

analysis is that there is more than a handful of scholars who deride the decision in *Obergefell*¹⁷⁹ and would probably argue against an expansion of the privilege in favor of same-sex couples.

C. Proposed Test and Factors for Consideration

With the backdrop of *Obergefell*'s mandate to recognize same-sex unions and a rich common-law tradition, federal judges should interpret these precedents "in the light of reason and experience"¹⁸⁰ to find that the marital communications privilege should extend to couples that were barred from marrying pre-*Obergefell*. Proposals for pre-*Obergefell* expansion of the marital privileges to unmarried same-sex couples noted even then that the court could easily determine if the privilege applies by simply asking if "the couple would legally marry if the option were available."¹⁸¹ However, a more nuanced test based on the requirements of common-law marriage would satisfy concerns of slap-dash application of the privilege, as well as firmly root the new privilege in the history of the common law.

Just as the court must determine whether a common-law marriage existed *as a question of fact*,¹⁸² so should the court consider *as a question of fact* whether a gay couple would have been married but for unconstitutional laws. The threshold question is whether the couple could have obtained a legal marriage in their state of residence before the communication occurred. If they could have done so the court should apply the rule for marital privileges as already in place.

Primarily, the court should look to whether the couple held themselves out to members of their community as married or similar. This, however, should not be read strictly: due to the history of animus against homosexual relationships in American history¹⁸³

179. See AM. PRINCIPLES PROJECT, *Statement Calling for Constitutional Resistance to Obergefell v. Hodges* (Oct. 8, 2015), <https://americanprinciplesproject.org/founding-principles/statement-calling-for-constitutional-resistance-to-obergefell-v-hodges/> [<https://perma.cc/9UJ5-PAMA>].

180. FED. R. EVID. 501

181. Brannen, *supra* note 17, at 338-39.

182. See *supra* note 75 and accompanying text.

183. See generally MICHAEL BRONSKI, A QUEER HISTORY OF THE UNITED STATES (2011) (chronicling instances of homophobic governmental action from Puritan Massachusetts

many gay couples have not publicized their relationships beyond close friends.¹⁸⁴ This history of discrimination may lead to the unfortunate situation where two people of the same sex regard each other as spouses but do not acknowledge the same to outsiders. Such a “secret marriage” would in fact even bar a couple from receiving recognition as a common-law marriage.¹⁸⁵ Thus a court should look to whether the couple held themselves out as married primarily to friends and family.

By the same token, although a ceremony can be taken as evidence in favor of a finding that the couple would have been married, the absence of a ceremony should not be taken as weighing against such a finding. This squares with the general doctrine of common-law marriage.¹⁸⁶

Given that several states offered marriage-like alternatives in the years before the legalization of gay marriage, if a same-sex couple had taken advantage of such a law, it should be taken as dispositive of an intent to marry. Although some courts have treated civil unions or domestic partnerships as synonymous with marriage, others have already ruled otherwise.¹⁸⁷ Furthermore, many expressed disdain at the notion of civil unions as being an entrenchment of “separate but equal” philosophy¹⁸⁸ and did not take advantage of those laws even when available.¹⁸⁹

Just like any marriage, the court must also make sure that the couple attempting to raise the privilege would have had the capacity to marry *at the time of the communication*, had the law not limited marriage to opposite-sex couples. These requirements can be taken

through the modern age).

184. For an excellent treatment of several high-profile but closeted “marriages” in American history, see STREITMATTER, *supra* note 24.

185. See *Ex parte Threet*, 333 S.W.2d 361, 364-65 (Tex. 1960) (“Under the Texas decisions, there can be no secret common law marriage as such.”).

186. See *supra* Part III.

187. See Commonwealth v. Clary, No. 11-CR-3329, at 6 (Ky. Cir. Ct. Sept. 23, 2013) (order denying the invocation of marital privilege) (“The fact that Vermont may extend the marital privilege to couples who have entered into a civil union does not require Kentucky to do so.”).

188. Andrew Koppelman, *The Decline and Fall of the Case against Same-Sex Marriage*, 2 U. ST. THOMAS L.J. 5, 13-15 (2004).

189. See *supra* note 46 and accompanying text.

directly from the forum state's laws, and usually include age,¹⁹⁰ mental capacity,¹⁹¹ and consanguinity.¹⁹²

CONCLUSION

Obergefell had an immediate and stunning effect on the world—thousands of same-sex couples nearly immediately began lining up at county clerks' offices to obtain their own marriage licenses. However, the promise of liberty in *Obergefell* must go beyond the prospective granting of marriage licenses and include the retroactive recognition of marriages in the limited circumstances where to not do so would be a denial of the couple's Due Process right. The key example of such retroactive recognition lies in the confidential marital communications privilege. Although this Note does not delve into the other rights and benefits of marriage, there is little reason why this analysis would not be applicable to those rights. By assiduously demanding the rights denied to them, same-sex couples might one day "achieve the full promise of liberty."¹⁹³

This Note focuses on the question of the confidential marital communications privilege for same-sex couples for two reasons: first, the unique nature of the privilege outlines *one* way in which same-sex couples can continue to feel the stigma of discriminatory marriage laws despite the holding in *Obergefell*; and second, the solution to that injustice provided in this Note is entirely forward-looking. Whether it be through concrete examples in the real world¹⁹⁴ or through fictional examples,¹⁹⁵ this Note amply covered the first rationale. The second reason is that arguing for an expansion of the confidential marital communications privilege—the least criticized of the spousal privileges¹⁹⁶—leaves the door open for more radical applications of this Note's analogy to common-law marriage.

190. 55 C.J.S. *Marriage* § 14 (2015).

191. *Id.* § 15.

192. *Id.* § 17.

193. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015).

194. See *supra* Part I.A.

195. See *supra* Introduction.

196. Anne N. DePrez, Note, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege*, 56 IND. L.J. 121, 122 (1980).

Same-sex couples have been denied the basic rights afforded to opposite-sex couples since the founding of the United States.¹⁹⁷ More recently, and notably, that discrimination continued as the gay rights movement coalesced and became a political force.¹⁹⁸ Although this Note argues for one way in which a *future* harm—the forced divulgence of marital secrets—can be avoided, it also provides a framework for addressing *past* harms, including by amending previous years' tax returns.¹⁹⁹ Although outside the ambit of this Note, an able litigator can use the retroactive recognition of same-sex marriages argued herein to seek redress for the discriminatory harms suffered by same-sex couples, such as the lack of marital benefits in tax. It is up to the LGBTQ community to decide how far to push *this* agenda—or if it is time to forgive and to forget past harms while zealously protecting ourselves from future harms.

*Steven A. Young**

197. See *supra* notes 24-31 and accompanying text.

198. See *supra* Part I.A.

199. In a forthcoming article, Professor Peter Nicolas addresses the “backdating” of same-sex marriages for the purposes of tax and social security benefits. See Peter Nicolas, *Backdating Marriage*, 104 CALIF. L. REV. (forthcoming Apr. 2017), <http://ssrn.com/abstract=2742843> [<https://perma.cc/K4ZQ-FEA3>].

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