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Post-Deportation Remedy and *Windsor*'s Promise

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ABSTRACT

Since 1996, the Defense of Marriage Act (DOMA) defined marriage for federal purposes as the union between a man and a woman. As same-sex marriage became legal across the United States, DOMA created a situation in which same-sex married couples could not access federal immigration benefits based on their married status. In some cases, this meant that noncitizens were removed from the United States solely because their same-sex marriages to U.S. citizens were not recognized by the federal government. This Comment calls such individuals pre-*Windsor* deportees, because their removal could have been prevented had it occurred after the U.S. Supreme Court's 2013 decision in *United States v. Windsor*, which effectively ruled DOMA unconstitutional. Essentially, pre-*Windsor* deportees were removed from the United States on the basis of an unconstitutional law.

This Comment argues that pre-*Windsor* deportees should have access to a remedy for their wrongful removal. Specifically, pre-*Windsor* deportees should be able to reopen their removal proceedings on collateral review through a motion to reconsider. *Windsor* should be applied retroactively to vacate the underlying orders of removal. This presents a formidable obstacle, because the Court's retroactivity jurisprudence is complex and unsettled. Thus, the bulk of this Comment is devoted to arguing that *Windsor* should be applied retroactively. Finally, this Comment determines that the proper remedy for a pre-*Windsor* deportee is unimpeded return to the United States as a legal permanent resident (LPR), and this conclusion is identified as an important area for further scholarly commentary.

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INTRODUCTION

In 2014, U.S. Immigration and Customs Enforcement (ICE) removed 315,943 individuals from the United States, a process commonly referred to as deportation.[1] Many are lawfully removed because they have no access to immigration status under controlling law.[2] Yet some individuals are wrongfully removed—some are citizens of the United States,[3] while others are removed because of a criminal conviction that was later found to be an invalid basis for removal.[4] This Comment considers a distinct but analogous situation, in which an individual is removed because an unconstitutional law prevents her from accessing lawful immigration status. It asks whether an individual in this situation could have access to some sort of remedy, and if so, what such a remedy might look like.

Specifically, this Comment considers the case of noncitizens who were removed from the United States because their same-sex marriages to U.S. citizens were not recognized by the federal government under the Defense of Marriage Act[5] (DOMA), but who would not have been removed had the U.S. Supreme Court's decision in *United States v. Windsor*[6]—which effectively ruled DOMA unconstitutional—existed at the time of their removal. This Comment

1. U.S. IMMIGRATION & CUSTOMS ENF'T, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2014 at 1 [hereinafter ICE REMOVALS], http://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf [http://perma.cc/R7PC-VGUV].
2. *See generally* Immigration and Nationality Act, 8 U.S.C. § 1227 (2012) (setting forth conditions under which noncitizens may be removed from the United States). For an argument that the United States should relax laws that require removal of legal permanent residents (LPRs) without allowing them to show family ties, employment history, or rehabilitation, see Rachel E. Rosenbloom, *Senseless Deportations*, WASH. POST (Mar. 25, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/03/23/AR2007032301590.html [http://perma.cc/R8QH-G52B].
3. *See e.g.*, Laura Murray-Tjan, *When Will We Stop Deporting U.S. Citizens?*, HUFFINGTON POST (Sept. 18, 2013, 3:03 PM), www.huffingtonpost.com/laura-murraytjan/when-will-we-stop-deporti_b_3942843.html [http://perma.cc/VB63-QL27].
4. *See, e.g.*, Navarro-Miranda v. Ashcroft, 330 F.3d 672 (5th Cir. 2003) (noncitizen removed for crime later determined not to be removable offense); *In re* Gomez, No. A91-200-176, 2008 WL 2783059 (B.I.A. June 11, 2008) (same).
5. Defense of Marriage Act, 1 U.S.C. § 7 (1996).
6. 133 S. Ct. 2675 (2013).

refers to such individuals as pre-*Windsor* deportees.[7] Pre-*Windsor* deportees include noncitizens who are married to same-sex U.S. citizen or legal permanent resident (LPR) spouses but who were removed from the United States because the federal government did not recognize their marriages for immigration purposes under DOMA.[8] For these individuals, DOMA was the only reason they could not access lawful immigration status. Individuals who could have been lawfully removed even without DOMA's existence, perhaps because they were subject to additional grounds of inadmissibility or deportability, are not included in this Comment's definition of pre-*Windsor* deportees. The overarching question that this Comment seeks to answer is whether pre-*Windsor* deportees could have access to some sort of remedy for their wrongful removal.

A hypothetical would help illustrate the problem. Imagine that a French citizen, Marie, meets a U.S. citizen, April, while studying abroad at Wellesley College in Massachusetts in 2000. When Marie's study abroad program is finished, Marie and April have a long distance relationship for a few years, and they decide to get married after Massachusetts legalizes same-sex marriage in 2003.[9] Marie flies to Boston for the wedding, entering the United States using the Visa Waiver Program.[10] The newly married couple wants to live together in the United States, so April does some online research and files an I-130 petition[11] with U.S. Citizenship and Immigration Services (USCIS) so that Marie can become an LPR on the basis of their marriage. Marie has never committed a crime, and she has no past immigration violations that would prevent her from becoming an LPR. But the petition is denied.

Confused and worried, Marie and April seek help from a local immigration nonprofit organization and learn that the petition was denied because of DOMA, a law that since 1996 defined marriage for federal purposes as a union

7. Pre-*Windsor* deportees are also commonly referred to as "DOMA Deportees." *See, e.g.*, *Stop the DOMA Deportations*, ADVOC. (Mar. 1, 2011, 10:40 PM), http://www.advocate.com/News/Daily_News/2011/03/01/An_Evolving_Immigration_Landscape [http://perma.cc/7X5U-KM8L] (discussing the removal proceedings of a citizen of El Salvador in a same-sex marriage with a U.S. citizen).

8. *See* Defense of Marriage Act, 1 U.S.C. § 7 (1996) (defining "marriage" as "only a legal union between one man and one woman as husband and wife").

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

10. The Visa Waiver Program (VWP) allows citizens of certain countries to visit the United States for limited purposes without first obtaining a visa. *Visa Waiver Program*, U.S. DEP'T OF STATE, http://travel.state.gov/content/visas/english/visit/visa-waiver-program.html [http://perma.cc/9Y66-3MJE] (last visited Nov. 5, 2015). Traveling to the United States for the purpose of getting married may not technically be allowed under the VWP, but it is likely that Marie could have successfully entered the country under the VWP anyway.

11. *I-130, Petition for Alien Relative*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/i-130 [http://perma.cc/MV79-QLNJ] (last updated May 27, 2015).

between one man and one woman. USCIS does not recognize their marriage as valid for immigration purposes, and ICE initiates removal proceedings against Marie. Having no other options to become an LPR or avoid removal, Marie is removed. In 2013, Marie and April learn that DOMA section 3 was struck down by the U.S. Supreme Court in a case called *United States v. Windsor*. They have renewed hope that Marie will be able to return to the United States, so they contact a local immigration lawyer. Unfortunately, the lawyer tells them that the situation is not so simple. Marie's prior removal order and departure have subjected her to a ten-year bar from reentering the United States.[12] Marie wonders if she could avoid the ten-year bar by asking a judge to reconsider her prior removal case in light of *Windsor*, but the lawyer tells her that this will not work because of yet another bar. The post-departure bar, the lawyer says, is a regulatory prohibition on reopening deportation and other immigration cases from abroad, and it has been upheld by precedent in the Board of Immigration Appeals (BIA) and the First Circuit.[13] And even if Marie could get her case reopened, the lawyer says, there is no guarantee that *Windsor* will apply retroactively to vacate her prior removal. Marie and April feel crushed.

Contrast Marie and April's case with another fictional case: that of Cesar and Joe. Cesar is a Mexican citizen living in Los Angeles with his fiancé Joe in 2013. Cesar is facing imminent removal after his affirmative application for asylum was denied. On the same day as the Supreme Court decides *Windsor*, it decides in *Hollingsworth v. Perry*[14] to allow same-sex marriage to resume in California. Cesar and Joe get married as soon as possible, and Joe files an I-130 petition so Cesar can become an LPR. The petition is granted, and Cesar's removal case is ultimately dismissed. In this way, *Windsor* saved Cesar from removal and solved his immigration problems because of a mere difference in timing. Is Cesar's case really that different from Marie's? Why should Cesar be so lucky when Marie is stuck on a different continent from her spouse? In essence, should pre-*Windsor* deportees like Marie have access to a remedy?

12. *See* 8 U.S.C. § 1182(a)(9)(A) (2012).

13. *See* Pena-Muriel v. Gonzales, 489 F.3d 438, 443 (1st Cir. 2007) (upholding regulatory post-departure bar against due process attack); Armendarez-Mendez, 24 I. & N. Dec. 646 (B.I.A. 2008) (holding that post-departure bar survives the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and thus the Board of Immigration Appeals (BIA) lacks authority to reopen removal proceedings, initiated by the immigrant or sua sponte, if the immigrant has left the United States). Three months after *Windsor* came down, *Pena-Muriel* was essentially overruled by two First Circuit cases: Perez Santana v. Holder, 731 F.3d 50 (1st Cir. 2013) and Bolieiro v. Holder, 731 F.3d 32 (1st Cir. 2013) (holding that regulatory post-departure bar conflicts with statute granting the right to a motion to reopen). For further discussion, *see infra* note 55 and accompanying text.

14. 133 S. Ct. 2652 (2013).

In order for a pre-*Windsor* deportee to be entitled to any sort of remedy at all, she must address both practical and theoretical matters. Practically, to avoid the ten-year bar on immigrating to the United States after having been removed, a pre-*Windsor* deportee needs the underlying removal order to be vacated.[15] This requires reopening the removal proceedings and successfully arguing the theory that *Windsor* applies retroactively to invalidate the removal. Only after successfully reopening proceedings and winning the argument that *Windsor* applies retroactively to vacate the underlying order would a court be able to decide what type of remedy to afford pre-*Windsor* deportees. This Comment argues that pre-*Windsor* deportees should be able to reopen their removal proceedings on collateral review through a motion to reconsider, that *Windsor* should be applied retroactively to vacate their underlying orders of removal, and that the proper remedy for someone removed in violation of *Windsor* is unimpeded return to the United States as an LPR.

Part I provides background information to explain why and how one can be removed from the United States. It also discusses how *Windsor* affected the immigration and removal landscape by ruling that DOMA section 3 is unconstitutional. This Part thus recognizes that same-sex spouses are entitled to immigration benefits that were previously only available to opposite-sex spouses.

Part II argues that pre-*Windsor* deportees should be able to reopen their removal cases on collateral review through a motion to reconsider. Currently, motions to reconsider are subject to strict time and number limitations, and in some jurisdictions they will not even be adjudicated when filed by someone who has left the United States pursuant to an order of removal. Part II concludes that the remaining circuit courts that have not invalidated the post-departure bar on reopening proceedings should do so. In the alternative, the Supreme Court could grant certiorari to a case challenging the post-departure bar and resolve the circuits' different approaches to this problem by invalidating the bar altogether.

Part III examines the Supreme Court's retroactivity jurisprudence to determine what considerations, if any, allow a constitutional decision like *Windsor* to have retroactive effect on a case brought on collateral review. It concludes that the Supreme Court's civil-collateral retroactivity jurisprudence is unsettled and, thus, ripe for change.

Part IV argues that *Windsor* should be applied retroactively on collateral review to vacate pre-*Windsor* deportees' underlying orders of removal. Invoking

15. A pre-*Windsor* deportee could also apply for an I-212 waiver of inadmissibility for the prior deportation. However, I-212 waivers are discretionarily granted on a case-by-case basis, making them less reliable than the method of systemic change set out in this Comment.

the fundamental concerns that the Supreme Court has found influential when deciding whether to apply a constitutional decision retroactively, this Part argues that each of the concerns considered favors a determination that *Windsor* applies retroactively to pre-*Windsor* deportees' cases.

Part V connects the concepts of retroactivity and remedy, arguing briefly that once *Windsor* applies to pre-*Windsor* deportees' cases brought on collateral review, the proper remedy is to provide for the pre-*Windsor* deportees' unimpeded return to the United States as LPRs. It finally identifies this point as an important area for further scholarly commentary.

I. SUBJECT MATTER BACKGROUND: THE PROCESS OF REMOVAL

Some background information on immigration and removal will provide a better understanding of how pre-*Windsor* deportees came to be. This Part explains why and how one can be removed from the United States and discusses how *United States v. Windsor*[16] affected the immigration and removal landscape.

A. Removal in General

Noncitizens[17] can be removed from the United States in accordance with rules prescribed by the U.S. Congress.[18] Those rules are found in the Immigration and Nationality Act (INA).[19] The INA establishes that anyone who has been admitted[20] to the United States and is not a citizen can potentially be removed—for committing crimes,[21] smuggling noncitizens into the United States,[22] and a whole host of other actions.[23] Additionally, the INA states that noncitizens can be removed because they were not admissible at the time they entered the United States.[24] A number of federal agencies are involved in the

16. 133 S. Ct. 2675 (2013).
17. This Comment uses the term noncitizens to describe people who may be subject to removal. Other sources may refer to individuals potentially subject to removal as aliens, but this Comment consciously employs the less politically charged term.
18. *See* Fong Yue Ting v. United States, 149 U.S. 698, 711 (1893) (holding that Congress has broad power to regulate deportability of noncitizens); *cf.* Chae Chan Ping v. United States, 130 U.S. 581, 603–04 (1889) (holding that Congress has broad power to regulate admissibility of noncitizens).
19. 8 U.S.C. §§ 1101–1537 (2012).
20. "Admission" is a legal term of art meaning "the lawful entry . . . into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A) (2012).
21. *Id.* § 1227(a)(2).
22. *Id.* § 1227(a)(1)(E).
23. *See id.* § 1227.
24. *Id.* § 1227(a)(1).

process of removal. ICE is the federal agency that decides to bring charges of removability (deportability or inadmissibility) against a noncitizen.[25] ICE identifies a noncitizen subject to removal and issues him a Notice to Appear (NTA), which states ICE's theory of deportability or inadmissibility and notifies the respondent of when he is supposed to appear in court.[26] After appropriate proceedings, an immigration judge issues a removal order if she finds that the respondent is subject to removal.[27] At that point, the respondent is considered legally subject to removal. A noncitizen subject to removal can appeal the immigration judge's decision to the BIA, an administrative agency within the U.S. Department of Justice.[28] While the appeal process is pending, the noncitizen can request a stay of removal, which puts off the removal order until the appeal is resolved.[29] If the noncitizen loses the BIA appeal, he may appeal further to the relevant federal circuit court of appeals and potentially to the Supreme Court as well.[30] If the noncitizen exhausts available avenues for relief or allows enough time to lapse after a decision to remove him is rendered, the removal order is considered final, and the noncitizen must leave the United States.[31]

B. *Windsor*'s Effect on Removability

To avoid removal, one way for a noncitizen to legally immigrate to the United States is to marry a U.S. citizen.[32] The citizen can then petition for the noncitizen to be granted LPR status.[33] After three years, the new LPR can apply

25. *See* ICE REMOVALS, *supra* note 1, at 1 (noting that ICE's role is "(1) the identification and apprehension of criminal aliens and other removable individuals located in the United States; and (2) the detention and removal of those individuals . . . .").
26. *See* 8 U.S.C. §§ 1103(a), 239 (2012); 8 C.F.R. §§ 2.1, 239.1 (2015).
27. *See* Robert Herreria, *Judge's Decision in Immigration Court: How Long Will It Take to Get*, NOLO, http://www.nolo.com/legal-encyclopedia/judges-decision-immigration-court-how-long-it-will-take-get.html [http://perma.cc/2KQX-EM5W] (last visited Nov. 5, 2015).
28. *Id.*
29. *See* TRINA REALMUTO ET AL., PRACTICE ADVISORY: SEEKING A JUDICIAL STAY OF REMOVAL IN THE COURT OF APPEALS 1 (2012), http://nationalimmigrationproject.org/legalresources/practice_advisories/pa_Seeking_a_Judicial_Stay_of_Removal_May2012.pdf [http://perma.cc/6KYG-JAYD].
30. *See* Herreria, *supra* note 27.
31. *See* 8 C.F.R. §§ 241.1, 1241.1 (2015).
32. *See Green Card for an Immediate Relative of a U.S. Citizen*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/green-card/green-card-through-family/green-card-immediate-relative-us-citizen [http://perma.cc/KTM8-R5JC] (last visited Nov. 5, 2015). This option is also open to noncitizens who marry LPRs, but for the sake of simplicity this avenue is not discussed here.
33. *See Green Card Through Family*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/green-card/green-card-through-family [http://perma.cc/UDH5-UV7V] (last visited Nov. 5, 2015).

for U.S. citizenship.[34] This process is facilitated by USCIS.[35] USCIS accepts and adjudicates the family petition form, called an I-130, on behalf of citizens petitioning for their noncitizen spouses.[36] Before it was struck down in *Windsor*, DOMA left this avenue of immigration open only to opposite-sex spouses, and USCIS summarily denied I-130 petitions filed on behalf of noncitizens in a same-sex marriage.[37] After *Windsor* struck down DOMA section 3, however, USCIS began accepting and approving I-130 applications filed by same-sex married couples.[38] Now, a U.S. citizen in a same-sex marriage can file an I-130 form to petition for his or her noncitizen spouse to become an LPR. Essentially, same-sex married couples are now treated the same way as opposite-sex married couples for purposes of petitioning for LPR status.

Windsor prevents the removal of noncitizens who would have been removed under DOMA because the federal government did not recognize their marriages. But does *Windsor* apply to those noncitizens who actually were removed under DOMA before the *Windsor* decision was handed down? To begin to answer this question, the next Part argues that pre-*Windsor* deportees should be able to reopen their prior deportation cases.

34. 8 U.S.C. § 1430 (2012); *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., A GUIDE TO NATURALIZATION 18 (2011), http://www.uscis.gov/sites/default/files/files/article/chapter4.pdf [http://perma.cc/X56H-WSV5]. Note that LPRs who achieve their LPR status through a method other than marriage generally must wait five years to apply for citizenship. *Path to U.S. Citizenship*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/us-citizenship/citizenship-through-naturalization/path-us-citizenship [http://perma.cc/TAR3-4QML] (last updated Jan. 22, 2013).

35. *See* U.S. CITIZENSHIP & IMMIGRATION SERVS., A GUIDE TO NATURALIZATION, *supra* note 34.

36. *See Green Card for an Immediate Relative of a U.S. Citizen*, *supra* note 32.

37. *See* Zeleniak, 26 I. & N. Dec. 158 (B.I.A. 2013) (reversing previous denial of I-130 petition in light of *Windsor*). As an interesting historical note, the first I-130 filed on behalf of a noncitizen in a same-sex marriage to a U.S. citizen was denied in 1975 with a letter from the Immigration and Naturalization Service (INS) stating, "You have failed to establish that a bona fide marital relationship can exist between two faggots." Elaine Woo, *Richard Adams Dies at 65*, L.A. TIMES, Dec. 22, 2012, http://articles.latimes.com/2012/dec/22/local/la-me-richard-adams-20121223 [http://perma.cc/3CQH-HJZQ]. In the years leading up to *Windsor*, the federal government often found ways to not remove binational same-sex married couples. These strategies included exercising prosecutorial discretion by not issuing Notices to Appear (NTAs) to such noncitizens, administratively closing or continuing cases for long periods of time, and awarding deferred action. *See* Joseph Landau, *DOMA and Presidential Discretion: Interpreting and Enforcing Federal Law*, 81 FORDHAM L. REV. 619 (2012).

38. *Same-Sex Marriages*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/family/same-sex-marriages [http://perma.cc/46QZ-VH7E] (last updated Apr. 3, 2014) (quoting statement made by Sec'y of Homeland Sec., Janet Napolitano).

II. BARRIERS TO PRE-*WINDSOR* DEPORTEES' RETURN TO THE UNITED STATES

Generally, an immigrant needs to be admissible in order to get a visa to come to the United States lawfully.[39] Pre-*Windsor* deportees will face problems with admissibility by virtue of the fact that they have previously been removed from the United States. It is notoriously difficult to return to the United States once removed.[40] In fact, the INA imposes a ten-year bar on returning to the United States after one has left the country pursuant to an order of removal.[41]

There are two options to get around the statutory ten-year bar. The first is to obtain consent from the Attorney General that amounts to a waiver of the bar.[42] This is a rare and special occurrence. The second, more viable option is to vacate the underlying order of removal. To do this, a pre-*Windsor* deportee would have to reopen his removal case on collateral review and argue that *Windsor* should apply retroactively to vacate the prior removal.[43] This requires filing a motion to reopen or a motion to reconsider (MTR).[44] A motion to reopen is used primarily to address changed factual circumstances, while a motion to reconsider can also address a changed legal issue.[45]

Filing a motion to reconsider is probably the best course of action for pre-*Windsor* deportees, considering that the basis of their claim is that *Windsor* changed the law applicable to their case. Pre-*Windsor* deportees would face yet another hurdle, though, as strict time and numerical limits apply to MTRs. The INA provides that an individual may only file one motion to reconsider, and she must file it within thirty days of the date her removal order becomes final.[46] Fortunately, however, many circuits have ruled that the time and number

39. *See* 8 U.S.C. §§ 1181(a), 1182 (2012).
40. *See, e.g.*, POST-DEPORTATION HUMAN RIGHTS PROJECT, RETURNING TO THE UNITED STATES AFTER DEPORTATION: A GUIDE TO ASSESS YOUR ELIGIBILITY 2 (2014) ("[I]t is very difficult to return to the United States after deportation. It is not a realistic option for the majority of people, at least not for many years.") (emphasis omitted).
41. 8 U.S.C. § 1182(a)(9)(A)(ii) (2012).
42. *Id.* § 1182(a)(9)(A)(iii) (2012).
43. *See infra* Part IV.
44. This Comment refers to both motions to reopen and motions to reconsider as MTRs; when the distinction is pertinent, the applicable term is written out fully.
45. 8 U.S.C. §§ 1229(c)(7)(B), 1229a(c)(6)(C) (2012). *See also* POST-DEPORTATION HUMAN RIGHTS PROJECT, POST-DEPARTURE MOTIONS TO REOPEN OR RECONSIDER 2 (2014), http://www.bc.edu/content/dam/files/centers/humanrights/pdf/Post-Departure%20Motions%20to%20Reopen%20&%20Reconsider%203.2014.pdf [http://perma.cc/9DX4-CLCQ].
46. 8 U.S.C. § 1229a(c)(6)(A)–(B) (2012).

limitations on a motion to reconsider are subject to equitable tolling.[47] In other words, if a pre-*Windsor* deportee can prove that she filed the motion to reconsider within thirty days of the change in law (in the case of *Windsor*, within thirty days of June 26, 2013), then it should be considered timely regardless of when the order of removal was entered. If a pre-*Windsor* deportee did not file her motion to reconsider within the correct timeline, or if her motion was denied, she could also ask the court that issued the removal order to reconsider the decision sua sponte.[48] But if the court that issued the removal order is the BIA, the pre-*Windsor* deportee faces an uphill battle to being granted sua sponte review, which the BIA usually only offers in exceptional circumstances such as a fundamental change in the law or ineffective assistance of counsel.[49] There are no time or number limits to a sua sponte MTR;[50] however, experienced immigration advocates advise those considering filing an MTR to argue first that the motion falls within the statutory guidelines, because denials of sua sponte MTRs are generally not reviewable.[51]

Unfortunately, some pre-*Windsor* deportees will be outright barred from filing an MTR in the first place because of the post-departure bar. The post-departure bar is a set of two federal regulations predating the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[52] (IIRIRA) that say that

47. *See, e.g.*, Hernandez-Moran v. Gonzales, 408 F.3d 496, 499–500 (8th Cir. 2005); Pervaiz v. Gonzales, 405 F.3d 488, 490 (7th Cir. 2005); Harchenko v. INS, 379 F.3d 405, 410 (6th Cir. 2004); Iturribarria v. INS, 321 F.3d 889, 897–99 (9th Cir. 2003); Riley v. INS, 310 F.3d 1253, 1257–58 (10th Cir. 2002); Iavorski v. INS, 232 F.3d 124, 129–30 (2d Cir. 2000); Davies v. INS, 10 Fed. App'x. 223 (4th Cir. 2001) (unpublished); *see also* Neves v. Holder, 613 F.3d 30 (1st Cir. 2010) (assuming without deciding that time and number limitations are subject to equitable tolling); Borges v. Gonzales, 402 F.3d 398, 406 (3d Cir. 2005) (*in absentia* orders subject to equitable tolling); Socop-Gonzalez v. INS, 272 F.3d 1176, 1183–85 (9th Cir. 2001) (time limitation subject to equitable tolling where alien is unable to obtain vital information on existence of claim); *cf.* Reyes Mata v. Lynch, 135 S. Ct. 2150, 2154–55 (2015) (reprimanding Fifth Circuit for consistently avoiding the issue of equitable tolling by reconstruing motions to reconsider as motions to open sua sponte and then denying on discretion).

48. *See* 8 C.F.R. § 1003.2(a) (2015) (giving BIA authority to reconsider judgments sua sponte); 8 C.F.R. § 1003.23(b)(1) (2015) (giving Immigration Judges the same authority). *But see* J-J-, 21 I. & N. Dec. 976, 984 (B.I.A. 1997) ("8 C.F.R. § 1003.2(a) allows the Board to power to reopen proceedings sua sponte in exceptional situations not present here . . . [and] is not meant to be used as a general cure for filing defects or to otherwise circumvent the regulations . . . .").

49. *See, e.g.*, Vasquez-Muniz, 23 I. & N. Dec. 207 (B.I.A. 2002) (deciding sua sponte to reconsider previous decision that felon-in-possession conviction was not aggravated felony in light of Ninth Circuit decision that it was); Grijalva-Barrera, 21 I. & N. Dec. 472 (B.I.A. 1996) (holding that ineffective assistance of counsel (IAC) can be a basis for granting a motion to reopen sua sponte if the IAC claim follows the procedural requirements of Lozada, 19 I. & N. Dec. 637 (B.I.A. 1988), and the IAC itself constituted "exceptional circumstances").

50. *See* 8 C.F.R. §§ 1003.2(a), 1003.23(b)(1) (2015).

51. *See* POST-DEPORTATION HUMAN RIGHTS PROJECT, *supra* note 45, at 4.

52. Pub. L. No. 104–208, 110 Stat. 3009-546 (1996).

MTRs "shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States."[53] As such, the post-departure bar prevents courts from adjudicating MTRs filed after the proponent has departed the United States pursuant to an order of removal.[54] Pre-*Windsor* deportees who want to avoid the statutory ten-year bar on returning after removal by collaterally attacking the underlying removal order may be prevented from filing an MTR in the first place by the post-departure bar. The BIA has held that the post-departure bar survives IIRIRA,[55] but most circuit courts have, using the *Chevron*[56] analysis, declined to follow the BIA and have struck down the post-departure bar in whole or in part.[57] It is only in the circuits that have not completely struck down the post-departure bar that pre-*Windsor* deportees will face barriers to filing MTRs. A pre-*Windsor*

53. 8 C.F.R. 1003.2(d) (2015); *see also* 8 C.F.R. 1003.23(b)(1) (2015).
54. Even if the proponent filed the MTR and then departs, it will be considered withdrawn.
55. *See* Armendarez-Mendez, 24 I. & N. Dec. 646, 657–58 (B.I.A. 2008) (holding that post-departure bar survives the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and thus the BIA lacks authority to reopen removal proceedings, initiated by the immigrant or sua sponte, if the immigrant has left the United States). *But see* Bulnes-Nolasco, 25 I. & N. Dec. 57, 60 (B.I.A. 2009) (holding that BIA can reopen removal proceedings when order was issued in absentia without notice).
56. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).
57. *See* Toor v. Lynch, No. 10-73212, slip. op. at 5 (9th Cir. June 17, 2015) (invalidating post-departure bar because it conflicts with clear statutory language granting right to motion to reopen); Santana v. Holder, 731 F.3d 50, 51 (1st Cir. 2013) (invalidating post-departure bar because it conflicts with clear statutory language granting right to MTR); Contreras-Bocanegra v. Holder, 678 F.3d 811, 813 (10th Cir. 2012) (en banc) (same); Desai v. Attorney Gen. of U.S., 695 F.3d 267, 271 (3d Cir. 2012) (upholding post-departure bar on sua sponte MTRs); Garcia-Carias v. Holder, 697 F.3d 257, 265 (5th Cir. 2012) (invalidating post-departure bar for timely-filed motions to reopen because it conflicts with clear statutory language granting right to motion); Lari v. Holder, 697 F.3d 273, 278 (5th Cir. 2012) (same); Jian Le Lin v. U.S. Attorney Gen., 681 F.3d 1236 (11th Cir. 2012) (same); Espinal v. Attorney Gen. of U.S., 653 F.3d 213, 224 (3d Cir. 2011) (same); Gordillo v. Holder, 640 F.3d 700, 702-03 (6th Cir. 2011) (invalidating post-departure bar for untimely-filed motions to reopen that had equitably tolled); Luna v. Holder, 637 F.3d 85, 92 (2d Cir. 2011) (invalidating post-departure bar for timely-filed MTRs because BIA cannot give up jurisdiction that Congress provided for statutorily); Pruidze v. Holder, 632 F.3d 234, 237–38 (6th Cir. 2011) (same); Zhang v. Holder, 617 F.3d 650, 652 (2d Cir. 2010) (reluctantly upholding post-departure bar on sua sponte MTRs); Marin-Rodriguez v. Holder, 612 F.3d 591, 594 (7th Cir. 2010) (invalidating post-departure bar for timely-filed motion to reconsider because BIA cannot give up jurisdiction that Congress provided for statutorily); Ovalles v. Holder, 577 F.3d 288, 300 (5th Cir. 2009) (upholding post-departure bar on sua sponte MTRs); William v. Gonzales, 499 F.3d 329, 329 (4th Cir. 2007) (invalidating post-departure bar because it conflicts with clear statutory language granting right to file MTRs). With the exception of the Second, Sixth, and Seventh Circuits, those circuits that have invalidated the post-departure bar have done so under the *Chevron* analysis, finding that the congressional intent in IIRIRA was clearly to provide for a statutory right to an MTR.

deportee whose order of removal was issued from a court in the Eighth Circuit,[58] for example, will likely be prevented from filing an MTR because that circuit has not struck down the bar. In this situation, a pre-*Windsor* deportee would have to find another way to circumvent the ten-year bar, such as asking for Attorney General discretion or seeking an inadmissibility waiver based on hardship to her U.S. citizen spouse.[59]

Assuming a pre-*Windsor* deportee is not prevented from filing an MTR by the post-departure bar, however, she can file it and argue that *Windsor* should be applied retroactively to her case on collateral review to vacate her removal order. If she wins that case, then her spouse can file an I-130 petition naming her as a beneficiary, and she should not have any other bars to becoming an LPR, and, eventually, a U.S. citizen.

III. THE SUPREME COURT'S RETROACTIVITY JURISPRUDENCE: WHAT MAKES A CONSTITUTIONAL DECISION LIKE *WINDSOR* RETROACTIVE?

This Part reviews the Supreme Court's retroactivity jurisprudence to determine what, if anything, makes a decision like *Windsor* retroactive.

A. Pure and Full Retroactivity Before *Linkletter*

While new laws put in place by the legislature generally only apply in the future (prospectively),[60] judicial decisions interpreting and deciding the constitutionality of existing laws can apply to future, present, and sometimes even past disputes.[61] The general assumption that laws made by the legislature are forward looking is based on the idea that people should have notice of what kinds of conduct the law proscribes and should be judged by how they conduct themselves under the law as it exists at the time of their actions, for they cannot know what the future law may be.[62] Yet this rationale does not carry as much

58. The Eighth Circuit includes Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

59. *See generally* 8 U.S.C. § 1153(b) (2012); *id.* § 1182(d)(3) (2012).

60. *Compare* Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence . . . ."), *with* INS v. St. Cyr, 533 U.S. 289, 316 (2001) ("[I]t is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect.").

61. *See* Rivers v. Roadway Express, Inc., 511 U.S. 298, 311–12 (1994) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student . . . .") (quoting United States v. Sec. Indust. Bank, 459 U.S. 70, 79 (1982)).

62. *See Landgraf*, 511 U.S. at 265 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly . . . ."); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J.,

weight in the context of judicial decisions that interpret existing laws. Indeed, it seems perverse to allow a court to determine what a law means, but then not apply that meaning to the parties before it and those similarly situated. For this reason, courts are sometimes willing to apply their decisions retrospectively.

There are a number of different ways courts apply judicial decisions retrospectively. The most expansive is pure retroactivity, which is the method the Supreme Court employed in applying its constitutional decisions to other cases for about 180 years before it changed course in 1965.[63] Pure retroactivity allows courts to apply a judicial decision to all other cases that come before it, regardless of whether the case at hand arrives to the court on direct or collateral review.[64] Pure retroactivity is based on the idea that judges find the law rather than make it,[65] because the principle of separation of powers requires that the legislature, not the judiciary, make the law.[66] Under this theory, if a judge finds a law to be unconstitutional, it must never have been the real law in the first place.[67] The Supreme Court explained this idea in its 1886 decision, *Norton v. Shelby County*.[68] In *Norton*, the Court held that an unconstitutionally formed board of county

concurring) ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.").

63. *See* Paul E. McGreal, *A Tale of Two Courts: The Alaska Supreme Court, the United States Supreme Court, and Retroactivity*, 9 ALASKA L. REV. 305, 308 (1992).

64. *Id.* at 307. It may be useful here to provide a definition of the terms direct and collateral review, though the terms are discussed more fully *infra* Part III.B. Direct review occurs when a higher court reexamines the decision of a lower court on a given case after a party to that case has appealed. *Direct Attack*, BLACK'S LAW DICTIONARY (9th ed. 2009). Collateral review, in contrast, refers to a situation in which a party challenges a court's decision that has already become final. *Collateral Attack*, BLACK'S LAW DICTIONARY (9th ed. 2009). Some separate procedural mechanism, such as a writ of habeas corpus or a motion to reopen, is required for a party to seek collateral review of a final judgment. *See id.* For a succinct explanation, see McGreal, *supra* note 63, at 307 ("A case pending on appeal before it has become final is considered on direct review. After a case has become final, a further attack on the judgment is considered on collateral review . . . . A case is generally considered final when the litigants have exhausted all avenues of direct appeal and the time for applying for a writ of certiorari has lapsed.").

65. For a comprehensive explanation of the find/make distinction and its history, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1758–64 (1991).

66. *See* McGreal, *supra* note 63, at 308 ("Pure retroactivity made sense in light of the traditional common law notion that judges 'found' law and legislatures 'made' law. . . . Thus, a judge who refused to apply a new legal rule retroactively was thought to exceed legitimate judicial authority and usurp a portion of the legislative power.").

67. *See* Linkletter v. Walker, 381 U.S. 618, 623 (1965) (noting that before 1965, decisions overruled on constitutional grounds were "thought to be only a failure at true discovery" and that new constitutional decisions were "not 'new law but an application of what is, and theretofore had been, the true law'") (quoting Harry Shulman, *Retroactive Legislation*, *in* 13 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 355, 356 (1934)).

68. 118 U.S. 425 (1886).

commissioners had no authority to issue bonds to a railroad company because "[such an] unconstitutional act is not a law; it confers no rights; it imposes no duties . . . it is, in legal contemplation, as inoperative as though it had never been passed."[69] The essence of pure retroactivity is that if unconstitutional acts are and never have been the law, then courts should not apply those unconstitutional laws to other cases under any circumstances, including when parties to the case might have relied on the unconstitutional laws.

While pure retroactivity can be supported by the find/make distinction and separation of powers theory, arguments against it rest on reliance, finality of judgments, and administrability concerns. Parties justifiably rely on rules that control at the time of their actions, and pure retroactivity ignores this reality by applying decisions that alter the law to conduct that happened before the alteration.[70] Pure retroactivity also threatens "the law's important interest in finality of judgments,"[71] which seeks to avoid readjudicating cases into perpetuity regardless of whether they would be decided differently in the future. Moreover, pure retroactivity can cause administrability problems inasmuch as its application to watershed constitutional decisions opens the floodgates for reconsideration of a multitude of cases all at once, taxing the already burdened court system.[72]

To allay these concerns, courts have often employed full retroactivity as an alternative approach.[73] Full retroactivity is slightly less expansive than pure retroactivity and was also commonly relied upon until 1965.[74] Instead of applying judicial decisions to all cases that come before it, courts using full retroactivity apply the judicial decision only to cases on direct review that are not final as of the announcement of the decision.[75] While a purely retroactive decision could apply to another case that has arguably already been settled, a fully retroactive decision would only reach cases that have not yet been finally decided as of the announcement of the decision.

69. *Id.* at 441–42.
70. *See Linkletter*, 381 U.S. at 624 ("judicial repeal ofttime did 'work hardship to those who (had) trusted to its existence.'") (quoting Cardozo, *Address to the N.Y. Bar Assn.*, 55 REP. N.Y. STATE BAR ASSN. 263, 296–97 (1932)); *see also* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1056 (1997) ("[Where] an area of the law is settled . . . reliance interests are at their peak.").
71. *See* Massaro v. United States, 538 U.S. 500, 504 (2003).
72. The U.S. Supreme Court found this concern very influential in deciding *Linkletter*, where it worried that applying a watershed constitutional criminal procedure decision retroactively would cause widespread administrability problems by requiring reconsideration of so many already-decided cases. *See Linkletter*, 381 U.S. at 637.
73. *See* McGreal, *supra* note 63, at 307.
74. *See Linkletter*, 381 U.S. at 624–25; Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 106–07 (1993) (Scalia, J., concurring); Fisch, *supra* note 70, at 1059.
75. *See* McGreal, *supra* note 63, at 307.

The classic example of a court employing full retroactivity is the Supreme Court's 1801 decision in *United States v. Schooner Peggy*.[76] In this case, a French ship had been seized on the high seas pursuant to a presidential order, and the United States sought an order of condemnation in the courts.[77] While the condemnation order was being decided, the United States signed a treaty with France in which the United States agreed to return captured French ships that had not yet been condemned.[78] The Supreme Court held that the intervening treaty must be respected and the ship must be returned to France[79] because the treaty became the law of the land before the ship was definitively condemned.[80] In so deciding, Chief Justice Marshall wrote, "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed . . . . If the law be constitutional . . . I know of no court which can contest its obligation."[81] Thus, the ultimate result of full retroactivity is to apply the current law of the land to pending decisions without disturbing decisions already rendered.

Although full retroactivity solves some of the problems with pure retroactivity, its weakness lies in its arbitrariness.[82] If, as Chief Justice Marshall says, courts truly cannot contest application of constitutional laws, then why should courts avoid applying constitutional laws to cases that come before them through a different procedural mechanism than direct appeal? Moreover, why should courts avoid applying constitutional laws to cases simply because of accidents of timing? From this perspective, pure retroactivity seems to make more sense than full retroactivity.[83]

The Warren Court did not think either doctrine ought to prevail. In 1965, the Court set aside both pure and full retroactivity, opting instead in *Linkletter v.*

76. 5 U.S. (1 Cranch) 103 (1801).
77. *Id.* at 104.
78. *Id.* at 107.
79. *Id.* at 108.
80. *Id.* at 110.
81. *Id.*
82. The dissent in *Linkletter v. Walker* had this exact criticism of the majority decision, which did not employ pure retroactivity. Justice Black stated, "Linkletter must stay in jail; Miss Mapp, whose offense was committed before Linkletter's, is free. This different treatment . . . points up at once the arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of *Mapp* [367 U.S. 643 (1961)] by keeping all people in jail who are unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961." *Linkletter v. Walker*, 381 U.S. 618, 641 (1965) (Black, J., dissenting).
83. Paul E. McGreal refers to these competing concerns as the "equity-reliance conflict." McGreal, *supra* note 63, at 315. Equity refers to the important notion that like parties should be treated alike, and reliance refers to parties' justified reliance on the state of the law when the disputed actions occurred. *Id.*

Walker[84] to employ a balancing test for deciding when to apply a constitutional decision retroactively.[85] *Linkletter* began when Louisiana police were investigating petitioner Linkletter's involvement in a burglary.[86] After two days of surveillance, police brought Linkletter to the station, searched his person, and took his keys.[87] Using Linkletter's keys to search his house and place of business, police seized some of his "property and papers."[88] Based on this evidence, a Louisiana court convicted Linkletter of "simple burglary"[89] and sentenced him to nine years of hard labor.[90] About two years after the conviction, the Supreme Court decided in *Mapp v. Ohio*[91] that evidence seized in violation of the Fourth Amendment was inadmissible at a criminal trial in state court.[92] *Mapp* called into question the constitutionality of Linkletter's conviction because the evidence used against Linkletter was likely seized in violation of the Fourth Amendment. Linkletter filed a petition for habeas corpus, seeking collateral review of his conviction.[93] The petition was denied, the Court of Appeals affirmed the denial, and Linkletter appealed to the Supreme Court.[94] The question for the Supreme Court to decide in *Linkletter* was whether *Mapp*'s exclusionary rule, required by the Constitution, should be applied to cases decided before *Mapp*'s announcement.[95]

The Court, citing reliance[96] and administrative[97] concerns, held that it should not.[98] Instead of applying pure or full retroactivity, the Court set forth a balancing test to decide when to apply a constitutional decision retroactively, limiting its decision to the criminal context.[99] To decide whether a constitutional criminal decision is retroactive, the Court held, courts must consider the purpose of the new rule, the reliance placed upon the old rule, and the "effect on the

84. 381 U.S. 618 (1965).
85. *Id.* at 629.
86. *Id.* at 621.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.* at 640.
91. 367 U.S. 643 (1961).
92. *Id.* at 655.
93. *Linkletter*, 381 U.S. at 621. A petition for habeas corpus is a procedural device used to bring a detainee or prisoner before a court so that court may determine whether the detention is legal. *Habeas Corpus*, BLACK'S LAW DICTIONARY (9th ed. 2009). Habeas corpus is a type of collateral review. *See supra* text accompanying note 64.
94. *Linkletter*, 381 U.S. at 621.
95. *Id.* at 619–20.
96. *Id.* at 636.
97. *Id.* at 637.
98. *Id.* at 640.
99. *Id.* at 629.

administration of justice" that retrospective application of the new rule would have.[100] Writing for the Court, Justice Clark noted that the purpose of the new *Mapp* rule was to enforce the Fourth Amendment through employing the exclusionary rule, and he refused to "say that this purpose would be advanced by making the rule retrospective" because "[r]eparation comes too late" for prisoners whose convictions rested on prior police misconduct.[101] The Court also found persuasive that the rule *Mapp* replaced[102] had enjoyed the "implicit approval" of the Court for many years and had thus been justly relied upon.[103] *Mapp*'s goal of deterring police misconduct, the Court reasoned, would not be "served by the wholesale release of the guilty victims."[104] Finally, the Court held that administrability concerns also weighed in favor of not applying *Mapp* retroactively, because rehearing scores of cases for a procedural reason that would not even refute the petitioners' underlying guilt would impose too heavy a burden on the courts.[105] All three concerns, the Court held, weighed in favor of not applying *Mapp* retroactively to overturn Linkletter's conviction.[106] Thus announced, *Linkletter*'s balancing test would govern retroactivity for criminal cases for the next twenty years, from 1965 until 1985.[107]

B. The Direct vs. Collateral Review Distinction in *Griffith* and *Teague*

Although the *Linkletter*[108] Court elected to employ a balancing test for deciding retroactivity, it could have decided the case on the distinction between direct and collateral review instead. Direct review is when a court of appeal hears "[a]n attack on a judgment made in the same proceeding as the one in which the judgment was entered . . . seeking to have the judgment vacated or reversed or modified by appropriate proceedings in either the trial court or an appellate court."[109] In contrast, collateral review occurs when a court hears "[a]n attack on a

100. *Id.* at 636.
101. *Id.* at 636–37.
102. *Mapp* replaced the *Wolf* doctrine, which held that evidence obtained in violation of the Fourth Amendment was admissible. Wolf v. Colorado, 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).
103. *See Linkletter*, 381 U.S. at 637.
104. *Id.*
105. *Id.* at 637–38.
106. *Id.* at 640.
107. *Linkletter* was the standard until *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *Teague v. Lane*, 489 U.S. 288 (1989), were decided. For a discussion of retroactivity under *Linkletter,* see John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C. L. REV. 745 (1983).
108. 381 U.S. 618 (1965).
109. *Direct Attack*, *supra* note 64.

judgment in a proceeding other than a direct appeal; . . . [in other words,] an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective."[110] *Linkletter* arose on collateral review because Linkletter had filed a petition for habeas corpus after his conviction became final. Instead of viewing this fact as dispositive, the *Linkletter* Court invented the balancing test for retroactivity and held that it applied to cases on collateral review. In fact, the Supreme Court decided a year after its holding in *Linkletter* that *Linkletter*'s balancing test should govern cases on direct review as well.[111]

In its 1982 opinion in *United States v. Johnson*,[112] however, the Court began to change course, moving away from the *Linkletter* balancing test and instead appearing to return to full retroactivity in a limited set of criminal cases. The *Johnson* Court held that the retroactivity analysis of Fourth Amendment decisions should be different depending on whether the case at issue comes to a court on direct or collateral review.[113] Although it said its decision was in line with and did not disturb existing retroactivity precedent,[114] the *Johnson* Court also said that "retroactivity must be rethought"[115] and left ample room for future argument that *Linkletter*'s balancing test might not always apply. *Johnson* applied a Fourth Amendment decision retroactively to cases on direct appeal, and it did so by more closely following Justice Harlan's dissenting views on retroactivity[116] than *Linkletter*'s balancing test.[117] Justice Harlan adhered to the idea that, at a minimum, courts must apply a new constitutional principle to cases on direct review; otherwise, courts ignored three principles of adjudication: the duty to make principled decisions, the idea that prospective law was the domain of the legislature, and the goal of treating similarly situated defendants alike.[118] At the risk of announcing a sea change in retroactivity jurisprudence, the Court severely

110. *Collateral Attack*, *supra* note 64.
111. *See* Johnson v. New Jersey, 384 U.S. 719, 729 (1966) (In deciding whether to apply *Escobedo* and *Miranda* to cases on direct review while *Escobedo* and *Miranda* were decided, the Court said, "[w]e are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial"); *see also* Stovall v. Denno, 388 U.S. 293 (1967) (applying *Linkletter* balancing test in a habeas case), *abrogated by* Harper v. Virginia Dep't of Taxation., 509 U.S. 86 (1993).
112. 457 U.S. 537 (1982).
113. *Id.* at 562.
114. *Id.*
115. *Id.* at 548 (quoting Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting)).
116. *See Johnson*, 457 U.S. at 546–48, 562.
117. *See id.*
118. *See id.* at 546–48.

limited its holding in *Johnson*; it did not apply the decision to criminal areas outside the Fourth Amendment, cases on collateral review, or civil cases.[119]

Five years after *Johnson* was decided and twenty-one years after *Linkletter*'s balancing test for retroactivity was announced, the Supreme Court implemented the very sea change it had previously avoided. In *Griffith v. Kentucky*,[120] the Court widened *Johnson*'s holding, effectively overruling *Linkletter* and returning to the Court's pre-*Linkletter* use of full retroactivity.[121]

In *Griffith*, the black defendant was tried for first-degree robbery by an all-white jury.[122] The prosecution had used its peremptory challenges to remove black jurors.[123] The jury convicted, and Griffith appealed up to the Supreme Court.[124] While the appeal was pending, the Court decided *Batson v. Kentucky*,[125] which held that state criminal defendants can establish a violation of the Fourteenth Amendment based on racial discrimination by showing that the prosecution used peremptory challenges to remove members of the defendant's race from the jury.[126]

The issue before the Court was whether *Batson*'s ruling applied retroactively to cases on direct review while *Batson* was decided.[127] The Court held that *Batson*'s ruling did apply retroactively to cases on direct review while *Batson* was decided, and moreover, that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."[128] This holds true, the Court said, even when the new rule constitutes a "clear break" with the past.[129] In reaching this conclusion, the Court reasoned that not applying constitutional rules retroactively to cases on direct review "violates the principle of treating similarly situated defendants the same."[130] *Griffith* therefore held that courts must apply new constitutional rules concerning criminal prosecutions to cases that are on direct review or not yet final,[131] but it left unresolved whether this new rule would apply to criminal cases on collateral review.

119. *See id.* at 562–63.
120. 479 U.S. 314 (1987).
121. *See id.* at 328.
122. *Id.* at 316–17.
123. *Id.* at 317.
124. *Id.* at 317–18.
125. 476 U.S. 79 (1986).
126. *Id.* at 96; *see also Griffith*, 479 U.S. at 318.
127. *Griffith*, 479 U.S. at 318.
128. *Id.* at 322, 328.
129. *Id.* at 328.
130. *See id.* at 323.
131. *Id.* at 328.

The Court's 1989 decision in *Teague v. Lane*[132] seemed to answer this question in the negative. A plurality[133] of the Court in *Teague* intimated that retroactivity of decisions for cases on collateral review was still governed by *Linkletter*,[134] but the Court decided to change its approach.[135] The *Teague* Court held that any "new" rule decided on or after the date the conviction at issue became final should not be given retroactive effect.[136] The time of conviction is the relevant inquiry.

Together, *Griffith* and *Teague* replaced *Linkletter*'s generally applicable balancing test with a set of rules for retroactivity that depend on whether the case at issue arises on direct or collateral review. Under *Griffith* and *Teague*, new rules are applied to cases on direct review but are generally not applied to cases on collateral review. The Court in *Teague* explains what a new rule is, saying, "In general . . . a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[137]

C. The Criminal/Civil Divide

Until *Linkletter*, there was no distinction between the way retroactivity functioned in the civil and criminal contexts; both generally employed full retroactivity.[138] While *Linkletter* changed criminal retroactivity from a full retro-activity approach to the balancing test, the decision was not thought to affect civil retroactivity doctrine. Why should retroactivity function differently in the criminal and civil contexts? In 1993, Justice O'Connor advocated for such a distinction on the grounds that the criminal justice system has a "generalized policy of favoring individual rights over governmental prerogative," which is inappropriate in civil cases since "[]retroactivity in the civil context does not necessarily favor

132. 489 U.S. 288 (1989).

133. Lest one think that *Teague* had less force because it is a plurality opinion, one must note that it is the most recent retroactivity case in the criminal world and that its "retroactivity analysis was endorsed by a majority of the Court later that same year in *Penry v. Lynaugh*." Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 823 (2003) (mentioning Penry v. Lynaugh, 492 U.S. 302 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002)).

134. *See Teague*, 489 U.S. at 301.

135. *See id.*

136. *Id.* at 310.

137. *Id.* at 301 (citations omitted).

138. *See* Note, *Retroactive Application of New Rules*, 122 HARV. L. REV. 425, 429–30 (2008) ("Until the 1960s, U.S. courts followed a general rule of full retroactivity in all cases, whether civil or criminal, on direct or collateral review.").

plaintiffs or defendants."[139] She further argued that civil litigants can get relief even in the absence of full retroactivity, whereas criminal defendants require full or pure retroactivity to reach their goal of reversing their convictions.[140] Interestingly, neither of these rationales holds weight in the context of pre-*Windsor* deportees: their civil cases are against the government and they cannot get relief without pure retroactivity. Thus, it would be reasonable to argue that pre-*Windsor* deportees, like criminal defendants, should benefit from the policy of favoring individual rights. Indeed, scholars and immigration advocates have persuasively argued for recharacterizing both immigration detention and deportation as criminal punishment.[141] But the Court has not embraced this idea.[142]

Despite Justice O'Connor's reasons for having different rules for criminal and civil retroactivity, the Court decided in 1971 to extend *Linkletter*'s balancing test to the civil context through *Chevron Oil Co. v. Huson*.[143] In this case, the Court was asked to decide whether to apply the rule of a case decided while the instant case was pending (on direct review).[144] Respondent Huson was injured while at work on an offshore oil rig.[145] His injuries did not manifest seriously for a number of months after the incident, but when they did, Huson filed a lawsuit against the oil rig's owner and operator, Chevron.[146] While Huson's case was in discovery, the Supreme Court announced in *Rodrigue v. Aetna Casualty & Surety Company*[147] that the applicable statute of limitations for cases such as Huson's was determined by state law rather than federal admiralty law.[148] Thus, the statute of limitations for Huson's case was now statutorily set at one year from the date of the accident instead of being governed by the (in this case, more lenient) rule of laches.[149] If

139. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 121 (1993) (O'Connor, J., dissenting).
140. *See id.*
141. *See* César Cuautémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346 (2014); Jordan Cunnings, Comment, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 551–59 (2015).
142. While the Court has not recharacterized immigration detention or deportation as criminal punishment, it has acknowledged the harshness of the penalty of deportation in recent years. *See* Padilla v. Kentucky, 559 U.S. 356, 360 (2010); *see also infra* note 197 and accompanying text.
143. 404 U.S. 97, 106–07 (1971).
144. *Id.* at 98.
145. *Id.*
146. *Id.*
147. 395 U.S. 352 (1969).
148. *Chevron Oil*, 404 U.S. at 99.
149. *See id.* at 100. The rule of laches prevents a plaintiff from "sleeping on [his] rights" by barring suits regardless of liability if the plaintiff unreasonably delays bringing the suit. *Laches,* BLACK'S LAW DICTIONARY (9th ed. 2009) (emphasis removed).

Rodrigue were applied retroactively to Huson's case, then Huson's claim would be barred.[150]

The Supreme Court held that *Rodrigue* should not be applied retroactively to Huson's claim.[151] In reaching this decision, the Court laid out a three-factor test for civil retroactivity—the *Chevron Oil* test—that closely mirrored the *Linkletter* test. In deciding whether to apply a civil decision retroactively to another case, the Court held, courts must consider three factors.[152] First, a decision that establishes "a new principle of law, either by overruling clear past precedent . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," should not be applied retroactively.[153] Second, courts are to look to the history, purpose, and effect of the rule to decide whether applying the decision retroactively will further or hinder those goals.[154] Finally, if applying the decision retroactively will cause "injustice or hardship," courts should not apply it retroactively.[155]

The Supreme Court answered all of these questions in favor of Huson, opining that (1) *Rodrigue* established a new principle of law because it overruled a line of Fifth Circuit decisions,[156] (2) Congress could not have meant to deprive Huson of all remedy,[157] and (3) it would be unjust to bar Huson's claim when he could not have known that the state statute of limitations would apply.[158] Thus, *Chevron Oil* signaled that the civil retroactivity doctrine was to follow the course of the criminal doctrine—away from full retroactivity and toward an arguably more restrictive balancing test.[159]

Despite similarities between how the retroactivity doctrine developed in both the civil and criminal contexts, the civil doctrine did not follow the criminal doctrine exactly. Recall that in the criminal context, the Court in *Griffith* and *Teague* moved away from the balancing test and toward a set of rules for full retroactivity that depend on the direct/collateral review distinction. Right on the heels of those two cases, however, the Court reaffirmed that "there are important distinctions between the retroactive application of civil and criminal decisions

150. *See Chevron Oil*, 404 U.S. at 99.
151. *Id.* at 100.
152. *Id.* at 106.
153. *Id.*
154. *Id.* at 106–07 (citing *Linkletter*, 381 U.S. at 629).
155. *Id.* at 107 (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)) (internal quotation marks omitted).
156. *Id.* at 107.
157. *Id.* at 108.
158. *Id.*
159. *See* McGreal, *supra* note 63, at 315 (noting that *Chevron Oil* allowed for non-retroactivity in civil cases that would not have been considered under the previous full retroactivity regime).

that make the Griffith rationale far less compelling in the civil sphere."[160] The vehicle for this pronouncement was *American Trucking Associations, Inc. v. Smith*.[161] In *Smith*, the Court considered whether to apply its decision in *American Trucking Associations, Inc. v. Scheiner*,[162] which declared a highway tax unconstitutional, retroactively to a similar tax scheme in a different state.[163] Specifically, the Court had to decide whether *Scheiner* applied retroactively to bar taxes that had been collected before the date *Scheiner* was decided.[164] The Court, in a plurality decision, answered this question in the negative.[165] In reaching this decision, the Court applied the *Chevron Oil* test and decided that each factor weighed in favor of nonretroactivity.[166]

Although the *Smith* Court refused to return to full retroactivity as it had done in the criminal cases, only a plurality supported adhering to the *Chevron Oil* test, which signaled a weakening of the *Chevron Oil* doctrine.[167] The dissent in *Smith* suggested that the civil doctrine should follow the criminal doctrine's lead of returning to full retroactivity, but the plurality rejected this view.[168] Instead, the plurality argued that the *Griffith* rationale of expanding procedural protections to criminal defendants did not apply in the civil arena, where reliance concerns are much more salient.[169]

The next decision that added complexity to the civil retroactivity jurisprudence was *James B. Beam Distilling Company v. Georgia*.[170] This case concerned excise taxes on imported alcohol.[171] The Court had ruled that such a tax levied in Hawaii was unconstitutional in *Bacchus Imports, Ltd. v. Dias*;[172] here it had to decide whether *Bacchus* applied retroactively to invalidate a similar tax in Georgia that was collected before *Bacchus* was decided.[173] This question garnered five separate opinions from the Court.[174] The judgment, announced in Justice

160. Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 197 (1990).
161. *Id.*
162. Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).
163. *Smith*, 496 U.S. at 171, 173 (1990).
164. *Id.* at 176.
165. *Id.* at 182.
166. *Id.* at 179–82.
167. *See* Shannon, *supra* note 133, at 823 (referring to *Smith* as "the [b]eginning of the [d]emise of *Chevron Oil*") (emphasis omitted).
168. *Smith*, 496 U.S. at 189.
169. *Id.* at 190–91.
170. 501 U.S. 529 (1991).
171. *Id.* at 532.
172. 468 U.S. 263, 276 (1984).
173. *Beam*, 501 U.S. at 532.
174. Justice Souter announced the judgment and wrote the opinion, which Justice Stevens joined. Justices White, Blackmun, Marshall, and Scalia all filed or joined in concurring opinions. Justice

Souter's opinion, held that since the Court in *Bacchus* decided that its rule should apply retroactively to the litigants then before the court, it was error for the lower court "to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so."[175] In so holding, Justice Souter specifically avoided applying the *Chevron Oil* analysis.[176]

Justice O'Connor's dissent reached the opposite conclusion (that *Bacchus* should apply only prospectively) by applying the *Chevron Oil* analysis.[177] And Justice Scalia reached the same conclusion as Justice Souter, but through a constitutional analysis based on separation of powers arguments rather than Justice Souter's choice of law framework.[178] *Beam* thus left the *Chevron Oil* analysis further weakened, opening the door for another change in civil retroactivity doctrine. The question was whether the Court would follow the criminal doctrine's moves in *Griffith* and *Teague*, or whether it would continue to forge a new path.

Although the Court did not answer this question in a resoundingly clear fashion, a majority of the Justices subsequently agreed in *Harper v. Virginia Department of Taxation*[179] that "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule."[180] From one perspective, the Court seemed to be abandoning the *Chevron Oil* balancing test in favor of a return to full retroactivity.[181] In fact, Justice Scalia's concurrence mounted a persuasive assault on the *Chevron Oil* test, arguing the following:

> The *Teague* plurality opinion set forth good reasons for abandoning *Linkletter*—reasons justifying a similar abandonment of [*Chevron Oil*]. It noted, for example, that *Linkletter* "ha[d] not led to consistent results," [citing *Teague*]; but neither has *Chevron Oil*. Proof that what it means is in the eye of the beholder is provided quite nicely by the

O'Connor filed a dissenting opinion that Chief Justice Rehnquist and Justice Kennedy joined. *Id.* at 531.

175. *Beam*, 501 U.S. at 540.

176. *Id.* ("[P]rinciples of equality and *stare decisis* here prevail[] over any claim based on a *Chevron Oil* analysis.").

177. *Id.* at 553–59 (O'Connor, J., dissenting).

178. *Id.* at 548–49 (Scalia, J., concurring).

179. 509 U.S. 86 (1993).

180. *Id.* at 97.

181. Justice O'Connor's dissenting opinion, however, reiterated the *Chevron Oil*-based analysis she undertook in *Beam*, and that she would not have applied the decision at issue in *Harper* retroactively. *Id.* at 113 (O'Connor, J., dissenting).

> separate opinions filed today: Of the four Justices who would still apply *Chevron Oil*, two find *Davis v. Michigan Dept. of Treasury* retroactive, [and] two find it not retroactive.[182]

From another perspective, however, it remains true that *Chevron Oil* has yet to be explicitly overruled, and its concerns over equal treatment of like individuals are still persuasive to the Court.[183]

Since *Harper*, the Court has only taken one opportunity to further clarify its civil retroactivity jurisprudence. In *Reynoldsville Casket Co. v. Hyde*,[184] the Court considered whether to apply its decision in *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*,[185] which held unconstitutional an Ohio tolling provision that essentially "gave Ohio tort plaintiffs unlimited time to sue out-of-state (but not in-state) defendants," to respondent Hyde's case.[186] The Ohio Supreme Court had held that *Bendix* did not apply retroactively, but the U.S. Supreme Court overruled, holding that *Bendix* applied retroactively and thus, Hyde's suit was barred.[187] Hyde acknowledged that *Bendix* must apply to her case in light of *Harper*, but she argued that the Ohio Supreme Court's decision was not about retroactivity; rather, it was about fashioning a remedy for the fact that she had relied on the state of the law pre-*Bendix*.[188] The U.S. Supreme Court refused to accept this argument, though, saying, "[W]e do not see how, in the circumstances before us, the Ohio Supreme Court could change a legal outcome that federal law . . . would otherwise dictate simply by calling its refusal to apply that federal law an effort to create a remedy."[189]

Interestingly, the Court stated later in the *Hyde* opinion that "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed."[190] Yet this is not entirely true, because otherwise collateral review would never happen. If new legal principles never apply to cases already closed, habeas would not exist, nor would motions to reopen or reconsider. So why would the Court make such a broad statement? One potential thought is that the statement

182. *Id.* at 103 (Scalia, J., concurring) (citations omitted).
183. *See* Elliot Watson, *The Revival of Reliance and Prospectivity:* Chevron Oil *in the Immigration Context*, 36 SEATTLE U. L. REV. 245, 252–53 (2012) ("While it appears that subsequent Supreme Court decisions eroded the importance of the *Chevron Oil* test, it was never expressly overruled. . . . Post-*Chevron Oil* decisions favored the retroactive application of law because it was central to the equal treatment of individuals.") (footnote omitted).
184. 514 U.S. 749 (1995).
185. 486 U.S. 888 (1988).
186. *Hyde*, 514 U.S. at 750.
187. *Id.* at 750–51.
188. *Id.* at 752–53.
189. *Id.* at 753.
190. *Id.* at 758.

is a symptom of the "somewhat chaotic" nature of the Court's civil retroactivity jurisprudence.[191] Another is that the statement foreshadows a change in the doctrine. Almost twenty years after *Hyde*, however, no such change has occurred. The civil retroactivity doctrine seems fairly settled in the view that previous constitutional decisions should apply retroactively to civil cases on direct review, regardless of whether the actions at issue occurred before the previous decision was handed down.[192] But for civil cases on collateral review, such as through a motion to reopen a case in light of new evidence or changed law, the path is less clear. In the context of pre-*Windsor* deportees, this means there is ample room for argument that *Windsor* should retroactively apply to their removal cases on collateral review.

IV. THE CASE FOR RETROACTIVITY OF *WINDSOR*

A. The Civil-Collateral Retroactivity Doctrine's Uncertainty

As demonstrated above, the civil adjudicatory retroactivity doctrine is far from settled. It has been called "somewhat chaotic"[193] and "a murky area"[194] by the Court and commentators alike. To add to the confusion, there has not always been a clear rationale behind the Court's differential treatment of the criminal and civil retroactivity doctrines.[195] The lack of articulated reasoning allows space to make arguments that draw on both the civil and criminal realms of the Court's retroactivity jurisprudence to decide how to approach the question of whether *Windsor* should be applied retroactively to pre-*Windsor* deportees' cases on collateral review.

Because removal remains a civil penalty, the Court's civil retroactivity cases, specifically *Chevron Oil* and those that follow it, are persuasive in the context of pre-*Windsor* deportees. Examining the Court's underlying concerns regarding

191. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 113 (1993) (O'Connor, J., dissenting).

192. *See id.* at 90; Shannon, *supra* note 133, at 836 ("[R]ecent Supreme Court precedent suggests that, were the Court to be formally confronted with the issue, it would also apply a firm rule of retroactivity in civil (non-habeas) cases.").

193. *Harper*, 509 U.S. at 113 (O'Connor, J., dissenting).

194. Jennifer H. Berman, Padilla v. Kentucky*: Overcoming* Teague*'s "Watershed" Exception to Non-Retroactivity*, 15 U. PA. J. CONST. L. 667, 685 n.101 (2012).

195. *See* Linkletter v. Walker, 381 U.S. 618, 627 (1965). To reach its holding in *Harper*, a civil retroactivity case, the Court appealed to the reasoning used in *Griffith*, a criminal case. *Harper*, 509 U.S. at 99. Further, in his concurring opinion in *Harper*, Justice Scalia stated, "One of the conceptual underpinnings of *Chevron Oil* was that retroactivity presents a *similar* problem in both civil and criminal contexts." *Id.* at 104 (Scalia, J., concurring).

retroactive application of judicial decisions as articulated in *Chevron Oil* and cases that follow it is instructive in deciding whether *Windsor* should apply retroactively.[196]

Further, the Court's reasoning in its most recent criminal retroactivity case, *Teague v. Lane*, is especially informative, because the consequences of removal proceedings look more similar to criminal punishment than to the outcomes of civil cases. Following *Teague*'s rationale and that of other criminal retroactivity cases is particularly persuasive when speaking about pre-*Windsor* deportees for at least two concrete reasons. First, the government is a party to pre-*Windsor* deportees' cases, just as in criminal cases. Second, the Court has recognized "that deportation is a particularly severe penalty" that has punitive and criminal aspects despite its enduring civil label.[197]

This Part will now consider the underlying concerns of the civil context—equity, treating like parties alike, fairness, finality, administrability, reliance, the role of the judiciary, policy, and remedy—in turn. It will then look specifically at how *Windsor*'s retroactivity is dictated under *Teague*, analogizing to the criminal context.

B. Equity, Treating Like Parties Alike, and Fairness

In *Chevron Oil*, the Court held that an analysis of whether a judicial decision should be applied retroactively must weigh "the inequity imposed by retroactive application" in order to avoid "injustice or hardship."[198] Pre-*Windsor* deportees by definition have already suffered the great injustice and hardship of being removed from the United States due to an immigration scheme based on an

196. It may be important to note that Justice Kennedy, often the deciding voter in the Roberts Court's decisions, wrote in *Harper*, "[I]n my view retroactivity in civil cases continues to be governed by the standard announced in *Chevron Oil Co. v. Huson.*" *Harper*, 509 U.S. at 110 (Kennedy, J., concurring).

197. Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893)); *see also* Barber v. Gonzales, 347 U.S. 637, 642–43 (1954) ("Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile,' and should be strictly construed.") (citation omitted); Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil, rather than a criminal, procedure."); Kate Aschenbrenner, *Beyond "Because I Said So": Reconciling Civil Retroactivity Analysis in Immigration Cases With a Protective Lenity Principle*, 32 REV. LITIG. 147, 188 (2013) ("The Court has gone so far as to label removal from the United States 'the equivalent of banishment or exile' and to admit that it is, at least functionally, a penalty for breaking the immigration laws.") (quoting Fong Haw Tang v. Phelan, 333 U.S. 6, 10 (1948)). For scholarly arguments that immigration detention and removal should be considered punishment, see *supra* note 141.

198. Chevron Oil v. Huson, 404 U.S. 97, 107 (1971). (quoting Cipriano v. City of Houma, 395 U.S. 701, 706 (1969)).

unconstitutional law. One commentator has said, "[B]ecause immigration law often concludes in a removal order, the resulting inequity may be substantially higher than it would otherwise be in a traditional civil setting."[199] Far from imposing further injustice or hardship, retroactive application of *Windsor* to pre-*Windsor* deportees' cases would help remedy the injustice and hardship they have already faced. Furthermore, retroactive application of *Windsor* would not impose injustice or hardship on the government. USCIS has already begun adjudicating the I-130 petitions of same-sex binational couples who filed their petitions after *Windsor*.[200] Additionally, allowing pre-*Windsor* deportees to return to the United States does not threaten a burden on taxpayers like the one Justice O'Connor feared in *Harper*. In that case, returning unconstitutionally collected taxes could have caused an unexpected windfall to plaintiffs while burdening "innocent taxpayers."[201] Pre-*Windsor* deportees' return to the United States would involve no redistribution of taxes or benefits; on the contrary, the government already spent taxpayer money by wrongfully removing pre-*Windsor* deportees at government expense, whereas the return of the same individuals to the United States would not be government funded.

An enduring concern of the Court that has particular salience in its retroactivity jurisprudence is the idea that like parties should be treated alike.[202] In *Griffith*, the Court concluded that "selective application of new rules violates the principle of treating similarly situated [parties] the same."[203] *Teague* also endorsed this idea in the context of collateral review, criticizing *Linkletter* for the fact that it "led to unfortunate disparity in the treatment of similarly situated defendants."[204] The Court embraced this idea in the civil context in *Harper*, taking seriously Justice Stevens' "admonition that '[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently.'"[205] The Court usually uses the term "similarly-situated" to describe litigants whose cases are on direct review rather than collateral review, but there is not a clear rationale behind this limitation, as evidenced by the Court's criticism in *Teague* of the *Linkletter* test.[206]

199. Watson, *supra* note 183, at 252.
200. *See Same-Sex Marriages*, *supra* note 38.
201. *Harper*, 509 U.S. at 131 (O'Connor, J., dissenting).
202. *See supra* note 83.
203. Griffith v. Kentucky, 479 U.S. 314, 323 (1987).
204. Teague v. Lane, 489 U.S. 288, 305 (1989).
205. Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993) (quoting Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 214 (1990) (Stevens, J., dissenting)).
206. Specifically, the *Teague* Court criticized the *Linkletter* test for leading to "unfortunate disparity in the treatment of similarly situated defendants on collateral review." *Teague*, 489 U.S. at 305.

The only difference between pre-*Windsor* deportees and their similarly situated counterparts—litigants whose removal proceedings were on direct review and vacated or administratively closed in light of *Windsor*—is timing, which is hardly a persuasive distinction.[207]

Fairness is also a compelling rationale for the retroactive application of *Windsor* to pre-*Windsor* deportees' cases. While the concept of fairness echoes aspects of both equity and similar treatment, the Court has often singled it out as its own factor in the analysis of whether to apply cases retroactively. Given the gravity of the equity concerns at issue and the fact that the Court has consistently relied on the notion of treating like parties alike in its retroactivity jurisprudence, it would be unfair to not apply *Windsor* retroactively. Moreover, it is fair to apply *Windsor* retroactively because it allows individuals to take advantage of a change in the law that helps them without hurting anyone else. The gain to society out-weighs any minimal loss that may exist.

C. Finality, Administrability, and Reliance

Despite the compelling arguments for retroactive application of *Windsor* based on equity, treating like parties alike, and fairness, the Court's concern with finality of judgments, administrability, and reliance initially seems to weigh against *Windsor*'s retroactive application. This Subpart discusses and neutralizes those concerns.

Finality of judgments is a fundamental concern of the common law. An efficient legal system depends on disputes being subject to a finite timeline.[208] The Supreme Court has discussed the importance of finality of judgments in many of its retroactivity cases, including *Linkletter*,[209] *Mackey*,[210] *Teague*,[211] *Smith*,[212] and *Hyde*.[213] Finality concerns have held serious weight in the civil

207. Their physical locations are likely different now, too, as pre-*Windsor* deportees are outside the United States and their counterparts discussed here are inside its borders, but this difference is a result of the timing accident.

208. *See* note 71 and accompanying text; *see also* Fallon & Meltzer, *supra* note 65, at 1793 ("Without some bar to retroactivity, no criminal conviction would ever be truly final. Nonetheless, particularistic considerations matter, including the nature of the right involved.").

209. Linkletter v. Walker, 381 U.S. 618, 627 (1965).

210. Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part).

211. Teague v. Lane, 489 U.S. 288, 308 (1989).

212. Am. Trucking Ass'ns, Inc. v. Smith, 496 U.S. 167, 212 (1990). (Stevens, J., dissenting) ("When the legal rights of parties have been finally determined, principles 'of public policy and of private peace' dictate that the matter not be open to relitigation every time there is a change in the law.") (internal citations omitted).

213. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 758 (finding finality concerns unpersuasive).

context for a long time; as noted in *Teague*, "it has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule."[214] In *Chicot County Drainage District v. Baxter State Bank*,[215] "the Court held that a judgment based on a jurisdictional statute later found to be unconstitutional could have res judicata effect. The Court based its decision in large part on finality concerns."[216] Still, the Court may not always find finality concerns persuasive,[217] and the U.S. system recognizes that compelling situations can warrant reconsideration of certain legal outcomes.[218] Moreover, the Court's consideration of the issue of retroactivity on collateral review has typically taken place in the context of writs of habeas corpus, where the issue at bar is unlikely to alter the previous adjudication of the petitioner's guilt.[219] Since the consideration of guilt is by definition absent in the case of pre-*Windsor* deportees, who were only removed because DOMA had not yet been found unconstitutional, finality concerns should hold less weight in this context.

Additionally, when the nature of the right involved is as fundamental as whether one has the opportunity to live with his or her spouse in the United States and seek U.S. citizenship, finality concerns should carry less weight. This should be especially true where an unconstitutional law (1) formed the basis of the denial of that important right and (2) caused the imposition of a severe consequence (removal from the United States).[220] In summary, although finality concerns are fundamental to the U.S. judicial system, there are compelling reasons that those concerns should not prevent *Windsor* from being applied retroactively.

214. *Teague*, 489 U.S. at 308.
215. 308 U.S. 371 (1940).
216. *Teague*, 489 U.S. at 308.
217. *See, e.g.*, text accompanying note 213.
218. *See, e.g.*, FED. R. CIV. P. 60 (federal procedural rule allowing reopening of judgments); 8 U.S.C. § 1229a(b)(5)(C) (2012) (statutory rule allowing reopening of immigration cases).
219. *See* United States v. U.S. Coin & Currency, 401 U.S. 715, 726 (1971) (Brennan, J., concurring) ("[W]hen a new procedural rule has cast no substantial doubt upon the reliability of determinations of guilt in criminal cases, we have denied the rule retroactive effect where a contrary decision would 'impose a substantial burden . . . upon the . . . judicial system . . . .'") (quoting Williams v. United States, 401 U.S. 646, 664 (1971)); Linkletter v. Walker, 381 U.S. 618, 637–38 (1965) ("To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.").
220. For an argument in favor of reduced reliance on finality as a concern in adjudicative retroactivity, see David Lehn, *Adjudicative Retroactivity as a Preclusion Problem:* Dow Chemical Co. v. Stephenson, 59 N.Y.U. ANN. SURV. AM. L. 563, 566 (2004).

Another relevant retroactivity concern is administrability. The criminal procedure revolution of the 1960s,[221] which established more procedural rights for defendants, was the impetus for restricting what was previously a liberal adjudicatory retroactivity doctrine.[222] For example, recall that in 1965 the Warren Court declined to apply *Mapp v. Ohio*[223] retroactively to invalidate convictions that relied on evidence gathered in violation of the new *Mapp* rule. One of the most important factors in the Court's reasoning was its belief that applying *Mapp* retroactively would have created a flood of litigation that "would tax the administration of justice to the utmost" despite having "no bearing on guilt."[224] The Court thought that *Mapp*'s goal of deterrence would not be served by a "wholesale release of guilty victims" that would put a large administrative burden on the justice system.[225]

In the case of *Windsor*, unlike *Mapp*, administrability concerns are not particularly salient. First, while the offenders seeking to overturn their convictions in light of *Mapp* had certainly committed crimes regardless of *Mapp*'s new rule, pre-*Windsor* deportees are not guilty of any crime. Put another way, *Mapp* made no difference in whether petitioners were guilty or not. Here, in stark contrast, *Windsor* makes all the difference in whether pre-*Windsor* deportees should have been removed from the United States. The Court's concern with flooding the lower courts with "[h]earings . . . of evidence long since destroyed, misplaced, or deteriorated"[226] would not apply to pre-*Windsor* deportees; they would only need to provide evidence that the sole reason for their removal was the federal law's unconstitutional refusal to recognize same-sex marriages before DOMA was struck down.

Second, unlike the criminal justice system in the 1960s, USCIS is prepared to adjudicate refiled and reopened I-130 petitions.[227] In fact, while *Windsor* was making its way through the court system, USCIS kept track of I-130 applications that would be affected by *Windsor*'s outcome[228] and announced it would reopen

221. Including such landmark cases as *Mapp v. Ohio*, 367 U.S. 643 (1961) (requiring exclusion of evidence obtained in violation of the Fourth Amendment), *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring provision of counsel to indigent defendants in criminal cases), and *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring procedural warnings during custodial interrogation), to name a few.

222. *See supra* note 63 and accompanying text.

223. 367 U.S. 643 (1961).

224. *Linkletter*, 381 U.S. at 637–38.

225. *Id.* at 637.

226. *Id.*

227. *See Same-Sex Marriages*, *supra* note 38.

228. *Id.* ("DHS has sought to keep track of DOMA denials that occurred after the President determined not to defend [s]ection 3 of DOMA on February 23, 2011 . . . .").

petitions that were "denied solely because of DOMA section 3."[229] Given the fact that *Windsor* will make a difference in the outcome of pre-*Windsor* deportees' underlying cases and that USCIS has the ability to handle the increased processing load, administrative concerns should not prevent *Windsor* from being applied retroactively to pre-*Windsor* deportees' cases.

A third concern that the Court has found compelling in deciding whether to apply its decisions retroactively is the idea of reliance. Reliance encapsulates the concept that parties should not be punished or burdened for relying on the state of the law as it was when they took a certain course of action. It is the strongest rationale against legislative retroactivity[230] and has been invoked to argue against returning unconstitutionally collected taxes to taxpayers (although this argument failed).[231] But reliance holds less force in an adjudicative retroactivity situation like the one at hand than it does in the case of legislative retroactivity. In the case of legislative retroactivity, the government is trying to punish someone now for conduct that was lawful when committed. In that situation, it is logical to think that the person standing to be punished justifiably relied on the state of the law when he committed the act at issue. In contrast, in an adjudicative retroactivity situation like the case of pre-*Windsor* deportees, a party is trying to take advantage of a changed interpretation of the law in a suit against the government. The government's reliance on the previous state of the law is no longer a persuasive policy concern, because the government does not have the same rights at stake as the individual.[232] Moreover, reliance holds less weight where the individual is asserting a right to take advantage of a new judicial interpretation of law, not a clear legislative change in the law.

229. *Id.* U.S. Citizenship and Immigration Services (USCIS) said that it will "make a concerted effort to" identify and reopen petitions denied solely because of DOMA section 3, but the agency will only look back to February 23, 2011. Many pre-*Windsor* deportees were removed before that date. Furthermore, reopening an I-130 petition with USCIS is only half of a pre-*Windsor* deportee's struggle, because previously removed immigrants face additional hurdles in returning to the United States after leaving the country pursuant to a removal order. *See supra* Part II.

230. Note that in the case of legislative retroactivity, the Constitution's prohibition on *ex-post facto* legislation does not apply to deportation. *See* Galvan v. Press, 347 U.S. 522, 531 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 594–96 (1952); Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1302 (2011) ("[I]mmigrants have no protection against retroactive changes in the law (they can plead guilty to minor offenses based upon the correct advice of counsel that they will not be deported and the next day Congress can change the rules) . . . ."). But legislative retroactivity is beyond the scope of this Comment.

231. *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86,131 (1993) (O'Connor, J., dissenting).

232. *See* Fallon & Meltzer, *supra* note 65, at 1792 ("Concerns of reliance and moral blamelessness carry less weight when a suit seeks relief from the government rather than an individual officer. A government is not a rights-bearer in the same sense as an individual."); Watson, *supra* note 183, at 270 (noting the "stark contrast" between plaintiffs who are trying "to take *advantage* of a change in the law" and plaintiffs "who are being *punished* for it.").

D. The Role of the Judiciary, Policy, and Remedy

Three other fundamental concerns underlying adjudicative retroactivity that weigh in favor of applying *Windsor* retroactively to pre-*Windsor* deportees' cases are the role of the judiciary, policy, and remedy.

The Court has invoked the role of the judiciary often in its discussions of retroactivity.[233] Historically, at least two competing conceptions of the role of the judiciary have been influential in the Court's retroactivity doctrine: one is that the role of the judge is to find the true law, and the other is that, practically speaking, judges make law.[234] As discussed *supra* in Part III.A., pure retroactivity—that is, applying new rules of law to cases on both direct and collateral review—makes sense if one assumes that judges simply "say what the law is."[235] If it is true that judges are limited to deciding the rights of the parties before them and must apply the law as it exists, then judges should apply *Windsor* to any case that comes before them, whether on direct or collateral review. This was the type of rule that held sway in American jurisprudence for around 180 years, before *Linkletter*.[236]

Although the legal realists "discredited [the] theoretical distinction between finding and making law,"[237] the idea that the judiciary has a proper role still remains.[238] It is generally understood that courts decide cases based on what the current law is, not based on past or future law.[239] Justice Harlan recognized this in his influential concurring opinion in *Mackey*, saying that the Court is supposed to "adjudicate[e] cases and controversies according to the law of the land."[240] When a case comes to a court on collateral review, then, the court should apply the law as it is now, not as it was before. If applying past law were the only option, it would make no sense to have collateral review at all. Since it is within the role of the judiciary to adjudicate cases on collateral review, courts should apply the law as it is when they do so. Further, if litigants wanted the old law to apply,

233. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 622–25 (1965); Carl D. Ciochon, Note, *Nonretroactivity in Constitutional Tax Refund Cases*, 43 HASTINGS L.J. 419, 426–29 (1992) (discussing the history of the judicial role in the retroactivity context).

234. *See supra* Part III.A.

235. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

236. *See* McGreal, *supra* note 63, at 308.

237. *Id.*

238. For example, as the most recent changes in the civil retroactivity doctrine were occurring, one commentator noted, "[T]he Supreme Court appears poised to recognize that retroactivity is an issue of constitutional nature, rooted in a proper understanding of the role of the judiciary." *Id.*

239. *See* Shannon, *supra* note 133, at 839–40 ("Generally speaking, courts do not decide cases based on what is perceived to be the former law, nor do they decide cases on the basis of what might become the law in the future. Rather, the usual rule is that 'a court is to apply the law in effect at the time it renders its decision.'") (quoting Landgraf v. USI Film Prods., 511 U.S. 244 (1994)).

240. Mackey v. United States, 401 U.S. 667, 678 (1971) (Harlan, J., concurring).

they would have few compelling reasons to bring cases on collateral review, because their cases were decided under the old law when it was originally adjudicated.

Policy concerns also play a role in adjudicative retroactivity. Courts should be more willing to apply cases retroactively if the argument is supported by compelling policy reasons. In the case of pre-*Windsor* deportees, immigration policy concerns are of paramount importance. The consequences of removal are severe and should not be imposed (or maintained) lightly: "Lawful immigrants can face life sentences of banishment from their homes, families, and livelihoods in the United States and can potentially be sent to countries they have not visited since childhood, where they[] have no family, do not speak the language, and can face serious persecution or death."[241] Pre-*Windsor* deportees were removed because an unconstitutional law kept them from accessing lawful immigration status—in other words, severe consequences were imposed because of an unconstitutional law. Even though applicable laws dictated this result at the time, now that the interpretation has changed, it does not make sense to continue imposing such harsh consequences on those pre-*Windsor* deportees who want to return lawfully to the United States. It is a good public policy goal to encourage people with ties to the United States to be present, productive citizens. In fact, an entire statutory scheme exists so noncitizens who marry U.S. citizens or LPRs can live in the United States and get on the path to citizenship.[242] In light of the fact that Congress has made this path available and the Court has held that it is equally open to same-sex married couples as it is to opposite-sex married couples, it does not make much sense to arbitrarily prevent some of those same-sex married couples from becoming present, productive U.S. citizens. Yet that is exactly what failing to apply *Windsor* retroactively will accomplish. Additionally, applying *Windsor* retroactively is good policy to promote the welfare of the U.S. citizens and LPRs who are married to pre-*Windsor* deportees. U.S. citizen and LPR spouses of pre-*Windsor* deportees suffer greatly when their spouses are not allowed to return to the United States. Good public policy dictates that an unconstitutional law should not burden the fundamental right of citizens to live in the United States with their spouses. For these reasons, policy goals weigh in favor of applying *Windsor* retroactively to pre-*Windsor* deportees' cases.

241. Markowitz, *supra* note 230, at 1301–02.
242. *See, e.g.*, 8 C.F.R. §§ 201(b), 216, 319 (2015).

A final concern that is intricately intertwined with retroactivity is the idea of remedy.[243] Here, it is important to note that constitutional rights exist to protect individuals and to uphold our society's values. As two scholars have put it,

> Constitutional remedies serve two basic functions . . . . The first is to redress individual violations. The slogan "for every right, a remedy" reflects this purpose. The second function is related but distinct: to reinforce structural values, including those underlying the separation of powers and the rule of law.[244]

The slogan mentioned in the previous quotation comes from *Marbury v. Madison*, which held that where the Constitution gives a right, and the right has been violated, there should be a remedy.[245] What that remedy should be exactly is at the discretion of the courts interpreting the Constitution, but it is fundamental that some sort of remedy should be afforded. In the case at hand, pre-*Windsor* deportees have a right to live in the United States with their spouses, but they are without a remedy if *Windsor* is not retroactive. To provide an adequate remedy for pre-*Windsor* deportees, *Windsor* must be applied retroactively to their cases. The Court has rejected this type of argument before, but only on the grounds that the issue was not properly before the Court.[246] It is possible that the Court would be more persuaded by such an argument if it were framed properly in the lower courts.

E. *Teague*'s Rule for Retroactivity on Collateral Review

In addition to examining retroactivity's underlying normative concerns to argue that *Windsor* should be applied retroactively to pre-*Windsor* deportees' cases, this Comment also examines *Teague* specifically, since that case is the most recent to affect retroactivity jurisprudence for cases on collateral review, albeit in the criminal context. Although *Teague*, a criminal retroactivity case, is not mandatory authority for the civil cases of pre-*Windsor* deportees, it is persuasive authority given that the Court has found criminal retroactivity cases persuasive to civil cases in the past and given that deportation looks like

243. *See* Ciochon, *supra* note 233, at 424 (noting that the questions of retroactivity and remedy are distinct but, in the case of constitutional tax refund cases, "weave together").
244. Fallon & Meltzer, *supra* note 65, at 1787 (citations omitted).
245. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
246. In *Hyde*, the Court rejected an argument that the Ohio Supreme Court was fashioning a remedy as opposed to applying a case retroactively, because the Ohio Supreme Court's decision was framed in terms of retroactivity, not remedy. Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, 752, 759 (1995).

punishment.[247] *Teague*'s holding, which adopts Justice Harlan's reasoning in *Mackey*,[248] is that new rules should generally not apply to criminal cases on collateral (habeas) review.[249] There are two exceptions: (1) "[A] new rule should be applied retro-actively [on collateral review] if it places 'certain kinds of primary, private indi-vidual conduct beyond the power of the criminal law-making authority to proscribe[,]'"[250] and (2) "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"[251] Can *Windsor* be seen as a new rule? If so, *Teague* would suggest that *Windsor* should not be applied retroactively to pre-*Windsor* deportees' removal cases on collateral review, leaving them out of luck. To prevail under *Teague*'s persuasive authority, then, pre-*Windsor* deportees must argue that *Windsor* is not a new rule; or, if it is, that it falls into at least one of *Teague*'s exceptions.

In *Teague*, the Court said, "It is admittedly often difficult to determine when a case announces a new rule . . . . In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government."[252] One could argue that *Windsor* did not break new ground because it was simply a logical extension of an existing concept, and that it did not impose new duties on the federal or state governments for similar reasons. At least in the immigration context, the federal government was already adjudicating marriage petitions; *Windsor* only opened the door to doing more of the same. If *Windsor* is not a new rule, then given *Teague*'s holding and the compelling normative concerns discussed above, *Windsor* should be applied retroactively to cases on direct and collateral review.

Even assuming *Windsor* is a new rule, however, it should still be applied retroactively on collateral review because it falls into at least one of *Teague*'s exceptions. As mentioned, *Teague* held that "a new rule should be applied retroactively [on collateral review] if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[253] The first question is, then, whether marriage is "primary, private individual conduct." In *Obergefell v. Hodges*,[254] the Supreme Court recently deter-mined that same-sex marriage is a fundamental liberty interest protected

247. *See supra* Part IV.A
248. 401 U.S. 667, 692 (1971).
249. Teague v. Lane, 489 U.S. 288, 310 (1989).
250. *Id.* at 307 (quoting *Mackey*, 401 U.S. at 692).
251. *Id.* (quoting *Mackey*, 401 U.S. at 693).
252. *Id.* at 301.
253. *Id.* at 307 (quoting *Mackey*, 401 U.S. at 692).
254. 135 S. Ct. 2584 (2015).

by the Fourteenth Amendment. Justice Kennedy wrote, "[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry."[255] In the wake of this decision, it cannot be argued that marriage (now clearly defined to include same-sex marriage) is not "primary, private individual conduct."

The second question is whether *Windsor* puts that conduct "beyond the power of the criminal law-making authority to proscribe."[256] *Windsor* was a civil case, so it did not speak to criminalization of same-sex marriage; it only held that it is unconstitutional for the federal government to define marriage as between one man and one woman. Yet, coupled with *Obergefell*'s holding that states likewise cannot deny same-sex couples the right to marry,[257] *Windsor*'s holding is only strengthened. Even if the government wanted to criminalize same-sex marriage, it simply would not be able to in light of these precedents.[258] Therefore, *Teague*'s exception clearly would apply, allowing retroactive application of *Windsor* on collateral review even if *Windsor* is considered a new rule under *Teague*. Ultimately, taking the entire retroactivity doctrine as a whole, *Windsor* should be applied retroactively on collateral review.

V. TOWARD A REMEDY FOR PRE-*WINDSOR* DEPORTEES

This Comment has considered the stages a pre-*Windsor* deportee must go through to reopen her prior removal case and vacate the order by applying *Windsor*[259] retroactively. In this Part, this Comment connects the concepts of retroactivity and remedy and argues briefly that pre-*Windsor* deportees should be afforded a remedy that puts them in their rightful position: eligible beneficiaries of I-130 petitions who can return unimpeded to the United States.

This final step of the analysis is an important area for further scholarly development, as retroactivity of *Windsor* is not enough on its own to solve the problems of pre-*Windsor* deportees. Even if *Windsor* is applied retroactively to vacate pre-*Windsor* deportees' removal orders, it does not necessarily follow that any particular remedy should issue to compensate for the negative effects of the

255. *Id.* at 2604–05.
256. Teague v. Lane, 489 U.S. 288, 307 (1989).
257. *Obergefell*, 135 S. Ct. at 2607 ("The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex").
258. *See* Lawrence v. Texas, 539 U.S. 558 (2003) (holding that the government cannot criminalize gay sex acts).
259. United States v. Windsor, 133 S. Ct. 2675 (2013).

removal.[260] Generally, the object of remedy is to put the wronged person in his or her rightful position.[261] What is the rightful position for pre-*Windsor* deportees?

Many people who are wrongfully removed most likely want the ability to return to the United States. For pre-*Windsor* deportees, this would be achieved by allowing them to be eligible beneficiaries of I-130 petitions and allowing them to return unimpeded to the United States. In the United States, money damages are the default method of putting someone in her rightful position. Non-monetary remedies, such as injunctions and specific performance, are only obtainable if a legal remedy is inadequate. This Comment proposes that the best remedy for pre-*Windsor* deportees is not money damages; rather, it is some form of equitable relief. While the exact contours of such relief are beyond the scope of this Comment, at the most basic level, the relief would include the ability to return unimpeded to the United States as the eligible beneficiary of an I-130 petition.[262]

CONCLUSION

A pre-*Windsor* deportee has suffered the hardship and indignity of being removed from the United States because an unconstitutional law, DOMA, prevented her from accessing lawful immigration status. To remedy this situation, the pre-*Windsor* deportee needs to be able to reopen her removal proceedings on collateral review and successfully argue that *Windsor* applies retroactively to invalidate her removal. A vacated removal order will allow the pre-*Windsor* deportee to return to the United States unimpeded by the INA's ten-year bar for prior removals as long as the pre-*Windsor* deportee's spouse files an I-130 family petition naming her as a beneficiary. This Comment argues that the pre-*Windsor* deportee deserves a remedy: the ability to reopen and

260. *See supra* note 243 and accompanying text; *see also* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 131 (1993) ("The questions of retroactivity and remedy are analytically distinct.") (O'Connor, J., dissenting) (citing Am. Trucking Ass'ns v. Smith, 496 U.S. 167, 167 (1990)).

261. *See* Michael B. Kelly, *The Rightful Position in "Wrongful Life" Actions*, 42 HASTINGS L.J. 505, 505 (1991) ("Legal remedies generally seek to put the plaintiff in her rightful position: the position she would have occupied but for the misconduct that provided her a right to recover. . . . [C]areful attention to the rightful position provides a court with an ideal against which it can assess the appropriateness of requested remedies."); *see also id.* at 505 n.1 ("'Rightful position' is a phrase coined by Douglas Laycock as shorthand for 'the position the plaintiff would have been in but for the wrong.'") (quoting DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 15 (1985)).

262. It is important to remember here that the definition of pre-*Windsor* deportees set forth in this Comment only includes individuals for whom DOMA was the single reason for their removal. Individuals with additional inadmissibility problems would need to surmount those legal hurdles before they could be considered pre-*Windsor* deportees.

vacate her prior removal order by having *Windsor* apply retroactively to her case, to be a beneficiary of an I-130 petition, and to return to the United States to live with her spouse and family as a productive member of U.S. society, on the path to U.S. citizenship.