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## NOTE

# *Windsor*, FAFSA, and Retroactivity: A Critique of the Department of Education's Guidance on Same-Sex Spousal Reporting

John Ormonde\*

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### INTRODUCTION

With tuition skyrocketing over the last several decades, financial aid has become an ever more important part of the United States' college system. Today, more than 70% of college students receive some sort of financial aid.<sup>1</sup> The average undergraduate student receives more than

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<sup>1</sup> David Radwin, et al., *2011–12 National Postsecondary Student Aid Study (NPSAS:12): Student Financial Aid Estimates for 2011–12*, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF

\$13,000 per year, and the average graduate student over \$25,000.<sup>2</sup> Two factors largely determine the amount of aid a student receives: first, the “cost” of attending, including living expenses and tuition; and second, the financial status of the student, which may include the student’s family.<sup>3</sup> The financial status of the student is generally determined using the Free Application for Federal Student Aid (“FAFSA”)<sup>4</sup> and possibly supplemental sources such as the Need Access form.<sup>5</sup> Academic institutions use the financial information collected to allocate grants (funds that students do not have to repay) and to determine the type of loans and interest rates available to the student.<sup>6</sup>

Following the *United States v. Windsor* decision,<sup>7</sup> the Department of Education (“DOE”) announced on December 13, 2013 that it will require combined reporting for all same-sex spouses when filling out FAFSA applications for the coming 2014–2015 academic year.<sup>8</sup> The U.S. Secretary of Education commented in a press release, “As students fill out their FAFSA this coming year, I’m thrilled they’ll be able to do so in a way that is more fair and just.”<sup>9</sup> However, many of those impacted by the decision

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EDUC. 5-6 (Aug. 2013), <http://nces.ed.gov/pubs2013/2013165.pdf>.

<sup>2</sup> *Trends in Student Aid: 2012*, COLL. BD. ADVOCACY & POLICY CTR. 3, <https://trends.collegeboard.org/sites/default/files/student-aid-2012-full-report.pdf> (last visited Aug. 2, 2014).

<sup>3</sup> Kim Clark, *Will You Get Enough Financial Aid? Ask Your College About These 10 Factors*, U.S. NEWS & WORLD REP. (Feb. 18, 2010, 10:17 AM), <http://www.usnews.com/education/articles/2010/02/18/will-you-get-enough-financial-aid-ask-your-college-about-these-10-factors>.

<sup>4</sup> *About Us*, FED. STUDENT AID, U.S. DEP’T OF EDUC., <http://studentaid.ed.gov/about> (last visited Aug. 2, 2014).

<sup>5</sup> See *Need Access Participating Schools*, NEED ACCESS, <http://www.needaccess.org/Schools/Participating-Schools.aspx> (last visited Aug. 2, 2014).

<sup>6</sup> See *FAFSA: Apply for Aid*, FED. STUDENT AID, U.S. DEP’T OF EDUC., <http://studentaid.ed.gov/fafsa> (last visited Sept. 5, 2014); *Grants and Scholarships*, FED. STUDENT AID, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/types/grants-scholarships> (last visited Sept. 5, 2014) (“Grants and scholarships are often called ‘gift aid’ because they are free money — financial aid that doesn’t have to be repaid. Grants are often need-based, while scholarships are usually merit-based.”).

<sup>7</sup> 133 S. Ct. 2675 (2013).

<sup>8</sup> See Press Release, U.S. Dep’t of Educ., Education Department Announces that All Legal Same-Sex Marriages Will Be Recognized for Federal Financial Aid Purposes (Dec. 13, 2013), available at <http://www.ed.gov/news/press-releases/education-department-announces-all-legal-same-sex-marriages-will-be-recognized-f>. There is an exemption for those who have already completed the FAFSA prior to the announcement of the new rule. *Id.*

<sup>9</sup> *Id.*

may not share his enthusiasm. Same-sex married students enrolled in degree programs potentially face substantial financial aid loss.<sup>10</sup>

This Note argues that the DOE's new policy of requiring same-sex spouses to use combined reporting on their future FAFSA applications will not survive legal challenge and that grandfathering in, or giving an option to, previously enrolled or accepted students will help avoid such problems. Through a hypothetical example, Part I demonstrates the potential magnitude of the impact on some students, specifically those who receive substantial need-based grants.<sup>11</sup> Part II gives a background on the law of retroactivity and discusses how it applies to the hypothetical situation discussed in Part I.<sup>12</sup> Part III evaluates the legality of the DOE's policy on same-sex spousal reporting, including an analysis of the constitutional and administrative law issues.<sup>13</sup> Part IV discusses another deficiency of the new policy — it fails to provide a remedy for past discrimination.<sup>14</sup> Part V argues that the proper policy regarding currently enrolled students is to give them the option to be grandfathered in under the old system.<sup>15</sup>

#### I. HOW WINDSOR AFFECTS FINANCIAL AID

On June 26, 2013, the United States Supreme Court announced its groundbreaking decision in *United States v. Windsor*.<sup>16</sup> In 2007, New York residents Edith Windsor and Thea Spyer traveled to Canada and entered into a valid same-sex marriage.<sup>17</sup> When Spyer died in 2009, she left her entire estate to Windsor.<sup>18</sup> New York, the couple's state of residency when Spyer died, recognized the couple's marriage; however, the Internal Revenue Service ("IRS") did not recognize the marriage because section three of the Defense of Marriage Act ("DOMA") prohibited all federal agencies from recognizing same-sex marriages.<sup>19</sup>

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<sup>10</sup> See *Percentage of Undergraduates Receiving Financial Aid, by Type and Source of Aid and Selected Student Characteristics: 2007–08*, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC. (July 2013), [http://nces.ed.gov/programs/digest/d12/tables/dt12\\_386.asp](http://nces.ed.gov/programs/digest/d12/tables/dt12_386.asp) (showing married students are less likely to receive grants and financial aid).

<sup>11</sup> See discussion *infra* Part I.

<sup>12</sup> See discussion *infra* Part II.

<sup>13</sup> See discussion *infra* Part III.

<sup>14</sup> See discussion *infra* Part IV.

<sup>15</sup> See discussion *infra* Part V.

<sup>16</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>17</sup> See *id.* at 2682.

<sup>18</sup> *Id.* at 2679, 2682.

<sup>19</sup> See Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2006)); *Windsor*, 133 S. Ct. at 2679.

The IRS's decision not to recognize the marriage subjected Windsor to \$363,053 in estate taxes.<sup>20</sup> If the IRS had recognized the marriage, Windsor would have qualified for the spousal exemption afforded to heterosexual spouses, exempting her from paying the estate tax.<sup>21</sup>

Windsor challenged the IRS's decision not to recognize her marriage, claiming that section three of DOMA was unconstitutional because it violated the principle of equal protection incorporated under the Due Process Clause of the Fifth Amendment.<sup>22</sup> The Supreme Court agreed, finding section three of DOMA unconstitutional because it violated the Fifth Amendment.<sup>23</sup> The decision changes the meaning of "spouse" in over 1,000 federal laws; its impact extends beyond estate taxes or taxes generally.<sup>24</sup> But how it changes the definition of "spouse" is not perfectly clear.<sup>25</sup>

For same-sex couples, *Windsor* is a long sought triumph for equality; however, not all of *Windsor*'s effects will benefit same-sex couples. In many respects, agency policies flowing from *Windsor* will economically harm same-sex couples.<sup>26</sup> The negative financial aid consequences have

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<sup>20</sup> See *Windsor*, 133 S. Ct. at 2679.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; see U.S. CONST. amend. V; see also *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (finding that although the Fifth Amendment does not explicitly use the words "equal protection," a violation of equal protection is also a violation of the Due Process Clause and prohibited under the clause).

<sup>23</sup> See *Windsor*, 133 S. Ct. at 2696 ("By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."). But, the decision also seems to rest on federalism grounds. See *id.* at 2691 ("Consistent with this allocation of authority, the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations."). But see Courtney G. Joslin, *Windsor, Federalism, and Family Equality*, 133 COLUM. L. REV. SIDEBAR 156, 158 (2013) (arguing that civil rights advocates dodged a bullet when the *Windsor* Court declined to embrace the categorical family status federalism theory).

<sup>24</sup> See *Windsor*, 133 S. Ct. at 2679 (stating that "the federal Defense of Marriage Act . . . amended the Dictionary Act — a law providing rules of construction for over 1,000 federal laws and the whole realm of federal regulations — to define 'marriage' and 'spouse' as excluding same-sex partners").

<sup>25</sup> See generally William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012) [hereinafter *Beyond DOMA*] (discussing what law will control in the absence of section three of DOMA).

<sup>26</sup> For an expansive list of negative economic effects, see Dylan Mathews, *How DOMA's Departure Could Cost Gay Couples Money*, WASH. POST (June 29, 2013, 11:00 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/29/how-domas-departure-could-cost-gay-couples-money/>. Notably, this includes the "marriage [tax] penalty" paid by two married persons who have similar incomes. See generally I.R.C. § 1(a)–(f) (West 2013); Anthony C. Infanti, *The Moonscape of Tax Equality: Windsor and Beyond*, 108 NW. U. L. REV. COLLOQUY 110 (2013) (discussing the tax consequences of

the capability to seriously burden a specific group of married same-sex students.

Consider the following situation: Tom and Joe are a same-sex couple. In 2007, they were validly married in the Commonwealth of Massachusetts. In 2012, Tom began applying to law school. The University of California, Davis (“UC Davis”) and the University of Colorado, Boulder (“Boulder”) both admitted Tom. When deciding between the two schools, he carefully considered the cost of his education and found it to be roughly equivalent after factoring in the respective grants, scholarships, living expenses, and tuition. Boulder offered him a large merit-based scholarship. UC Davis awarded him a \$30,000 need-based grant,<sup>27</sup> which presumably would renew annually so long as he remained in good academic standing. Tom’s desire to live in a state that fully recognized his marriage weighed heavily on his decision. As the State of Colorado does not recognize same-sex marriage,<sup>28</sup> Tom decided to head out to California where his marriage would be recognized for state law purposes.<sup>29</sup> Northern California was also an attractive location because several years ago Joe inherited an apartment in San Francisco worth \$500,000.

Besides academic standing, Tom’s only *foreseeable* restriction on his grant renewal was financial.<sup>30</sup> So long as his financial situation remained within an acceptable range, calculated via FAFSA, he would continue to receive the yearly grant.<sup>31</sup> When Tom applied to school he was neither

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*Windsor*); U.S. CENSUS BUREAU, CHARACTERISTICS OF SAME SEX HOUSEHOLDS: 2012 (2012), available at <http://www.census.gov/hhes/samesex/files/sssex-tables-2012.xls> (showing that on average unmarried same-sex couples earn more than married opposite-sex couples and are more likely to have two income earning spouses).

<sup>27</sup> The author currently receives this amount of aid from the UC Davis and has an EFC of \$0.00.

<sup>28</sup> COLO. CONST. art. II, § 31. However, Colorado would recognize their relationship under the term “civil union.”

<sup>29</sup> See *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2660-68 (2013); *In re Marriage Cases*, 43 Cal. 4th 757, 856 (2008) (holding that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution).

<sup>30</sup> There are other restrictions, such as being convicted of a drug related crime. See 20 U.S.C. § 1091(r) (2012) (disqualifying students convicted of drug offenses for financial aid for specific periods of time following the offense). But in Tom’s case, this would not have been an issue.

<sup>31</sup> See *Free Application for Federal Student Aid*, CAL. STUDENT AID COMM’N, <http://www.csac.ca.gov/doc.asp?id=1470> (last visited Aug. 3, 2014) (“To apply for a Cal Grant, you must complete and submit two forms: the Free Application for Federal Student Aid (FAFSA) and the Cal Grant GPA Verification Form . . .”). UC Davis also uses the Need Access form, but that is only upon making the initial award; one does not need to fill it out again following enrollment. See *Financial Aid: Welcome*, UC DAVIS SCH.

required nor allowed to report his spouse's income or assets when filing his FAFSA. At the time he applied, section three of DOMA prohibited all federal agencies, including the DOE, from recognizing same-sex marriages.<sup>32</sup>

The DOE's new guidance requires that Tom report Joe's assets (i.e., the apartment that he inherited) on his FAFSA, and because of this, he will likely no longer qualify for his \$30,000 in anticipated grant funding.<sup>33</sup> This would amount to Tom paying an extra \$60,000 over the next two years in order to graduate,<sup>34</sup> and if paid back in the form of an unsubsidized loan at 6.8% over ten years,<sup>35</sup> it amounts to nearly \$83,000. Knowledge of this outcome may have affected Tom's previous decisions and conduct in at least two ways. First, it may have impacted his decision of which school to attend — schools offering merit scholarships (such as Boulder) would not revoke funding due to a change in financial status.<sup>36</sup> Secondly, he may have chosen to forgo marriage until after he graduated from school in order to exclude his

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OF LAW, <https://law.ucdavis.edu/financial-aid/> (last visited Aug. 16, 2014) (requiring the Need Access application for entering and transferring students, but not continuing students, unless they have not previously filed one).

<sup>32</sup> See *2013–14 Free Application for Federal Student Aid*, FED. STUDENT AID, U.S. DEP'T OF EDUC. 2, <http://www.fafsa.ed.gov/fotw1314/pdf/PdfFafsa13-14.pdf> (last visited Aug. 3, 2014) ("According to the Defense of Marriage Act . . . 'the word 'marriage' means a legal union between one man and one woman as husband and wife, and the word 'spouse' refers to a person of the opposite sex who is a husband or a wife.' Therefore, same-sex unions are not considered marriages for federal purposes, including the FAFSA.").

<sup>33</sup> See Press Release, U.S. Dep't of Educ., *supra* note 8; *The EFC Formula, 2012–2013*, U.S. DEP'T OF EDUC. 6, <http://studentaid.ed.gov/sites/default/files/2012-13-efc-formula.pdf> (last visited Aug. 3, 2014) [hereinafter *The EFC Formula*]. Joe's assets are added to the calculation based on 20% of their current value. See *The EFC Formula, supra*, at 21, 35. Thus, Tom's EFC will exceed \$100,000 per year because of Joe's home. Therefore, he will not receive his previous grant in the following years because \$100,000 (20% of the value of the equity in the house in the following year) will exceed his expected need.

<sup>34</sup> Generally, law school is three years long and Tom still has two years left.

<sup>35</sup> *Interest Rates and Fees*, FEDERAL STUDENT AID, U.S. DEP'T OF EDUC., <http://studentaid.ed.gov/types/loans/interest-rates> (last visited Sept. 21, 2014).

<sup>36</sup> See James Ming Chen, *Scholarships at Risk: The Mathematics of Merit Stipulations in Law School Financial Aid 3* (Univ. of Louisville Brandeis Sch. of Law Legal Studies Research Paper Series, Paper No. 2012-12, Aug. 20, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2133018](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2133018) ("The typical merit stipulation merely states the minimum GPA that a student must maintain in order to continue receiving financial aid, or at least the full amount of the grant awarded at the time of admission.").

partner's assets and income from his FAFSA calculation, a common practice among students.<sup>37</sup>

Tom has the option to divorce and remarry after graduation to avoid including Joe on his FAFSA. As in the case of Tom, \$83,000 appears to be an ample incentive. This is not the type of policy that our legal system has traditionally encouraged; in fact, U.S. law frowns upon any policy encouraging divorce.<sup>38</sup> Moreover, the policy of discouraging divorce still adheres even when spouses intend to remarry at a later date.<sup>39</sup>

Some might claim that Tom was on notice of the coming change in policy and, thus, it was his own fault for taking the risk that his aid might change because *Windsor* had already prevailed at the circuit level.<sup>40</sup> Yet, it seems absurd that society should incentivize Tom not to attend UC Davis just because the U.S. Court of Appeals for the Second Circuit found that the IRS cannot refuse to recognize same-sex marriage. Without a Supreme Court decision on the books, and without knowledge of how agencies will respond to such a decision, it is certainly unfair to place Tom in this situation.

While heterosexual couples have always had an opportunity to plan when to marry in order to avoid reporting their spouse's income and assets on their FAFSA — they knew the consequences of their marriage — same-sex couples married after DOMA and before *Windsor* were stripped of this opportunity. They likely and justifiably thought that it did not matter when they married. The law of retroactivity has granted

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<sup>37</sup> See Grace, *Postponing Remarriage to Get More College Financial Aid*, COST OF COLL., <http://costofcollege.wordpress.com/2012/03/20/postponing-remarriage-to-get-more-college-financial-aid/> (last visited Aug. 3, 2014) (“There are . . . many ‘tricks’ that will increase your odds of getting college financial aid, including postponing remarriage so that household income looks low.”); Jennifer Ludden & Brad Wilcox, *Talk of the Nation: Young Families Delay Marriage, Not Parenthood*, NAT’L PUB. RADIO (Dec. 6, 2010, 1:00 PM), available at <http://www.npr.org/2010/12/06/131853955/young-families-delay-marriage-not-parenthood> (quoting a student as stating, “[I]f I got married, it would change the context in which I got all my financial aid.”).

<sup>38</sup> See *Williams v. North Carolina*, 317 U.S. 287, 301 (1942) (suggesting as part of its analysis that rules should not “encourage collusive divorces”); J.T.W., Annotation, *Encouraging Divorce Litigation as Ground for Disbarment or Suspension*, 9 A.L.R. 1500, 1500 (1920). See generally *In re Estate of Feinberg*, 235 Ill. 2d 256 (2009) (stating that will provisions encouraging divorce are contrary to public policy).

<sup>39</sup> See *Boyer v. Comm’r of Internal Revenue*, 668 F.2d 1382, 1384-85 (4th Cir. 1981) (refusing to recognize a divorce and subsequent remarriage when the sole reason for obtaining the divorce was “because the tax laws, as currently written, caused us to pay a penalty for being married”); Rev. Rul. 76-255, 1976-2 C.B. 40.

<sup>40</sup> See generally *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (holding that the IRS was required to recognize Windsor’s same-sex marriage).

relief before to those faced with similar circumstances and may provide a remedy for students like Tom.

## II. ADMINISTRATIVE RETROACTIVITY

While the correct definition of a retroactive law is debatable, courts have provided some guidance.<sup>41</sup> The Supreme Court has defined a retroactive judicial decision as one that “alters the legal status of acts that were performed before [the decision] came into existence.”<sup>42</sup> Courts have similarly defined a retroactive statute as one that “creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.”<sup>43</sup> In short, retroactive laws alter legal obligations of past events when people relied on the previous state of the law in making decisions and planning for the future.<sup>44</sup>

Legal limitations on retroactivity vary with circumstances, such as criminal versus civil rulemaking.<sup>45</sup> On its face, the Ex Post Facto Clause (“Clause”) of the U.S. Constitution prohibits all retroactive laws,<sup>46</sup> but the Supreme Court has interpreted the Clause as only applying to criminal laws.<sup>47</sup> Limitations on retroactivity also depend on the source of the retroactive rule and whether it originated in the legislature, judiciary, or an administrative agency.<sup>48</sup> While courts render judicial

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<sup>41</sup> Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL’Y 811, 812 n.2 (2003).

<sup>42</sup> *Id.*; see James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535-38 (1991).

<sup>43</sup> Soc’y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156); see United States v. Ne. Pharm. & Chem. Co., 579 F. Supp. 823, 839 (W.D. Mo. 1984); State *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1303 (N.D. Ohio 1983).

<sup>44</sup> See Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 953 (1995); Matthew A. Schwartz, *A Critical Analysis of Retroactive Economic Legislation: A Proposal for Due Process Revitalization in the Economic Arena*, 9 SETON HALL CONST. L.J. 935, 974-75 (1999) (“Unlike prospective laws, retroactive economic legislation impinges upon individuals’ personal autonomy by preventing market participants from altering their past conduct.”).

<sup>45</sup> See Jan G. Laitos, *Legislative Retroactivity*, 52 WASH. U.J. URB. & CONTEMP. L. 81, 100 (1997).

<sup>46</sup> U.S. CONST. art. 1, § 9, cl. 3.

<sup>47</sup> See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798).

<sup>48</sup> Compare Robert R. Gunning, *Back from the Dead: The Resurgence of Due Process Challenges to Retroactive Tax Legislation*, 47 DUQ. L. REV. 291 (2009) (discussing retroactive legislation), with William V. Luneburg, *Retroactivity and Administrative Rulemaking*, 1991 DUKE L.J. 106 (discussing retroactive administrative decisions), and Pamela J. Stephens, *The New Retroactivity Doctrine: Equality, Reliance and Stare Decisis*, 48 SYRACUSE L. REV. 1515 (1998) (discussing judicial retroactivity).



decisions and legislatures enact statutes, administrative agencies wear two hats and may use both means to impose rules retrospectively.<sup>49</sup> They may announce new regulations<sup>50</sup> or create new retroactive rules through administrative adjudication.<sup>51</sup> The method by which the agency creates the rule will change the analysis of any retroactive rule's validity.<sup>52</sup>

If a judicial decision directly compels an action, such as the IRS having to allow same-sex spouses to amend their tax returns, then courts will analyze the retroactive outcomes under the doctrine of judicial retroactivity.<sup>53</sup> However, the *Windsor* decision did not hold that federal agencies must recognize same-sex marriage in all instances.<sup>54</sup> Rather, *Windsor* held that federal agencies cannot deny same-sex couples the right to have their marriage recognized if they were validly married in, and currently reside in, a state that recognizes the marriage.<sup>55</sup> If neither a judicial decision nor a statute<sup>56</sup> compels an agency to enforce a specific retroactive rule, then the validity of the rule is analyzed under the doctrine of "administrative retroactivity."<sup>57</sup> Thus,

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<sup>49</sup> See James M. Puckett, *Embracing the Queen of Hearts: Deference to Retroactive Tax Rules*, 40 FLA. ST. U. L. REV. 349, 355 (2013).

<sup>50</sup> Although it is possible for an administrative agency to do this, they must explicitly be granted this power by Congress in order for their regulation to be valid. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). But see Geoffrey C. Weien, *Retroactive Rulemaking*, 30 HARV. J.L. & PUB. POL'Y 749, 749-50 (2007) ("In the years since *Bowen*, however, courts of appeals have not applied this rule consistently.").

<sup>51</sup> Weien, *supra* note 50, at 751.

<sup>52</sup> See, e.g., *Bowen*, 488 U.S. at 209 (finding that retroactive regulations are prohibited, at least if amounting to primary retroactivity); *SEC v. Chenery Corp.*, 332 U.S. 194, 203-04 (1947) (finding that rules created through adjudication are subject to a balancing test).

<sup>53</sup> See generally *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993) (disapproving of *Chevron Oil* in favor of per se retroactive application); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538 (1991) (limiting the application of *Chevron Oil*); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) (creating a three-factor test for evaluating retroactive decisions).

<sup>54</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2708 (2013) (Scalia, J., dissenting).

<sup>55</sup> See generally *id.* at 2682-96 (majority opinion) (holding section 3 of DOMA unconstitutional and not stating the reach of its holding beyond the facts of the case).

<sup>56</sup> If a statute compelled the action then the rule is "legislative retroactivity." See generally Laitos, *supra* note 45 (discussing legislative retroactivity).

<sup>57</sup> See, e.g., *Bowen*, 488 U.S. at 208 (analyzing a rule created by the Department of Health and Human Services under the standards of administrative retroactivity). See generally Raoul Berger, *Retroactive Administrative Decisions*, 115 U. PA. L. REV. 371 (1967) (discussing the standard of administrative retroactivity); Puckett, *supra* note 49, at 350 (discussing retroactive decisions in the context of taxes; i.e., either by Congress or the IRS).

because neither a judicial decision nor a statute compels the DOE to force all students to report their spouses,<sup>58</sup> courts should analyze the DOE's guidance as administrative retroactivity.

Outside of constitutional limitations, two cases hallmark the Supreme Court's administrative retroactivity jurisprudence.<sup>59</sup> The first, *Bowen v. Georgetown University Hospital*, limits the ability of agencies to create retroactive laws by way of rulemaking (as opposed to making judicial determinations).<sup>60</sup> The second, *SEC v. Chenery Corp.*, gives agencies the power to choose to create law through adjudication or through the rulemaking process.<sup>61</sup> Thus, under *Chenery*, an agency can avoid violating the rule from *Bowen* if it creates the new law by way of an administrative adjudication.<sup>62</sup> The DOE did not create the rule through adjudication — it announced the policy in a press release.<sup>63</sup> Therefore, for our purposes, *Bowen* should guide the analysis.

Courts have carved out exceptions allowing the implementation of retroactive rules to avoid the prohibitive language delineated by the *Bowen* majority. In *Bowen*, the Court pronounced the rule that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”<sup>64</sup> Taken literally, this would prohibit agencies from creating any new rules without congressional approval, provided that someone had relied on the previous rule in the course of making some decision in the past. Pragmatically, this would invalidate almost all new rules pronounced by administrative agencies.<sup>65</sup> Thus, it was necessary for courts to develop alternative means to ensure that *Bowen* did not unduly prohibit administrative agencies from updating regulations to match the current needs of the country.

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<sup>58</sup> See generally Press Release, U.S. Dep't of Educ., *supra* note 8 (announcing the DOE's new policy, which allows, but does not require, the recognition of same-sex couples for financial aid calculation purposes).

<sup>59</sup> See generally *Lunenburg*, *supra* note 48 (discussing the limitations on administrative retroactivity).

<sup>60</sup> See *Bowen*, 488 U.S. at 208-09; *Lunenburg*, *supra* note 48, at 107.

<sup>61</sup> See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

<sup>62</sup> *Id.* at 203 (“Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency.”).

<sup>63</sup> See generally Press Release, Dep't of Educ., *supra* note 8 (announcing the new rule).

<sup>64</sup> *Bowen*, 488 U.S. at 208.

<sup>65</sup> See generally Donald T. Hornstein, *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking*, 89 N.C. L. REV. 1549 (2011) (discussing the reasons that retroactive law is sometimes necessary).

In doing so, many courts have strictly prohibited the creation of primarily retroactive rules by agencies without congressional approval, but have upheld secondarily retroactive rules so long they are reasonable.<sup>66</sup> Primarily retroactive rules are rules that alter the past legal consequences of past actions.<sup>67</sup> Secondarily retroactive rules are rules that alter the future legal consequences of past actions.<sup>68</sup>

It is by sheer coincidence that legal scholars have traditionally illustrated the distinction between primary and secondary retroactivity through an example of a law validating a previously invalid marriage.<sup>69</sup> In the example, all couples married in one county during the past year discovered that their marriages were invalid because the office that issued their marriage certificates failed to attach a proper seal.<sup>70</sup> In order to cure the problem, the government passes a law validating the marriages.<sup>71</sup> If the law states that the couples were married from the date of the issuance of the original certificate, then this law is primarily retroactive — it changes the past legal consequences of the prior marriage.<sup>72</sup> If, on the other hand, the law states that they are married from the date of the new law's implementation, then it is secondarily retroactive — it alters the future legal consequences of the marriage that was effectuated in the past.<sup>73</sup>

With formal endorsement by only three Supreme Court justices, the highly criticized primary/secondary retroactivity distinction<sup>74</sup> has led to

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<sup>66</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) (Scalia, J., concurring); *Bowen*, 488 U.S. at 216 (Scalia, J., concurring); *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 670 (D.C. Cir. 2009); *U.S. W. Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 957-58 (9th Cir. 2002); *Nat'l Med. Enters., Inc. v. Sullivan*, 957 F.2d 664, 671 (9th Cir. 1992); William L. Fishman, *Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934*, 50 FED. COMM. L.J. 1, 38 (1997); Mary Gilliam Zuchegno, *How New Rules Affect Existing Oil and Gas Leases*, 19 COLO. LAW. 2073, 2076 (1990).

<sup>67</sup> See *Bowen*, 488 U.S. at 219 (Scalia, J., concurring); Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1068 (1997).

<sup>68</sup> *Bowen*, 488 U.S. at 219-20 (Scalia, J., concurring); Fisch, *supra* note 67, at 1068.

<sup>69</sup> See Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329, 1336 (2000); see, e.g., Stephen R. Munzer, *Retroactive Law*, 6 J. LEGAL STUD. 373, 381-82 (1977) (explaining the distinction in the context of validation of a previously invalid marriage).

<sup>70</sup> See Troy, *supra* note 69, at 1336-37.

<sup>71</sup> See *id.*

<sup>72</sup> Munzer, *supra* note 69 at 381; Troy, *supra* note 69, at 1334-40.

<sup>73</sup> See Troy, *supra* note 69, at 1338-39.

<sup>74</sup> See, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 515 (1986) (suggesting a broad definition of retroactivity is the most accurate one prior to the *Bowen* decision).

a confusing legal landscape for agencies and courts.<sup>75</sup> Nonetheless, it is important because it has influenced the outcome in many cases, particularly when courts analyze retroactive rules promulgated by administrative agencies.<sup>76</sup> In sum, determining the validity of a retroactive law depends on its source, the procedure by which it was created, and its operation as applied to the facts and circumstances.

### III. EVALUATING THE LEGAL VALIDITY OF THE DEPARTMENT OF EDUCATION'S NEW POLICY

The DOE recently announced the requirement that future FAFSA filings must include the income and assets of same-sex spouses.<sup>77</sup> This rule may not survive legal challenge by affected students, such as Tom, who previously enrolled in programs based on former DOE guidance.<sup>78</sup> Tom's situation, as described in the previous section, falls under the broad definition of retroactivity. He made decisions in the past: he married Joe and chose to enroll in a program at UC Davis. The consequences of his past decisions have significantly changed due to *Windsor*.<sup>79</sup> When Tom initially married Joe, the consequences of that marriage did not include reporting Joe as his spouse for any federal purpose.<sup>80</sup> This has clearly changed.<sup>81</sup> When Tom initially accepted UC Davis's offer, the consequences of doing so did not include paying an additional \$60,000 in order to earn a degree. Thus, the change in the law is retroactive — it changed the legal consequences of past actions.

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<sup>75</sup> Fisch, *supra* note 67, at 1069; see Luneburg, *supra* note 48, at 156-58 (“[C]ourts will be hard-pressed to invent principled distinctions between types of retroactivity.”); Troy, *supra* note 69, at 1338-39 (stating the category of secondary retroactivity is unhelpful); Weien, *supra* note 50, at 751-52.

<sup>76</sup> For cases and journal articles recognizing the distinction between primary and secondary retroactivity, see sources cited *supra* note 66.

<sup>77</sup> See Press Release, U.S. Dep't of Educ., *supra* note 8.

<sup>78</sup> See *supra* Part I.

<sup>79</sup> See *United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013).

<sup>80</sup> See 1 U.S.C. § 7 (2012) (“In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”).

<sup>81</sup> See *Windsor*, 133 S. Ct. at 2695-96; Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (stating that the IRS will consider a couple married so long as the couple was validly married in a state that recognized their marriage); Baude, *Beyond DOMA*, *supra* note 25, at 1418-23 (stating that when the federal statute is not clear, “[f]ederal courts should . . . treat parties as married if their home state — their domicile — treats them that way”).

This section aims to discuss possible claims that same-sex married students could make in challenging the DOE's new rule. Several limitations curtail administrative agencies' ability to create retroactive rules, including the Constitution,<sup>82</sup> the Administrative Procedures Act,<sup>83</sup> and judicially-imposed limitations on retroactive administrative rulemaking.<sup>84</sup>

#### A. *The Due Process Clause*

Although the action of the DOE qualifies as administrative retroactivity and is subject to an agency-specific doctrine, agencies, as is Congress, are bound by the limitations of the Due Process Clause.<sup>85</sup> Under the Due Process Clause, retroactive law is generally disfavored.<sup>86</sup> In *Landgraf v. USI Film Products*, the Supreme Court stated that three considerations must guide the analysis when determining whether a statute is impermissibly retroactive: "reasonable reliance, fair notice, and settled expectations."<sup>87</sup> Beyond these general considerations, *Landgraf* requires courts to conduct a two-pronged analysis: "first, the court must ask whether a law imposes new negative consequences on past actions; second, the court must ask whether those consequences are imposed without fair notice, or in a manner that undermines reasonable reliance or upsets settled expectations."<sup>88</sup>

In 2001, in *INS v. St. Cyr*,<sup>89</sup> the Supreme Court held that a recently enacted statute denying formerly available discretionary relief from post-judgment deportation could not apply to those who had already entered into plea agreements.<sup>90</sup> In coming to this decision, the Court applied its two-part retroactivity test set forth in *Landgraf*.<sup>91</sup> In making

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<sup>82</sup> See Puckett, *supra* note 49, at 374-83.

<sup>83</sup> See 5 U.S.C. §§ 551-559, 701-706 (2012).

<sup>84</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (stating that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms").

<sup>85</sup> See *United States v. Hoyts Cinemas Corp.*, 380 F.3d 558, 573 n.11 (1st Cir. 2004); *Cheshire Hosp. v. N.H.-Vt. Hospitalization Serv., Inc.*, 689 F.2d 1112, 1121 (1st Cir. 1982).

<sup>86</sup> See *E. Enters. v. Apfel*, 524 U.S. 498, 547-50 (1998).

<sup>87</sup> *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

<sup>88</sup> *Chang v. United States*, 327 F.3d 911, 920 (9th Cir. 2003); see *Landgraf*, 511 U.S. at 280; see also *Olatunji v. Ashcroft*, 387 F.3d 383, 389 (4th Cir. 2004).

<sup>89</sup> 533 U.S. 289 (2001).

<sup>90</sup> See *id.* at 321-26.

<sup>91</sup> See *id.*

its judgment, the Court noted that “the possibility of such relief” is a main consideration of immigrants in making the decision “to accept a plea offer or instead to proceed to trial.”<sup>92</sup> Because the Court found that applying the new rule to petitioners would upset their “settled expectations” of possibly receiving discretionary relief, the Court held that applying the repeal to such petitioners would be impermissibly retroactive.<sup>93</sup> Lower courts have split on how to apply *St. Cyr*.<sup>94</sup> While some courts read *St. Cyr* more expansively,<sup>95</sup> many courts have found that it is controlling only when there is a quid pro quo agreement between the petitioner and the government.<sup>96</sup>

The quid pro quo agreement is an important factor because the government, or other state actor, should not be allowed to use a bait and switch tactic — to promise (or impliedly promise in the case of *St. Cyr*) one thing, gain a benefit from those that relied on their statements (such as obtaining a plea), and then change the applicable laws such that those who relied on the prior law will no longer receive the benefit that they bargained for.

The importance of upholding a quid pro quo agreement between persons and the U.S. government is recognized again in *Chang v. United States*.<sup>97</sup> In this case from the U.S. Court of Appeals for the Ninth Circuit, seven immigrant investors participated in the “EB-5 program,” which granted resident status to those who make qualifying investments under the Immigrant Investor Law.<sup>98</sup> After the immigrants’ investment proposals and business plans had been approved and their dependents had moved to the United States, the Immigration and Naturalization Service changed the rules of the EB-5 program, informing the immigrants that they no longer qualified for the program.<sup>99</sup> Because the immigrants had “fulfilled their part of the originally approved bargain,”

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<sup>92</sup> *Id.* at 323.

<sup>93</sup> *See id.* at 325-26.

<sup>94</sup> *Ponnapula v. Ashcroft*, 373 F.3d 480, 488 (3d Cir. 2004).

<sup>95</sup> *See id.*; *Ponnapula v. Ashcroft*, 235 F. Supp. 2d 397, 401-02 (M.D. Pa. 2002).

<sup>96</sup> *See Swaby v. Ashcroft*, 357 F.3d 156, 161-62 (2d Cir. 2004); *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2003); *Chambers v. Reno*, 307 F.3d 284, 290-91 (4th Cir. 2002). Other Courts of Appeals have also limited *St. Cyr*’s retroactivity holding to the plea bargain context without specifically invoking the quid pro quo language from *St. Cyr*. *See, e.g., Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) (per curiam); *Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002); *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116 (9th Cir. 2002); *Dias v. INS*, 311 F.3d 456 (1st Cir. 2002).

<sup>97</sup> 327 F.3d 911 (9th Cir. 2003).

<sup>98</sup> *See id.* at 915.

<sup>99</sup> *Id.* at 915-16.

the court found that that the retroactive application was impermissible.<sup>100</sup>

In *Cort v. Crabtree*, a civil case brought by prisoners before the Ninth Circuit, the court found that admitting inmates to a program allowing a sentence reduction prevented the agency from changing the terms of the program.<sup>101</sup> The authorizing statute, 18 U.S.C. § 3621(e)(2)(B), allowed sentence reductions of up to one year to prisoners convicted of nonviolent offenses provided that they complete a substance abuse treatment program.<sup>102</sup> After the prisoners began participation in the program, the agency changed the definition of nonviolent offenses in the statute and thereby disqualified the petitioners.<sup>103</sup> The court stated that once the agency had admitted prisoners to the program, it could not revoke eligibility and disrupt the prisoners' "settled expectations."<sup>104</sup> This was especially true considering that the inmates' participation in the program had already commenced.<sup>105</sup> Since the government had received part of its bargain — participation and enrollment in the program — it could not disqualify the petitioners. Thus, there is strong support for the proposition that the government cannot induce reliance through lawmaking, gain a benefit from people's reliance on the law, and then change the law retroactively.

Applying the *Landgraf* standard to the DOE's new policy, the first prong is certainly satisfied in the earlier hypothetical with Tom. The "law imposes new negative consequences on past actions" because it will cost Tom significantly more to finish the program now than it would have when he initially made his decision. Second, the consequences were imposed "without fair notice."<sup>106</sup> Certainly his reliance on the prior rule was reasonable — it was the only position ever taken by the DOE and the DOE had never warned students that their aid could change based on a changing definition of "spouse." The

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<sup>100</sup> See *id.* at 916, 930.

<sup>101</sup> See *Cort v. Crabtree*, 113 F.3d 1081, 1085-86 (9th Cir. 1997); see also Weien, *supra* note 50, at 760 (discussing how the court recognized a salient retroactivity event in *Crabtree* when prisoners either enrolled in the program or were informed of their eligibility).

<sup>102</sup> See *Crabtree*, 113 F.3d at 1085.

<sup>103</sup> See *id.* at 1083.

<sup>104</sup> *Id.* at 1086 ("Before an agency may disrupt 'settled expectations' in such a manner, the language of the relevant regulation must compel such a result.") (internal citations omitted).

<sup>105</sup> See *id.*

<sup>106</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994).

change certainly upset his “settled expectations.”<sup>107</sup> Thus, under *Landgraf*, the DOE’s new policy may be invalid.

Moreover, schools actively recruit, and in doing so provide students with their expected aid package, which certainly impacts the students’ decisions. These schools, which courts commonly qualify as state actors,<sup>108</sup> have a quid pro quo agreement with the students: you come to our school, and based on your economic situation, this is the aid we can provide. By enrolling in the program, the students have fulfilled their part of the originally approved bargain and thus the schools, as state actors, should not be allowed to change the terms of the deal in a way that violates the students’ settled expectations.

In *United States v. Carlton*, the Supreme Court set out a framework for analyzing the validity of a retroactive tax law as a violation of the Due Process Clause.<sup>109</sup> Justice Blackmun’s majority opinion stated that the general rules applicable to retroactive economic legislation, rational basis review, also apply to retroactive taxes.<sup>110</sup> So, it is possible that *Carlton* is applicable here. Despite this statement by Justice Blackmun, many argue that *Carlton* is exceptional because of its remedial purpose and the fact that Congress has explicitly granted the IRS authority to create retroactive rules.<sup>111</sup> The standard is, thus, more lenient than that

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<sup>107</sup> See *id.* at 296; *Olatunji v. Ashcroft*, 387 F.3d 383, 389 (4th Cir. 2004); *Chang v. United States*, 327 F.3d 911, 920 (9th Cir. 2003).

<sup>108</sup> This of course depends on the school’s relationship with the state. See Daniel L. Schwartz, *Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations*, 75 CAL. L. REV. 2117, 2154 (1987); see, e.g., *Molthan v. Temple Univ.*, 778 F.2d 955, 960-61 (3d Cir. 1985) (finding university is state actor due to its statutory relationship with state); *Brown v. Strickler*, 422 F.2d 1000, 1001 (6th Cir. 1970) (holding that actions by statutorily defined “municipal university” constitute state action); *Hammond v. Univ. of Tampa*, 344 F.2d 951, 951 (5th Cir. 1965) (stating that the defendant is state actor because “its establishment was largely made possible by the use of a surplus city building and the use of other city land leased for the University purposes”); see also Richard Thigpen, *The Application of Fourteenth Amendment Norms to Private Colleges and Universities*, 11 J. L. & EDUC. 171, 201 (1982) (“[S]tate financing and control . . . brought public colleges within reach of the fourteenth amendment.”) (footnote omitted); cf. *Carlson v. Hightler*, 612 F. Supp. 603, 604 (E.D. Tenn. 1985) (finding that the University of Tennessee could invoke sovereign immunity because it was an agent of the state); *Wynne v. Shippenburg Univ. of Pa.*, 639 F. Supp. 76, 79-80 (M.D. Pa. 1985) (applying sovereign immunity to public university on the ground that it is an “arm” or “alter ego” of state).

<sup>109</sup> See *United States v. Carlton*, 512 U.S. 26, 32-33 (1994); see also Fisch, *supra* note 67, at 1066 (noting how considerations of notice and fairness are now beginning to permeate the Court’s analysis); Puckett, *supra* note 49, at 377-78 (referring to *Carlton* as the latest case shaping the Supreme Court’s retroactive due process analysis).

<sup>110</sup> See *Carlton*, 512 U.S. at 30-31.

<sup>111</sup> See Laitos, *supra* note 45, at 83 n.1, 121 n.133.



which applies generally.<sup>112</sup> Under *Carlton*, the Court asks the following: (1) whether the retroactive application of the statute supports a legitimate purpose; and (2) whether that purpose is furthered by rational means.<sup>113</sup>

Applying the rule from *Carlton* to its facts, the Court found that there was a legitimate purpose in the retroactive application of the statute.<sup>114</sup> Specifically, the Court found that Congress had made an inadvertent error by creating a loophole in the tax code that was likely to cost the U.S. Department of the Treasury twenty times the initial calculation.<sup>115</sup> In deciding whether the statute was supported by rational means, the Court considered the short period of retroactivity and decided that the retroactivity period here, about one year, was short enough not to offend rationality.<sup>116</sup> Justice O'Connor stated in her concurrence that retroactivity periods extending back further than one year from the date of the legislative enactment would raise "serious constitutional issues."<sup>117</sup> Although her opinion is not controlling, several state courts have cited her concurrence while striking down retroactive statutes extending back more than one year.<sup>118</sup>

Applying *Carlton* to the DOE's rule, the first prong of the analysis appears to be satisfied — the rule has a legitimate purpose: it furthers the goal of equality.<sup>119</sup> The greater hurdle for the DOE's policy is the second prong of *Carlton* — implementation by rational means.<sup>120</sup> Courts are split on exactly how far back the rule must reach in order to

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<sup>112</sup> See *id.*

<sup>113</sup> See *Carlton*, 512 U.S. at 30-31; see also *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) ("Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches . . .").

<sup>114</sup> See *Carlton*, 512 U.S. at 32.

<sup>115</sup> *Id.*

<sup>116</sup> See *id.* at 32-33.

<sup>117</sup> *Id.* at 38 (O'Connor, J., concurring).

<sup>118</sup> See *Gunning*, *supra* note 48, at 317-22; see, e.g., *City of Modesto v. Nat'l Med, Inc.*, 128 Cal. App. 4th 518, 529 (2005) (striking down legislation reaching back four to eight years); *Rivers v. State*, 327 S.C. 271, 278-79 (1997) (striking down legislation reaching back two to three years).

<sup>119</sup> See U.S. CONST. amend. XIV, § 1.

<sup>120</sup> See, e.g., *Carlton*, 512 U.S. at 38 (O'Connor, J., concurring) ("A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions."). *But see* *Gunning*, *supra* note 48, at 314-22 (finding that some courts adhere to the one year limitation and other have ignored it).

violate the second prong of *Carlton*.<sup>121</sup> In 2004, the Ninth Circuit found that a statute reaching back three years violated the Due Process Clause under *Carlton*.<sup>122</sup> In 1996, the Ninth Circuit upheld retroactive legislation reaching back six years in *Montana Rail Link, Inc. v. United States*.<sup>123</sup> But in doing so, the court failed to strictly apply the second prong of *Carlton*, emphasizing the special circumstances and the strong government interest that the legislation achieved.<sup>124</sup> The South Carolina Supreme Court has invalidated legislation with a retroactivity period of two to three years.<sup>125</sup> And, a California appellate court invalidated legislation reaching back four to eight years.<sup>126</sup>

Here, the rule would change the consequences of previous enrollment in an educational program.<sup>127</sup> And, as applied to students currently in their third year of a four year program, the rule would retroactively reach back three years. Thus, where a court falls on the permissible retroactivity period spectrum will determine whether the rule violates the second prong of *Carlton* — implementation by rational means.

#### B. Administrative Law: Specific Limitations on Retroactivity

As discussed, *Bowen* held that agencies cannot adopt retroactive rules without explicit congressional authorization.<sup>128</sup> Thus, on its face *Bowen* would prohibit the DOE's new rule because, unlike the IRS, Congress has not granted the DOE explicit authority to make retroactive rules. However, lower courts have carved out exceptions to this broad rule.<sup>129</sup>

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<sup>121</sup> See *Gunning*, *supra* note 48, at 312-22. Compare *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1055-56 (9th Cir. 2004) (Pregerson, J., concurring) (finding a three year retroactivity period violated the Due Process Clause), with *Mont. Rail Link, Inc. v. United States*, 76 F.3d 991, 993-94 (9th Cir. 1996) (upholding a six year retroactivity period), *Nat'l Med, Inc.*, 128 Cal. App. 4th at 529 (striking down legislation reaching back four to eight years), and *Rivers*, 327 S.C. at 278-79 (striking down legislation reaching back two to three years).

<sup>122</sup> See *Ubaldo-Figueroa*, 364 F.3d at 1055-56.

<sup>123</sup> See *Mont. Rail Link, Inc.*, 76 F.3d at 993-94.

<sup>124</sup> *Gunning*, *supra* note 48, at 315, 326.

<sup>125</sup> *Rivers*, 327 S.C. at 278-79.

<sup>126</sup> *Nat'l Med Inc.*, 128 Cal. App. 4th at 529.

<sup>127</sup> See *supra* notes 26-40 and accompanying text (discussing how the DOE's new policy affects students).

<sup>128</sup> *Weien*, *supra* note 50, at 749; see, e.g., *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) ("An agency may not promulgate retroactive rules absent express congressional authority.").

<sup>129</sup> *Weien*, *supra* note 50, at 749-50; see *Glover v. Standard Fed. Bank*, 283 F.3d 953, 959 n.4 (8th Cir. 2002) (warning that courts must be careful not to allow an agency to create de facto new regulations under the guise of interpreting an earlier regulation);

Here, a particularly applicable exception is that some courts find that *Bowen* does not limit interpretative non-legislative rules, which merely clarify the meaning of statutes.<sup>130</sup> This is because non-legislative rules are similar to judicial decisions in that they do not create new rules; they merely interpret what the law has always been. Thus the reasoning goes, they are not truly retroactive.<sup>131</sup> Additionally, some courts find that if the law is secondarily retroactive, then it is valid so long as the rule is reasonable.<sup>132</sup>

The DOE's guidance does not qualify for the interpretative rule exception because the exception does not apply where the interpretative rule is "new."<sup>133</sup> A court should consider the DOE's policy a "new" rule because the DOE has completely changed the legal landscape in regards to its policy on same-sex spousal reporting.<sup>134</sup> Moreover, overturning a long-standing interpretation, such as the meaning of "spouse," is inherently more suspect.<sup>135</sup> Additionally, the interpretative exception is rooted in the deference traditionally afforded to administrative agencies;<sup>136</sup> and, as to be discussed below,<sup>137</sup> the decision may receive little deference. Thus, the interpretative rule exception should not apply.

The DOE's new rule is an example of secondary retroactivity because it changes the future consequences of past actions: namely, how students will fill out their FAFSA in the future following a past marriage. The source of the primary/secondary retroactivity distinction in modern administrative law is grounded in the language of the Administrative Procedures Act ("APA"), which imposes procedural limitations on

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Bergerco Can. v. U.S. Treasury Dep't, 129 F.3d 189, 192 (D.C. Cir. 1997) (limiting *Bowen*'s application to primary retroactivity).

<sup>130</sup> Weien, *supra* note 50, at 754.

<sup>131</sup> *Id.*

<sup>132</sup> See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring); *Nat'l Ass'n of Indep. Tel. Producers & Distribs. v. FCC*, 502 F.2d 249, 255 (2d Cir. 1974); *Gen. Tel. Co. of Sw. v. United States*, 449 F.2d 846, 863 (5th Cir. 1971).

<sup>133</sup> See *Standard Oil Co. v. Dep't of Energy*, 596 F.2d 1029, 1061 (Temp. Emer. Ct. App. 1978); see also *Glover v. Standard Fed. Bank*, 283 F.3d 953, 959 n.4 (8th Cir. 2002) (warning that courts must be careful not to allow an agency to create de facto new regulations under the guise of interpreting an earlier regulation).

<sup>134</sup> See 2013–14 *Free Application for Federal Student Aid*, *supra* note 32, at 2 (discussing the DOE's previous position and guidance on the FAFSA form).

<sup>135</sup> Russell L. Weaver, *Challenging Regulatory Interpretations*, 23 ARIZ. ST. L.J. 109, 153 (1991); see *Mehta v. INS*, 574 F.2d 701, 705-06 (2d Cir. 1978).

<sup>136</sup> See *Standard Oil*, 596 F.2d at 1055-56 (discussing the interpretative rule exception under the heading of "Deference to Administrative Agencies").

<sup>137</sup> See *infra* notes 149–70 and accompanying text (discussing the application of *Chevron* and *Skidmore* deference).

administrative agencies.<sup>138</sup> The APA distinguishes between rules (administrative equivalent of statutes) and orders (judicial decisions).<sup>139</sup> In the APA, Congress defines “rule” as a statement with future effect,<sup>140</sup> while the definition of “order” does not include any future effect reference.<sup>141</sup> Due to this distinction, some argue that Congress intended rules to apply only prospectively, and orders both prospectively and retrospectively.<sup>142</sup>

Justice Scalia’s concurrence in *Bowen v. Georgetown University Hospital*, which is often cited as if it was the majority opinion,<sup>143</sup> stated that this limitation on administrative rulemaking should only apply to primarily retroactive laws because secondarily retroactive laws only affect the future legal consequences of past actions.<sup>144</sup> Hence, the word “rule” only has future effect when it is only secondarily retroactive and thus would still comply with the language of the APA requiring a rule to have only future effect.<sup>145</sup> Some courts have rejected this argument and no Supreme Court majority has ever endorsed it.<sup>146</sup> Indeed, the U.S. Court of Appeals for the D.C. Circuit clearly rejected the APA limitation in *Bergerco Canada v. Treasury Department*<sup>147</sup> by stating “until we devise time machines, a change can have its effects only in the future.”<sup>148</sup> In sum, it is truly hard to predict how a court will approach the problem.

The new rule may still be invalid even if found to be secondarily retroactive. There is still a general limitation on administrative

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<sup>138</sup> See 5 U.S.C. §§ 551–559, 701–706 (2000); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216–25 (1988) (Scalia, J., concurring).

<sup>139</sup> Weien, *supra* note 50, at 750–51; see 5 U.S.C. § 551(4)(6).

<sup>140</sup> 5 U.S.C. § 551(4) (stating “[R]ule’ means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.”); Weien, *supra* note 50, at 751.

<sup>141</sup> 5 U.S.C. § 551(6); Weien, *supra* note 50, at 751.

<sup>142</sup> See *Bowen*, 488 U.S. at 216 (Scalia, J., concurring) (stating that “the APA independently confirms” the *Bowen* decision); Weien, *supra* note 50, at 751.

<sup>143</sup> See Weien, *supra* note 50, at 756; see, e.g., *Mobile Relay Assocs. v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006) (citing Justice Scalia’s *Bowen* concurrence for the proposition that “[r]etroactive rules [alter] ‘the past legal consequences of past actions’”).

<sup>144</sup> *Bowen*, 488 U.S. at 216–25 (1988) (Scalia, J., concurring).

<sup>145</sup> *Id.*

<sup>146</sup> Weien, *supra* note 50, at 749–50.

<sup>147</sup> *Bergerco Can. v. U.S. Treasury Dep’t*, 129 F.3d 189 (D.C. Cir. 1997); Weien, *supra* note 50, at 756.

<sup>148</sup> *Bergerco Can.*, 129 F.3d at 192.

rulemaking that prohibits agencies from making rules that are “arbitrary and capricious.” This is a standard that agencies must satisfy even when they are afforded the greatest deference, commonly referred to as *Chevron* deference.<sup>149</sup> In *Bowen*, Justice Scalia states, “[a] rule that has unreasonable secondary retroactivity — for example, altering future regulation in a manner that *makes worthless substantial past investment incurred in reliance upon the prior rule* — may for that reason be ‘arbitrary’ or ‘capricious,’ and thus invalid.”<sup>150</sup> Thus, if a new regulation “makes worthless substantial past investment incurred in reliance upon the prior rule,” it may be invalid.<sup>151</sup>

It is not entirely clear what Justice Scalia means by “worthless,” but the cases discussed previously<sup>152</sup> suggest that it is merely the investment itself, not what was invested, that must be rendered worthless. For example, in *Chang*, *Cort*, and *St. Cyr*, the investments were not rendered completely “worthless,” yet the Court still found the rules invalid when applied retroactively under the more rigorous due process standard. In *Chang*, at the end of the day, the immigrants still had their valuable investments in the American partnerships.<sup>153</sup> In *Cort*, the prisoners still had the benefit of participating in an educational drug abuse program although they did not receive the benefits of “successful completion” (much like Tom).<sup>154</sup> And in *St. Cyr*, the defendants still arguably derived

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<sup>149</sup> *Chevron* deference is the greatest form of deference and is essentially the equivalent of the APA’s arbitrary and capricious limitation. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1249 n.79 (2007); Puckett, *supra* note 49, at 362 (“When *Chevron* deference applies, the court’s review virtually collapses into arbitrary and capricious review.”); see *Judulang v. Holder*, 132 S. Ct. 476, 483 n.7 (2011) (stating that the “analysis would be the same” under *Chevron* step two and the APA’s standard of arbitrary and capricious review). *Chevron* deference consists of a two part test. See *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). Under *Chevron*, a reviewing court must first consider “whether Congress has directly spoken to the precise question at issue” through statute. *Id.* at 842-43 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). If Congress has left a gap for the agency to fill, and the administration’s rule is in line with Congress, then the court will defer to the agency interpretation. *Id.* at 843-44. If the statute does not directly address the precise question, then the court defers to the agency’s interpretation unless it is “arbitrary, capricious, or manifestly contrary to the statute.” *Id.*

<sup>150</sup> *Bowen*, 488 U.S. at 220 (emphasis added) (internal citations omitted).

<sup>151</sup> See *id.*

<sup>152</sup> See *supra* Part III.A (discussing the due process limitations on retroactivity).

<sup>153</sup> *Chang v. United States*, 327 F.3d 911, 928 (9th Cir. 2003) (“The government argues that Appellants have suffered no burden, since they can ask for their money back from the limited partnerships in which they invested.”).

<sup>154</sup> See *Cort v. Crabtree*, 113 F.3d 1081, 1083-85 (9th Cir. 1997) (“Appellants . . .

some value by entering into a plea agreement, perhaps a lower sentence.<sup>155</sup> Thus, the question should not be whether the entire investment was rendered worthless, but whether *that* investment is now “worthless” in light of the reasonable alternatives. Following Justice Scalia’s statement, the next question is whether the loss was substantial. Referencing back to our earlier hypothetical, Tom has suffered a substantial loss in both the cost of moving to California and forgoing the opportunity of attending Boulder on a merit-based scholarship or just simply not attending at all. Certainly, being forced to pay over \$80,000 more for a college degree is a substantial loss and would more than likely have altered Tom’s decision if all the relevant facts would have been known at the time of his decision.

Furthermore, the Supreme Court has provided specific guidance on what violates the arbitrary and capricious standard afforded under *Chevron* deference.<sup>156</sup> Relevant to an analysis of the DOE’s new rule, “an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem . . . .”<sup>157</sup> Here, there is no evidence that the DOE considered the problem of students like Tom. The DOE press release announcing the new rule did not mention the potential harmful effects that the new legislation would have on existing students.<sup>158</sup> Thus, it is possible that the DOE did not consider the harmful effects of its new rule, and further possible that courts could categorize the rule as arbitrary and capricious.

Although the rule may qualify as arbitrary and capricious, an even lower deferential standard may apply if a court finds that the agency action is only afforded *Skidmore* deference. Depending on the reviewing court, *Skidmore* deference results in a slight deference given to the agency’s decision or possibly no deference at all.<sup>159</sup> In 1992, the U.S.

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completed the 500-hour [drug abuse] program, and sought habeas corpus relief in district court under 28 U.S.C. § 2241.”).

<sup>155</sup> See *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (“In exchange for some perceived benefit, defendants waive several of their constitutional rights . . .”).

<sup>156</sup> See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Bowman Transp., Inc. v. Ark-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974).

<sup>157</sup> *Motor Vehicle Mfrs.*, 463 U.S. at 43.

<sup>158</sup> See Press Release, U.S. Dep’t of Educ., *supra* note 8.

<sup>159</sup> There are two competing views of *Skidmore* deference. Hickman & Krueger, *supra* note 149, at 1251. Some courts and scholars endorse the “independent judgment” model, while others view *Skidmore* as a “sliding scale.” *Id.* at 1251-58. Under the sliding scale model, a court is not free to ignore the administrative interpretation or to reject it merely because it differs from the court’s preferred interpretation. *Id.* at 1255-56. Under the independent judgment model, courts defer to an agency interpretation “only to the extent that those interpretations have the ‘power to persuade.’” *Christensen v. Harris*

Court of Appeals for the D.C. Circuit applied *Chevron* deference to a similar situation involving the Secretary of Education's decision to clarify a statutory ambiguity.<sup>160</sup> In this situation, however, the Secretary did not completely change the prior rule — as is the case here.<sup>161</sup> Moreover, subsequent cases circumscribed the application of *Chevron* deference.<sup>162</sup> As a result, courts now use *Skidmore* deference as the standard for most administrative interpretations.<sup>163</sup>

Under *Christensen v. Harris County*,<sup>164</sup> *Skidmore* now governs interpretations such as those in opinion letters, policy statements (such as the press release), agency manuals (such as the guidelines on how to fill out the FAFSA), and enforcement guidelines.<sup>165</sup> Nevertheless, if the agency creates the rule through the notice and comment rulemaking process,<sup>166</sup> or if Congress has explicitly granted such power to the agency, the decision typically receives *Chevron* deference.<sup>167</sup>

Generally, predicting whether an agency will receive *Chevron* or *Skidmore* deference or how these tests are applied is somewhat unpredictable.<sup>168</sup> But here, because the DOE did not create the new rule through the note and comment process (due to the fact that it had to be a quick decision following *Windsor*) and Congress has not explicitly

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Cnty., 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); see *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385-86 (2003); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 (2002); *Hickman & Krueger*, *supra* note 149, at 1252.

<sup>160</sup> *Ass'n of Accredited Cosmetology Schs. v. Alexander*, 979 F.2d 859, 863 (D.C. Cir. 1992).

<sup>161</sup> This is related to the “new” rule exception to the interpretation exception mentioned above. See *supra* notes 135–139 and accompanying text (discussing the interpretation exception to *Bowen*).

<sup>162</sup> *Hickman & Krueger*, *supra* note 149, at 1245-46 (“With *Christensen* in 2000 and *Mead* in 2001, the Court significantly constricted *Chevron*'s scope. In so doing, these cases reaffirmed *Skidmore* as the deference standard for most administrative interpretations.”).

<sup>163</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001); *Christensen*, 529 U.S. at 587; *Hickman & Krueger*, *supra* note 149, at 1245-46.

<sup>164</sup> *Christensen*, 529 U.S. at 576.

<sup>165</sup> *Id.* at 587; *Hickman & Krueger*, *supra* note 149, at 1245.

<sup>166</sup> For background information on the notice and comment rulemaking process, see *The Administrative Procedure Act (APA)*, EPIC.ORG, [http://epic.org/open\\_gov/Administrative-Procedure-Act.html](http://epic.org/open_gov/Administrative-Procedure-Act.html) (last visited Jan. 19, 2013).

<sup>167</sup> See *Mead*, 533 U.S. at 230; Richard W. Murphy, *Hunters for Administrative Common Law*, 58 ADMIN. L. REV. 917, 933 (2006).

<sup>168</sup> See generally Jud Mathews, *Deference Lotteries*, 91 TEX. L. REV. 1349 (2013) (finding that although many observers conclude that the courts' deference practice is an unpredictable muddle, it is really a lottery, in the sense the term is used in expected utility theory).

granted the DOE the ability to define “spouse” or to create retroactive rules, *Christenson* suggests that the new rule is likely to receive *Skidmore* deference.<sup>169</sup> Therefore, if a court disagrees with the DOE’s position and finds some other course of action more reasonable, such as grandfathering students in under the old rule, the court will have discretion to overrule the DOE’s policy.<sup>170</sup> In sum, courts will have broad discretion to overrule the DOE’s new policy.

#### IV. THE NEW POLICY FAILS TO PROVIDE A REMEDY FOR PAST DISCRIMINATION

Since its inception, DOMA prohibited same-sex students from reporting their spouses on their FAFSA applications.<sup>171</sup> If a student had significant assets or high income, reporting a spouse (and any of the spouse’s children as dependents) could have resulted in substantial financial aid benefits.<sup>172</sup> Following *Windsor*, the IRS provided same-sex couples the option to amend their income tax returns for the last three years, allowing them to report their newly recognized same-sex spouse.<sup>173</sup> This decision by the IRS was not out of the kindness of their hearts, but because they were legally bound to do so as a result of the modern judicial retroactivity and tax remedy doctrine.<sup>174</sup> The DOE may have a similar obligation because they have similarly denied couples a benefit unconstitutionally.

The standard governing judicial retroactivity has undergone substantial change over the years. In 1971, the Court announced its decision in *Chevron Oil* and stated a three-part test to evaluate judicial retroactivity.<sup>175</sup> First, a court must determine whether the decision

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<sup>169</sup> See *supra* notes 156–167 and accompanying text (discussing the application of *Skidmore* and *Chevron* deference).

<sup>170</sup> See *supra* note 159 and accompanying text (discussing *Skidmore* deference).

<sup>171</sup> See 2013–14 *Free Application for Federal Student Aid*, *supra* note 32, at 2 (“According to the Defense of Marriage Act (1996), ‘. . . the word ‘marriage’ means a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers to a person of the opposite sex who is a husband or a wife.’ Therefore, same-sex unions are not considered marriages for federal purposes, including the FAFSA.”).

<sup>172</sup> See generally *The EFC Formula*, *supra* note 33 (discussing, inter alia, the impact of dependents on the expected family contribution).

<sup>173</sup> See Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

<sup>174</sup> See *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, Dep’t of Bus. Regulation of Fla., 496 U.S. 18, 31 (1990) (holding that in the context of unconstitutional taxes, the agency must provide meaningful backward-looking relief).

<sup>175</sup> *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).



establishes a new principle of law.<sup>176</sup> Second, a court must look at the prior history of the rule in question and decide whether retroactive application of the rule advances the underlying policy behind the rule.<sup>177</sup> Finally, a court must evaluate the inequity imposed by retroactive application by asking whether it will produce “injustice or hardship.”<sup>178</sup>

In 1993, *Harper v. Virginia Department of Taxation* disapproved of the *Chevron Oil* analysis in favor of a per se rule calling for the retroactive application of judicial decisions.<sup>179</sup> Justice Thomas’s majority opinion made clear that the three-part test was no longer valid.<sup>180</sup> According to *Harper*, no matter how great the reliance or injustice resulting from retroactive application of law, a court cannot grant a remedy after the initial case is decided.<sup>181</sup> As a result of *Harper*, there is an irrefutable presumption that all judicial decisions apply retroactively unless the deciding court specifically addresses the issue.<sup>182</sup> Thus, *Windsor* applies to all same-sex marriages that fall under its holding — valid marriage where celebrated and domicile of the couple in a state that recognizes the marriage — because the Court did not limit its retroactive application.<sup>183</sup> Therefore, prior to *Windsor*, the DOE had no basis for preventing same-sex couples from reporting their spouses, so long as they were validly married and resided in a state that recognized the marriage. The proper remedy for this unconstitutional deprivation is beyond the scope of this Note, but they should be due some remedy, at least regarding those actions that fall within the applicable statute of limitations.

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<sup>176</sup> *Id.* A new principle of law is one that overrules clear past precedent, or decides an issue of first impression whose resolution was not clearly foreshadowed. *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 89-90 (1993).

<sup>180</sup> *Id.* at 99-100.

<sup>181</sup> *Id.* at 97 (“Mindful of the ‘basic norms of constitutional adjudication’ that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the application of federal law in noncriminal cases. In both civil and criminal cases, we can scarcely permit ‘the substantive law [to] shift and spring’ according to ‘the particular equities of [individual parties]’ claims’ of actual reliance on an old rule and of harm from a retroactive application of the new rule.”) (citation omitted) (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543 (1991)).

<sup>182</sup> *Id.* at 96 (“After the case announcing any rule of federal law has ‘appl[ie]d that rule with respect to the litigants’ before the court, no court may ‘refuse to apply [that] rule . . . retroactively.’”) (quoting *Beam*, 501 U.S. at 540).

<sup>183</sup> See William Baude, *Interstate Recognition of Same-Sex Marriage After Windsor*, 8 N.Y.U. J.L. & Liberty 150, 153-55 (2013).

## V. A PROPOSED SOLUTION FOR THE CURRENT PROBLEM

Despite the questionable legality of the rule,<sup>184</sup> the policy favoring avoidance of litigation<sup>185</sup> suggests that the government should provide a remedy to students like Tom. To do so, Congress or the DOE could afford same-sex married students that enrolled in a degree program prior to *Windsor* the option to file their FAFSA jointly or separately until they finish that program.<sup>186</sup> Allowing previously-enrolled students to continue to receive anticipated financial aid packages would prevent a disruption of those students' settled expectations. This would level the playing field with heterosexual couples who have had the opportunity to plan when to marry in order to receive the highest amount of aid possible.

There is no nationwide requirement to rely on FAFSA in calculating grant amounts, but most institutions voluntarily rely on the calculations because they are an established part of the academic system.<sup>187</sup> However, this solution would not solve the problem for purposes of aid granted directly by the federal government.<sup>188</sup> If institutions independently disregard FAFSA's calculation of expected family

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<sup>184</sup> See *supra* Part III.

<sup>185</sup> See *Cardtoons, LC v. Major League Baseball Players Ass'n*, 335 F.3d 1161, 1167 (10th Cir. 2003) (referring to the "longstanding policy favoring efforts to avoid litigation").

<sup>186</sup> This is similar to the IRS's position on past marriage status; it allowed couples the option to refile their taxes for any of the last three years. See Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

<sup>187</sup> See *Need-Based Grant Policy*, UC BERKELEY LAW (Sept. 23, 2014, 3:35 PM), <http://www.law.berkeley.edu/12689.htm#eligibility> ("Berkeley Law provides need-based Boalt Hall Grants to ensure that the school remains financially accessible to all students. The policy was established by the Financial Aid Committee comprised of faculty, staff, and students to provide a greater amount of assistance to students whose families do not have the ability to assist them financially. We acknowledge that many parents choose not to help pay for their children's education, however limited funding requires us to target need-based grant awards to families with the most limited financial resources."); see *Free Application for Federal Student Aid*, *supra* note 31 ("To apply for a Cal Grant, you must complete and submit two forms: the Free Application for Federal Student Aid (FAFSA) and the Cal Grant GPA Verification Form . . .").

<sup>188</sup> *Basic Eligibility Criteria*, FED. STUDENT AID, U.S. DEP'T OF EDUC., <https://www.studentaid.ed.gov/eligibility/basic-criteria> (last visited July 29, 2014) ("Our general eligibility requirements are that you must demonstrate financial need (for most programs) . . ."); *Federal Pell Grants*, FED. STUDENT AID, U.S. DEP'T OF EDUC., <http://studentaid.ed.gov/types/grants-scholarships/pell> (last visited Sept. 23, 2014) ("The amount you get . . . will depend on your financial need, your cost of attendance, your status as a full-time or part-time student, and your plans to attend school for a full academic year or less.").

contribution for students such as Tom, a portion of the most financially detrimental outcomes could be avoided.<sup>189</sup>

Institutions, rather than the federal government, award many of the largest grants. In 2013–2014, the maximum Federal Pell Grant award is \$5,645<sup>190</sup> and the maximum Federal Supplemental Educational Opportunity Grant is \$4,000.<sup>191</sup> These awards pale in comparison to the \$30,000 that Tom received yearly from the State of California to attend UC Davis and those awarded to many medical and business students. Thus, even if the federal government does not disregard the FAFSA calculation for newly recognized marriages which have lowered a student's aid, the most drastic effects can be avoided at the discretion of the academic institutions.

#### CONCLUSION

To drastically change financial aid for an individual who relied on a previous calculation strips the individual of the ability to plan for their future.<sup>192</sup> While heterosexual couples have and will continue to marry or not to marry in order to minimize their tuition liabilities,<sup>193</sup> many same-sex couples married prior to *Windsor* were deprived of this opportunity. Furthermore, some students may not have attended school in the first place or may have gone to a different school had they foreseen the tuition consequences of *Windsor*. These students may be entitled to a legal remedy, but they should not be forced to traverse the arduous legal process. Considering the history of discrimination against same-sex couples, society should be willing to provide a process for bestowing equality that does not upset their settled expectations in the process. It is for these reasons that the states, schools, Congress, or the DOE should try to provide a remedy to currently enrolled same-sex married students whose cost of attendance will unforeseeably rise because of the *Windsor* decision.

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<sup>189</sup> Compare *Federal Pell Grants*, *supra* note 188 (limiting awards to those with a qualifying EFC), and *Federal Supplemental Educational Opportunity Grant*, FED. STUDENT AID, U.S. DEPT OF EDUC., <http://studentaid.ed.gov/types/grants-scholarships/fseog> (last visited July 29, 2014) (same), with *supra* Part I (explaining the potential impact of losing state or institution specific grants on some students).

<sup>190</sup> *Federal Pell Grants*, *supra* note 188.

<sup>191</sup> *Federal Supplemental Educational Opportunity Grant*, *supra* note 189.

<sup>192</sup> See Cass, *supra* note 44, at 953; Schwartz, *supra* note 44, at 974-75.

<sup>193</sup> See *supra* note 37 and accompanying text (discussing how marriage choices may be influenced by financial aid considerations).