

Notes

WINDSOR AND ITS DISCONTENTS: STATE INCOME TAX IMPLICATIONS FOR SAME-SEX COUPLES

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ABSTRACT

In United States v. Windsor, the Supreme Court struck down section three of the federal Defense of Marriage Act. Shortly thereafter, the Internal Revenue Service issued a ruling under which all married same-sex couples will be treated as married for federal tax purposes. The IRS Ruling raised a host of state taxation issues for lawfully married same-sex taxpayers residing in nonrecognition states, given that nearly all states conform to the federal tax system to some degree so as to minimize taxpayers' calculations, record-keeping, and compliance burdens.

This Note explores the impact of the post-Windsor IRS Ruling on the taxation of same-sex couples in states that do not recognize same-sex marriage yet require taxpayers to reference their federal tax returns when completing their state tax returns. It details the tax filing approaches adopted by affected states and the disparate state and federal tax treatments faced by the majority of married same-sex couples domiciled in a nonrecognition state. Finally, this Note concludes with a discussion of the constitutional- and administrative-law challenges that married same-sex taxpayers can raise against state tax policies that result in discriminatory treatment of same-sex marriage at the state level.

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INTRODUCTION

On June 26, 2013, the Supreme Court decision in *United States v. Windsor*¹ overturned section three of the federal Defense of Marriage Act (DOMA).² Much of the commentary surrounding *Windsor* focused on the theme of marriage equality and federal recognition of same-sex marriages.³ But *Windsor*, arguably one of the most important civil rights cases of this generation, is at its heart a case about the discriminatory tax treatment of married same-sex couples.⁴ The Court held unconstitutional the unequal treatment of married same-sex couples on the federal level. However, *Windsor* did not provide a roadmap of what should happen under the numerous federal statutes in which marital status plays a key role, including tax statutes,⁵ thus creating great uncertainty regarding the federal tax treatment of married same-sex couples.

On August 29, 2013, the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) announced a Revenue Ruling (IRS Ruling) implementing the federal tax aspects of the Supreme Court decision in *Windsor*.⁶ Under the IRS Ruling, each legally married same-sex couple is treated as married for federal tax purposes, even if the couple is domiciled in a state that does not recognize the marriage.⁷

Since its issuance, the IRS Ruling has created difficulties for those states that do not recognize the marriages of their same-sex residents (nonrecognition states). Nearly all states reference the federal tax code at some point, and in most states, the taxpayer's

1. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

2. Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2012)).

3. See, e.g., Adam Liptak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES, June 26, 2013, at A1 (referring to *United States v. Windsor* as a “major victor[y] for the gay rights movement”).

4. Edith Windsor sought a refund of \$363,053 paid in federal estate taxes on a transfer of property from her deceased same-sex spouse to herself, the surviving spouse. If they had been a married opposite-sex couple, no estate taxes would have been owed. *Windsor*, 133 S. Ct. at 2683 (2013).

5. See *infra* note 29 and accompanying text.

6. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. A Revenue Ruling is an official pronouncement applying the Internal Revenue Code to a particular set of facts. Revenue Rulings may be cited as precedent but are not final and conclusive. WILLIAM A. RAABE, GERALD E. WHITTENBURG & DEBRA L. SANDERS, FEDERAL TAX RESEARCH 513 (9th ed. 2011).

7. *Id.*

federal “taxable income”⁸ or “adjusted gross income” (AGI)⁹ serves as the starting point for calculating state income taxes.¹⁰ For example, a basic tax distinction for income tax purposes is the taxpayer’s marital status. However, this distinction can be a complicated question for same-sex couples. Legally married same-sex couples face problems of recognition and classification; for instance, they may be married (in the federal government’s eyes or in New York’s, for example), or unmarried (in North Carolina’s eyes, for example).¹¹

Tax policy is an area in which federal and state operations tend to be closely intertwined. Professor Ruth Mason, who explores federal-state income tax conformity in a recent article, points out that federal tax policies reflect national, not state, political preferences.¹² Mason argues that conforming state income tax laws to the federal model leads to an indirect adoption of federal policy choices.¹³ At the same time, the significant costs associated with decoupling from the federal income tax regime can deter states from deviating from the federal base.¹⁴ The IRS Ruling thus radically alters the federal income tax regime for married same-sex couples and raises new questions with respect to federal-state tax-base conformity.

This Note explores the impact of the post-*Windsor* IRS Ruling on the taxation of married same-sex couples in states that do not recognize same-sex marriage, but have a state tax base that conforms to the federal tax base. The IRS Ruling has prompted these states to adjust their tax rules, regulations, and policies. Some of these states have been able to provide new rules for same-sex taxpayers administratively, while others likely will need to amend state legislation mandating federal-state tax-base conformity. This Note surveys the guidance given to married same-sex couples by

8. Taxable income, generally speaking, is an individual’s gross income, less any allowable tax deductions (such as medical expenses and property taxes). I.R.C. § 63 (2012).

9. Adjusted gross income is defined as gross income minus adjustments to income (such as student-loan interest payments and IRA contributions). See I.R.C. § 62 (2012).

10. Thirty-six states start with the federal AGI, federal gross income, or federal taxable income and then apply either one flat rate or their own graduated rates, and in some cases, their own income tax brackets. For a discussion of the potential issues related to conformity and a list of states affected, see *infra* Part II.B.

11. For a list of states that recognize same-sex marriage, see *infra* Table 1 and accompanying text.

12. Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267, 1297 (2013).

13. *Id.*

14. *Id.* at 1272.

nonrecognition states in the wake of the IRS Ruling, providing a snapshot of state income tax policy in a rapidly changing field.¹⁵ In exploring the tax filing approaches states have adopted for same-sex couples, it contends that these tax policies could be challenged on both constitutional- and administrative-law grounds.

Part I sketches the tax landscape for married same-sex couples before *Windsor* and the IRS Ruling, on both federal and state levels. Part II describes the IRS Ruling and the implications for state income tax systems, particularly the disruptive impact on federal-state tax-base conformity. Part II also outlines the potential costs and benefits associated with conformity to the federal tax base, acknowledging that states are unlikely to elect to decouple from the federal tax base in response to the IRS Ruling. Part III introduces the paradigmatic approaches adopted by states affected by the IRS Ruling and explores the application and economic effects in hypothetical test cases. Finally, Part IV sets forth the constitutional and procedural concerns associated with these newly adopted state approaches, such as challenges based on state administrative-rulemaking procedures and on Fourteenth Amendment equal protection principles. While discussions about tax law and policy often focus primarily on federal law, this Note argues that state tax law offers unique opportunities to study the constitutional and administrative issues associated with the conflicting treatment of same-sex marriage among different states, and between states and the federal government. Indeed, discriminatory tax treatment of same-sex marriage on the state level is a viable avenue that same-sex marriage advocates might explore when framing challenges to state bans on same-sex marriage.

I. BACKGROUND

Of the numerous statutory provisions that rely on a determination of marital status,¹⁶ tax provisions are often overlooked

15. In August 2013, the Tax Foundation produced a map of states that were impacted by the IRS Ruling. Nick Kasprak, *State of Celebration*, TAX FOUNDATION BLOG (Aug. 29, 2013), <http://taxfoundation.org/blog/state-celebration>. At the time, there were twenty-four states with a ban on same-sex marriage and an income tax coupled to the federal income tax system. As of September 5, 2014, twenty-one states banned same-sex marriage while conforming to the federal tax system. *See infra* note 93 and accompanying text. This is therefore a constantly developing topic.

16. According to the U.S. General Accounting Office, there are 1,138 federal statutory provisions that rely on a determination of marital status. U.S. GEN. ACCOUNTING OFFICE, GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (Jan. 23, 2004),

outside of tax academia. Any discussion of tax law must begin with an acknowledgment that tax preferences reflect societal preferences and are “part of a larger ‘blueprint for the aims and ambitions of the nation state.’”¹⁷ In this way, tax law and policy can reflect and reinforce disparities and inequalities based on race or ethnicity, socioeconomic status, gender, and sexual orientation.¹⁸ The Internal Revenue Code (the Code) might appear to be neutral, but this obscures the normative choices and value judgments underlying tax policy. The tax system is not limited to raising revenue, but serves regulatory and social-welfare functions as well.¹⁹ Tax commentators have argued that embedded within tax provisions are historical preferences in favor of procreation and the so-called traditional family.²⁰ For example, only married couples with disproportionate incomes (that is, traditional couples with one principal wage earner) tend to be eligible for the marriage bonus.²¹ Because of this, some commentators have argued that Congress structured the tax system to incentivize women to undertake conventional household roles and to discourage them from entering the wage-labor market.²² Indeed, politicians have embraced such marriage-promotion aspects of tax

available at <http://www.gpo.gov/fdsys/pkg/GAOREPORTS-GAO-04-353R/pdf/GAOREPORTS-GAO-04-353R.pdf>.

17. Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 NW. J.L. & SOC. POL’Y (forthcoming 2014), available at <http://ssrn.com/abstract=2304378>; see also Anthony C. Infanti, *Tax Reform Discourse*, 32 VA. TAX. REV. 205, 254–55 (2012) (stating that tax preferences are a reflection of society and describing how American tax law reflects cultural preferences such as privileging homeownership).

18. See Anthony C. Infanti & Bridget J. Crawford, *Introduction to CRITICAL TAX THEORY: AN INTRODUCTION*, at xxi, xxii (Anthony C. Infanti & Bridget J. Crawford, eds., 2009) (noting that tax laws “reflect and even reify discrimination based on race, gender, sexual orientation, class, disability or family structure”).

19. See, e.g., Reuven A. Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3–4 (2006) (noting that in addition to revenue-raising, taxation also serves redistributive and regulatory ends); Kristin E. Hickman, *Administering the Tax System We Have*, 63 DUKE L.J. 1717, 1721–22 (2014) (explaining that raising revenue is no longer the sole focus of the U.S. tax system).

20. E.g., Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, in *CRITICAL TAX THEORY: AN INTRODUCTION* 3, 3 (Anthony C. Infanti & Bridget J. Crawford, eds., 2009) (“Close scrutiny of the Code reveals a strong pattern of work disincentive for married women and inequitable treatment of the two-earner family.”); EDWARD J. MCCAFFERY, *TAXING WOMEN* 1 (1997) (“The tax system’s strong bias in favor of single-earner families now sits uneasily under modern conditions.”).

21. Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 340–41 (1994).

22. See generally Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

policy.²³ In addition, the importance of traditional notions of marriage and family in tax laws is evident in the federal DOMA and state analogs' privileging of married opposite-sex couples as compared to married same-sex couples.

This Part describes the federal and state tax landscape for married same-sex couples pre-*Windsor*. Section A gives a general overview of federal tax treatment of same-sex marriage under DOMA. Section B discusses the impact of DOMA on state taxation of married same-sex couples in states that recognized same-sex marriage before section three of DOMA was overturned in June 2013.

A. *Pre-Windsor Federal Tax Treatment of Same-Sex Marriage*

DOMA was an unusual federal intrusion into an issue previously reserved for the states.²⁴ In fact, before DOMA's enactment in 1996, the federal government had "by history and tradition" relied on the states' determinations of what constituted marriage.²⁵ During the Congressional hearings on DOMA, Professor Cass Sunstein testified that Congress had never before singled out any marriages for special federal legislative treatment—not even polygamous marriages, marriages between minors, incestuous marriages, or bigamous marriages.²⁶ Section three of DOMA provided the operative language:

23. For example, President George W. Bush defended his plan to increase marriage bonuses by saying, "I like to remind people that the tax code ought to encourage marriage, not discourage marriage." President George W. Bush, Remarks Following a Discussion on the National Economy, 1 PUB. PAPERS 241, 243 (Feb. 19, 2004). *But see* Patricia Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 503 (2009) (arguing that the tax code was never intended as an instrument to benefit married couples).

24. Under the Tenth Amendment to the Constitution, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend X.

25. *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013); *see also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) ("Long ago we observed that '[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.'" (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890))); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 236 (D. Mass. 2010) (challenging DOMA's constitutionality on the basis that the definition and regulation of marriage is a states' rights issue).

26. *The Defense of Marriage Act: Hearing Before the Comm. on the Judiciary, United States Senate, on S. 1740 a Bill to Define and Protect the Institution of Marriage*, 104th Cong. 44 (1996) (statement of Prof. Cass Sunstein). *But cf.* W. Burlette Carter, *The "Federal Law of Marriage": Deference, Deviation and DOMA*, 21 AM. U.J. GENDER SOC. POL'Y & L. 705, 736–48 (2013)

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.²⁷

Thus, DOMA precluded the federal government from recognizing a same-sex marriage, regardless of the validity of the marriage under state law.

DOMA impacted numerous federal provisions, including the Code.²⁸ The federal income tax system uses the married couple as a unit of taxation,²⁹ and it is DOMA’s definition of marriage that currently applies to the Code. Therefore, for federal tax purposes, from 1996 until 2013, marriage was defined as a legal union between one man and one woman.³⁰ Married same-sex couples were treated as legal strangers;³¹ their relationship as a “tax nothing.”³² As a result, they were neither able to enjoy the tax benefits of marriage nor were they subject to the tax penalties of marriage.³³

(discussing Congress’s restriction on polygamy as an example of federal deviation from state determinations of valid marriage).

27. 1 U.S.C. § 7 (2012).

28. *Windsor*, 133 S. Ct. at 2694 (2013) (“Among the over 1,000 statutes and numerous federal regulations that DOMA controls are laws pertaining to Social Security, housing, taxes, criminal sanctions, copyright and veterans’ benefits.”). It appears that the impact on tax law was barely considered during the congressional hearings leading up to the enactment of DOMA. Cain, *supra* note 23, at 492 (noting that no tax experts were consulted in either the House or Senate Hearings, and that tax law was rarely mentioned).

29. Under the Code, marital status determines filing status. *See* I.R.C. § 1 (2012). Married couples are not permitted to file as single individuals but can file jointly or separately. Federal income tax was largely marriage-neutral before 1948 because the tax was levied individually. The joint tax return, allowing married couples to file jointly, was established in 1948. *See* Revenue Act of 1948, §§ 301–03, Pub. L. No. 8-471, 62 Stat. 110, 114–16 (repealed 1969). For a critique of the joint return, see generally Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993).

30. *See supra* note 27 and accompanying text.

31. As Edith Windsor said, “In the midst of my grief [after the death of my spouse], I realized that the federal government was treating us as strangers.” Amy Davidson, *The Skim Milk in Edith Windsor’s Marriage*, THE NEW YORKER (Mar. 28, 2013), <http://www.newyorker.com/online/blogs/comment/2013/03/edith-windsors-victory-doma.html>.

32. Anthony C. Infanti, *LGBT Families, Tax Nothings*, 17 J. GENDER RACE & JUST. 35, 47 (2014).

33. There is considerable literature detailing the numerous federal tax benefits and burdens associated with marriage. *See, e.g.*, Carter, *supra* note 26, at 773–74 (discussing the marital deduction for estate and gift taxes); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 988–1013 (1993)

The marriage penalty and marriage bonus are oft-cited tax burdens and benefits that are limited to spouses. Two high-earning spouses filing a joint return will almost always face a greater income tax burden as compared to two unmarried high earners filing individual returns.³⁴ Therefore, same-sex spouses under DOMA often paid lower taxes than financially comparable opposite-sex spouses.³⁵ Other tax burdens avoided by same-sex spouses under DOMA included the prohibition on recognition of losses on sales and exchanges between related parties³⁶ and taxation of debt discharged to a “related person.”³⁷ It is doubtful, however, that the avoidance of these nonrate-structure burdens could be considered a meaningful benefit for married same-sex couples forced to file federal returns as single taxpayers under DOMA.³⁸

In contrast, under DOMA, certain tax benefits associated with marriage were limited to married opposite-sex couples. For example, the marriage bonus, received by about half of all married couples

(outlining five ways in which an individual’s tax treatment is impacted by marriage); Shari Motro, *A New “I Do”: Toward a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1517–29 (2006) (discussing marriage-based income splitting and resultant lower taxes for married couples with unequal incomes—that is, the “marriage bonus”); Zelenak, *supra* note 21, at 340–41 (1994) (discussing the “marriage penalty” faced by married couples with equal incomes, particularly those at high income levels).

34. See, e.g., Theodore Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1567–68 (2008) (illustrating the higher tax burden faced by a married opposite-sex couple filing a joint return compared to that faced by a married same-sex couple filing a single tax return under DOMA).

35. *Id.*

36. Section 267 of the Code prevents certain related parties, such as spouses and siblings, from recognizing losses on sales to each other. I.R.C. § 267 (2012). *But see* Patricia Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F.L. REV. 465, 484–87 (2000) (arguing that while same-sex spouses would presumably not be subject to this burden, certain long-term couples run the risk of being classified as related parties by the IRS).

37. Section 108(e)(4) of the Code prohibits married couples from structuring their debt discharges to avoid income recognition, by providing that purchase of debt by a “related person” (including a spouse or other family member) is to be treated as a purchase by the debtor herself. I.R.C. § 108(e)(4) (2012). Because a same-sex spouse was not recognized as a “related person” under DOMA, a same-sex couple could structure their debt discharges to avoid income recognition and the accompanying tax liability. For an extended discussion of this tax-avoidance technique, see Seto, *supra* note 34, at 1550–51.

38. See Cain, *supra* note 36, at 484–91 (suggesting that any tax-avoidance benefits to same-sex couples are overstated). It is important to note that while many married same-sex couples were actually treated better than married opposite-sex couples, same-sex couples—unlike opposite-sex couples—were unable to choose the most beneficial tax reporting stance. *Id.* at 469.

filing tax returns, was inaccessible to married same-sex couples.³⁹ This marriage bonus is clearly an economic benefit, but is usually limited to couples in which one spouse earns most or all of the income.⁴⁰ Beyond the marriage bonus, there are other marital benefits within the Code that were unavailable to married same-sex couples under DOMA, including the exclusion from gross income of employer-offered fringe benefits.⁴¹ A key fringe benefit unavailable to same-sex couples was employer-provided medical coverage, which is provided tax-free not only to the employee⁴² but also to his or her spouse and dependents.⁴³ Furthermore, married same-sex couples were unable to take advantage of the tax-free transfer of property between spouses,⁴⁴ whether in the form of a gift⁴⁵ or as part of an estate after death.⁴⁶

Under DOMA, same-sex couples were also unable to receive several *nontax* benefits, including Social Security benefits. The financial implications of legalizing same-sex marriage are significant. In 2004, the Congressional Budget Office (CBO) estimated that by 2014, the federal government would have to pay \$350 million per year to provide Social Security benefits to married same-sex couples if it recognized same-sex marriage.⁴⁷

39. In 1997, the Congressional Budget Office estimated that 51 percent of families received a marriage bonus. CONGRESSIONAL BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX xiv (1997). These figures have likely changed since the report was released, but this remains the most comprehensive study of the topic.

40. Cain, *supra* note 36, at 469–70 (illustrating the marriage bonus received by a married opposite-sex couple and denied to a married same-sex couple unable to file a joint tax return under DOMA).

41. See I.R.C. § 132 (2012) (listing employer-offered fringe benefits which can be provided tax-free to an employee). I.R.C. § 132(h) provides that certain benefits will be tax-free even if provided to the employee's spouse or dependent children.

42. I.R.C. § 106 (2012).

43. See Treas. Reg. § 1.106-1 (1960) (providing that the tax exclusion under Code § 106 extends to an employee's spouse and dependents).

44. Cain, *supra* note 36, at 475–76 (calculating the economic burden of property transfer on a hypothetical same-sex couple ineligible for the marital deduction); see also Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 784–88 (2004) (describing the recordkeeping and reporting requirements faced by same-sex couples trying to track their net interspousal transfers for income and gift tax returns).

45. See I.R.C. § 2523 (2012) (providing for the gift tax marital deduction).

46. See I.R.C. § 2056 (2012) (providing that property passing from a decedent to the surviving spouse qualifies for a marital deduction).

47. Letter from the Congressional Budget Office to Steve Chabot, Chairman, Subcomm. on the Constitution, Comm. on the Judiciary, U.S. House of Representatives (June 21, 2004). This was the last time the CBO provided information on the budgetary effects of recognizing same-sex marriage. Aside from the economic effects resulting from the denial of tax benefits, tax scholars have also argued that differential tax treatment always carries stigmatic harm. See

DOMA thus created “debilitating uncertainty” for married same-sex couples, and the IRS provided little guidance to fill this gap.⁴⁸ The fact that federal tax treatment under DOMA drove several legal challenges to DOMA shows that tax discrimination was a key concern of same-sex taxpayers and advocates for marriage equality.⁴⁹

B. State Income Tax Treatment Under DOMA

All states that tax personal income permit married couples to file joint tax returns and mimic the four federal filing statuses (single, head-of-household, married-filing-jointly, and married-filing-separately), relying on the federal definition of each filing status.⁵⁰ In states that recognized same-sex marriage before the Supreme Court overturned section three of DOMA, married same-sex couples were subject to the same state income tax rules as married couples and were permitted to file joint state tax returns. However, at the federal level, these individuals were required to file as single taxpayers. This nonrecognition of state marriages at the federal level produced a “peculiar and problematic” situation with respect to state income tax and created excessive burdens on both married same-sex couples and state tax agencies.⁵¹

As mentioned earlier, most state income tax laws invariably piggyback on the federal income tax code.⁵² Thus, for states that recognized the validity of a same-sex marriage (recognition states) and also conformed to the federal tax base, DOMA completely disrupted federal-state filing status conformity. Same-sex spouses in recognition states were required to file as single or as head of

Cain, *supra* note 36, at 491–93 (discussing the stigmatic harm that results from the IRS’s nonrecognition of same-sex marriage for tax purposes); Infanti, *supra* note 32, at 31–32 (arguing that disparate tax treatment under DOMA visibly and publicly stigmatizes same-sex couples).

48. Anthony C. Infanti, *LGBT Taxpayers: A Collision of “Others,”* 13 GEO. J. GENDER & L. 1, 18–20 (2012).

49. For examples of legal challenges to DOMA, see generally Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2012), *aff’d sub nom.* Massachusetts v. U.S. Dep’t of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012); Dragovich v. U.S. Dep’t of Treasury, 872 F. Supp. 2d 944 (N.D. Cal. 2012); Golinski v. Office of Pers. Mgmt., 824 F. Supp. 2d 968 (N.D. Cal. 2012), *aff’d*, 724 F.3d 1048 (9th Cir. 2012); Pederson v. Office of Pers. Mgmt., 881 F. Supp. 2d 294 (D. Conn. 2012).

50. Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29, 40 (2012).

51. *Id.* at 30; see also Patricia Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 837–38 (2008).

52. Smith & Stein, *supra* note 50, at 30; see also *infra* note 81 and accompanying text.

household for federal income tax purposes, but were treated as married for state income tax purposes.⁵³ Therefore, at the state level, they were required to file using the married-filing-jointly or married-filing-separately status.⁵⁴ This disparity created an administrative burden not just for state tax agencies—which could no longer rely on federal tax return information for assessing state tax returns—but also for same-sex taxpayers, a burden that heterosexual couples did not face.⁵⁵ Same-sex taxpayers had to spend additional time preparing their federal and state tax returns and usually had to create a “dummy” (pro forma) federal return using the married-filing-jointly status to calculate their federal AGI as if they were married (the usual starting point for most state income tax returns).⁵⁶ As discussed below in Part II, the post-*Windsor* IRS Ruling creates a mirror image of this problem for same-sex couples living in nonrecognition states.

II. THE IRS RULING AND STATE TAX IMPLICATIONS

This Part introduces the post-*Windsor* IRS Ruling’s implications for state income tax systems in two sections. Section A provides a general overview of the “state-of-celebration” rule adopted by the IRS for the purpose of determining whether a legal same-sex marriage exists for federal tax purposes. Now that section three of DOMA has been overturned, the marital status of same-sex couples for federal tax purposes is determined by reference to state law.⁵⁷ Section B explores the challenges faced by states that do not recognize same-sex marriage, but have income tax regimes that generally conform to the federal income tax system. It provides an overview of the costs and benefits associated with state income tax conformity with the federal income tax, and highlights the difficulties states would face if they decoupled from the federal tax base.

53. Anthony C. Infanti, *The Moonscape of Tax Equality: Windsor and Beyond*, 108 *Nw. U. L. REV. COLLOQUY* 110, 125 (2013). For a list of recognition states, see *infra* Table 1.

54. *Id.*

55. Smith & Stein, *supra* note 50, at 44.

56. In addition to the extra time and expense of tax preparation for same-sex couples, there was also the likelihood that their returns would contain more mistakes and that they might face a greater audit risk. *See id.* at 44 (discussing the problems faced by same-sex couples and suggesting ways to ease their administrative burden).

57. Rev. Rul. 2013-17, 2013-38 *I.R.B.* 202.

A. *An Overview of the IRS Ruling*

The Supreme Court's landmark decision in *Windsor* led to a dramatic shift in the federal government's legal treatment of same-sex marriage, particularly from a tax perspective. Under DOMA, the federal government defined marriage as being between one man and one woman.⁵⁸ Following *Windsor*, however, spousal status is determined by the state of celebration for purposes of federal rights and entitlements.⁵⁹ The majority opinion made it clear that states were not required to recognize same-sex marriage.⁶⁰ However, *Windsor* left unclear how the federal government was to determine whether a same-sex couple was legally married for purposes of the myriad federal rules and regulations that require a definition of marriage, including the Code. As Justice Antonin Scalia wrote in his dissent, at the time it was not clear whether, in determining marital status for federal tax purposes, the IRS would use the state of current domicile, the state of celebration, or the state of domicile at the time the marriage was entered into.⁶¹ Thus, in the absence of a uniform federal definition of marriage post-*Windsor*, the federal government is confronted with choice-of-law issues.⁶²

In settling this question, the IRS issued Revenue Ruling 2013-17 (IRS Ruling), holding that for federal tax purposes the IRS "recognizes the validity of a same-sex marriage that was valid in the

58. See *supra* note 27 and accompanying text.

59. For example, same-sex spouses will now be able to receive the entirety of a participant's Section 401(k) account balance at death, unless the spouse consented to another beneficiary. See 29 U.S.C. § 1055 (2012) (requiring pension plans to give survivorship rights to spouses of plan participants).

60. The majority opinion begins by noting that it is not addressing section 2 of DOMA, which allows states to refuse to recognize same-sex marriages legally performed elsewhere. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013). However, in the wake of *Windsor*, one federal district court has held that interstate recognition of same-sex marriage is constitutionally required. See *Obergfell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262, at *8 (S.D. Ohio, July 22, 2013). In a recent article, Professor William Baude addresses the impact of *Windsor* on interstate recognition of same-sex marriage, noting that the "validity of Section 2 is a natural question after *Windsor*." William Baude, *Interstate Recognition of Same-Sex Marriage After Windsor*, 8 N.Y.U. J.L. & LIBERTY 150, 151 (2013).

61. *Windsor*, 133 S. Ct. at 2708 (Scalia, J. dissenting). "State of celebration" refers to the state where the couple was married. "State of domicile" can be interpreted as either the current place of residence or the residence at the time of the wedding.

62. In an excellent article, Professor William Baude tackled this choice-of-law dilemma and the question of how the federal government should decide which state's law applies in order to determine when a same-sex marriage is valid. Baude presciently recognized that judges would confront this choice-of-law problem following the demise of DOMA. William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1381 (2012).

state where it was entered into, regardless of the married couple's place of domicile."⁶³ This state-of-celebration rule is the same standard that the IRS has applied to common-law marriages since it issued Revenue Ruling 58-66 in 1958.⁶⁴ Indeed, the IRS Ruling explicitly recognized this precedent, stating that "[f]or over half a century, for federal income tax purposes, the Service has recognized marriages based on the laws of the state in which they were entered into, without regard to subsequent changes in domicile"⁶⁵ The IRS thus extended Revenue Ruling 58-66 to apply to same-sex marriages as well.

In arguing for its position, the IRS reasoned that the state-of-celebration rule had been successfully applied to common-law marriages for over fifty years.⁶⁶ Furthermore, "[g]iven our increasingly mobile society," it was important to have a "uniform rule of recognition that can be applied with certainty . . . for all federal tax purposes."⁶⁷ Importantly, the IRS Ruling also outlined the administrative problems and adverse consequences associated with adopting a state-of-domicile rule (instead of a state-of-celebration rule) for taxpayers, employers, and employee benefit plan administrators.⁶⁸ The IRS wanted to avoid the problems that would arise with a state-of-domicile rule, with "marriages possibly appearing and disappearing each time a taxpayer moves."⁶⁹

The IRS Ruling raises several new concerns. As Professor Anthony C. Infanti points out, the IRS Ruling does not address the status of evasive marriages⁷⁰ or choice-of-law issues that arise in

63. Rev. Rul. 2013-17, 2013-38 I.R.B. 202.

64. Rev. Rul. 58-66, 1958-1 C.B. 60 (providing that the IRS would treat individuals as married if applicable state law treated them as married under common-law marriage rules, and would also recognize marriages even "in the case of taxpayers who enter into a common-law marriage in a state which recognizes such relationship and who later move into a state in which a ceremony is required to initiate the marital relationship").

65. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.8.

66. *Id.* at 3.

67. *Id.* at 10. *But see* Infanti, *supra* note 53, at 118 (arguing that the IRS Ruling provides "no more than the same veneer of clarity that DOMA did, as it leaves important questions unanswered, lays traps for the unwary, creates inequities, and entails unfortunate (and hopefully, unintended) consequences").

68. For example, the IRS noted that under a state-of-domicile rule, employee benefit plan administrators "would need to continually track the state of domicile of all married same-sex employees and former employees and their spouses." Rev. Rul. 2013-17, 2013-38 I.R.B. 204.

69. Infanti, *supra* note 53, at 118.

70. Evasive marriages occur when a couple domiciled in one state travels to another state to marry and immediately returns to their state of domicile to live. *Id.* at 119 (discussing the

determinations of parent-child relationships; these issues are often linked to the marital status of parents and affect federal tax treatment.⁷¹ Importantly, the IRS Ruling does not apply for state tax purposes unless a state expressly adopts it. Therefore, state income tax filings for married same-sex couples living in nonrecognition states present an open question for taxpayers and state tax authorities alike.

B. Implications for State Income Tax: Disrupting Conformity

Before discussing the ways in which nonrecognition states are responding to the IRS Ruling, it is important to examine what is the cornerstone of many state income tax systems: conformity with the federal tax base. State income tax conformity with the federal income tax system is more of a rule than an exception.⁷² The IRS Ruling has the potential to disrupt conformity; one might argue that it already has. Although the IRS Ruling creates consistency for federal tax purposes, it complicates income tax filing at the state level, just as section three of DOMA complicated tax filing for married same-sex couples residing in states that legally recognized their marriages.⁷³

State conformity with the federal tax base can assume a variety of forms, and the degree of conformity can vary greatly in strength.⁷⁴ Some states use a “rolling” conformity, with changes in federal tax provisions automatically applying to the state tax code as they occur.⁷⁵ Other states use a fixed or “static” conformity, conforming to the

unclear federal tax status of same-sex couples in evasive marriages). However, a natural reading of the IRS Ruling seems to include both migratory and evasive marriages, a point that makes this topic even more significant, given that many same-sex couples in evasive marriages are impacted by newly adopted state income tax provisions.

71. See *Infanti*, *supra* note 53, at 120–21 (explaining that the IRS Ruling does not address instances in which marital status is relevant to the determination of federal tax consequences only indirectly through the application of state law, as with the existence of parent-child relationships).

72. See *infra* note 91 and accompanying text.

73. See *supra* Part I.B.

74. Heather M. Fields, *Binding Choices: Tax Elections & Federal/State Conformity*, 32 VA. TAX REV. 527, 537 (2013).

75. See, e.g., KAN. STAT. ANN. § 79-32,109a (2014); LA. REV. STAT. ANN. § 47:290 (2014); NEB. REV. STAT. § 77-2714 (2014).

federal tax code as it existed on a certain date,⁷⁶ and still others use a “selective” conformity—adopting only certain federal tax provisions.⁷⁷

Federal-state tax conformity is most visible in the computation of state income tax, as most state income tax regimes at some point reference the federal tax code.⁷⁸ Most states, like the federal government, impose an income tax on taxable income only.⁷⁹ On the federal level, taxable income is then adjusted to produce AGI, which is then reduced by any deductions and exemptions.⁸⁰ Almost all states do not require a separate calculation of taxable income. Instead, most state-level calculations begin with federal AGI, which is then adjusted to eliminate or add certain items.⁸¹ States then apply their own deductions and exemptions to the state taxable income.⁸²

States generally conform to the federal tax code to minimize taxpayers’ calculations, record-keeping, and compliance burdens.⁸³ However, to reflect the values and preferences of the taxpayers in a particular state, state legislators may want to tax married same-sex couples differently than does the federal government.⁸⁴ Thus, in states that do not recognize same-sex marriage, but do conform to the federal tax base, the post-*Windsor* IRS Ruling may create a mirror image of the pre-*Windsor* challenge faced by same-sex couples, in terms of complexity and administrative burden.⁸⁵

76. See, e.g., ARIZ. REV. STAT. ANN. § 43-105 (2014) (West); KY. REV. STAT. ANN. § 141.010 (West 2014); VA. CODE. ANN. § 58.1-301 (West 2014).

77. See, e.g., ALA. CODE § 40-18-1.1 (2014) (using a “rolling” conformity, but only for select provisions).

78. See *infra* Table 2.

79. Smith & Stein, *supra* note 50, at 34.

80. *Id.*

81. While the majority of states that impose a personal income tax use federal AGI as the starting point, certain other states use federal taxable income or federal gross income as the starting point for determining state taxable income. See *State Personal Income Taxes: Federal Starting Points*, FED’N OF TAX ADM’RS (Jan. 1, 2014), http://www.taxadmin.org/fta/rate/stg_pts.pdf (providing an overview of the conformity starting point for each state).

82. See *Computing State Taxable Income*, 1 BENDER’S STATE TAXATION: PRINCIPLES AND PRACTICE § 8.03 (Charles W. Swenson ed., 2014) (describing how states allow deductions and various exemptions to the taxpayer).

83. See generally Mason, *supra* note 12, at 1279–81 (describing various advantages arising from states having the same tax base as the federal government).

84. In states with their own constitutional provisions barring same-sex marriages (“mini-DOMAs”), such as Arizona, Idaho, and Virginia, state legislators would face constitutional hurdles if they chose to recognize married same-sex couples for the purpose of state income tax filings.

85. See *supra* notes 52–55 and accompanying text.

Forty-one states impose a broad-based income tax, seven states have no individual income tax, and two states only tax interest and dividend income.⁸⁶ This Note focuses on states that impose a broad-based income tax, and within that group of states, gives specific attention to states that do not recognize same-sex marriage and that do conform at some level to the federal income tax system.⁸⁷ Table 1 provides a list of recognition and nonrecognition states.

*Table 1: State Recognition of Same-Sex Marriage*⁸⁸

States with Statutes or Judicial Decisions Allowing Same-Sex Marriage	California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, District of Columbia
States with Constitutional Provisions Banning Same-Sex Marriage but with Broad Recognition Short of Marriage	Colorado, Nevada
States with Constitutional or Statutory Bans on Same-Sex Marriage	Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Mississippi, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming

86. Mason, *supra* note 12, at 1274–75.

87. Twenty-one states fit this description. *See infra* Table 2 and note 93.

88. This table is based on information compiled by the National Conference of State Legislatures. *See Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 5, 2014), <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx> (providing an overview of same-sex-marriage laws by state).

Thus, at the time of this publication, nineteen states and the District of Columbia allowed same-sex marriage.⁸⁹ In contrast, thirty-one states currently ban same-sex marriage by statute or constitutional provision.⁹⁰

Table 2 illustrates the varying degrees of conformity between state income tax regimes and their federal counterpart.

*Table 2: State Conformity with the Federal Tax Code*⁹¹

Starts with Federal AGI, then Applies One Rate	Illinois, Indiana, Michigan, Utah
Starts with Federal Taxable Income, then Applies One Rate	Colorado
Starts with Federal Taxable Income, then Applies Own Rates to Federal Brackets	North Dakota, Vermont

89. *See id.*

90. *Id.* As of September 5, 2014, twenty-eight states have constitutional mini-DOMAs banning same-sex marriage, while three states have statutory provisions doing the same. In thirteen of these states (namely, Arkansas, Colorado, Florida, Idaho, Indiana, Kentucky, Michigan, Oklahoma, Tennessee, Texas, Utah, Virginia, and Wisconsin), judges have issued rulings allowing same-sex marriage, but many of these rulings have been stayed as they proceed to appellate courts.

91. This table is based on information compiled by the Tax Foundation. *See* Joseph Henchman, *IRS Issues "State of Celebration" Guidance for Same-Sex Couples*, TAX FOUNDATION 3-4 (Aug. 29, 2013), <http://taxfoundation.org/article/irs-issues-state-celebration-guidance-same-sex-couples-further-guidance-24-states-may-be-required> (describing the various degrees of state conformity with the federal tax code). The table only includes states that have some form of individual income tax and that require reference to the federal return.

Starts with Federal Taxable Income, then Applies Own Rates and Brackets	Minnesota, North Carolina, ⁹² South Carolina
Starts with Federal AGI, then Applies Own Rates and Brackets	Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, Virginia, West Virginia, Wisconsin
Starts with Federal Gross Income, then Applies Own Rates and Brackets	Massachusetts, District of Columbia

Consequently, twenty-one states do not recognize same-sex marriage but do require state taxpayers to reference their federal tax return when preparing their state tax returns.⁹⁵ These states are directly impacted by the IRS Ruling. In formulating their responses to it, they must decide whether to continue to conform to the federal income tax system.

Tax commentators have long warned states that, given the benefits associated with federal-state tax-base conformity, decoupling from the federal tax base is not a viable option. This issue has received renewed attention following the IRS Ruling. A few days after the IRS Ruling was issued, Joseph Henchman of the Tax Foundation cautioned affected states to resist calls to delink or decouple from the federal tax base, arguing that “decoupling is a

92. Through December 2013, North Carolina taxpayers started with federal taxable income and applied state rates and brackets. As of January 2014 (and for their 2014 tax returns), taxpayers start with federal AGI and then apply one tax rate. *Id.* at 4.

93. These states are: Arizona, Colorado, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Utah, Virginia, West Virginia, and Wisconsin.

move away from sound tax policy.”⁹⁴ At the same time, other tax experts have noted that some states would be tempted to decouple regardless of the costs, but are kept from doing so by state statutes that mandate conformity.⁹⁵ Insofar as certain nonrecognition states must now determine whether to continue to conform to the federal tax base, this Part discusses the costs and benefits associated with conformity.

1. *Benefits of Conformity.* Conformity to the federal tax base provides sizeable benefits, such as simplifying tax preparation, reducing taxpayers’ compliance costs, and aiding state tax enforcement goals.⁹⁶ Indeed, Professor Ruth Mason argues that the administrative advantages of tax-base conformity are so substantial that states will not abandon conformity in general.⁹⁷

From the taxpayer’s perspective, conformity to the federal tax system reduces recordkeeping and filing burdens and thus makes compliance easier.⁹⁸ For instance, to complete their state income tax returns for the same year, taxpayers do not need to engage in separate calculations of their income;⁹⁹ they only need to make minor adjustments to federally computed items.¹⁰⁰ In many cases, taxpayers

94. Richard Borean, *Options for States Accommodating IRS’s Same-Sex Ruling*, TAX FOUNDATION (Aug. 29, 2013), <http://taxfoundation.org/article/options-states-accommodating-irs-s-same-sex-ruling> (quoting Joseph Henchman).

95. See Maria Koklanaris, *States Respond to IRS Same-Sex Guidance*, STATE TAX NOTES, Sept. 16, 2013, available at LEXIS, 69 STATE TAX NOTES 694, 694 (“But [states’] problem is that the statute says a taxpayer should start with the federal return when filing state income taxes.”).

96. There is considerable literature discussing the compliance and administrability benefits associated with conformity. See generally, e.g., Fields, *supra* note 74, at 537–40; Mason, *supra* note 12, at 1297; Richard D. Pomp, *Restructuring a State Income Tax in Response to the Tax Reform Act of 1986*, TAX NOTES TODAY, Sept. 14, 1987, available at LEXIS, 36 TAX NOTES 1195, 1199; Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 920–21 (1992); Otto G. Stolz & George A. Purdy, *Federal Collection of State Individual Income Taxes*, 1977 DUKE L.J. 59, 126–27 (1977).

97. Mason, *supra* note 12, at 1273. But see Fields, *supra* note 74, at 538 n.31 (“As the degree of conformity weakens . . . the compliance, simplicity, and administrability benefits . . . generally decrease.”).

98. See Mason, *supra* note 12, at 1280 (“[C]onformity avoids the need for taxpayers to calculate their income twice or to keep two sets of records.”).

99. *Id.*

100. Smith & Stein, *supra* note 50, at 32.

file federal and state tax forms together using electronic filing programs.¹⁰¹

From the perspective of state tax authorities, conformity leads to efficiencies in enforcement and administration of the income tax system. State tax agencies receive federal tax return information from the IRS, which states can use to assess additional state tax.¹⁰² Furthermore, many states audit individual state income tax reports primarily through federal tax data and audit reports.¹⁰³ States can thus benefit from (or, as Professor Mason describes it, “free ride” on)¹⁰⁴ the IRS’s “superior capacity for enforcement.”¹⁰⁵ States can also avail themselves of well-developed federal tax definitions, interpretive guidance, and case law.¹⁰⁶ From an economic-efficiency perspective, states need not reinvent the wheel—they can instead rely on the IRS and Treasury’s expertise when it comes to tasks such as drafting tax regulations.¹⁰⁷

From a multistate perspective, federal-state tax-base conformity reduces the risk of taxpayers exploiting disparities in state tax regimes

101. Harley Duncan & LeAnne Luna, *Lending a Helping Hand: Two Governments Can Work Together*, 60 NAT’L TAX J. 663, 672 (2007) (“The most ambitious effort has been in the area of cooperative or coordinated electronic filing.”).

102. *Id.* at 669. Information exchanged includes copies of federal audits, address and location information for taxpayers, and information on possible taxpayer assets. *Id.* I.R.C. § 6103(d)(1) provides that returns and return information should:

[B]e open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of [s]tate tax laws for the purpose of, and only to the extent necessary in, the administration of such laws.

I.R.C. § 6103(d)(1) (2012) (emphasis added).

103. Duncan & Luna, *supra* note 101, at 669; *see also* Smith & Stein, *supra* note 50, at 33 (noting that because state income tax rates are so low, it would be too costly for the states to audit certain items, but the IRS can undertake federal audits for these items because high federal tax rates justify the expense).

104. Mason, *supra* note 12, at 1280.

105. David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2595 (2005); *see also* Stolz & Purdy, *supra* note 96, at 70–75 (describing federal-state cooperation in enforcement of tax laws).

106. Fields, *supra* note 74, at 539; *see also* Kirk J. Stark, *The Federal Role in State Tax Reform*, 30 VA. TAX REV. 407, 423–24 (2010) (“The very existence of the Code, Treasury Regulations, IRS administrative guidance, and federal judicial case law creates an almost irresistible incentive for the states to . . . piggyback on the federal income tax.”).

107. Mason, *supra* note 12, at 1281; *see also* Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 135 (2008) (detailing costs associated with writing regulations and arguing that “by piggybacking on the federal definition [of income], the state legislature saves itself and its taxing authority the work of adjusting the law to changing circumstances.”).

for tax-avoidance purposes.¹⁰⁸ Thus, both taxpayers and states stand to gain from federal-state tax-base conformity in terms of filing, compliance, administration, and enforcement costs.

2. *Costs of Conformity.* As previously explained, states derive numerous benefits from conformity with the federal tax base. But at the same time, “[t]hese benefits come at a cost.”¹⁰⁹ States that conform to the federal tax base cede authority to the federal government over questions such as tax incentives,¹¹⁰ tax penalties,¹¹¹ filing statuses,¹¹² and the definition of income.¹¹³ With federal-state tax conformity, Congress—not the state legislatures—makes the key determinations about such matters. By adopting federal tax policy preferences, states cannot tailor their tax policies to local conditions and local voter preferences.¹¹⁴ In this way, tax treatment of married same-sex couples typifies the tension between federal and local policy preferences.

Federal-state tax-base conformity also impedes states’ ability to tailor tax incentives or penalties to local conditions. As Professor Mason points out, “one-size-fits-all” federal tax incentives can create divergent effects in different states and can also cause inefficiencies.¹¹⁵ State legislators may also suffer political stigma from their default adoption of federal tax policies.¹¹⁶ Furthermore, although states reduce their administrative and enforcement burdens by adopting Treasury and IRS tax regulations and guidance, they also cede their

108. Shaviro, *supra* note 96, at 911 (“Tax base disparities present obvious planning opportunities for taxpayers . . .”).

109. Fields, *supra* note 74, at 537.

110. See Mason, *supra* note 12, at 1293 (describing states’ importation of federal tax incentives, including incentives for home ownership, employer provision of health insurance, charity, savings, and family planning).

111. See *id.* (describing the importation of federal tax provisions that penalize activities such as “gambling, failure to save, failure to buy private health insurance, and participation in the illegal drug trade” (footnotes omitted)).

112. The federal income tax regime recognizes four filing statuses: single, head-of-household, married-filing-separately, and married-filing-jointly. Conformity binds states to these filing statuses, which impact tax liability considerably. The latter two in particular have been the subject of much scholarly writing. See *supra* note 33.

113. See Mason, *supra* note 12, at 1275 (describing how most states incorporate federal definitions of income into their own tax laws).

114. See Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 1020 (2011) (“[W]hen states adopt the federal tax base as their own tax base, they deliberately or inadvertently import into their own tax systems federal regulatory preferences . . .”).

115. Mason, *supra* note 12, at 1303.

116. See Fields, *supra* note 74, at 542 (arguing that state conformity with federal tax law can undermine state legislators’ political accountability).

administrative and enforcement authority to the Treasury. Thus, federal-state tax conformity entails significant costs as well as obvious benefits.

III. FORMULATING RULES: STATE RESPONSES TO THE IRS RULING

A. *Two Approaches to Computing State Income Tax Post-Windsor*

This Part discusses the various approaches that the twenty-one affected states have adopted in response to the IRS Ruling. These approaches can be roughly classified into two models: the Louisiana Model and the Missouri Model.

1. *The Louisiana Model.* Louisiana requires same-sex couples who are eligible for joint federal filing to file separate individual returns at the state level.¹¹⁷ The Louisiana Department of Revenue cited the state's constitutional ban on same-sex marriage in support of its ruling, stating that "any recognition of a same-sex filing status in Louisiana as promulgated in IRS Revenue Ruling 2013-17 would be a clear violation of Louisiana's Constitution."¹¹⁸

Same-sex spouses in Louisiana with a federal filing status of married filing jointly or married filing separately must file a separate state tax return using the status of single or, if qualified, head of household. Because Louisiana uses federal AGI as the starting point for state income tax calculations, taxpayers must create "dummy" federal tax returns—using a filing status of either single or head of household—to calculate their individual federal AGI.¹¹⁹ They then use their recalculated federal AGI to file the single state income tax return.

Several other states have also disallowed married same-sex couples from using a joint tax return for state tax returns. These states

117. La. Dep't of Revenue, *Revenue Information Bulletin No. 13-024* (Sept. 13, 2013), available at <http://revenue.louisiana.gov/forms/lawspolicies/RIB%2013-024.pdf>.

118. *Id.* The relevant constitutional provision reads:

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman.

LA. CONST., art. XII, § 15.

119. The Revenue Information Bulletin instructs taxpayers with a federal filing status of married filing jointly or married filing separately to provide the same federal income tax information on the state income tax return that they would have provided before the IRS Ruling was issued. La. Dep't of Revenue, *supra* note 117.

include Georgia,¹²⁰ Idaho,¹²¹ Indiana,¹²² Kentucky,¹²³ Michigan,¹²⁴ Montana,¹²⁵ Nebraska,¹²⁶ North Carolina,¹²⁷ Oklahoma,¹²⁸ South Carolina,¹²⁹ Virginia,¹³⁰ and West Virginia.¹³¹

120. Ga. Dep't of Revenue, *Informational Bulletin IT-2013-10-25, U.S. Supreme Court and the Defense of Marriage Act*, at 4 (Oct. 25, 2013), available at https://etax.dor.ga.gov/TaxLawandPolicy/DOMA_bulletin_10-25-2013.pdf. Georgia law does not require taxpayers to use the same filing status for state and federal purposes, but federal AGI is used as a starting point for calculating Georgia taxable income. *Id.* For Georgia income tax purposes, individuals in a same-sex marriage must recompute federal AGI as if they had filed a single federal income tax return to complete their individual state income tax returns. *Id.*

121. Idaho State Tax Comm'n, *Instructions for 2013 Individual Income Tax*, at 5 (2013) available at http://tax.idaho.gov/forms/EIN00046_11-22-2013.pdf. These instructions state that although Idaho filing status must mirror the federal filing status, this requirement does not apply to same-sex couples filing a joint federal return. *Id.* Each taxpayer must prepare a recomputed federal income tax return using the filing status of single or head of household and use it to file an Idaho tax return as single or head of household. *Id.* The Idaho State Legislature passed emergency legislation codifying this State Tax Commission guidance in February 2014. Idaho H.B. 375 revised the state's income tax provisions as follows: "For all purposes of the Idaho income tax act, a marriage must be one that is considered valid or recognized under section 28, article III, of the constitution of the state of Idaho and defined in section 32-201, Idaho Code, or as recognized under section 32-209, Idaho Code." Idaho Code Ann. § 63-3004(c) (West 2014).

122. Ind. Dep't of Revenue, *Same-Sex Marriage Tax Filing Guidance*, IN.GOV (Nov. 22, 2013), <http://www.in.gov/dor/4895.htm>.

123. Ky. Dep't of Revenue, *Same-Sex Married Couples Filing Guidance*, KY. TAX ALERT, Nov. 2013, at 1, 1.

124. Mich. Dep't of Treasury, *Notice to Taxpayers: Same-Sex Couples Filing Joint Federal Income Tax Returns Must File Michigan Income Tax Returns as Single Filers* (Sept. 27, 2013), http://www.michigan.gov/documents/taxes/DOMAnotice_434103_7.pdf.

125. Memorandum from the Mont. Dep't of Revenue to the Revenue and Transportation Interim Comm. (Oct. 1, 2013), available at http://revenue.mt.gov/Portals/9/committees/Revenue_Transportation/2013-2014/october/Discussion_of_Same_Sex_Marriage.pdf. The memorandum cites the state's constitutional ban on same-sex marriage as grounds for its decision. *Id.*

126. Neb. Dep't of Revenue, *Rev. Rul. 22-13-11* (Oct. 24, 2013). The Revenue Ruling is based on Nebraska's constitutional ban on recognizing same-sex marriage and requires a married same-sex individual to file a Nebraska income tax return as "single." *Id.* Nebraska's Department of Revenue declined to enforce a state statute, Neb. Rev. Stat. § 77-2732 (2013), mandating conformity between federal and state income tax filing statuses.

127. N.C. Dep't of Revenue, *Directive PD-13-1* (Oct. 18, 2013), available at <http://www.dorn.com/practitioner/individual/directives/pd-13-1.pdf>. Legally married same-sex couples in North Carolina must file a dummy federal return for state purposes to recompute their AGI, deductions, and tax credits; this form is submitted along with the state tax return. *Id.* The directive cites the state's statutory ban on same-sex marriage as the basis for its decision. *Id.* In *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493 (4th Cir. July 28, 2014), the Fourth Circuit struck down a state ban on same-sex marriage. Unless the Supreme Court overturns that decision, the North Carolina Department of Revenue position will presumably need to be revisited. The Fourth Circuit decision will also affect the tax guidance issued by state tax authorities in South Carolina, Virginia, and West Virginia.

A few states have slightly modified this model and created worksheets for married same-sex taxpayers to use to recalculate their taxable income on an individual basis. States adopting this worksheet approach include Arizona,¹³² Kansas,¹³³ North Dakota,¹³⁴ Ohio,¹³⁵ and

128. Public Notice, Okla. Tax Comm'n, NOTICE: Oklahoma Income Tax Filing Status for Same Sex Couples (Sept. 27, 2013), available at <http://www.tax.ok.gov/upmin092713.html>. Same-sex couples in Oklahoma "must provide the same federal income tax information on [their] state return that would have been provided prior to the issuance of the IRS Ruling." *Id.* They must prepare a dummy return recomputing their federal income tax as single or head of household and, if required, submit this dummy return with their state income tax return. *Id.* The Oklahoma Tax Commission position will presumably need to be revisited unless the Tenth Circuit's decision in *Bishop v. Smith*, Nos. 14-5003, 14-5006, 2014 WL3537847 (10th Cir. July 18, 2014), striking down a ban on same-sex marriage, is overturned by the Supreme Court.

129. S.C. Dep't of Revenue, *SC Individual Income Tax*, at 3-3 (2013), available at <http://www.sctax.org/Tax+Policy/SC+Individual+Income+Tax+Manual.htm>.

130. Va. Dep't of Taxation, *Tax Bulletin 13-13* (Nov. 8, 2013), available at http://www.tax.virginia.gov/Documents/TB_13-13_DOMA.pdf. Notably, the Bulletin recognizes that Virginia's income tax law generally conforms to federal income tax law and that a couple's marital status for state income tax purposes is based on their marital status for federal income tax purposes. *Id.* It then requires Virginia to decouple from the federal income tax treatment of same-sex marriage because of the state's constitutional and statutory bans on same-sex marriage. *Id.*

131. See generally W. Va. State Tax Dep't, *Personal Income Tax Forms & Instructions*, at 16 (2014), available at <http://www.state.wv.us/taxrev/forms/2013/it140.forms-and-instructions.pdf> (referring to husband and wife when discussing married filings). West Virginia has enacted legislation mandating conformity to the federal income tax base. Any term used in the state's income tax law has the same meaning as when it is used in a comparable context in federal income tax law. W. VA CODE § 11-21-1 (2013). However, the State Tax Department requires married same-sex couples to file state income taxes as single individuals. W. Va. State Tax Dep't, *supra*.

132. Press Release, Ariz. Dep't of Revenue, A New 2012 Individual Income Tax Form is Now Available For Same-Sex Couples That File A Joint Federal Tax Return To Determine Their Starting Point For Their Arizona Single Returns (Oct. 11, 2013), available at <http://www.azdor.gov/News/tabid/74/newsid530/476/A-New-2012-Individual-Income-Tax-Form-is-now-Available-For-Same-Sex-Couples-That-File-A-Joint-Federal-Tax-Return-To-Determine-Their-Starting-Point-For-Their-Arizona-Single>Returns-/Default.aspx>.

133. Kan. Dep't of Revenue, *Notice 13-18*, at 1 (Oct. 4, 2013), available at <http://www.ksrevenue.org/taxnotices/notice13-18.pdf>. Kansas requires same-sex individuals who are married for federal income tax purposes to file a separate Kansas income tax return using the filing status of single or head of household. *Id.* They must also complete a worksheet allocating the federal AGI reported on the joint federal income tax return and determining their individual federal AGI for Kansas tax-filing purposes. *Id.*

134. N.D. Dep't of Revenue, *Guideline: Income Tax Filing by Individuals in a Same-Sex Marriage* (2012), available at <http://www.nd.gov/tax/indincome/pubs/guide/same-sexmarriageguideline.pdf?20131223172303>. North Dakota requires each individual in a same-sex marriage to file a separate state income tax return and to complete a supplemental worksheet allocating income. *Id.* The guidelines specifically cite the state's constitutional ban on same-sex marriage. *Id.*

Wisconsin.¹³⁶ There is no substantive difference between the “dummy” federal return approach and the worksheet approach, as both are methods of allocating income between spouses.

2. *The Missouri Model.* Missouri requires married same-sex couples who file a joint federal income tax return to file a combined state income tax return as well. On November 14, 2013, Missouri Governor Jeremiah Nixon issued an Executive Order stating that because the state tax code is coupled to the federal tax code, the state Department of Revenue “must apply the same meaning to the phrase ‘husband and wife’ as is applied under federal law pursuant to [IRS] Revenue Ruling 2013-17.”¹³⁷

Missouri’s approach was unprecedented, making it the first nonrecognition state to recognize same-sex marriages for state tax purposes. This decision is particularly notable because Missouri has constitutionally prohibited recognition of same-sex marriages since 2004.¹³⁸ Thus, although the Executive Order complies with Missouri’s conformity statute, it is at odds with the state’s constitution.

Missouri might have been the first state to adopt this approach, but a handful of nonrecognition states soon followed. On November 29, 2013, the Colorado Department of Revenue promulgated an emergency regulation clarifying the income tax filing status for same-sex couples.¹³⁹ The regulation mandates that, because Colorado’s state

135. Ohio Dep’t of Taxation, *IT 2013-01 – Filing Guidelines for Taxpayers Filing a Joint Federal Income Tax Return with Someone of the Same Gender* (Dec. 19, 2013), available at http://www.tax.ohio.gov/Portals/0/ohio_individual/individual/information_releases/DOMAINformationRelease.pdf. Ohio requires each spouse in a same-sex marriage to file a separate Ohio income tax return using the filing status of single or head of household and for the two spouses to complete a supplementary Ohio Schedule IT S to be attached to their individual returns. *Id.* This schedule enables each spouse to allocate the federal AGI reported on her joint federal income tax return and determine her individual federal AGI for Ohio tax-filing purposes. *Id.*

136. Wis. Dep’t of Revenue, *Tax Guidance for Individuals in a Same-Sex Marriage* (Sept. 6, 2013), <http://www.revenue.wi.gov/taxpro/news/130906.html>. Each member of a same-sex marriage must file a separate Wisconsin income tax return as single or head of household. *Id.* Each spouse must also complete Schedule S, which enables her to allocate her federal AGI reported on the federal joint income tax return and calculate the federal AGI to be used for Wisconsin tax purposes. *Id.*

137. Mo. Exec. Order No. 13-14 (Nov. 14, 2013), available at <http://governor.mo.gov/orders/2013/13-14.htm>.

138. MO. CONST. art. I, § 33.

139. COLO. CODE REGS. § 201-2 (2014); see also Colo. Dep’t of Revenue, *Income Tax Filing Status for Same-Sex Couples* (Nov. 29, 2013), available at <http://www.colorado.gov/cs/Satellite/Revenue/REVV/1251648321168>.

tax code is coupled with the federal tax code and uses federal taxable income as the starting point for state income tax determinations, all Colorado taxpayers must use the same filing status for federal and state income tax returns.

Until May 19, 2014, Oregon did not allow same-sex marriages.¹⁴⁰ As a nonrecognition state, however, it treated same-sex couples legally married in other jurisdictions as married for Oregon tax purposes.¹⁴¹ Thus, married same-sex couples in Oregon could complete their 2013 state income tax return using the same filing status and information provided on their federal returns.¹⁴² Utah has gone back-and-forth on the issue of recognizing same-sex marriage for state income tax purposes.¹⁴³ Given Utah's uncertain status as a nonrecognition state, the Utah Tax Commission ultimately determined that couples married before the end of 2013 would be eligible to file joint state tax returns if they elected to file joint federal income tax returns.¹⁴⁴ Notably, the newest tax guidance goes beyond

140. On May 19, 2014, a federal district court judge declared that same-sex couples in Oregon had the right to marry. No party appealed and the decision took effect in Oregon. *Geiger v. Kitzhaber*, No. 6:13-cv-01834-MC, 2014 WL 2054264, at *16 (D. Or. May 19, 2014).

141. Or. Dep't of Revenue, *Oregon Tax Information for Same-Sex Married Couples* (2013), available at <http://www.oregon.gov/dor/PERTAX/Pages/same-sex.aspx>.

142. *Id.*

143. Initially, the Utah Tax Commission Chairman indicated that married same-sex couples could file state income taxes as married, based on conformity with federal law. Ray Parker & Dan Harrie, *IRS to Treat Same-Sex Marriages Equally for Tax Purposes*, SALT LAKE TRIB., Aug. 29, 2013, available at <http://www.sltrib.com/sltrib/world/56799616-68/sex-married-tax-couples.html.csp>. However, the Utah State Tax Commission then instructed same-sex couples filing a joint federal return to file their Utah income tax returns using the same information that they would have provided prior to the IRS Ruling. Utah State Income Tax Comm'n, *Utah Income Tax Filing Status for Same-Sex Couples* (Oct. 9, 2013), <http://tax.utah.gov/notice/2013-10-09.pdf>. Same-sex spouses are now told to complete an "as-if" federal return with a single or head-of-household filing status and complete their Utah return using this pro forma federal return. *Id.* These instructions were called into question by a federal court's ruling overturning Utah's constitutional ban on same-sex marriage. *Kitchen v. Herbert* No. 2:13-cv-217, 2013 WL 6697874, at *1215-16 (D. Utah Dec. 20, 2013), *aff'd* No. 13-4178, 2014 WL 2868044 (10th Cir. June 25, 2014). In January 2014, the U.S. Supreme Court granted Utah's application for a stay pending appeal. *Herbert v. Kitchen*, 134 S. Ct. 893, 839 (2014). The Utah governor's office refused to recognize the one-thousand-plus same-sex marriages that took place before the stay was granted. Jack Healy, *Utah Says It Won't Recognize Same-Sex Marriages It Licensed*, N.Y. TIMES, Jan. 9, 2014, at A14. However, the Utah State Tax Commission reversed itself yet again, issuing new guidance stating that legally married same-sex couples will be considered married for purposes of state income tax filings for 2013. Utah State Income Tax Comm'n, *Individual Income Tax Returns for Same-Sex Couples for Tax Year 2013* (Jan. 15, 2014), <http://tax.utah.gov/notice/2014-01-15.pdf>.

144. Utah State Income Tax Comm'n, *Individual Income Tax Returns for Same-Sex Couples for Tax Year 2013* (Jan. 15, 2014), <http://tax.utah.gov/notice/2014-01-15.pdf>.

the same-sex couples who were married during the brief seventeen-day period when same-sex marriage was allowed in Utah.¹⁴⁵ The guidance also encompasses same-sex couples who were residents of Utah and legally married outside the state, as long as they were married by the end of 2013.¹⁴⁶ The Utah guidance is limited to the 2013 tax year, however.

Thus, four nonrecognition states have permitted same-sex couples to file joint state tax returns, even though each constitutionally prohibits same-sex marriage. In contrast, eighteen nonrecognition states have instructed married same-sex taxpayers to file individual state income tax returns. The two markedly different approaches adopted by nonrecognition states have created an interesting mix of state tax policies.

B. Answering the Economic Impact Question: Examples

In the wake of *Windsor*, tax commentators noted that recognition of same-sex marriage for federal tax purposes could have substantial financial implications for some couples.¹⁴⁷ But how does *state* recognition or nonrecognition affect married same-sex couples? State income tax revenue constitutes a significant part of total state tax revenue.¹⁴⁸ The analysis below considers the economic impact of recognizing or not recognizing married same-sex couples for state income tax purposes.

To illustrate how filing status affects tax liability, I use two hypothetical same-sex couples and estimate the tax impact of allowing

145. *Id.* The Tax Notice simply provides that “same-sex couples who are eligible to file a joint federal income tax return and who elect to file jointly, may also file a joint 2013 Utah Individual Income Tax Return . . .” *Id.*

146. Dan Harrie, *Utah Tax Officials Allow Joint Filing for Married Same-Sex Couples*, SALT LAKE TRIB., Jan. 16, 2014, <http://www.sltrib.com/sltrib/politics/57406343-90/tax-sex-couples-state.html.csp>.

147. See, e.g., David J. Herzig, *Same-Sex Marriage and Estate Taxes: Why Windsor Is Still at Issue*, STATE TAX NOTES, Oct. 8, 2013, available at LEXIS, 2013 TNT 195-5 (highlighting the economic impact of the IRS Ruling on estate taxes); David J. Herzig, *The Tax Implications of Windsor*, TAXPROF BLOG (June 27, 2013), http://taxprof.typepad.com/taxprof_blog/2013/06/herzig-tax.html (last visited Aug. 26, 2014) (describing how same-sex taxpayers will be impacted, with some married same-sex couples now owing more tax).

148. Personal income tax accounted for 34 percent of state tax revenue in 2010. NAT'L CONFERENCE OF STATE LEGISLATURES, STATE PERSONAL INCOME TAXES, 2012, at 1 (Mar. 5, 2013), available at <http://www.ncsl.org/research/fiscal-policy/state-personal-income-taxes-2012.aspx>.

them to file joint state income tax returns.¹⁴⁹ First, I calculate what these couples owe in state income tax when each spouse files as a single individual. Then I estimate the couples' tax payments as if they were instead permitted to use the married-filing-jointly status. Both hypotheticals assume a childless household with only wage income and no itemized deductions.¹⁵⁰ Assume the couple resides in a state with a progressive tax rate structure, with different brackets for single and married-filing-jointly filers:¹⁵¹

Single

Income	Rate
\$0+	2%
\$12,500+	4%
\$50,000+	6%

Married Filing Jointly

Income	Rate
\$0+	2%
\$25,000+	4%
\$100,000+	6%

1. *A Household with Disparate Incomes.* Suppose that Spouse A earns \$80,000 and Spouse B earns \$20,000. They reside in a nonrecognition state and are required to file as single individuals. After all deductions and exemptions,¹⁵² the AGI for Spouse A is \$80,000, and the taxable income is \$75,500. Spouse A will pay tax at the rate of 2 percent for the first \$12,500, 4 percent for all income up

149. Note that filing status has a tangible economic impact only in states with progressive taxation. See *infra* note 151.

150. For purposes of these calculations, I adopt Louisiana's basic rate structure (which determines taxable income based on federal AGI), but not its exemptions and deductions. My hypothetical applies a standard deduction of \$4,000 for taxpayers filing as single and \$8,000 for taxpayers filing as married filing jointly. The personal exemption is \$500. Furthermore, I assume that there are no estimated adjustments to income (such as IRA contributions or moving expenses) and that federal AGI is therefore the same as the wage income.

151. Thirty-four states have a progressive income tax structure, meaning that as taxable incomes increase, so do effective tax rates. Matthew Glans, *Research & Commentary: Progressive Taxation*, THE HEARTLAND INST. (July 15, 2013), <http://heartland.org/policy-documents/research-commentary-progressive-taxation> (last visited Aug. 26, 2014).

152. Each spouse can only claim one personal exemption (for himself or herself) of \$500 and will be limited to the single taxpayer's standard deduction of \$4,000. See *supra* note 150.

to \$50,000, and 6 percent for all income over \$50,000, generating an income tax liability of \$3,280. Spouse B has an AGI of \$20,000 and a taxable income of \$15,500. Spouse B will pay tax at the rate of 2 percent for the first \$12,500 and 4 percent for the remainder of his taxable income. Spouse B will owe a total of \$370 in state income taxes. Therefore, the combined state income tax liability for Spouse A and Spouse B is \$3,650.

Now suppose that the couple may file joint returns. Their combined wages are \$100,000, and after all exemptions and standard deductions,¹⁵³ their taxable income is \$91,000. In this case, the tax will be assessed at 2 percent for the first \$25,000 and 4 percent for the remainder, leaving the couple with a joint state income tax liability of \$3,140.

Therefore, because Spouses A and B cannot file a joint return, they are unable to take advantage of a marriage bonus of \$510. Their household tax burden is higher if they file as two single individuals.

2. *A Household with Two High-Income Earners.* Suppose that Spouse C earns \$100,000 and Spouse D also earns \$100,000. Living in a nonrecognition state, each spouse files as a single individual. After all deductions and exemptions,¹⁵⁴ the taxable income for each spouse is \$95,500. Each will pay tax at the rate of 2 percent for the first \$12,500, 4 percent for all income up to \$50,000, and 6 percent for all income over \$50,000, leading to a state income tax liability of \$4,480 each. Therefore, the combined state income tax liability for these spouses (computed as if they were not married) is \$8,960.

If Spouse C and Spouse D are allowed to file joint state tax returns, their combined taxable income will be \$191,000.¹⁵⁵ Assuming the marginal tax brackets specific to the married-filing-jointly status apply, their joint state income tax liability is again \$8,960.

However, if a state's rate structure and brackets for married filers are not simply double those for single filers, a married couple such as Spouses C and D could face a marriage penalty.¹⁵⁶ The

153. The filing spouse can claim a personal exemption for himself and also one for his spouse, for a total of \$1,000. The standard deduction for a taxpayer using the married-filing-jointly status is \$8,000. *See supra* note 150.

154. *See supra* note 152.

155. *See supra* note 153.

156. Some states double bracket widths for joint filers. Others increase but do not double brackets for joint filers. For a list of state income tax rates, both for individuals and joint filers, see TAX FOUND., STATE INDIVIDUAL INCOME TAX RATES 2000-2013, *available at*

marriage penalty applies when the combined tax liability of a married couple filing jointly is greater than the sum of each individual spouse's tax liabilities, computed as if each spouse were single.¹⁵⁷ The marriage penalty usually applies when both spouses work and have relatively equal incomes. Thus, for a married couple like Spouses C and D, where both spouses earn relatively equal and high incomes, joint filing could result in a marriage penalty, depending on the state's rate structure and brackets for married filers.¹⁵⁸

C. Other Economic Impacts

Even though the rate structure's impact on married versus single taxpayers might be a mixed bag, nonrate-structure items such as the earned income credit and health insurance deductions for married spouses can be quite significant. For example, Wisconsin's tax guidance for same-sex couples states that although an employee may include a same-sex spouse on employer-provided health insurance, when filing a Wisconsin income tax return as single, the income calculation must include the fair market value of the same-sex spouse's health insurance.¹⁵⁹ If one estimates the fair market value of the same-sex spouse's health insurance to be \$500 per month, this

http://taxfoundation.org/article_ns/state-individual-income-tax-rates-2000-2013. For example, North Carolina's 2013 tax brackets for married filers used amounts that were less than twice those for single filers. *Id.* For individuals, earnings up to \$12,750 were taxed at 6 percent. However, for joint filers, only earnings up to \$21,250 were taxed at 6 percent. *Id.* Thus, a married couple could get pushed into the next tax bracket even though on an individual basis, one or both partners have earnings below \$12,750. *Id.* Other states that do not "double up" include Georgia, Minnesota, and Wisconsin. *Id.* Still other states, such as Arkansas, Delaware, and Virginia, do not have different brackets for married filers. *Id.* For an explanation of the impact of tax rate structure and brackets on the marriage penalty, see generally Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1 (2000).

157. See James Alm & Leslie A. Whittington, *Marriage Penalty* in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY, at 251–52 (Joseph J. Cordes, Robert D. Ebel & Jane G. Gravelle, eds., 2005) (explaining how the combined income tax liability of a married couple could exceed their combined income tax liabilities as two single individuals).

158. Lest one think that states are providing some sort of benefit by forcing married same-sex couples to "escape" the marriage penalty, the words of Professor Anthony Infanti hold otherwise: "Can my recognition as a full member of society be bought at the cheap price of an exemption from the marriage penalty . . . ?" Infanti, *supra* note 44, at 765.

159. Wis. Dep't of Revenue, *Instructions for Schedule S* (2013), available at http://www.revenue.wi.gov/forms/2013/ScheduleS_inst.pdf. Wisconsin does not provide explicit guidance on how to value a same-sex spouse's benefits. *Id.* One possible way to value the taxable income is to measure the increased employer contribution for health insurance when an employee signs up a spouse. *Id.*

now constitutes a \$6,000 increase in taxable income.¹⁶⁰ This increase is likely to make a dent in a married same-sex taxpayer's budget. For example, a Wisconsin taxpayer with a taxable income of \$50,000 would pay \$2,317 in state income tax. If the fair market value of his same-sex spouse's health coverage is added to his taxable income, his state income tax burden increases by nearly \$400 to \$2,707.

Most states have remained silent on whether employee benefits such as health insurance should be included in the income calculation, restricting all guidance to the issue of filing status.¹⁶¹ This raises additional questions as to whether a same-sex taxpayer is required to report such benefits as part of her state income calculations. Thus, the economic implications of state recognition or nonrecognition of same-sex marriage go beyond the size of couples' income tax liabilities to encompass considerations regarding employer-provided fringe benefits.

IV. PROCEDURAL AND CONSTITUTIONAL CONCERNS

The *Windsor* majority recognized that DOMA unequally affected married same-sex couples, burdening their lives in visible and public ways. The Court specifically noted that DOMA forced couples to follow a complicated procedure to file their state and federal tax returns jointly.¹⁶² In considering how same-sex couples can challenge new state income tax rules requiring them to file state income tax returns that do not conform to their federal returns, this Note suggests two avenues for them to explore: administrative-law challenges and constitutional challenges.

Section A proposes two potential administrative-law challenges that could be raised against state tax-agency decisions requiring same-sex couples to follow different tax-preparation procedures in the wake of the IRS Ruling. This Section uses several states' administrative-procedure frameworks to illustrate each challenge, and explores the standard of deference that courts might apply in evaluating these agency decisions. Section B argues that same-sex couples might also successfully raise constitutional challenges based

160. For example, the State of Wisconsin Group Health Insurance Program provides a range of fair market values to be used in making such a calculation, with most values being close to \$500 per month. See *Monthly Fair Market Value (FMV) – Imputed Income Estimates* (Sept. 26, 2013), <http://uwservice.wisc.edu/docs/publications/imputed-income-state-active-2014.pdf>.

161. See *supra* notes 120–35 and accompanying text.

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

on equal protection principles as articulated in *Windsor*. Section C discusses the likelihood of success for both types of challenges.

A. *Administrative-Law Challenges to State Action*

As a preliminary matter, one must consider whether tax rules and regulations are even subject to the requirements of state administrative law. The notion of tax exceptionalism from the norms of administrative law has long persisted amongst tax lawyers, administrators, and courts alike.¹⁶³ The Supreme Court recently ruled, however, that the validity of federal tax regulations must be evaluated using the same standard of review that applies to regulations issued by all other federal agencies, making it clear that tax is not exempt from the requirements of administrative law.¹⁶⁴ Taxpayers can now invoke administrative-law principles, such as the Administrative Procedure Act's (APA's) arbitrary-and-capricious standard, to challenge IRS actions.¹⁶⁵ This Note is concerned specifically with regulations enacted by *state* tax authorities. Whether state tax regulations are vulnerable to direct challenges based on applicable administrative-law norms is a complex question.¹⁶⁶ State courts have frequently looked to state administrative-law standards in

163. See, e.g., Paul Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to Be Tax Lawyers*, 13 VA. TAX REV. 517, 519–31 (1994) (describing how the “tax is different” mindset has led to tax exceptionalism in the law); Anthony C. Infanti, *LGBT Taxpayers: A Collision of Others*, 13 GEO. J. GENDER & L. 1, 8–17 (2012) (listing a series of examples showing the pervasiveness of the notion of tax exceptionalism); Lawrence Zelenak, *Maybe Just a Little Bit Special After All?*, 63 DUKE L.J. 1897, 1906–18 (2014) (offering a defense of the tax-exceptionalist position).

164. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011) (“We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.”). *Chevron* provides a two-step test for judicial deference: (1) if the statute is unambiguous, the court should apply the statute without deference to the agency's view, but (2) if the statute is ambiguous, the court should defer to the agency's interpretation if that interpretation is at least reasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

165. Patrick J. Smith, *The APA's Arbitrary and Capricious Standard and IRS Regulations*, TAX NOTES TODAY, July 16, 2012, available at LEXIS, 2012 TNT 137-4. Smith describes how IRS regulations are particularly vulnerable to challenge under the arbitrary-and-capricious standard because the IRS generally does not explain the reasons for its rules. *Id.* at 274. A challenge based on the APA's arbitrary-and-capricious standard is one based on procedural grounds: did the agency engage in reasoned decision-making and did it articulate a satisfactory explanation for its action? *Motor Vehicles Mfrs. Ass'n Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

166. For a discussion of these complexities, see *infra* Part IV.A.2.

determining the validity of agency regulations.¹⁶⁷ State departments of revenue generally qualify as agencies and are therefore subject to the requirements of their respective state analogs to the APA.¹⁶⁸ In this context, two lines of attack may prove fruitful.

1. *State Statutes Mandating Conformity to the Federal Income Tax System.* Almost immediately after the IRS Ruling was issued, tax experts recognized that nonrecognition states with some level of federal-state tax-base conformity would face a dilemma.¹⁶⁹ Perhaps states that instruct married same-sex couples *not* to use the information provided on their federal income tax return while preparing their state income tax returns are breaking their own laws mandating conformity to the federal income tax system.

On December 30, 2013, two married same-sex couples sued the Kansas Department of Revenue, adopting this very approach.¹⁷⁰ They alleged that the Department violated state tax laws that couple the state income tax code to the federal tax code.¹⁷¹ The argument is simple: same-sex couples should refer to state law requiring the state income tax code to conform to the federal tax code; in the absence of legislation repealing this statutory requirement, they must be permitted to file returns based on the state statute (that is, to reference their federal tax return and filing status for state tax

167. See, e.g., *Kokochak v. W. Va. State Lottery Comm'n*, 695 S.E.2d 185, 189 (W. Va. 2010) (considering the validity of rules issued by the state lottery commission in light of the state APA); *Labor Comm'r v. Littlefield*, 153 P.3d 26, 44 (Nev. 2007) (holding a Labor Commissioner's determination to delete certain worker classifications to be invalid because it did not comply with the state APA's notice-and-hearing requirements); *N.J. Educ. Ass'n v. Librera*, 840 A.2d 266, 268–69 (N.J. Super. Ct. App. Div. 2004) (considering whether a Department of Education manual was subject to the state APA's procedural requirements); *Parker v. Gorczyk*, 787 A.2d 494, 495 (Vt. 2001) (holding that the state Department of Corrections cannot issue a furlough policy without complying with the Vermont APA's rulemaking procedures); *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 820 P.2d 1206, 1222–23 (Idaho 1991) (holding a state tax commission interpretation invalid because it failed to supply the normal safeguards that should exist when an agency construes a statute); *Miss. State Tax Comm'n v. Vicksburg Terminal*, 592 So. 2d 959, 961 (Miss. 1991) (applying the arbitrary-and-capricious standard to tax rules promulgated by the state tax commission).

168. See, e.g., KAN. STAT. ANN. § 77-502 (West 2014), which defines a “state agency” to include any department, bureau, board, authority, agency, or commission and excludes only the judiciary and legislature; and OHIO REV. CODE ANN § 119.01 (West 2014), which expressly subjects the state Department of Taxation to the state's APA.

169. See, e.g., *Koklanaris*, *supra* note 95, at 694 (quoting CPAs and tax consultants on the “tough decisions” facing states).

170. Petition at 1, 8–10, *Nelson v. Kan. Dep't of Revenue*, No. 13C1465 (Kan. Dist. Ct. Dec. 30, 2013).

171. *Id.* at 8.

purposes).¹⁷² For example, the Kansas legislature has enacted tax legislation specifically titled, “Conformity with Federal Code,” which states that “any term used in this act shall have the same meaning as when used in a comparable context in the federal internal revenue code [*sic*].”¹⁷³ Presumably, this would include the IRS Ruling, which concludes that the terms “spouse,” “marriage,” “husband and wife,” “husband,” and “wife”—as used in the Code—should be interpreted to include same-sex spouses.¹⁷⁴ Further legislation in Kansas provides that “all returns required by this act shall be made as nearly as practical in the same form as the corresponding form of income tax return by the United States.”¹⁷⁵

Several other states have similar legislation. Virginia’s tax code provides that “any term used in this chapter shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required.”¹⁷⁶ North Carolina tax legislation defines “married individual” as one who is married and is considered married under section 7703 of the federal Code.¹⁷⁷

Married same-sex couples in these states may therefore argue that the relevant tax authorities are violating state income tax codes by requiring legally married same-sex couples to file state income tax returns that do not conform to their federal returns. State laws clearly direct tax authorities to follow the federal government’s lead on income tax matters.¹⁷⁸ The success of such an argument depends on a

172. For example, in New York, under DOMA, even after the state recognized same-sex marriages undertaken in other states, married same-sex couples had to file their state tax returns as if they were single. This was because of a state statute, Tax Law section 607(b), mandating conformity with the federal tax base. The problem was later corrected with the passage of the Marriage Equality Act. See Patricia A. Cain, *The New York Marriage Equality Act and the Income Tax*, 5 ALB. GOV’T L. REV. 634, 638–40 (2012) (describing how New York had long recognized valid same-sex marriages from other jurisdictions, except for the purposes of state taxation—due to the conformity statute).

173. KAN. STAT. ANN. § 79-32, 109 (West 2014).

174. Rev. Rul. 2013-17, 2013-38 I.R.B. 200.

175. KAN. STAT. ANN. § 79-3221 (West 2014).

176. VA. CODE ANN. § 58.1-301 (West 2014). Ohio has identical statutory language regarding income taxation. OHIO REV. CODE ANN. § 5747.01 (West 2014).

177. N.C. GEN. STAT. § 105-134.1 (West 2014). Wisconsin has similar language incorporating the Code’s definitions of “married person” and “spouse.” WIS. STAT. ANN. § 71.01(8) (West 2014).

178. See *supra* notes 173, 176 and accompanying text.

state-by-state determination of the degree of conformity between a state's tax code and the federal Code.¹⁷⁹

The IRS Ruling has placed state tax agencies in the unenviable position of deciding whether to abide by statutes mandating federal-state tax-base conformity, or else state constitutional or statutory provisions banning the recognition of same-sex marriage. Several tax agencies have explicitly cited these state bans when issuing new guidance for married same-sex couples.¹⁸⁰ Therefore, same-sex taxpayers must also persuade courts that the agency was required to resolve the issue in favor of the state's federal conformity statute. Same-sex taxpayers could invoke a longstanding canon of construction—that specific statutes control over general ones¹⁸¹—to argue that a state's general statutory or constitutional provision must yield to its specific statute mandating federal-state tax-base conformity.¹⁸²

The plaintiffs in *Nelson v. Kansas Department of Revenue*¹⁸³ argued along these lines. They claimed that the general language contained in the Kansas Constitution and statutory provision banning same-sex marriage did not address the question of filing status for income tax purposes.¹⁸⁴ On the other hand, the state conformity statute clearly directed that federal law control determinations of filing status.¹⁸⁵ The plaintiffs cited cases stating that when a general statute conflicts with a specific one, the specific statute must control.¹⁸⁶

This is not an invincible argument, however, because agencies could persuasively invoke contrary legislative intent, as manifested in statutory provisions banning recognition of same-sex marriage.¹⁸⁷ For

179. For example, while Idaho legislation states that “[h]usbands and wives shall, if they elect to file a joint return for federal purposes, be required to file a joint return for state purposes,” it contains no cross-reference to the Internal Revenue Code for the definition of “husband” and “wife.” IDAHO CODE ANN. § 63-3031 (West 2014). Therefore, married same-sex couples in Idaho will have a weaker claim than those in Kansas, Virginia, Ohio, and North Carolina. *See supra* notes 175–77 and accompanying text.

180. *See supra* notes 117, 120, 123, 125, 133–35 and accompanying text.

181. *See Simpson v. United States*, 435 U.S. 6, 15 (1978) (“[G]ive[] precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern, even if the general provision was enacted later.”).

182. *See infra* notes 184–86 and accompanying text.

183. Petition, *Nelson v. Kan. Dep’t of Revenue*, No. 13C1465 (Kan. Dist. Ct. Dec. 30, 2013).

184. *Id.* at 17.

185. *Id.* at 8–9.

186. *Id.* at 17.

187. *See, e.g., Meyer v. United Parcel Serv., Inc.*, 909 N.E.2d 106, 111 (Ohio 2009) (“[W]here there is no manifest legislative intent that the general provision prevail over the specific

example, the Missouri governor's Executive Order, discussed in Part III.A.2, reads the state's tax conformity statute as overriding its constitutional ban. In Louisiana, however, the tax authorities interpret their state's constitutional ban as superseding the state conformity statute.¹⁸⁸ In this way, each state's executive branch reached the opposite conclusion when confronted with the same dilemma. Overall, although the specific-over-general argument is unlikely to be a winning one for same-sex taxpayers and their allies,¹⁸⁹ it might be more compelling in a state (such as North Carolina) where the conformity statute speaks with unusual specificity on the issue of marriage itself.¹⁹⁰

2. *State Agencies Issuing New Regulations Without Public Comment or Standard Legal Review.* A second potential argument would be based on administrative-rulemaking procedures. Such an attack entails arguing that, in adopting and implementing the rules, regulations, and policies dealing with married same-sex couples, tax authorities failed to follow the proper state statutory requirements for administrative rulemaking, such as a public notice-and-comment process¹⁹¹ or opportunities for a public hearing.¹⁹² Indeed, the chairman of Utah's Tax Commission recognized that the Commission's decision preventing same-sex couples from filing a joint state income tax return failed to follow the agency's decisionmaking norms.¹⁹³

provision, the specific provision applies."); *Butler v. State*, 637 S.E.2d 688, 689 (Ga. 2006) ("[A] specific statute will prevail over a general statute, absent any indication of a contrary legislative intent."); *Nucor Corp. v. Gen. Bearing Corp.*, 423 S.E.2d 747, 751 (N.C. 1992) ("[T]he particular, specific statute will be construed as controlling, absent a clear legislative intent to the contrary.").

188. See *supra* notes 117 and 137 and accompanying text.

189. While most conformity statutes speak specifically about tax, they speak generally about marriage. State mini-DOMAs, on the other hand, speak specifically about marriage.

190. See *supra* note 177 and accompanying text.

191. See *infra* note 195 and accompanying text. For example, the Illinois APA mandates two rounds of notice-and-comment for proposed rulemaking. See generally 5 ILL. COMP. STAT. 100/5-40 (2002).

192. For example, the Utah Administrative Rulemaking Act states that agencies shall hold a public hearing on a proposed rule if "another state agency, ten interested persons, or an interested association having not fewer than ten members request a public hearing." UTAH CODE ANN. 63G-3-302 (West 2014).

193. See Dan Harrie & Lee Davidson, *Utah Rejects Joint Tax Filings by Same-Sex Couples*, THE SALT LAKE TRIB. (Oct. 10, 2013, 6:21 PM), <http://www.sltrib.com/sltrib/politics/56984564-90/utah-couples-state-sex.html.csp> (describing how the Utah Tax Commission Chairman

In determining whether a state agency has followed appropriate procedures, one must first decide whether the relevant agency's regulation, policy, or guidance for same-sex taxpayers is a "rule" subject to the rulemaking requirements of the state's APA. Importantly, rules are not limited solely to regulations and formal interpretive pronouncements from administrative agencies, but also encompass any agency standard or policy that generally applies to the public.¹⁹⁴ Rules that fail to meet the promulgation requirements are susceptible to challenges regarding their validity. For the purposes of illustrating such a challenge, this Note considers Louisiana's administrative-rulemaking procedures.

The Louisiana Administrative Procedure Act (LAPA)¹⁹⁵ establishes a specific rulemaking process designed to guarantee that the public is informed of an agency's intent to issue a rule, has the opportunity to comment on the rule, and receives an explanation as to why a particular rule was chosen.¹⁹⁶ Arguably, the Department of Revenue's Revenue Information Bulletin (RIB) falls squarely within the definition of a rule as set out in the LAPA.¹⁹⁷ The RIB applies generally, impacting the entire segment of the population to which it is addressed: married same-sex couples. Furthermore, it has the force and effect of law—compelling same-sex taxpayers to follow its dictates. Therefore, the RIB should be subject to the LAPA's specific procedures for rulemaking,¹⁹⁸ which are mandatory.¹⁹⁹ In an earlier

acknowledged that it might have been better to make this decision in an open, public meeting, as is normally the case with commission rules and decisions).

194. Bruce P. Ely, William T. Thistle, II, & H. Michael Madsen, *State Administrative Procedure Acts: Procedural Avenues to Attack Faulty Regulations and Assessments*, 19 J. MULTISTATE TAXATION & INCENTIVES, Aug. 2009, at 6, 9.

195. LA. REV. STAT. ANN. § 49:950–:999.25 (2014).

196. *Id.* § 49:953.

197. According to the state APA: "'Rule' means each agency statement, guide, or requirement for conduct or action . . . which has general applicability and the effect of implementing or interpreting substantive law or policy, or which prescribes the procedure or practice requirements of the agency." *Id.* § 49:951. The Department of Revenue website defines a Revenue Information Bulletin as "an informal statement of information issued for the public, announcing general information that the department believes to be useful in complying with the laws administered." *Policy Documents*, LOUISIANA DEPARTMENT OF REVENUE (Aug. 5, 2014), <http://www.revenue.louisiana.gov/sections/lawspolicies/pd.aspx?ribs=show>.

198. These procedures include ninety days' notice for intended agency rulemaking, submission of oral or written comments by the public, a hearing, response to comments and submissions, and a preamble explaining the basis and rationale for the rule. LA. REV. STAT. ANN. § 49:953.

199. "No rule . . . is valid unless adopted in substantial compliance with [the Louisiana Administrative Procedure Act]." *Id.* § 49:954.

case involving an income tax rule issued by the Department of Revenue, the Louisiana Court of Appeals stated that if an agency fails to submit a rule to the notice-and-promulgation requirements of LAPA, the rule is invalid and unenforceable.²⁰⁰ As such, although the RIB can be considered a “rule,” the Department of Revenue’s failure to submit it to the notice-and-promulgation requirement of LAPA raises concerns regarding its validity and enforceability.

Although Louisiana’s rulemaking requirements apply to tax agencies, some states explicitly exempt tax authorities from their rulemaking requirements.²⁰¹ Same-sex-marriage taxpayers must therefore consult the rulemaking provisions set out in each state’s APA (or an equivalent thereof). Furthermore, not all state courts construe the term “rule” liberally and have, in some instances, concluded that an agency statement or policy is merely a guideline and therefore not subject to the requirements of the state’s APA.²⁰² Therefore, the likelihood of success for such a challenge will differ depending on state case law and statutory provisions.

3. *Standard of Deference.* A key question for taxpayers seeking to challenge state tax-authority rules and guidelines on the basis of administrative law is the appropriate standard of judicial deference toward these tax policies. The deference doctrine and the relationship between courts and administrative agencies are important points of intersection between state tax law and administrative law.²⁰³

As discussed earlier, the Supreme Court has held that tax rules are subject to administrative-law norms and that the IRS is entitled to *Chevron* deference.²⁰⁴ On the federal level, the APA’s arbitrary-and-capricious standard requires that agencies give reasoned explanations for their decisions.²⁰⁵ This standard applies to review of all agency

200. *Star Enter. v. State ex rel. Dep’t of Revenue & Taxation*, 676 So. 2d 827, 832 (La. 1996).

201. The North Carolina Department of Revenue is exempted from the notice, hearing, and public-comment requirements for rulemaking. It is also exempt from the requirement that an agency provide a concise written explanation for why it adopted a rule. N.C. GEN. STAT. ANN. § 150B-1(d)(4) (West 2014). Similarly, the Indiana Department of Revenue is exempt from state APA requirements. IND. CODE § 4-21.5-2-4(a)(9) (2013).

202. Ely et al., *supra* note 194, at 9.

203. Steve R. Johnson, *Judicial Deference to State Tax Agencies – An Overview*, STATE TAX NOTES, Nov. 29, 2010, available at LEXIS, 58 STATE TAX NOTES 633, 633.

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

205. See 5 U.S.C. § 706(2)(A) (2012) (creating an arbitrary-and-capricious standard).

actions, including informal rulemaking.²⁰⁶ For example, in a 2012 case, *Dominion Resources Inc., v. United States*,²⁰⁷ the Federal Circuit Court of Appeals invalidated a tax regulation based on this common administrative-law principle. The court held that the regulation was not a permissible construction of the Code under *Chevron* and that the Treasury's regulation violated the APA's arbitrary-and-capricious standard.²⁰⁸ It is unclear, however, whether less formal administrative guidance (such as revenue rulings) warrants *Chevron* deference or whether it should receive less deferential review.

On the state level, married same-sex taxpayers should examine the deference standards espoused by state courts in previous tax cases. The question of whether rules issued by tax authorities receive deference, and if so, to what degree, remains unsettled.²⁰⁹ Judicial review of state tax authorities varies greatly, with judges applying a range of deferential standards—from a high level of deference, to *Chevron* deference, to little or no deference—to interpretations and positions of tax authorities.²¹⁰ Several states have applied *Chevron* deference in cases involving agency interpretation of tax provisions.²¹¹ In other cases, states have applied the Supreme Court's *Auer v. Robbins*²¹² principle, which states that an agency's interpretation of its own regulation controls unless it is clearly inconsistent with the

206. The Supreme Court has held that the appropriate standard of review for informal agency actions is the arbitrary-and-capricious test of section 706(2)(A) of the APA. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

207. *Dominion Res., Inc. v. United States*, 681 F.3d 1313 (Fed. Cir. 2012).

208. *Id.*

209. See Ely et al., *supra* note 194, at 15–17 (describing the deference accorded by various state courts).

210. See Johnson, *supra* note 203 (describing six broad categories of state deference regimes); see also Ann Graham, *Chevron Lite: How Much Deference Should Courts Give to State Agency Interpretation?*, 68 LA. L. REV. 1105, 1109–10 (2008) (“Existing state models range along a continuum from express adoption of the *Chevron* doctrine to outright rejection of *Chevron*'s applicability. A middle ground approach sounds very much like the federal *Skidmore* test”); Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 984 (2008) (“A survey of the fifty states' equivalents to the *Chevron* doctrine shows an array of different announced standards”).

211. See Steve R. Johnson, *Chevron Deference to State Tax Agencies*, STATE TAX NOTES, Jan. 24, 2011, available at LEXIS, 59 STATE TAX NOTES 285, 286 (providing a list of state tax cases applying *Chevron* deference).

212. *Auer v. Robbins*, 519 U.S. 452 (1997).

regulation.²¹³ However, same-sex taxpayers have two possible arguments that the generous *Auer* standard should not apply to agency interpretations of their income tax filings: first, state statutes mandating federal-state tax-base conformity are not ambiguous, and second, the agency's interpretation was not set out in the appropriate manner.²¹⁴

Regardless, if married same-sex taxpayers cannot convince courts that the informal tax guidance offered by state tax authorities should be considered a "rule" subject to administrative-procedure requirements, they might yet have room to maneuver. State tax authorities cannot have their cake and eat it too—they cannot enjoy the ease of issuing informal guidance yet legally obligate taxpayers to follow it. Same-sex taxpayers could argue that informal pronouncements do not carry significant weight.²¹⁵ Had state tax authorities addressed same-sex tax filings through formal agency action, they would be entitled to greater deference and be less susceptible to taxpayer challenges.

B. Constitutional Challenges to State Action

On top of the administrative concerns outlined above, state tax rules and policies for married same-sex couples are also open to constitutional challenges. *Windsor's* holding was based on the Fifth Amendment's due process and equal protection principles, which do not apply to states.²¹⁶ According to the majority, DOMA revealed a "desire to harm" same-sex couples whose "moral and sexual choices the Constitution protects."²¹⁷ It is reasonable to find similar protections enshrined in the Fourteenth Amendment, which applies

213. See Steve R. Johnson, *Deference to Tax Agencies' Interpretation of Their Regulations*, STATE TAX NOTES, May 30, 2011, available at LEXIS, 60 STATE TAX NOTES 665, 665–66 (explaining *Auer* deference).

214. See *id.* at 666–68 (describing arguments that taxpayers can make against *Auer*-style deference).

215. In *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court held that "[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference;" rather, opinion letters and more informal pronouncements are merely "'entitled to respect' under . . . *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), but only to the extent that those interpretations ha[d] the 'power to persuade.'" *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

216. *United States v. Windsor*, 133 S. Ct 2675, 2693 (2013) ("[DOMA] violates basic due process and equal protection principles applicable to the Federal Government.").

217. *Id.* at 2694–95.

to the states. Indeed, Justice Scalia emphasized this point in his dissent, stating: “it is just a matter of listening and waiting for the other shoe.”²¹⁸ Arguably, the other shoe has dropped. Same-sex couples in nonrecognition states have the ability to raise an equal protection challenge to state tax rules based on the Fourteenth Amendment. Indeed, some state tax agencies apparently anticipate that they will be sued based on Fourteenth Amendment equal protection principles.²¹⁹ Below, this Note first considers the grounds on which same-sex couples can make an equal protection claim, and then turns to the standard of review.

1. *The Basis for Claims.* The Equal Protection Clause of the Fourteenth Amendment provides that no state “shall deny to any person within its jurisdiction the equal protection of the laws.”²²⁰ To establish an equal protection violation, a plaintiff “must prove purposeful discrimination directed at an identifiable or suspect class.”²²¹ When a distinction in taxation is drawn along a “protected” class line, the tax will arguably be seen as violating the Equal Protection Clause.²²² Nonrecognition states following the “Louisiana Model” are therefore susceptible to equal protection challenges. These states require legally married same-sex couples to file dummy federal tax returns or complete additional worksheets, thereby imposing a burden on a discrete set of married taxpayers and creating a conflict with the Fourteenth Amendment. Burdening married same-sex couples with filing requirements that they would not face if they were married opposite-sex couples amounts to discrimination based on what Professor Infanti calls “noneconomic characteristics.”²²³

218. *Id.* at 2710 (Scalia, J., dissenting).

219. Charles S. Johnson, *Official: Same-Sex Couples Who Marry Outside Montana Can't File State Taxes Jointly*, MISSOULIAN Oct. 2, 2013, http://missoulian.com/news/local/official-same-sex-couples-who-marry-outside-montana-can-t/article_30cae8ba-2b01-11e3-9ada-0019bb2963f4.html (quoting an exchange between Senator Dick Barrett and Montana Revenue Department Director Mike Kadas in which Kadas acknowledged that it was a “distinct possibility” that the agency would be sued under the Equal Protection Clause).

220. U.S. CONST. amend. XIV.

221. *Giano v. Senkowski*, 54 F.3d 1050, 1057 (2d Cir. 1995) (citations omitted).

222. *See, e.g., Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n.*, 488 U.S. 336, 345–46 (1989) (holding that the Fourteenth Amendment’s Equal Protection Clause protects individuals from state action that discriminates against them by subjecting them to taxes not imposed on others of the same class).

223. Anthony C. Infanti, *Taxing Civil Rights Gains*, 16 MICH. J. GENDER & L. 319, 320 (2010).

Arguably, these states have instituted tax practices that subordinate married same-sex couples, subjecting them to burdens not faced by other married couples. Same-sex-marriage taxpayers should frame the constitutional issue as whether the state can effectively deprive certain individuals of an *existing* marital status.²²⁴ To this end, the argument that states must recognize marriages performed in sister states is persuasive. When a state recognizes the validity of certain marriages performed in other states that are not legal in the state in question—such as incestuous marriages or the marriage of minors—yet refuses to recognize a same-sex marriage legally performed in another state, it could be violating the Equal Protection Clause.²²⁵ Legally married same-sex taxpayers can argue that the principal purpose of the tax policies adopted post-*Windsor* is to deny recognition to their marriages and to treat them differently than other legally married couples. Indeed, the *Windsor* majority reached a similar conclusion, holding that DOMA undermined the public significance of state-sanctioned marriages, “for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.”²²⁶ The differential tax treatment of two similarly situated groups is a solid basis for an equal protection claim against state tax provisions.²²⁷ Here, an equal protection claim

224. State courts are likely to be more amenable to such a claim rather than one that frames the issue as whether same-sex couples enjoy a constitutional right to marry in the state. *See infra* note 243 and accompanying text.

225. *See, e.g.*, Letter from Mary Williams, Or. Deputy Att’y Gen., to Michael Jordan, Chief Operating Officer, Dep’t of Admin. Servs. (Oct. 16, 2013) (concluding that Oregon would violate the Fourteenth Amendment equal protection rights of its residents if it declined to recognize a same-sex marriage legally conducted in another state); *see also* Obergefell v. Kasich, No. 1:13-cv-501, 2013 WL 3814262, at *1 (S.D. Ohio July 22, 2013) (describing how Ohio has historically recognized out-of-state marriages between minors and first cousins, even if they are not authorized under Ohio law, and holding that Ohio therefore may not single out out-of-state same-sex marriages as legally unrecognizable); *Ghassemi v. Ghassemi*, 998 So. 2d 731, 743–44 (La. Ct. App. 2008) (holding that Louisiana will recognize a marriage between first cousins contracted in a state where such a marriage is legal, even though first cousins cannot legally marry in Louisiana).

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

227. State courts have held that while the Equal Protection Clause “does not preclude the state from drawing distinctions between different groups of individuals,” it “does require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.” *See, e.g.*, *Shelton v. Phalen*, 519 P.2d 754, 757 (Kan. 1974).

narrowly framed to apply to migratory marriages will likely be more successful than one that also includes evasive marriages.²²⁸

2. *The Standard of Review.* Challenges to state tax provisions based on equal protection principles will generally be subject to rational-basis review—the same standard courts apply in evaluating equal protection challenges to state commercial regulations and economic legislation.²²⁹ To pass rational-basis review, a legislative classification must be rationally related to a legitimate governmental purpose.²³⁰ Same-sex taxpayers should rely on the equal protection arguments advanced in *Windsor*, which held that “discriminations of an unusual character . . . suggest careful consideration.”²³¹ Although the majority opinion did not clearly articulate the level of scrutiny being applied, it used the language of rational-basis review.²³² As Justice Scalia noted, however, the Court seemed to be applying something greater than traditional rational-basis review.²³³ The Court’s disinclination to follow familiar equal protection analysis might have stemmed from the majority’s desire to maintain flexibility in anticipation of subsequent litigation involving state bans on same-sex marriage.

C. *The Likelihood of Success*

This Section considers same-sex taxpayers’ likelihood of succeeding on challenges grounded in the equal protection and administrative-law principles outlined above. The outcome of an equal protection challenge to state tax provisions aimed at same-sex taxpayers will likely turn on the level of scrutiny applied²³⁴ and

228. For a discussion of evasive versus migratory marriages, see Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2145 (2005).

229. See *Fulton Corp. v. Faulkner*, 516 U.S. 325, 345 (1996) (“[W]e continue to measure the equal protection of economic legislation by a ‘rational basis’ test . . .”).

230. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”).

231. *Windsor*, 133 S. Ct. at 2692 (quoting *Romer*, 517 U.S. at 633).

232. See *id.* at 2696 (“The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”).

233. See *id.* at 2706 (Scalia, J., dissenting) (noting that the majority “does not apply anything that resembles th[e] deferential framework” of rational-basis review (emphasis omitted)).

234. Post-*Windsor*, courts are debating the level of scrutiny to be applied in cases challenging state bans on same-sex marriage. See, e.g., *SmithKline Beecham Corp. v. Abbott*

whether the state agency's action has a discriminatory impact on a certain group of taxpayers.²³⁵ On the federal level, equal protection challenges to federal tax provisions have been unsuccessful, given that distinctions drawn in tax statutes are almost universally upheld as reasonable legislative choices in the administration of tax law.²³⁶ On the state level, before *Windsor*, state courts that applied rational-basis review to state action challenged for discriminating on the basis of sexual orientation upheld agency actions in the vast majority of cases.²³⁷

To prevail on an equal protection claim under rational-basis review, same-sex taxpayers must prove that “[t]he principal purpose [of the state same-sex tax-filing rules] is to impose inequality, not for other reasons like governmental efficiency.”²³⁸ A key element of any successful claim is to argue that the challenged rule cannot withstand constitutional scrutiny because the state cannot justify the unequal treatment its tax rule inflicts. The *Windsor* Court noted that DOMA was an “unusual deviation” which was “strong evidence of a law having the purpose and effect of disapproval of the class.”²³⁹ Same-sex taxpayers could easily draw parallels to the state tax rules under scrutiny here, characterizing them as unusual deviations from a longstanding tradition of conformity. At the same time, states are likely to cite *Windsor*'s federalism underpinnings and the majority's lengthy discussion of states' traditional authority to define and regulate marriage.²⁴⁰ Such a defense would have its limits, however, because as the Court repeatedly noted, such state authority over marriage was “subject to constitutional guarantees.”²⁴¹

Thus, married same-sex taxpayers raising an equal protection challenge have a compelling claim that state tax provisions are not

Labs., 740 F.3d 471, 482–84 (9th Cir. 2014) (applying heightened scrutiny to classifications based on sexual orientation); *Bourke v. Beshear*, No. 3:13-cv-750, 2014 WL 556729, at *4–5 (W.D. Ky. Feb. 12, 2014) (discussing the applicable standard of review); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 482 (E.D. Va. 2014) *aff'd sub nom.* *Bostiv v. Schaefer*, Nos. 14-1167, 14-1169, 14-1173, 2014 WL 3702493 (4th Cir. July 28, 2014) (declining to apply heightened scrutiny because Virginia's same-sex marriage ban would fail under even the most deferential level of scrutiny).

235. See *supra* note 221–22 and accompanying text.

236. Cain, *supra* note 23, at 510.

237. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 466 n.132 (2000).

238. *Windsor*, 133 S. Ct. at 2694.

239. *Id.* at 2693.

240. *Id.* at 2692.

241. *Id.*

treating like groups—that is, married couples—alike and that the provisions are intended to discriminate against a distinct group of taxpayers. The state would have to persuade courts that the challenged tax provisions are supported by sufficient state interests—not an easy task in the wake of *Windsor* and its discourse on equality.

Although an equal protection challenge might succeed under *Windsor* principles,²⁴² a suit based on administrative-law procedures is likely to be more palatable to state courts.²⁴³ Administrative challenges, however, face their own set of obstacles. As mentioned earlier, several states exempt their revenue or tax agencies from the states' APA requirements.²⁴⁴ For states that do not, married same-sex taxpayers should anticipate that the relevant state tax agency will claim that any guidance it issued does not rise to the level of a “rule” or “regulation,” and is therefore not subject to the state’s APA rulemaking procedures.²⁴⁵

It is doubtful that state agencies will prevail on such claims, however, given that the new tax provisions sharply depart from the agencies' longstanding application of prior statutory language mandating federal-state tax-base conformity.²⁴⁶ Furthermore, as argued by the plaintiffs in *Nelson v. Kansas Department of Revenue*, agency instructions or guidance—“nonrules”—may not give rise to any legal duty,²⁴⁷ whereas agency policies, which apply generally and have the effect of law, are considered to be rules.²⁴⁸ Courts are likely to express reservations about deferring to agency interpretations made informally, which is the manner in which most state tax provisions were issued in the wake of the IRS Ruling.²⁴⁹ Of course, if

242. See *supra* note 226 and accompanying text.

243. Telephone Interview with David J. Brown, The Law Office of David J. Brown (Jan. 3, 2014). Brown is the attorney for the petitioners in *Nelson v. Kan. Dep't of Revenue*. Petition, *Nelson v. Kan. Dep't of Revenue*, No. 13C1465 (Kan. Dist. Ct. Dec. 30, 2013).

244. See *supra* note 201 and accompanying text.

245. See, e.g., Answer at 8, *Nelson v. Kan. Dep't of Revenue*, No. 13C1465 (Kan. Dist. Ct. Feb. 3, 2014) (stating that Notice 13-18, instructing same-sex taxpayers on filing status, is not subject to rulemaking requirements).

246. See *supra* notes 173 and 175 and accompanying text.

247. KAN. STAT. ANN. §77-415(b)(2)(D) (2014).

248. See *Bruns v. Kan. State Bd. of Technical Professions*, 877 P.2d 391, 395 (Kan. 1994) (holding that a “rule” or “regulation” is a policy that is of general application and has the effect of law).

249. See, e.g., *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (holding that agency interpretations such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law, are not entitled to *Chevron* deference;

state legislatures codify the tax rules provided by state tax agencies, as Idaho's has done,²⁵⁰ challenges based on administrative-rulemaking procedures could be moot.

CONCLUSION

The post-*Windsor* IRS Ruling presents nonrecognition states with choices—not just about whether to conform to or decouple from the federal income tax system when it comes to same-sex taxpayers, but about the possible ways to make such a policy change. Different states have made different decisions, with some states opening themselves up to legal challenges based on administrative-law and constitutional equal protection principles.

This Note should provide some guidance for same-sex marriage advocates seeking to challenge state tax provisions that prohibit married same-sex couples from using a married filing status. A taxpayer challenge based on state administrative-law and constitutional equal protection principles might be the best strategy for married same-sex taxpayers seeking to challenge nonrecognition provisions in general.

This Note's approach, however, is merely a starting point in the development of a strategy for same-sex-marriage advocates to use in challenging the disparate tax treatment of same-sex couples. The coming months will undoubtedly witness additional litigation over the post-*Windsor* state tax regulations, which will suggest additional modifications to the approach set forth here. Even if the nonconstitutional concerns diminish over time as state legislatures specifically address the conformity issue, same-sex taxpayers can still challenge agency actions for the current tax-filing season. State tax treatment of same-sex marriage in nonrecognition states is a complex and fast-developing issue, and any proposal must evolve in parallel with related litigation.

such interpretations warrant only judicial "respect," and only to the extent that they have the "power to persuade" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

250. See *supra* note 121 and accompanying text.