TAXATION OF SAME-SEX COUPLES AFTER *UNITED STATES V. WINDSOR*: DID THE IRS GET IT RIGHT IN REVENUE RULING 2013-17?

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I. INTRODUCTION

The tax world for same-sex couples changed dramatically on June 26, 2013, when the United States Supreme Court handed down its decision in *United States v. Windsor*.[1] The Court ruled that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional.[2] That case involved Edie Windsor's claim for a tax refund, based on the fact that the IRS had failed to recognize her marriage to her deceased spouse.[3] Windsor argued that the estate, which was left to her, was entitled to a marital deduction. The amount of wrongly paid taxes was $363,000.[4] As Windsor tells it, "I was anguished about the money, but it was more about the indignation. The government was not recognizing us, and we deserved recognition."[5]

Edie and her spouse, Thea Spyer, had been together over 40 years.[6] When Spyer's health deteriorated due to multiple sclerosis, the

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[1] 570 U.S. __, 133 S. Ct. 2675 (2013).

[2] *Id.* (Section 3 of DOMA provides, "[i]n 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." 1 U.S.C. § 7 (2012)).

[3] *Id.* at 2683.

[4] *Id.*

[5] Lila Shapiro, *Edie Windsor vs. DOMA May Be Best Chance to Strike Federal Gay Marriage Ban*, HUFFINGTON POST (July 17, 2012, 3:43 PM), http://www.huffingtonpost.com/2012/07/17/edie-windsor-doma_n_1680217.html.

[6] *See Windsor*, 133 S. Ct. at 2683 (noting that Windsor and Spyer met in 1963 and remained together until Spyer's death in 2009).

couple decided they wanted to tie the knot legally before it was too late.[7] They wed in Toronto in 2007.[8] Two years later Spyer died and the estate tax problem arose.[9] Windsor filed her refund suit in 2010.[10]

Throughout the litigation, much emphasis was placed on the fact that New York recognized Canadian marriages in 2009, even though a same-sex couple could not legally marry in New York at that time.[11] New York did not recognize marriages between couples of the same sex for state taxation purposes, however.[12] For example, a same-sex married couple could not file a joint tax return at the state level. State revenue officials determined that it would be too difficult to administer joint returns at the state level when the couple could not, because of DOMA, file jointly at the federal level.[13] While the official announcement from the Department of Revenue referred only to income taxes, it was assumed by practitioners that the nonrecognition rule also applied to estate taxes.[14] The State of New York had a lower exemption level than the federal one, but otherwise its estate tax is

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[7] *See id.* (noting concern about Spyer's deteriorating health as an impetus behind Windsor and Spyer's decision to wed); *see also* Shapiro, *supra* note 5 (discussing Spyer's years-long battle with multiple sclerosis).

[8] Shapiro, *supra* note 5.

[9] *Windsor*, 133 S. Ct. at 2683. The estate tax exemption in 2009 was only $3.5 million, compared to $5.25 million in 2013. BRANT J. HELLWIG & ROBERT T. DANFORTH, ESTATE AND GIFT TAXATION 18 (2d ed. 2013). If Spyer had died after 2009, there would have been no estate tax due because of the higher exemption (and the fact that the estate tax totally went away in 2010, but just for that year). *See id.*

[10] Shapiro, *supra* note 5.

[11] Windsor v. United States, 833 F. Supp. 2d 394, 398-99 (S.D.N.Y.), *aff'd* 699 F.3d 169 (2d Cir. 2012), *aff'd* 570 U.S. __, 133 S. Ct. 2675 (2013); Windsor v. United States, 699 F.3d 169, 177-78 (2d Cr. 2102), *aff'd* 570 U.S. __, 133 S. Ct. 2675 (2013).

[12] Patricia A. Cain, *The New York Marriage Equality Act and the Income Tax*, 5 ALB. GOV'T L. REV. 634, 638 (2012).

[13] *See* N.Y. State Dep't of Taxation & Fin. Technical Mem. TSB-A-06(2)I (Apr. 4, 2006), *available at* http://www.tax.ny.gov/pdf/advisory_opinions/income/a06_2i.pdf [hereinafter N.Y. TSBA-06(2)I].

[14] *See, e.g.*, Sean R. Weissbart, *Strategies to Minimize Estate and Gift Tax for Same-Sex Couples*, EST. PLAN. 33, 38 (Feb. 2010) (noting, in a section devoted to state estate and gift tax considerations for same-sex couples, that "although New York currently recognizes same-sex marriages performed in other jurisdictions, according to an advisory opinion from 2006, New York treats same-sex couples as unmarried individuals for tax purposes." (citing N.Y. TSBA-06(2)I, *supra* note 13)).

based on the federal estate tax provisions.[15] Windsor also paid an estate tax to New York that she should not have had to pay.[16]

Despite this nonrecognition of the Windsor and Spyer marriage for state taxation purposes, it did seem to matter to both the federal district court and the Court of Appeals for the Second Circuit that New York, the state of domicile of the couple, did in fact recognize the marriage generally. At the Supreme Court level, New York's recognition of the marriage appeared important as well. Justice Kennedy mentioned it several times in his majority opinion.[17] Furthermore, the federalism concerns that were raised in the case depended on there being a conflict between state and federal law, and of course, there would be none if New York had refused to recognize the Windsor-Spyer marriage as well. While the case was decided primarily on equal protection grounds, some constitutional scholars believe that concerns about federalism helped Kennedy to scrutinize the provision more closely than mere traditional rational basis analysis would have required.[18]

Once the opinion was handed down, pundits across the country began to wonder about the questions that *Windsor* did not answer:

(1) What marriages would the federal government recognize? Would *Windsor* be limited to marriages in states where the marriage was recognized (a place of domicile test)? Or, would the federal government apply a place of celebration test to determine the validity of a marriage?
(2) What should be the retroactive effect of *Windsor*? Once the Court struck DOMA down as unconstitutional, that meant it had been unconstitutional all along. But what if taxpayers and employers had re-

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[15] *See* N.Y. TAX LAW § 951 (McKinney 2006) (describing the interplay between the federal Internal Revenue Code and determination of New York state estate tax and establishing an exclusion amount of $1,000,000 for state estate tax purposes); *see also* HELLWIG & DANFORTH, *supra* note 9, at 18 (indicating the federal exclusion amount in 2009 was $3,500,000).

[16] She did, however, file a protective claim for a refund with the State of New York, and the tax paid was refunded to her after the Supreme Court decision was handed down. *See* Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Estate Tax Refunds Available to Qualified Spouses of Same-Sex Couples (July 23, 2013), *available at* https://www.governor.ny.gov/press/07232013-estate-tax-returns.

[17] United States v. Windsor, 570 U.S. __, __, 133 S. Ct. 2675, 2689, 2692 (2013).

[18] *See* Ilya Somin, *The Impact of Judicial Review on American Federalism: Promoting Centralization More Than State Autonomy*, *in* COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS? (Nicholas Aroney & John Kincaid eds., forthcoming) (manuscript at 35-36), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2311400; *see also* Courtney G. Joslin, Windsor*, Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 164 (2013) (noting the debate among scholars as to whether federalism played a part in the decision).

lied on DOMA and taken tax reporting positions accordingly? Could those positions now be challenged?

(3) What about Registered Domestic Partners (RDPs) and Civil Union Partners (CUPs)? Since they are accorded all the rights and benefits of marriage under the laws of some states, would they be treated as spouses for federal purposes?

Some federal agencies responded quickly. The Office of Personnel Management (OPM) responded that so long as the marriage was contracted in a recognition state,[19] the federal agency would consider the marriage valid for purposes of extending benefits to federal employees.[20] The employee's state of domicile at the time of the marriage, or at any other time, would be irrelevant. The agency further announced that RDPs and CUPs would not be treated as spouses.[21] The Department of Defense followed and adopted the same two rules: place of celebration for validity of the marriage, and RDPs and CUPs would not be treated as spouses.[22]

Finally, on August 29, 2013, the long-awaited guidance from the Internal Revenue Service was issued.[23] In Revenue Ruling 2013-17, the IRS ruled that it would follow the place of celebration rule and that taxpayers who had relied on DOMA with respect to filing status would essentially be held harmless, but taxpayers who would benefit from filing amended returns as married taxpayers were free to do so, provided the past tax year was still open under the applicable statute of limitations.[24] And, consistent with policies announced by other federal agencies, the ruling concluded that RDPs and CUPs would not be treated as spouses.[25]

The ruling stated that the new rule would become fully effective on September 16, 2013.[26] That meant that any married taxpayers who had not yet filed their returns for tax year 2012 could opt to file as single provided they filed before September 16. As of September 16,

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[19] By "recognition state" I mean only those states that recognize the validity of a marriage between same-sex couples. Office of Personnel Benefits Administration Letter No. 13-203 from John O'Brien (July 17, 2013), *available at* www.opm.gov.

[20] *Id.*

[21] *Id.*

[22] Secretary of Defense Memorandum for Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness (Aug. 13, 2013), *available at* www.defense.gov.

[23] Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

[24] *Id.*; *see* I.R.C. § 6511 (2008) (establishing the statute of limitations).

[25] Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

[26] *Id.*

all legally married same-sex spouses would have to file their original returns as married, either jointly or married filing separately.[27]

Was the IRS right to adopt a place of celebration rule, or is there something about taxation that makes it more appropriate to adopt a place of domicile rule? And was it right to be so generous on the retroactive effect of the new rule? Finally, does it make sense in the world of taxation to treat RDPs and CUPs as non-spouses, indeed as legal strangers, for purposes of taxation? The rest of this article will address these questions.

II. Adoption of the Place of Celebration Rule

The Internal Revenue Code does not indicate whether tax law should apply a place of celebration or place of domicile rule; nor is there anything in the treasury regulations that addresses this issue. The only definition of marriage in the Code is found in Section 7703, which provides that if you marry by the end of the year, you will be treated as married for the full year for certain tax purposes, such as filing status.[28]

Gay rights advocates generally supported a place of celebration rule, in keeping with the Respect for Marriage Act, which would have repealed DOMA.[29] As introduced most recently on June 26, 2013,[30] the

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[27] The ruling does not say that the September 16 date applies only to original returns. As drafted it did seem to apply to any return filed by a taxpayer after September 15, including amended returns. Tax return preparers became concerned about the possibility that a client might want to file an amended return to correct an omission on the original return that had nothing to do with marital status. For example, assume taxpayer A omitted a large charitable deduction in tax year 2011 and would now like to file an amended return. A does not want to file a joint return or a married filing separately return, but instead wants to retain her single filing status. Since the return is filed after September 15, is A still able to elect to file the amended return as single? The September 16 date applies only to original returns. *See Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law*, IRS.gov (Nov. 20, 2013), http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples ("For tax year 2012 and all prior years, same-sex spouses who file an original tax return on or after Sept. 16, 2013 (the effective date of Rev. Rul. 2013-17), generally must file using a married filing separately or jointly filing status.").

[28] I.R.C. § 7703 (2004).

[29] S. 1236, 112th Cong. § 7 (2011); H.R. 2523, 112th Cong. § 7 (2011).

[30] H.R. 2523 was introduced by Representative Jerrold Nadler. It had 171 co-sponsors as of December 16, 2013. The Senate Bill is S. 1236, introduced by Senator Diane Feinstein. It had forty-two co-sponsors as of December 16, 2013. See http://beta.congress.gov/bill/113th/house-bill/2523 for updates.

Act proposes replacing current Section 3 of DOMA[31] with the following:

> Sec. 7. Marriage (a) For the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State.

Many pundits, however, surmised that the IRS would not adopt a place of celebration standard because it had long relied on a state of domicile rule.[32] Even the Human Rights Campaign, a strong supporter of the Respect for Marriage Act, announced that the general IRS rule in the past indicated a state of domicile rule.[33] Now that the IRS has clearly stated in its August ruling that it will apply a place of celebration rule, many folks are scratching their heads and asking why the IRS changed course. Was it subject to political pressure to follow the other agencies and make the benefits of marriage as widely available as possible to same-sex married couples?[34] Or is the rule justified as a matter of good tax policy? And, if it is good tax policy, then why hasn't place of celebration always been the rule?

A. *Past IRS Positions on Validity of Marriages*

The case that pundits typically cite as establishing the precedent that the Internal Revenue Service must rely on state of domicile rather than state of celebration is *Eccles v. Commissioner*.[35] The issue in that

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[31] 1 U.S.C. § 7 (2012).

[32] *See* Jeremy W. Peters, *Federal Court Speaks, but Couples Still Face State Legal Patchwork*, N.Y. TIMES June 26, 2013, *available at* http://www.nytimes.com/2013/06/27/us/politics/federal-court-speaks-but-couples-still-face-state-legal-patchwork.html ("Federal taxes, for example, are generally determined by where a couple live."); Amy S. Elliott, *Practitioners Discuss Expected IRS Guidance on Determining Marital Status After Windsor*, TAX NOTES, Aug. 1, 2013, at 3.

[33] *See* Anne A. Marchessault, *Federal Marriage Act Would Help Workers Who Have Same-Sex Spouses, Speaker Says*, 133 DLR A-11, July 11, 2013 (quoting Brian Moulton, Legal Director, Human Rights Campaign).

[34] Of course in tax law, having one's marriage recognized is not always beneficial. Sometimes a couple's tax burden increases when they marry. *See generally* Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 483-84 (2009); Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1564-68 (2008).

[35] Comm'r v. Eccles, 19 T.C. 1049, *aff'd* 208 F.2d 796 (4th Cir. 1953); *see* HRC whitepaper entitled "Re: Development of 'State of Domicile Standard in Federal Tax Policy'" (on file with author).

case was whether or not husband and wife were married at the end of the year for purposes of determining how they should have filed their tax return for that year.[36] They were domiciled in Utah.[37] They had married in Utah and they had filed for divorce in Utah.[38] Before the end of the year in question, the divorce court had issued an interlocutory decree that created a legal separation but not a divorce.[39] Under Utah law, the divorce would not become final for another six months, a time period that extended into the following year.[40] Taxpayer took the position that he was still legally married at the end of the year and thus entitled to file jointly with his wife.[41] The Commissioner, relying on the forerunner to Section 7703, pointed to the language in that statute that says, "an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married."[42] The issue, said the court, was whether or not, under Utah law, the decree was one of divorce or of separate maintenance.[43] After examining Utah law, the court concluded that the decree was neither.[44]

This case does not present an issue of a conflict between the laws of a recognition state and a nonrecogniton state. The only potential conflict here is a conflict between state law (Utah) and federal law (the Internal Revenue Code). And the court chose state law.[45] But a more accurate way to describe this case is as one in which the courts construed the language "legally separated" and "decree of . . . separate maintenance" differently from the IRS.[46]

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[36] *See Eccles*, 19 T.C. 1049.

[37] *See id.*

[38] *See id.*

[39] *See id.*

[40] *See id.* at 1049, 1051.

[41] *See id.* at 1051.

[42] *Id.* at 1050-51; I.R.C. § 7703(a)(2) (formerly under 53 U.S.C. § 51(a) (1939)).

[43] *See Eccles*, 19 T.C. at 1050.

[44] The court relied heavily on Utah family law, which provided that until the divorce was final, the spouses would be treated as spouses. That meant that if husband had died before the six-month period had expired, surviving wife would have been entitled to a spousal share of his estate. And, as the court concluded, that should mean the estate would be entitled to a marital deduction. If the spouse were going to be recognized as a spouse for purposes of the estate tax, uniformity would suggest she should continue to be recognized as such for purposes of the income tax. *See id.* at 1053-54.

[45] *See id.*

[46] The Commissioner continued to take the position that any decree that created a legal separation meant that the spouses should no longer be treated as married. He issued a nonacquiescence in *Eccles*. *Id.* at 1052, 1054-55. *See* Rev. Rul. 55-178, 1955-1 C.B. 322. But after losing this position consistently in the courts, the Commissioner finally

Eccles is cited in a number of subsequent cases for the principle that the court must focus on the state law in which the couple was domiciled to determine the validity of a marriage.[47] But all of these cases involve either a question of whether the couple is validly divorced under the only state law that is relevant (as was the case in *Eccles*) or whether a divorce is valid when there is conflict between two states (or a state and a foreign country) as to the validity of the divorce.

The presence of an invalid divorce can affect the validity of a marriage entered into subsequent to the divorce, but that is the only sense in which the courts and the IRS have supported a choice of law rule that will look to the state of domicile.[48] And, the domicile that matters here is domicile at the time of divorce.[49] A typical example from these cases involves a couple married and living in New York. In situations where New York would not grant a divorce,[50] one spouse (usually the husband) travels to a jurisdiction that will allow the divorce (Mexico, Florida, Nevada) and then returns to New York and marries a second wife. The first wife files a declaratory action in the New York courts asking that the court declare the invalidity of the foreign divorce and that she is still the only legal wife. The New York court does so.[51] Later, the husband dies in New York. The conflict here is between two states (e.g., New York and Florida). And, if New York law applies, then the divorce is invalid and that means that the second marriage is invalid as well.

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withdrew the nonacquiescence, revoked the 1955 ruling, and agreed to follow the judicial constructions of the statute. *See* Rev. Rul. 57-368, 1957-2 C.B. 896.

[47] *See, e.g.*, Gersten v. Comm'r, 28 T.C. 756, 770 (1957), *aff'd in relevant part*, 267 F.2d 195, 195-96, 200 (9th Cir. 1959) (citing *Eccles* as authority for relying on the state of domicile of the spouses to determine the validity of their marriage); Dunn v. Comm'r, 70 T.C. 361, 366 (1978), *aff'd* 601 F.2d 599 (7th Cir. 1979) (acknowledging *Eccles* as a decision "recognizing that whether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the state of the marital domicile.").

[48] *See Gersten*, 28 T.C. at 770-71.

[49] *Id.*

[50] These cases stem from the fact that no-fault divorce was not widely available until the 1960s and in New York, was not available until 2010. *See* J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559 (2007); Joel Stashenko, *Those Eager to be "Ex-Spouse" Embrace No-Fault*, N.Y. L.J., Oct. 13, 2010, at 1.

[51] Note that these cases typically involved unilateral divorce actions, i.e., where only one spouse submitted to the jurisdiction of the foreign court. In 1965, the New York Court of Appeals did uphold a bilateral Mexican divorce, i.e., one in which both spouses submitted to the jurisdiction even though neither spouse had any other contact with the jurisdiction. *See* Rosenstiel v. Rosenstiel, 209 N.E.2d 709, 713 (N.Y. 1965).

Often, the IRS has turned to New York law (state of domicile) to determine the validity of the divorce and thus indirectly the validity of the second marriage.[52] But even here, the case law is not uniform. Some cases do rely on domicile at time of divorce,[53] but others have been willing to say that if the divorce was legal when and where it was obtained, it should be recognized for purposes of federal tax law.[54] Sorting through the cases, the following rule seems to emerge: if the case involves the estate tax and if the decedent is domiciled in the state that does not recognize the divorce, then the IRS will rely on the state of domicile. This makes some sense because the estate is being administered under the laws of a state that continues to recognize the first marriage. As a result, the first spouse is the only legal spouse and might be entitled to a spousal share. *That* spousal share should qualify for the marital deduction. In the absence of a divorce, however, none of these cases is determinative on the issue of whether or not a marriage recognized in the place of celebration, but not by the place of domicile, should be recognized by the federal tax authorities.

B. *Revenue Ruling 1958-66*[55]

Revenue Ruling 1958-66 is more on point. This ruling was cited and discussed in Revenue Ruling 2013-17.[56] It provides authority for the position taken in the 2013 ruling.[57] The 1958 ruling concluded that the IRS would recognize any common law marriage that was legally entered into even if the spouses then moved to a state that did not recognize the marriage.[58] This conclusion obviously rejects the state of domicile rule. At its core, this ruling stands for the proposition that once legally married, you remain legally married for tax purposes even if you are domiciled in a state that does not recognize your marriage.

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[52] *See, e.g.,* Estate of Goldwater, 539 F.2d 878, 880-81 (2d Cir. 1976).

[53] *Id.* (New York domicile and Mexican divorce); Estate of Steffke, 538 F.2d 730 (7th Cir. 1976) (Wisconsin domicile and Mexican divorce).

[54] *See* Estate of Spalding v. Comm'r, 537 F.2d 666, 667-69 (2d Cir. 1976) (New York domicile and Nevada divorce; altogether six different states played a role in this case); Estate of Borax v. Comm'r, 349 F.2d 666, 668 (2d Cir. 1965) (New York domicile and Mexican divorce); Wondsel v. Comm'r, 350 F.2d 339, 341 (2d Cir. 1965) (New York domicile and Florida divorce). *But see* Rev.Rul. 67-442, 1967-2 C.B. 65 (in which the IRS announced that it would not follow *Borax* and *Wondsel*).

[55] Rev. Rul. 58-66, 1958-1 C.B. 60.

[56] 2013-38 I.R.B. 201.

[57] Rev. Rul. 58-66, 1958-1 C.B. 60.

[58] *Id.* at 60-61.

The role of domicile in the validity of common law marriages raises conflict of laws issues that are very similar to the conflicts issues that arise in the case of same-sex marriages. Today, all states will recognize a valid common law marriage from another state, at least in cases in which the couple was domiciled in the state in which they claim to have become married.[59] The states are split, however, as to whether or not they will recognize a common law marriage of a couple domiciled in that state that travel to another state and enter into a common law marriage while temporarily residing in that other state. A number of states will recognize such marriages so long as they were contracted validly in the foreign state.[60] In other states, such marriages will not be recognized in the state of domicile.[61] The 1958 ruling appears to adopt a rule that says the IRS will look to the state of celebration rather than state of domicile.[62] That makes the current 2013 ruling regarding recognition of same-sex marriages consistent with long-time tradition of the IRS.[63]

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[59] *See, e.g.*, Jennifer Thomas, *Common Law Marriage*, 22 J. AM. ACAD. MATRIMONIAL L. 151, 152 (2009).

[60] *See In re* Mott v. Duncan Petroleum Trans., 414 N.E.2d 657, 658 (N.Y. 1980); *see also In re* Estate of Duval v. Nathalie Duval, 777 N.W.2d 380, 382-83 (S.D. 2010) (stating that South Dakota will recognize a valid common law marriage from another state even if the couple was domiciled in South Dakota at the time and citing cases from other states that apply a similar rule).

[61] *See* Smith v. Anderson, 821 So. 2d 323, 326 (Fla. Dist. Ct. App. 2002).

[62] There are numerous tax cases that say in order to determine whether or not a couple has a valid common law marriage, the IRS relies on the marital domicile. But all of these cases involve couples who at all relevant times lived in states that did not recognize common law marriages and never cohabited in a state that did recognize common law marriages. As a result the marital domicile can only be the place where they lived together. Such cases do not raise the conflict of laws issue discussed in the text. *See* Amaro v. Comm'r, 29 T.C.M. (CCH) 914 (1970) (couple only cohabited in California and Nevada, neither of which recognizes common law marriage); *see also* von Tersch v. Comm'r, 47 T.C. 415, 419 (1967) (announcing rule that validity of marriage is determined on the basis of the law of the state where the couple "resides"). Residence is where the couple lives and is not necessarily their domicile.

[63] A Westlaw search in the tax cases database turned up over eighty cases that included the term "common law marriage." Twelve of these cases (including *Windsor*) include a citation to Rev. Rul. 58-66. None of the cases presented the issue addressed in Rev. Rul. 2013-17, i.e., whether to rely on place of celebration or place of domicile to determine the validity of a marriage. The only conflicts raised in any of the cases involved the validity of a foreign divorce in the state of domicile. The common law marriage cases fell into two groups: (1) cases in which the taxpayer had only lived in states that recognized common law marriages and the issue in such cases was whether or not the requirements for a valid common law marriage had been met, and (2) cases in which the taxpayer had claimed to be in a common law marriage even though the couple had never lived or cohabited in a state that recognized common law marriages.

C. *Tax Policy*

In addition to being consistent with past IRS practice, the IRS was justified in adopting a place of celebration rule for sound reasons of tax policy.

1. Marital status for tax purposes should not change as the taxpayers cross state lines and establish a new domicile

If a state of domicile rule were applied, couples could establish a new domicile in a nonrecognition state and effectively become divorced for tax purposes. The marriage might not be recognized by the new state of domicile, but it would continue to be recognized by seventeen other states.[64] And the spouses would continue to live as though they were married. Such a rule would allow creative same-sex couples to manipulate the tax rules to their advantage. While living in a nonrecognition state, they could engage in such tax advantageous transactions as selling loss property from one spouse to the other and recognizing the loss.[65] In high-income years they could avoid the marriage tax penalty that applies to married couples. If in a later year, one spouse leaves the workforce temporarily, for example, to have a child, then the couple could establish a new domicile in a recognition state and be entitled to file jointly and thereby reduce tax liability.

It is against public policy to give taxpayers this much control over which rules should apply to them from year to year. Indeed, Mr. and Ms. Boyter, Maryland residents subject to a tax penalty under joint filing, tried to do something similar many years ago.[66] They flew to Haiti at the end of each tax year and obtained a divorce.[67] This entitled them

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Therefore, it may be a stretch to say turning to place of celebration is a long time tradition of the IRS. However, the ruling states the place of celebration as the policy and the IRS has never taken a position inconsistent with that.

[64] As of the end of 2013 there were at least seventeen states (plus the District of Columbia) that clearly recognize marriages of same-sex couples. The recognition came about by court decision in six states (California, Connecticut, Iowa, Massachusetts, New Jersey, and New Mexico), by legislation in eight states (Delaware, Hawaii, Illinois, Minnesota, New Hampshire, New York, Rhode Island, and Vermont), and by popular vote in three states (Maine, Maryland, and Washington). *17 States with Legal Gay Marriage and 33 States with Same-Sex Marriage Bans*, PROCON.ORG, http://gaymarriage.procon.org/view.resource.php?resourceID=004857 (last visited Dec. 20, 2013).

[65] *See* Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008) (explaining additional tax advantages that married same-sex couples could claim if their marriage is not recognized under the tax law).

[66] Boyter v. Comm'r, 668 F.2d 1382, 1383 (4th Cir. 1981).

[67] *Id.* at 1384.

to file as single.[68] Then, upon return to Maryland, they remarried.[69] By doing this each year, they were manipulating the tax system to their benefit. The IRS audited them and claimed that the divorces were "sham transactions" that should be ignored for tax purposes.[70] The matter was litigated and the IRS won on this theory before the court of appeals.[71] While the IRS might use the sham transaction doctrine against a same-sex couple that manipulated the tax laws by changing domicile, it would be a much harder argument to make in the case of a same-sex couple.[72] It would be much simpler to administer a law that provides that changes in domicile do not affect marital status.

2. The place of celebration rule is simpler to apply

Ease of administration is a strong policy consideration in the formulation of a national tax law. Imagine the IRS having to apply a state of domicile law to determine, for each year, whether or not the couple that was clearly married in a recognition state was similarly domiciled in a recognition state. When the *Windsor* litigation began in 2010,[73] there were only six jurisdictions that clearly recognized marriages of same-sex couples.[74] In addition to these six jurisdictions, New York was said to recognize same-sex marriages, but not for state tax purposes.[75] In addition, the Attorney General of Rhode Island had opined that

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[68] *Id.*

[69] *Id.*

[70] *Id.* at 1384-85.

[71] *Id.* at 1388 (ruling that the divorces were invalid because Maryland would not recognize the foreign divorces, but the Court of Appeals thought that Maryland law was not clear on that issue. Instead, it ruled, in a 2-to-1 decision, that even if the divorces were valid under the applicable law, they should be treated as shams for tax purposes).

[72] A divorce followed by a marriage a week later seems to have less substance that an actual change in location and the establishment of new meaningful connections with the new state.

[73] Shapiro, *supra* note 5 ("Windsor first filed suit in 2010 . . . .").

[74] Those states were: Massachusetts (*see* Goodridge v. Dep't of Pub. Health, 789 N.E.2d 941 (Mass. 2003) (marriages were authorized to begin in May 2004)); Connecticut (*see* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008)); Iowa (Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009)); New Hampshire (*see* H.B. 436, codified at N.H. REV. STAT. ANN. § 457:1 *et seq.*, effective in 2009)); Vermont (*see* S. 115, amending 15 V.S.A. § 8 (effective in 2009)); and the District of Columbia (*see* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 27 (Jan. 1, 2010) (effective Mar. 3, 2010 with a three-day waiting period so first marriages took place on March 6, 2010) (codified at D.C. CODE § 46-401 to -421)). California also recognized valid same-sex marriages provided they had been entered into before November 5, 2008, the date that Proposition 8 took effect (*see* Strauss v. Horton, 207 P.3d 48 (Cal. 2009)).

[75] N.Y. TSBA-06(2)I, *supra* note 13, at 2-3.

foreign same-sex marriages would be recognized in Rhode Island, but then a Rhode Island court refused to recognize such a marriage for purposes of a divorce.[76] At the end of 2013, there were seventeen states, in addition to the District of Columbia, that clearly recognized such marriages.[77] There are, however, marriage equality cases currently in litigation involving numerous other states and some of them are likely to be successful, thereby adding to the number of recognition states.[78] And the Attorney General of Oregon has opined that, post-*Windsor*, Oregon must recognize valid marriages between same-sex spouses if legally entered into.[79] The status of the law is constantly and rapidly changing. That state of affairs would make it very difficult for the IRS to stay current with which states are recognition states and which are nonrecognition states from year to year. Determining whether or not a couple is legally married because their marriage occurred in a state, which at the time recognized the legality of the marriage, is a much simpler task. It is more likely to provide certainty and uniform application of tax rules, both of which are goals of tax policy.

Most scholars who keep up with the changing legal landscape regarding recognition of same-sex spouses predict that it is merely a matter of time before all states will be recognition states.[80] Adopting a policy that recognizes as many current marriages as possible is consistent with this rapidly changing landscape.

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[76] Chambers v. Ormiston, 935 A.2d 956, 967 (R.I. 2007) (denying divorce to couple married in Massachusetts; construing Rhode Island statute granting jurisdiction to family court to grant divorces from the "bonds of marriage" to apply only to opposite-sex marriages).

[77] PROCON.ORG, *supra* note 64.

[78] Post-*Windsor*, at least nine federal district judges have ruled that a state's failure to recognize the marriage of a same-sex couple is a violation of the equal protection clause. *See* DeBoer v. Snyder, 2014 WL 1100794 (E.D. Mich. Mar. 21, 2014); Tanco v. Haslam, ___ F. Supp. 2d ___, 2014 WL 997525 (M.D. Tenn. Mar. 14, 2014); De Leon v. Perry, ___ F. Supp. 2d ___, 2014 WL 715741 (W.D. Tex. Feb. 26, 2014); Lee v. Orr, 2014 WL 683680 (N.D. Ill. Feb. 21, 2014); Bostic v. Rainey, ___ F. Supp. 2d ___, 2014 WL 561978. (E.D. Va. Feb. 13, 2014); Bourke v. Beshear, ___ F. Supp. 2d ___, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014); Bishop v. U.S. *ex rel.* Holder, ___ F. Supp. 2d ___, 2014 WL 116013 (N.D. Okla. Jan. 4, 2014); Kitchen v. Herbert, 2013 WL 6834634 (D. Utah, Dec. 23, 2013); Obergefell v. Wymyslo, ___ F. Supp. 2d ___, 2013 WL 5934007 (S.D. Ohio, Nov. 1, 2013) (Ohio state law unconstitutional).

[79] Lauren Dake, *Oregon Won't Defend Ban on Same-Sex Marriage*, THE BULLETIN (Feb. 21, 2014), http://www.bendbulletin.com/home/1810492-151/oregon-wont-defend-ban-on-same-sex-marriage.

[80] *See, e.g.*, Ross Douthat, *The Terms of Our Surrender*, N.Y. TIMES, Mar. 1, 2014, http://www.nytimes.com/2014/03/02/opinion/sunday/the-terms-of-our-surrender.html.

3. A place of celebration rule simplifies determination of marital status by employers

A huge burden, keeping track of an employee's domicile from year to year while also keeping track of whether that domicile recognizes the marriage, would be placed on employers who have a large number of employees in different states. Employers need to know marital status for various purposes, but primarily to determine how benefits and retirement plans are to be administered.[81] Health plan benefits for an employee's spouse, for example, are excluded from income, whereas those for mere partners are generally taxable.[82] If a retirement plan is covered by the Employee Retirement Income Security Act (ERISA), any available death benefit must be paid to the employee's spouse unless the spouse has signed a waiver.[83] Failure to comply with ERISA rules could put a plan at risk of losing its tax-exempt status.[84] It is not surprising that benefits lawyers were lobbying the IRS shortly after the *Windsor* decision to adopt a place of celebration rule. In their view, a place of domicile rule would be costly and inefficient.[85] Simplicity is a tax policy value, not just for the IRS, but also for the taxpayer who needs to comply with the tax law.

4. A place of celebration rule creates a more uniform rule for all married same-sex couples and avoids geographical discrimination

U.S. tax law has been through several periods of geographical discrimination among married couples. After the 1930 decision in *Poe v. Seaborn*, holding that community property spouses could split income,[86] came an uncomfortable period of geographical discrimination against

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[81] *An Overview of Federal Rights and Protections Granted to Married Couples*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples (last visited Mar. 1, 2014).

[82] I.R.C. §§ 105-06 (2012) (health plan coverage for an employee's spouse and dependents is excluded from income); *see also* Patricia A. Cain, *Taxation of Domestic Partner Benefits: The Hidden Costs*, 45 U.S.F. L. REV. 481 (2010) (a partner can qualify as a dependent in certain situations, although not all employers understand this rule).

[83] U.S. Dep't of Labor, *FAQs About Retirement Plans and ERISA*, http://www.dol.gov/ebsa/faqs/faq_consumer_pension.html (last visited Feb. 26, 2014).

[84] *Id.*

[85] Letter from American Benefits Council to Secretary Lew, Secretary Sebelius, Acting Secretary Harris, and Commissioner Werfel (on file with author) (last modified July 17, 2013), *available at* http://www.americanbenefitscouncil.org/documents2013/ssm-doma_admin-letter071713.pdf.

[86] 282 U.S. 101, 118 (1930).

spouses that lived in non-community property states. That problem was not solved until the Tax Act of 1948, which adopted the modern joint return.[87] Equal treatment of spouses, regardless of domicile or residence, was the principle behind the 1948 Act.[88] Another era of geographical discrimination against non-community property spouses began after the 1962 decision in *United States v. Davis*, a decision that held that property divisions between spouses involving a transfer of appreciated property were taxable events.[89] Shortly after that, community property spouses established that they should not be taxed on such transactions because they were merely dividing property that was already jointly owned.[90] In 1984, with the passage of Section 1041, that geographical discrimination ended.[91] Today no spouse, no matter state of domicile or residence, will be taxed on the transfer of appreciated property incident to divorce.[92]

The adoption of the place of celebration rule results in a uniform rule that all legally married couples will be treated as married for tax purposes, whether that status is beneficial or harmful under the tax law. Domicile and residence are irrelevant.[93] The common attribute that counts is not where you live, but whether or not you are legally married. And there is another important point to make here. If a legally married couple lives in a nonrecognition state, that *does not* mean that they are not married. Today they are married in at least seventeen states.[94] And even though their state of domicile may not recognize the marriage, it is real. Neither spouse is free to marry anyone else. At any time, one spouse can move to a recognition state and institute a

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[87] Comment, *Joint Income Tax Returns Under the Revenue Act of 1948*, 36 CALIF. L. REV. 289 (1948).

[88] For a general history of how the country moved from *Seaborn* to joint returns, see Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 806-17 (2008).

[89] 370 U.S. 65, 73-74 (1962).

[90] *See* Carrieres v. Comm'r, 64 T.C. 959 (1975), *acq. in result*, 1976-2 C.B. 1, *aff'd per curiam*, 552 F.2d 1350 (9th Cir. 1977) (holding that there is a nontaxable division of community property, but a gain is recognized to the extent separate property is exchanged for community interest); Rev. Rul. 76-83, 1976-1 C.B. 213 (citing additional cases in accord).

[91] *See* I.R.C. § 1041 (2006).

[92] *Id.*

[93] Residence and domicile are different concepts. Residence is where you actually reside. Domicile is where you intend to live permanently (or at least for the foreseeable future). College students may live in Berkeley or New Haven but be domiciled in Oregon or New York. *See* Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 6-7 (1997).

[94] PROCON.ORG, *supra* note 64.

divorce.[95] And, for those spouses who married in certain jurisdictions, the place of celebration will retain jurisdiction to issue a divorce.[96] So these couples are truly married. Application of a place of celebration rule treats all "truly married" couples the same.

D. *Yes, the IRS was Right to Adopt Place of Celebration*

I applaud the IRS ruling for adopting place of celebration as the standard for determining the validity of a marriage for federal tax purposes. The ruling takes a position consistent with prior IRS law. It takes a position that is supported by policy, and, it takes a position that is consistent with reality. If you are married in the State of Washington (a recognition state) but domiciled in Texas (a nonrecognition state), you are nonetheless really married. You are legally married until that marriage is dissolved by death or divorce. Texas may not recognize your marriage, but that does not mean you are not married elsewhere. In this mobile society of ours, that marriage is real.

III. Retroactive Application of the *Windsor* Holding

A. *Effect of the Ruling During Open Years*

The Supreme Court's ruling that DOMA is unconstitutional means that DOMA has always been unconstitutional.[97] As a general rule, court decisions holding that statutes are unconstitutional are applied retroactively.[98] Since DOMA was ruled unconstitutional, it is no longer effective and should not be effective for any open tax year under the statute of limitations.

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[95] After establishing any residency requirements that might apply.

[96] Married same-sex couples living in nonrecognition states are often unable to obtain a divorce. That is because the state in which they live will not even recognize the marriage for purposes of granting a divorce. In addition, states that would grant the couple a divorce generally require a minimum period of domicile or residence by at least one of the spouses. To remedy this situation, a growing number of recognition states have enacted legislation that will allow the court of that state to retain jurisdiction over a couple who was married in that state solely for purposes of granting them a divorce in the event the spouses find themselves unable to obtain a divorce in their current domicile. Those states are California, Colorado, Delaware, Hawaii, Illinois, Minnesota, Oregon, and Vermont. Similar laws have also been enacted by the District of Columbia and by Canada. For specifics of how these laws work, see *Divorce for Same-Sex Couples Who Live in Non-Recognition States: A Guide For Attorneys*, Nat'l Ctr. for Lesbian Rights, http://www.nclrights.org/wp-content/uploads/2013/07/Divorce_in_DOMA_States_Attorney_Guide.pdf (last visited Apr. 15, 2014).

[97] *See* United States v. Windsor, 570 U.S. __, __, 133 S. Ct. 2675, 2696 (2013).

[98] *See* 16A Am. Jur. 2d *Constitutional Law* § 195 (2009).

IRC Section 7805(b)(8) provides, "[t]he Secretary may prescribe the extent, if any, to which any ruling (including any judicial decision or any administrative determination other than by regulation) relating to the internal revenue laws shall be applied without retroactive effect."[99] So, does this mean the IRS could have ruled that *Windsor* would only be applied prospectively? No, because the ruling was applied to Edie Windsor retroactively, giving her a tax refund.[100] It would be difficult to find any justification for not applying it to any other married same-sex couple that could file a refund in the same way that she did.

The real issue under Section 7805 is whether the IRS should apply the rule only prospectively to those who relied on DOMA. In other words, prospective application would prevent the IRS from asserting marriage tax penalties against the many same-sex married couples that reported as single taxpayers relying on DOMA.[101] And, in fact, the IRS did rule in Revenue Ruling 2013-17 that *Windsor* would generally be applied only prospectively to those who had relied on it.[102] No married couple would be required to amend a return and recompute their tax liability on a joint return.[103] At the same time, any taxpayer who would benefit from amending a return, i.e., who was in the same position as Edie Windsor was, would be allowed to amend so long as the statute of limitations had not run on the year at issue.[104]

This certainly appears to be the fair thing to do. After all, couples have relied on a law that Congress passed and which the IRS continued to enforce even as serious questions about its constitutionality were

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[99] I.R.C. § 7805(b)(8) (2006).

[100] *Windsor*, 133 S. Ct. at 2682.

[101] *See* Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739, 748 n.4 (2004), in which the Court noted that the Secretary had the power to apply the Court's ruling on a tax matter prospectively only and that it would be equitable to do so in the current case. Retroactive application might have disqualified a number of ERISA plans that had relied on instructions from the IRS that the Court ruled invalid. Similarly, prospective application to couples who have relied on DOMA in filing past returns would be equitable.

[102] Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

[103] As a general rule, taxpayers are not required to amend returns. Treasury Regulation Section 1.451-1(a) provides: "If a taxpayer ascertains that an item should have been included in gross income in a prior taxable year, he should . . . file an amended return and pay any additional tax due." Treas. Reg. § 1.451-1(a) (1977). Despite this regulation, as a general matter, a taxpayer has no legal obligation to file an amended return. *See* BERNARD WOLFMAN ET AL., STANDARDS OF TAX PRACTICE § 207.4.1 (3d ed. 1995). *See also* P.H. Glatfelter Co. v. Lewis, 746 F. Supp. 511, 519 n.23 (E.D. Pa. 1990) (affirming this understanding of the taxpayer's lack of obligation).

[104] Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

raised.[105] To suddenly be exposed to a marriage tax penalty that could run into tens of thousands of dollars could upset settled expectations. No one is required to file an amended return. The real threat was whether or not the IRS would ever assert, in an audit or otherwise, that a couple legally married who had filed as single, following the rule of DOMA, could be subjected by the IRS to penalties for not filing as married. The 2013 ruling, although not explicit on this point, does appear to remove that threat. And the informal guidance that the IRS has provided, both in writing[106] and orally,[107] supports the conclusion that the agency wants to do what is fair.

In support of the IRS position, it is worth pointing out that this sort of position, i.e., letting those who benefit claim one position and those who do not claim a different one, is not without precedent. While it is rare for a tax provision to be ruled unconstitutional, a similar situation arose in the 1980s regarding the constitutionality of certain Social Security provisions that were linked to provisions in the Internal Revenue Code about how to allocate the tax and the earnings credits for self-employment income earned by a spouse in a community property state.[108] Section 1402 of the Internal Revenue Code (and the related Social Security provision)[109] used to provide that any self-employment income earned by a community property couple would presumptively be the income of the husband.[110] The point of the statute was to avoid splitting the income 50/50 under the *Seaborn* deci-

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[105] *See* Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (announcing that the Justice Department would no longer defend DOMA because it believed the statute was unconstitutional). Nonetheless, as the letter explained, federal agencies would continue to enforce the statute until a court made the final determination as to constitutionality or until Congress repealed the law.

[106] *See Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law*, IRS.GOV (Nov. 20, 2013), http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples.

[107] Several tax practitioners, including this author, have spoken with the co-authors of Revenue Ruling 2013-17 to ask for additional clarity and have been told that the IRS intends to do what is fair. Thus, if a taxpayer wants to amend for one prior year and not another, that is fine. If only one of the spouses wants to amend and not the other one, that is also fine. *See supra* text accompanying note 9.

[108] *See, e.g.*, Edwards v. Heckler, 789 F.2d 659 (9th Cir. 1985).

[109] Social Security Act § 211(a)(5)(A), as amended, 42 U.S.C.A. § 411(a)(5)(A) (West 2008).

[110] I.R.C. § 1402(a)(5)(A) (West 2010).

sion[111] and to assign it to the spouse who, in Congress's view when it passed the legislation in 1950, was the more likely earner.

In the 1980s, after decisions such as *Craig v. Boren*[112] and *Califano v. Goldfarb*,[113] wives who were retiring challenged the sex discrimination inherent in assigning all earnings to the husband even if the wife might have been engaged in the business, or indeed even run it herself. And they won. The Secretary of HHS fairly quickly agreed that the statutes at issue were unconstitutional.[114] That decision left only the question of remedy. How should the earnings credits be reallocated to account for the fact that they had been misallocated for years? The Secretary of HHS appears to have adopted a similar "hold harmless" rule.[115] Couples were free to decide for themselves whether or not the earlier earnings should be reallocated or whether the status quo should be maintained.[116] In effect, if the new rule created a benefit, spouses could elect to be covered under the new rule. If the old rule produced a better result for the couple, then the spouses could elect to be covered by the old rule.[117]

B. *Can Equity Toll the Statute of Limitations?*

For all tax refund claims, there is a general statute of limitations of three years, typically measured from the date the return should have been filed to be timely, or in some cases three years from the date actually filed.[118] Some tax professionals have questioned whether or not a strict application of this three-year statutory period is sufficiently fair, given the fact that this was, after all, a discriminatory statute that

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[111] In this author's view, the special rule assigning the income to the husband was unnecessary because there was no reason for the *Seaborn* decision to apply to self-employment income. *Seaborn* determined that income taxation was based on ownership of the income. If community property rules made the spouses equal owners, then the income tax liability should be split between them. But the self-employment tax is not about ownership of the income. The statutory language of Section 1402 focuses on the earner of the income, not the owner. In any event, concerned about whether *Seaborn* would apply or not, Congress elected to overrule *Seaborn* and assign the income to the husband rather than saying it should be assigned to the earner.

[112] 429 U.S. 190 (1976).

[113] 430 U.S. 199 (1977).

[114] *See* Edwards v. Heckler, 789 F.2d 659 (9th Cir. 1985).

[115] *Id.* at 664.

[116] *Id.*

[117] *Id.*

[118] *See* I.R.C. § 651 (West 2008) (stating that if the taxpayer takes advantage of the automatic six-month extension in order to file after April 15 then the limitations period runs from the date of filing).

was ultimately ruled unconstitutional.[119] The argument appears to be based on the claim that since the statute was always unconstitutional but was nonetheless being enforced by the IRS, it would have been unreasonable to expect a taxpayer to file a claim for refund at a time when existing case law had universally upheld DOMA.[120]

A similar question was raised in the Social Security litigation from the 1980s. Under the Social Security laws, an individual was allowed to request an amendment of his or her income records to correct an error or an omission, but only within the applicable statute of limitations.[121] The district court in *Edwards* had ruled that it would be inequitable to apply this statute of limitations to the individuals who had been harmed by the discriminatory law.[122] And the court of appeals affirmed, saying: "The district court . . . has broad discretion to fashion a remedy which 'restore[s] . . . victims of discriminatory conduct to the position they would have occupied in the absence of such conduct,'" and citing *Milliken v. Bradley*,[123] a 1977 Supreme Court opinion.[124]

Secretary Heckler then argued that if the new rule was going to be applied retroactively, "the period of retroactivity should be limited to the period in which the result was 'clearly foreshadowed' by previous sex discrimination cases."[125] The court of appeals disagreed, thereby opening up all prior earnings years and allowing all claimants to amend for whatever retroactive period they elected.[126] The court cited to an earlier Social Security case[127] also involving a claim of sex discrimination, in which the district court had to decide whether a new rule (extending benefits to fathers who had lost a worker spouse that previously had only been available to mothers who had lost a worker spouse), which was established as of 1975 by a Supreme Court deci-

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[119] *See, e.g.*, George D. Karibjanian, *"WELL, THAT CERTAINLY RESOLVED EVERYTHING. . ." SAME SEX PLANNING IN A POST-*WINDSOR *AND* PERRY *WORLD*, SV030 ALI-ABA 367, 493 (2013).

[120] *See, e.g.*, *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005).

[121] *See* 42 U.S.C.A. § 405(c)(1)(B), (c)(4) (West 2010) (stating that the statute of limitations is three years, three months, and fifteen days from the end of the taxable year, i.e., April 15, usually).

[122] *Edwards*, 789 F.2d at 664.

[123] 433 U.S. 267 (1977).

[124] *Edwards*, 789 F.2d at 664.

[125] *Id.*

[126] *Id.*

[127] *Id.* (citing Hurvich v. Califano, 457 F. Supp. 760 (N.D. Cal. 1978)).

sion,[128] could be applied to years prior to 1975. The district court held that it could.[129] But in that case the father had actually applied for the benefits upon his wife's death in 1969.[130] He had been denied and so renewed the claim in 1975.[131] The district court ruled that he was entitled to benefits going back to 1969, his original application date.[132]

Altogether these Social Security cases appear to support a claim that it would be inequitable to apply the normal statute of limitations to claims by same-sex couples that wish to amend and file joint returns for years that are closed under the statute of limitations. But, there are also important distinctions. In the *Hurvich* case (father initially denied widower's benefits), the claimant had actually made a claim to the benefits.[133] Under Social Security law, a beneficiary is not entitled to benefits until he or she makes a claim.[134] Under tax law, this should mean that you would have had to make a timely claim to file jointly, either under an original return, or under an amended return. The Social Security cases, read together, do not stand for the broad principle that a court can ignore the statute of limitations whenever the claim for refund is based on a determination that a tax law is unconstitutional.

Instead, the question to ask is whether the application of the statute of limitations in this case violates due process.[135] The statute is three years, but the administrative practice is to allow taxpayers to file protective claims if there is ongoing litigation that might change the law affecting that tax year.[136] So, when should someone have considered filing a protective claim? Marriages were not available to same-sex couples in this country until 2004.[137] A 2004 tax return should have been filed by April 15, 2005, and thus the three-year statute of limitations to amend it would normally have run by April 15, 2008. It wasn't

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[128] Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

[129] *Hurvich*, 457 F. Supp. at 764-65.

[130] *Id.* at 761.

[131] *Id.*

[132] *Id.* at 764-65.

[133] *Id.* at 761.

[134] *See* 42 U.S.C. § 402 (2006).

[135] *See* Harper v. Va. Dep't of Taxation, 509 U.S. 86, 100-02 (1993) (discussing *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) and concluding that retroactive versus prospective application of new rule created by court decision is a question best analyzed under a due process analysis).

[136] Comment, *Protective Claims for Refund: Protecting the Interests of Taxpayers and the IRS*, 56 Me. L. Rev. 1 (2004).

[137] However, they were available in foreign countries earlier, e.g., in Canada as of 2003.

until the two successful DOMA challenges from Massachusetts, decided in 2010,[138] that the general public began to think it was actually possible to win a DOMA challenge. But some of the plaintiffs in the Massachusetts case brought by GLAAD[139] were making claims for tax year 2004.[140] Since they were able to file their claims within the statute of limitations period, their situation is some evidence that the limitations period is not unreasonable. Besides, the Supreme Court has approved shorter statutes of limitation as meeting the requirements of due process.[141]

In conclusion, I doubt that a court will equitably toll the normal statute of limitations in this case. The IRS has thus correctly determined that taxpayers who want to amend are free to do so. But those claims for refunds must be filed within the applicable statute of limitations period.

C. *What about Equitable Recoupment?*

There is a doctrine called equitable recoupment that might be available to provide some equitable relief to the statute of limitations problem. It would require an expansion of the doctrine as it is currently understood. However, given the IRS position that the agency wants to do what is fair in light of the unconstitutionality of DOMA, it is an avenue worth exploring.

This doctrine typically applies when the IRS is going after the taxpayer for a tax that is owed on the IRS's theory of a particular transaction.[142] Assume the taxpayer had reported the transaction in a different manner and paid a tax on that transaction according to the

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[138] Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010); Massachusetts v. U.S. Dep't of Health and Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010).

[139] *Gill*, 699 F. Supp. 2d at 374.

[140] Second Amended and Supplemental Complaint for Declaratory, Injunctive, or Other Relief and for Review of Agency Action at ¶ 205, Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 1:09-cv-10309), 2010 WL 2826297.

[141] *See* McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla., 496 U.S. 18, 45 (1990) (holding that a state that had wrongly taxed businesses under an unconstitutional tax provision had to provide retroactive relief of some sort, such as a refund of the unconstitutional taxes). The Court also said that there were various limitations that a state might put on the right to a refund including "relatively short statutes of limitations applicable to such actions . . . ." *See also* Stone Container Corp. v. United States, 229 F.3d 1345, 1349-50 (Fed. Cir. 2000) (citing *McKesson* and upholding a two-year statute of limitations as applied to a refund request for prior payment of what turned out to be an unconstitutional tax).

[142] *See* United States v. Dalm, 494 U.S. 596, 602-03 (1990).

taxpayer's theory. Now it is some years later and the IRS is claiming the transaction is subject to a different tax. For example, assume the taxpayer reported a wealth transfer to herself as a taxable gift and she agreed to and did pay a gift tax on the transfer. Some years later, the IRS timely charges that the transfer was actually income to the recipient and assesses an income tax. The statute of limitations for claiming a refund on the gift tax has passed. If the IRS wins on its income tax claim, the taxpayer may be able to claim the prior gift tax paid as an offset to the amount of income tax owed, even though she could not file a new suit making a refund claim.[143]

In a recent Tax Court case, the requirements for a successful equitable recoupment claim were summarized as follows:

> (1) the overpayment or deficiency for which recoupment is sought by way of offset is barred by an expired period of limitation; (2) the time-barred overpayment or deficiency arose out of the same transaction, item, or taxable event as the overpayment or deficiency before the Court; (3) the transaction, item, or taxable event has been inconsistently subjected to two taxes; and (4) if the transaction, item, or taxable event involves two or more taxpayers, there is sufficient identity of interest between the taxpayers subject to the two taxes that the taxpayers should be treated as one.[144]

The doctrine is limited. It clearly would not support a claim for a refund. It is an equitable remedy.[145] The remedy is an offset.[146] The offset amount is the amount of tax that should not have been paid if the original transaction had been correctly reported.[147] Here is an example of how the doctrine might be applied to same-sex married couples that may have overpaid a tax:

Assume that A and B were legally married in Massachusetts. In 2006, A made a taxable gift to B, taxable only because the marital deduction was not available because of DOMA. As a result A paid a gift tax of $x. The three-year statute of limitations has run, preventing A from claiming a refund of the gift tax paid. Now assume that A dies in 2013 leaving a taxable estate that produces an estate tax of $x, even after taking into account the marital deduction for gifts to B. The es-

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[143] *See id.* at 608-10 (1990) (taxpayer could not file a refund claim for the gift tax although she might have been entitled to claim the earlier tax paid as an offset to the income tax assessed); Bull v. United States, 295 U.S. 247 (1935) (equitable recoupment allowed in a similar situation).

[144] *See* K & K Veterinary Supply, Inc. v. Comm'r, 84 T.C.M. *31 (2013).

[145] *Id.* at *13.

[146] *Id.*

[147] *Id.* at *13-14.

tate tax is computed on aggregate lifetime and deathtime giving.[148] The tax base, correctly computed at death in 2013, should exclude all gratuitous transfers to a spouse. If A's estate computes the final tax base correctly under *Windsor*, the gift in 2006 should not be part of that tax base. Under equitable recoupment, the estate cannot claim a refund of $x taxes paid on that gift. But if the estate's tax base, excluding the 2006 gift to a spouse, produces an estate tax of $x, might the estate claim an offset for the taxes paid on the 2006 gift, even though the statute of limitations for a claim for refund has run? It would be a stretch of the doctrine of equitable recoupment, to be sure. But such a result would be in keeping with the basic premise that same-sex couples should be held harmless from the application of an unconstitutional law.[149]

There is additional evidence that the IRS intends to provide wide relief to taxpayers who may have relied on DOMA to their detriment. In early 2014, the IRS issued a revenue procedure that specifically benefits same-sex married couples that may have relied on DOMA.[150] Revenue Procedure 2014-18 announces a deadline extension for married

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[148] Smith v. Comm'r, 94 T.C. 872, 879 (1990).

[149] There is additional indirect support for this outcome in Rev. Rul. 76-451, 1976-2 C.B. 304. In this ruling a taxpayer had mistakenly claimed his lifetime gift tax exemption of $30,000 (pre-1976) against gifts to his spouse on which he failed to claim the then available marital deduction of fifty percent. In a later tax year, he was allowed to recoup the unnecessarily claimed exemption amount from the earlier years and to use it in a current year. This recoupment of the exemption should be available either in a current gift tax return or an estate tax return. The statute of limitations does not prevent correction of the current tax base by recalculating how much of the exemption amount was actually used in a prior year. Nothing in this ruling, however, addresses the question of recoupment of wrongly paid gift taxes.

Note that the validity of this ruling has been called into question by the Internal Revenue Service Restructuring and Reform Act of 1998, H.R. 2627, 105th Cong. (2d Sess. 1998), which provided in Section 2504 that the value of any gift for gift tax purposes would be finalized if the provisions of that section were followed. The proposed regulations under that section initially included a reference to Rev. Rul. 76-451, which suggested that only valuation issues (i.e., questions of fact) would be subject to the three-year statute of limitations and that legal questions (e.g., was this a gift of a present interest or not) would not be subject to the three-year statute. In response to criticism from practitioners, the IRS changed the regulations before finalizing them. The regulations currently state that both issues of fact (value) and issues of law (e.g., was this a gift of a present interest) are covered by the three-year statute. The desire was to have finality regarding gift tax liability, both on issues of valuation and on issues of legal construction of statutes. But, even though the reference to Rev. Rul. 76-451 has been removed from the final regulations, there has been no pronouncement that the ruling is obsolete or otherwise not good law. Technically, then, it is still good law.

[150] Rev. Proc. 2014-18, 2014-7 I.R.B. 513.

couples that may not have elected the benefits of "portability"[151] for estate tax purposes.[152] Portability benefits must be elected by filing an estate tax return for the first spouse to die.[153] Estate tax returns are due nine months after death.[154] If a Massachusetts same-sex spouse died in 2010 with a non-taxable estate, it might have seemed a costly option to file what would basically have been a protective claim to the portability benefit. The cost in this case would have been the cost of filing an otherwise unnecessary federal estate tax return, which would have had to include all the details and appraisals necessary for filing such a return. Now, however, post-*Windsor*, we know that the return would in fact gain the portability benefit. Realizing the issues inherent in this sort of decision-making, the IRS issued this 2014 revenue procedure, giving all deceased estates an extension to December 31, 2014, in which to file a return claiming portability.[155]

IV. How Should Registered Domestic Partners and Civil Union Partners Be Treated?

While I think the IRS generally "got it right" in adopting a place of celebration rule and a "hold harmless" stance with respect to retroactive application of *Windsor*, I am less certain that the ruling is correct with respect to the tax treatment of Registered Domestic Partners (RDPs) and Civil Union Partners (CUPs). To be sure, there are good arguments on both sides of this issue. Let me outline them first.

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[151] *Id.* "Portability" is a new concept under the Estate Tax. Basically, it provides that if the first spouse to die did not use his or her exemption amount (in 2014 at $3.43 million) then the estate can file an estate tax return and elect for that exemption to be available to the surviving spouse—in addition to the exemption amount available to the surviving spouse. Here's a simple example to explain the benefit: Assume that each spouse has $5 million in assets. The $5+ million exemption means that each spouse can give that much to his/her kids (or to anyone) tax-free. But now assume that Spouse A leaves everything to Spouse B. Now Spouse B has $10M in assets—an amount in excess of the exemption amount. Spouse B will therefore incur an estate tax. But, under portability, if a proper election is made on an estate tax return filed by Spouse A's estate (even though the estate is below the exemption amount, it must file a return to gain this benefit for the survivor) then Spouse B can add to his or her exemption amount the unused exemption amount of Spouse A.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.* The Revenue Procedure specially mentions the *Windsor* dilemma (i.e., should a taxpayer file a return for a benefit during a period in time when the benefit was denied to same-sex spouses), but it also extends the benefit to all spouses, which seems totally equitable given the newness of this election.

A. *Why RDPs and CUPs should not be treated as spouses for federal tax purposes*

1. There are state cases that say that such partnerships are not the same as marriages

A couple of individuals at the IRS have explained to me[156] that the justification for not treating RDPs and CUPs as spouses is that the IRS wanted to honor the state's determination that these relationships were not marriages. Despite the fact that such relationships are accorded all the rights and responsibilities of marriage, both the California Supreme Court and the Connecticut Supreme Court have ruled that such relationships are not equal to marriage.[157] The state does not denominate partners as spouses.[158] State law controls for determining marital status for federal tax purposes.[159] As a result, the federal government should not construe the word "spouse" to include registered domestic partners or civil union partners, or any other formal relationship that a state may recognize that is legislatively created as an alternative to marriage.

2. Partners in such partnerships may have relied on the fact that their relationships are not marriages for purposes of federal law

Registered domestic partners and civil union partners have never before been treated as married for purposes of federal laws that apply only to marriage.[160] Since there are many ways that tax laws can negatively impact a married couple, some couples may choose to register rather than marry. Those couples ought to be allowed to continue to rely on the assumption that they are not spouses for federal purposes. Opposite sex couples that have registered their partnerships have relied on the assumption that they are not married for federal tax pur-

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[156] The conversations were private and the remarks were not for attribution.

[157] *See In re* Marriage Cases, 43 Cal. 4th 757 (2008) (holding that since RDP relationships are not equal to marriage, it is a violation of the California Constitution to exclude same-sex couples from marriage); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (holding that since civil unions are not equal to marriage, it is a violation of the California Constitution to exclude same-sex couples from marriage.

[158] Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

[159] *Id.*

[160] This is true, despite the widely-reported letter from the IRS Office of Chief Counsel to an accountant in Illinois concluding that opposite-sex civil union partners should file as married because state law treated them the same as spouses. *See* Amy Elliot, *IRS Memo Indicates Civil Unions Are Marriages for Tax Purposes*, 133 Tax Notes Weekly 794 (Nov. 14, 2011).

poses.[161] If they want to be treated as spouses, of course, they are free to marry. Now that the IRS has adopted a place of celebration rule to determine the validity of a marriage, same-sex couples are similarly free to choose between marriage in a recognition state or some other form of relationship recognition.[162]

3. How to tax RDPs and CUPs is a complex policy question that ought to be addressed by Congress rather than the IRS

Currently RDPs and CUPs are taxed as single people, but to the extent they have certain property rights under state law (e.g., community property or other marital property rights), the IRS must recognize those property rights.[163] In the past, before DOMA, Congress and the IRS always relied on state family law to determine who should be treated as married.[164] Registered partnerships and civil unions are relatively new.[165] In addition, there are other types of relationships that are recognized by some states.[166] Determining how all of these different relationships should be treated for federal tax purposes is a complex matter and best handled by Congress.

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[161] *See* James Angelini, *The Federal and State Taxation of Domestic Partner Benefits*, TAX ANALYSTS (Nov. 8, 2011), http://www.taxanalysts.com/www/features.nsf/Articles/03CEC7C26C62E94A852579420059DC81?OpenDocument. California recognizes opposite-sex RDPs, but only if one of the partners is at least age sixty-two. Colorado, Hawaii, Illinois, and Nevada all recognize opposite-sex partners regardless of age.

[162] *See* Joseph Henchman, *IRS Issues "State of Celebration" Guidance for Same-Sex Couples – Further Guidance by 24 States May Be Required*, TAX FOUND. (Aug. 29, 2013), http://taxfoundation.org/article/irs-issues-state-celebration-guidance-same-sex-couples-further-guidance-24-states-may-be-required. For example, anyone can register as domestic partners in the State of California. As with marriage, there is no requirement that the couple or either partner be a resident. Angelini, *supra* note 161.

[163] *See* I.R.S. C.C.A. 201021050 (May 28, 2010) (stating that *Seaborn* applies to RDPs subject to a community property regime).

[164] Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

[165] *See generally Civil Unions & Domestic Partnership Statutes*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx (last updated Feb. 26, 2014).

[166] Wisconsin, for example, recognizes registered partners, but does not treat them as equivalent to spouses. They have only a handful of marital rights. Hawaii recognizes a relationship called "reciprocal beneficiaries," that is not intended as an alternative to marriage. Instead, it is available to people who cannot marry, such as mother and daughter. This status also accords only a handful of rights to the registered couple. *See id.*

B. *Why RDPs and CUPs should be treated as spouses for federal tax purposes*

1. Such a distinction creates a tax avoidance situation

The policy question at the core of this issue is: why do we tax spouses as a unit? The apparent answer is that we do so in order to avoid the application of *Poe v. Seaborn* and thereby tax all spouses the same regardless of geographical distinctions in marital property laws.[167] However, that same type of geographical discrimination is created now for same-sex couples who are registered and live in community property states.[168] Under C.C.A. 201021050, partners in such states can split all of their community income equally between them and file as single.[169] In most cases this will produce a tax that is lower than if the couple filed as married. This confluence of state law and federal non-recognition of the relationship creates an easy route for tax avoidance in such situations. It would be better as a matter of tax policy to treat such relationships the same as marriages.

2. RDPs and CUPs are treated as married for state tax purposes

While it is true that state courts have ruled that registered partnerships are not equal to marriages,[170] that is not the same thing as saying they should not be treated as marriages. In fact, at the state level, with the exception of Colorado,[171] every state that recognizes a spousal equivalency status treats registered partners as spouses for state tax purposes.[172] Requiring registered couples to file as single at the federal level and as married at the state level creates waste in the overall tax system. Such couples end up paying more to tax return preparers and

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[167] *See* Cain, *supra* note 88, at 808.

[168] *See generally* I.R.S. C.C.A. 201021050 (May 28, 2010); NAT'L CONF. OF ST. LEGISLATURES, *supra* note 165 (At the moment, such states include California and Nevada. Washington, also a community property state, used to recognize registered partners, but is now converting those partnerships into marriage, except in cases in which one of the partners is at least age sixty-two).

[169] I.R.S. C.C.A. 201021050 (May 28, 2010).

[170] *See In re* Marriage Cases, 43 Cal. 4th 757 (2008) (holding that since RDP relationships are not equal to marriage, it is a violation of the California Constitution to exclude same-sex couples from marriage); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (holding that since civil unions are not equal to marriage, it is a violation of the California Constitution to exclude same-sex couples from marriage.

[171] COLO. REV. STAT. § 14-15-117 (2013).

[172] *E.g.*, Or. Rev. Stat. § 106.340 (2008). *But c.f.* NEV. REV. STAT. § 122A.010 *et seq.* (2009) (Nevada, which recognizes RDP status, says nothing about taxation at the state level because Nevada has no income tax).

impose burdens and costs on state taxing authorities. The simpler and fairer solution overall would be to treat such couples as married for tax purposes even if not married for other federal purposes.

3. Some states are automatically converting registered partnerships to marriages

Recently, a number of states that used to recognize spousal equivalency relationships for same-sex couples have enacted marriage equality legislation.[173] Although a couple of states will continue to recognize partners who registered prior to the enactment of marriage equality, many states are automatically converting the prior relationship (registered domestic partnership or civil union) into a marriage.[174] And the conversion is retroactive.[175] Thus, for example, as of June 30, 2014, all same-sex RDPs in the State of Washington (unless one partner is at least sixty-two) will become married and the date of the marriage will be the date of the registration, which might have been years in the past.[176]

This phenomenon not only proves that the states really do think such partners are the same as spouses, but it also creates several problems under the IRS ruling. For example, assume that A and B registered as partners in the State of Washington in 2009. They have been filing their federal tax returns as single, but they would be better off filing as married. Can they now file amended returns for 2009 and beyond? Or, must they wait until June 30, 2014? They also have the option to apply for a marriage license now. Still, under state law, although the marriage may be solemnized in 2013, the effective date of the marriage will be 2009. Will the IRS treat them as married for 2009? If the IRS treated RDPs as spouses, these issues would disappear.

4. At least one state recognizes registered partners as spouses

The Commonwealth of Massachusetts recognizes registered partners as spouses under state law.[177] Thus, if a registered partner from California moves to Massachusetts, she is not free to marry because Massachusetts views her as already married.[178] And, if she wants to dis-

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[173] *See generally* NAT'L CONF. OF ST. LEGISLATURES, *supra* note 165.
[174] *Id.*
[175] WASH. REV. CODE § 26.60.100 (2012).
[176] *Id.*
[177] *See* Elia-Warnken v. Elia, 972 N.E.2d 17, 18 (Mass. App. Ct. 2012).
[178] *See id.*

solve her relationship, she must get a divorce, because under the laws of Massachusetts, she is married.[179] Will the IRS apply the law of Massachusetts (state of domicile) to determine that the couple is married or the law of California (state of celebration of the original relationship)? If the IRS will treat the relationship as a marriage, what is the effective date, date of registration or date the couple moved to Massachusetts? These complex issues could similarly be avoided if the IRS merely construed the word "spouse" to include spousal equivalents.

5. There is great uncertainty in the tax law as to how RDPs and CUPs should be taxed if they are not taxed as spouses

Currently, there is great uncertainty as to how RDPs and CUPs should be taxed. The tax laws do not mention registered partners. There are no special rules for them. That means they are treated the same as cohabitants, for whom there are also no rules. The issue for RDPs and CUPs is more difficult however because marriage rules apply to them.[180] They are obligated to support each other.[181] Presumably any fulfillment of that state-imposed obligation would not be a taxable gift, whereas supporting a mere cohabitant does create a taxable gift.[182] When RDPs and CUPs dissolve their relationships they are subject to the same property division and alimony rules as spouses. We have a number of special statutory provisions that determine how property divisions and alimony arrangements should be taxed.[183] But the statutes only apply to "spouses." Spouses have clarity about the tax treatment of their dissolutions. Registered partners do not. This type of uncertainty is not good tax policy. Treating partners as spouses would bring them certainty.

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[179] *See id.* at 22; *see also* Hunter v. Rose, 463 Mass. 488 (2012).

[180] *See generally* Nat'l Conf. of St. Legislatures, *supra* note 165.

[181] *See id.*

[182] *See* Rev. Rul. 82-98, 1982-1 C.B. 141 (parent support of adult disabled child held as taxable gifts); *see also* Robert G. Popovich, *Support Your Family, but Leave out Uncle Sam: A Call for Federal Gift Tax Reform*, 55 Md. L. Rev. 343 (1996). *But see* Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 Law & Sexuality 97 (1991) (arguing that support payments by one partner for the joint consumption of both partners should not be viewed as taxable gifts because they are not transfers of property and such payments do not constitute the sort of estate-depleting transfers that the gift tax was intended to cover).

[183] *See* I.R.C. §§ 71, 215, 1041 (2014).

6. Developing case law supports treating RDPs and CUPs as spouses for purposes of federal law

The IRS's failure to treat RDPs and CUPs as spouses is almost certain to be challenged in litigation. While RDPs and CUPs going forward can choose to marry and thus receive recognition as spouses under the federal tax law, that option is not available to resolve claims based on past events. For example, if a registered couple is in the midst of dissolution, might the uncertainty of the tax treatment of their property division drive them to hastily marry so that they can divorce at the same time they dissolve the partnership?[184] That solution to the tax problem seems a bit extreme. And besides, if they were married for one month, but had been registered for ten years, would the IRS determine independently that only a portion of the property settlement, the minimal part attributable to the one-month marriage, qualified for tax-free treatment under Section 1041? This issue could be litigated in the future. And if the dissolution is final and one partner is paying alimony that otherwise would qualify for a deduction under Section 215, but the IRS denies the deduction, that would present a litigable issue. Finally, of course, there are registered partners who may have died, leaving behind a surviving partner who might want some of the benefits that a surviving spouse would have, such as the marital deduction.

While there is no case directly on point, there is a recently published opinion by a Ninth Circuit panel that held that RDPs should have the same federal employment benefits as spouses.[185] After all, if the couple is treated the same as a spousal unit under state law, what is the justification for the federal government to treat the couple differently? The Ninth Circuit panel concluded that there is no sufficient justification for this differential treatment.[186] This published opinion is not a court opinion in a litigated case.[187] It is an administrative decision by the Executive Committee of the Ninth Circuit Judicial Council in an appeal of an employee's complaint of discrimination by her em-

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[184] A couple that is both registered and married would need to dissolve both relationships.

[185] *See In re* Fonberg, 736 F.3d 901 (9th Cir. Jud. Council 2013); *see also* Dragovich v. U.S. Dep't of Treas., 872 F. Supp. 2d 944 (N.D. Cal. 2012) (court did not hold that RDPs should automatically be treated as spouses for tax purposes, but did rule that a tax statute that included spouses and numerous other relatives was unconstitutional for its failure to include registered partners).

[186] *See Fonberg*, 736 F.3d at 903.

[187] *Id.* at 901.

ployer, a federal district judge in Oregon.[188] Oregon recognizes registered domestic partners and basically extends to them all the same rights and responsibilities as spouses.[189] After *Windsor*, the Office of Personnel Management announced that spousal benefits would be extended to all federal employees in a same-sex marriage, provided they were married, but benefits would not be extended to registered domestic partners.[190] Based on this administrative position, the district court refused to extend spousal benefits to the registered domestic partner of the court's employee.[191] The employee appealed that denial and the executive committee (Judges Kozinski, Clifton, and Beistline) agreed with the employee, finding that the agency's position was discrimination on the basis of sex and, under *Windsor*, constituted a deprivation of due process and equal protection.[192]

With this opinion available, it is likely that other RDPs will pursue past benefits that they have been denied. Why not avoid the controversy and accept the Ninth Circuit's analysis and rule that the word "spouse" will include registered partners, so long as they are spousal equivalents?

C. *Pro or Con? Which Side Wins?*

The Ninth Circuit panel opinion makes sense to me. If spouses and partners are sufficiently similarly situated, then they should be treated the same under our tax laws. I *do* think the case would be harder to make, claiming a denial of equal protection, if the plaintiff were litigating for rights that he or she could have obtained by marrying after June 26, 2013. In such a case, the individual is not really being denied the benefit because of the partnership status but is being denied the benefit because of a failure to take steps to marry—a course of action totally available to same-sex partners after June 26, 2013. But, even if equal protection would be harder to argue successfully, I think

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[188] *See id.*

[189] *See* Oregon Family Fairness Act, Or. Rev. Stat. §§ 106.300-.340 (2013).

[190] *See* Off. of Pers. Mgmt., Benefits Admin. Letter No. 13-203, Coverage of Same-Sex Spouses (2013).

[191] *See Fonberg*, 736 F.3d at 902 ("[O]n March 6, 2013, Chief Judge Aiken rescinded her directive to the Clerk to reimburse Fonberg '[b]ecause no legal method for reimbursement is currently available . . . [and] the law affords Fonberg no remedy in this matter.' Chief Judge Aiken further ruled that, because Fonberg and her partner are not married, there was no authority within the Ninth Circuit to permit her to order reimbursement of the cost of health benefits for Fonberg's domestic partner.").

[192] *Id.* at 903.

as a matter of sound tax policy, it makes sense to treat partners as spouses. Such treatment would bring all committed couples that are subject to the same marital regimes in the various states under the same tax regime. It would create certainty for couples that otherwise are unsure how their inter-partner transactions will be taxed. And, it would end the geographical disparity between registered partners in community property states and registered partners in other states.[193]

V. Conclusion

The *Windsor* decision created a huge shift in tax treatment of same-sex spouses, but there are still many unresolved issues. Revenue Ruling 2013-17 is a step in the right direction as it resolves some of the issues that arose after *Windsor*, but there is still work to be done. As with sports, it "ain't over till the fat lady sings."[194]

[193] My preference, to be clear, would be to end joint returns altogether and return to single returns for everyone. We would still have to figure out special rules for inter-spousal transactions, and how a couple's income and expenses should be allocated, but single filing would get rid of many of the current problems in a system that creates unwarranted marriage penalties. But that's another project, beyond this paper.

[194] This saying is attributed to a San Antonio sports broadcaster in the 1970s, Dan Cook. *See* Oxford Dictionary of Proverbs (5th ed. 2008).