

TAXING FEDERALISM: ANALYZING REVENUE RULING 2013-17 IN LIGHT OF *WINDSOR*'S FEDERALISM LANGUAGE

INTRODUCTION

It is hard to overstate the effect that *United States v. Windsor*¹ will have on the American legal system.² Abrogating the definitional purpose³ of the federal Defense of Marriage Act⁴ (“DOMA”) had immediate effect on “over 1,000 federal statutes and a myriad of federal regulations.”⁵ Although President Obama promised that the Court’s decision would be implemented “swiftly and smoothly,”⁶ the tentative reasoning⁷ with which the majority struck down DOMA left much uncertainty as to the long-term consequences of the Court’s landmark ruling.⁸ Many legal battles loom on the horizon regarding the ability to define marriage in America.⁹

¹ 133 S. Ct. 2675 (2013).

² See, e.g., Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not “Argle Barge”*: *The Inevitability of Marriage Equality After Windsor*, 23 TUL. J.L. & SEXUALITY 17, 21 (2014) (“From this immediate and sweeping implementation of *Windsor*’s holding across the country, it is apparent that the import of the decision cannot be overstated.”).

³ “[The Defense of Marriage Act] amends the Dictionary Act in Title 1, § 7, of the United States Code to provide a federal definition of ‘marriage’ and ‘spouse.’” *Windsor*, 133 S. Ct. at 2682–83.

⁴ Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified in scattered sections of 1 U.S.C. & 28 U.S.C. (2012)). *Windsor* took issue only with section 3 of DOMA, 133 S. Ct. at 2683, which provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2012). Section 2 of DOMA, which allowed states to deny the existence of same-sex marriages entered into in another state, was unaffected by the *Windsor* ruling. *Windsor*, 133 S. Ct. at 2682–83 (“Section 2 . . . has not been challenged . . .”).

⁵ *Windsor*, 133 S. Ct. at 2688.

⁶ Presidential Statement on the United States Supreme Court Ruling on the Defense of Marriage Act, 2013 DAILY COMP. PRES. DOC. 459 (June 26, 2013).

⁷ “The particular constitutional guarantee in *Windsor* is hard to identify amidst the various rationales. Indeed, the muddled nature of the majority opinion—rest[s] at times on the federal balance, equal protection, or due process” Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. ONLINE 29, 31 (2013).

⁸ Susannah W. Pollvogt, *Windsor, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 205 (2013) (identifying the varying interpretations courts and commentators could take from the *Windsor* decision).

⁹ See William Duncan, *Bad News for Marriage, Good News for Government Power*, SCOTUSBLOG (June 26, 2013, 3:50 PM), <http://www.scotusblog.com/2013/06/bad-news-for-marriage-good-news-for-government-power/> (“Based on today’s decisions, the future looks to

By removing, but not replacing, the definitional provision of DOMA,¹⁰ the Court left application of its decision largely up to the federal agencies responsible for administering federal benefits.¹¹ Without a guiding, uniform definition, federal agencies have taken varying approaches in determining who will receive relevant marital benefits.¹² This Note asks the question: what guiding principles should federal agencies use to determine eligibility for federal marital benefits in the absence of DOMA's definitional provision? This Note suggests that the federalism language emphasized by the *Windsor* majority should be the principal guide for federal agencies in administering relevant federal benefits. Using a post-*Windsor* Internal Revenue Service Revenue Ruling that defines eligibility for marital benefits for federal tax purposes¹³ as an example, this Note explains how federal agencies can best implement the sweeping ruling in *Windsor* while preserving state sovereignty.

Part I of this Note discusses the prolific federalism language in the *Windsor* opinion. Part II of this Note discusses commentators' interpretation of the federalism language in *Windsor* and the current state of affairs regarding same-sex marriage in the fifty states. Part III analyzes the structure and text of Revenue Ruling 2013-17 in light of the federalism language contained in the *Windsor* opinion. Subsumed in this discussion, this Note presents issues raised by the IRS's decisions to adhere to a "state of celebration" rule in administering benefits to migratory marriages and to exclude marriage-like institutions from receiving federal marital tax benefits.

I. WINDSOR'S FEDERALISM LANGUAGE

Although the *Windsor* decision did not clearly rest on federalism principles, amidst the muddled majority opinion¹⁴ it is undeniable that the

hold more litigation, more judicial and executive discretion, but a diminished social role for marriage.").

¹⁰ *Windsor*, 133 S. Ct. at 2695–96. The majority's reasoning relied, in part, upon the states' ability to define marriage and decided that DOMA's federal definition of marriage could not stand. *Id.* at 2692 ("DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.").

¹¹ See Meg Penrose, *Something to [Lex Loci] Celebrationis?: Federal Marriage Benefits Following United States v. Windsor*, 41 HASTINGS CONST. L.Q. 41, 45–46 (2013) (discussing the lack of clarity created by *Windsor* and the responsibility thrust upon federal agencies).

¹² "The United States government has not spoken with a single voice regarding its reaction to *United States v. Windsor*. Instead, in piecemeal fashion, various federal agencies are beginning to announce who is considered married for certain federal purposes." *Id.* at 44.

¹³ Rev. Rul. 2013-17, 2013-38 I.R.B. 201–02.

¹⁴ "The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated

Court was greatly troubled by DOMA's encroachment upon the states' traditional role in regulating marital relations.¹⁵ Chief Justice Roberts was so convinced by the majority's elucidation of concern for state sovereignty that he concludes in his dissent that "it is undeniable that [the majority's] judgment is based on federalism."¹⁶ The other dissenting Justices took notice of the majority's federalism language but were not as convinced as to its ultimate applicability.¹⁷ Similarly and unsurprisingly, commentators have reached opposite conclusions regarding the catalytic rationale of the Court's decision.¹⁸ No matter which Justice commentators, practitioners, or lower court judges ultimately side with as to the definitive rationale of the *Windsor* majority, one cannot hide the bolded thread of federalism running throughout the opinion.

A. The Majority

The Court begins its seven-page tribute to federalism¹⁹ by acknowledging the "history and tradition" of limited federal involvement in domestic relations, stating that this "is 'an area that has long been

by a "bare . . . desire to harm" couples in same-sex marriages." *Windsor*, 133 S. Ct. at 2707 (Scalia, J., dissenting) (alteration in original).

¹⁵ "By history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Id.* at 2689–90 (majority opinion).

¹⁶ *Id.* at 2697 (Roberts, C.J., dissenting).

¹⁷ Compare *id.* at 2705 (Scalia, J., dissenting) ("[The majority opinion] fool[s] many readers, I am sure, into thinking that this is a federalism opinion."), with *id.* at 2720 (Alito, J., dissenting) ("Indeed, the Court's ultimate conclusion is that DOMA falls afoul of the Fifth Amendment To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree.").

¹⁸ Compare Courtney G. Joslin, *Windsor, Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 166 (2013) ("But while the Court did rely on the history of the allocation of power as between the states and the federal government as a trigger for more careful equal protection review, it is misleading to describe *Windsor* as a federalism-based opinion."), and Douglas Nejaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219 (2013) ("[T]hough the U.S. Supreme Court's decision in *Windsor's* favor is sprinkled with elements of federalism and due process, it ultimately rests on equal protection grounds."), and Elizabeth B. Wydra, *Reading the Opinions—and the Tea Leaves—in United States v. Windsor*, 2012–2013 CATO SUPREME CT. REV. 95, 103–04 (2013) ("For those who wish to maintain state laws excluding gay and lesbian couples from the institution of marriage, the threads of federalism running through the majority opinion might be cause for optimism But a close reading of the majority opinion suggests that it is not really about federalism"), with Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012–2013 CATO SUPREME CT. REV. 117, 119 (2013) ("Federalism principles played a critical role in defining the contours of the equality right at stake Rather than choosing between federalism and rights-based approaches to the case, *Windsor* demonstrated how federalism can become an integral part of the rights calculus.").

¹⁹ "[T]he opinion starts with seven full pages about the traditional power of States to define domestic relations" *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting).

regarded as a virtually exclusive province of the States.’”²⁰ The Court implies that a necessary facet within the regulation of domestic relations, and understood “‘at the time of the adoption of the Constitution,’” was that states “‘possessed full power over the subject of marriage and divorce.’”²¹ The Court then explains that the ability to define marriage is “central to state domestic relations law”²² and “the foundation of the State’s broader authority to regulate the subject of domestic relations.”²³ Further bolstering the historic and constitutional grounding of state sovereignty in regulating marriage, the Court states that “[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for ‘when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States.’”²⁴ The Court acknowledges the limited power of the federal government in stating “‘the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce.’”²⁵ The Court concludes, in the absence of any affirmative grant of power in the Constitution or any implied power from historical practice, that it is “[c]onsistent with this allocation of authority, [that] the Federal Government . . . defer[s] to state-law policy decisions with respect to domestic relations.”²⁶

The Court applauds New York’s decision to “recognize and then to allow same-sex marriages.”²⁷ It describes these actions as a “proper exercise of [New York’s] sovereign authority within our federal system, all in the way that the Framers of the Constitution intended.”²⁸ Further expanding on the importance of New York’s role as a sovereign state in “the formation of consensus respecting the way the members of a *discrete community* treat each other in their daily contact and constant interaction with each other,”²⁹ the Court implies that, in this area, broad national standards do not adequately represent the social mores of states as “discrete communit[ies].”³⁰ The majority goes on to cheer the democratic process through which New York arrived at its final decision: “After a

²⁰ *Id.* at 2691 (majority opinion) (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

²¹ *Id.* (quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906)).

²² *Id.*

²³ *Id.*

²⁴ *Id.* (quoting *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84, (1930)).

²⁵ *Id.* (quoting *Haddock v. Haddock*, 201 U.S. 562, 575 (1906)).

²⁶ *Id.*

²⁷ *Id.* at 2692.

²⁸ *Id.*

²⁹ *Id.* (emphasis added).

³⁰ *Id.*

statewide deliberative process that enabled its citizens to discuss and weigh arguments for and against same-sex marriage, New York acted to enlarge the definition of marriage to correct what its citizens and elected representatives perceived to be an injustice that they had not earlier known or understood.”³¹

These highlighted portions of the majority’s tribute to federalism clearly demonstrate the Court’s grave concern for states’ ability to meaningfully define the bounds of domestic relations within each state’s discrete community. With this language framing the debate, it is unsurprising that the Court characterizes DOMA as an “unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage”³² and infringement upon the “unquestioned authority of the States”³³ to define marriage.

B. The Dissent

The disagreement amongst the Justices regarding the definitive rationale in striking down the definitional provision in DOMA displays the weight of concern the majority placed upon federalism principles in domestic relations. In their dissents, Chief Justice Roberts and Justice Alito echo the majority’s federalism language, seemingly hoping to convince the majority of the weight of their words.

Worried about the impact the majority’s equal protection and due process language³⁴ may have on states’ ability to retain a traditional

³¹ *Id.* at 2689.

³² *Id.* at 2693.

³³ *Id.*

³⁴ *See id.* at 2695 (“[T]hough Congress has great authority to design laws to fit its own conception of sound national policy, it cannot deny the liberty protected by the Due Process Clause of the Fifth Amendment. What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are to demean those persons who are in a lawful same-sex marriage. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution. The liberty protected by the Fifth Amendment’s Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.”). But even in its concluding remarks, the majority is careful to couch its language in the context of federalism:

[DOMA] imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.

Id. at 2695–96.

definition of marriage,³⁵ Chief Justice Roberts carefully points out the emphasis the majority places upon state sovereignty in defining marriage and the majority Justices' displeasure with DOMA's encroachment:

The majority extensively chronicles DOMA's departure from the normal allocation of responsibility between State and Federal Governments, emphasizing that DOMA "rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State." *But there is no such departure* when one State adopts or keeps a definition of marriage that differs from that of its neighbor, for it is entirely expected that state definitions would "vary, subject to constitutional guarantees, from one State to the next."³⁶

Justice Alito expresses a similar concern in his dissent:

To the extent that the Court takes the position that the question of same-sex marriage should be resolved primarily at the state level, I wholeheartedly agree. I hope that the Court will ultimately permit the people of each State to decide this question for themselves. Unless the Court is willing to allow this to occur, the whiffs of federalism in the [sic] today's opinion of the Court will soon be scattered to the wind.³⁷

As demonstrated by the prolific federalism language in the majority's opinion and the reiteration of that language in the dissenting Justices' opinions, *Windsor* is—at least facially—a win for state sovereignty in defining domestic relations and marriage.

II. WHAT DOES IT MEAN?

If the opinion did not ultimately rest on federalism grounds, as Justice Scalia insists,³⁸ what is to be made of all this federalism language? Some commentators suggest that DOMA's "unusual" departure from general principles of federalism merely triggered closer equal protection review.³⁹ Other commentators view the majority's language more

³⁵ Roberts anticipates a subsequent suit challenging a state's definitional provision retaining a traditional definition of marriage:

Thus, while "[t]he State's power in defining the marital relation is of central relevance[.]" . . . that power will come into play on the other side of the board in future cases about the constitutionality of state marriage definitions. So too will the concerns for state diversity and sovereignty that weigh against DOMA's constitutionality in this case.

Id. at 2697 (Roberts, C.J., dissenting) (quoting majority opinion at 2692).

³⁶ *Id.* (emphasis added) (citation omitted) (quoting majority opinion at 2692).

³⁷ *Id.* at 2720 (Alito, J., dissenting).

³⁸ "[The majority opinion] fool[s] many readers, I am sure, into thinking that this is a federalism opinion." *Id.* at 2705 (Scalia, J., dissenting).

³⁹ See Joslin, *supra* note 18, at 166–67 ("DOMA[s] unusual . . . departure from the tradition of deference to state marital status determinations . . . was not what rendered section 3 unconstitutional. This deviance or departure was simply a trigger for more careful equal protection review. Ultimately, what rendered DOMA unconstitutional was that it

cynically, suggesting that, in the *Windsor* world, states only retain the ability to define marriage more expansively.⁴⁰ Yet others view the federalism language as an outright affirmation of state sovereignty in defining marriage.⁴¹

State definitions of marriage are rapidly changing in the *Windsor* world. At the time of this writing, nineteen states (“recognition states”) and the District of Columbia have expanded their definitions of marriage to include same-sex couples.⁴² If the federal court decisions issued after

failed equal protection review because its purpose was to mark a class of people as less worthy of dignity and respect.” (footnote omitted)).

⁴⁰ See Elizabeth Oklevitch & Lynne Marie Kohm, *Federalism or Extreme Makeover of State Domestic Regulations Power? The Rules and the Rhetoric of Windsor (and Perry)*, 6 ELON L. REV. 337, 341 (2014) (“[I]t is unclear whether [federalism] principles are applied as strongly for state jurisdictions defining marriage traditionally. It is therefore possible that strong federalism is consistent with the ruling in *Windsor* only if it expands marriage.” (footnote omitted)); see also Wydra, *supra* note 18, at 106 (“Justice Kennedy would likely have a difficult time justifying state authority to discriminate against gay and lesbian couples when it comes to marriage. As the *Windsor* majority opinion notes, states do enjoy traditional authority to regulate marriage, but this authority must be used in compliance with the Constitution.”).

⁴¹ Eric Restuccia and Aaron Lindstrom argue that the holdings in the twin decisions *Windsor* and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), “share an unexpected unifying theme—state sovereignty.” Eric Restuccia & Aaron Lindstrom, *Federalism and the Authority of the States to Define Marriage*, SCOTUSBLOG (June 27, 2013, 3:49 PM), <http://www.scotusblog.com/2013/06/federalism-and-the-authority-of-the-states-to-define-marriage/>. They further argue that these holdings predict a more hopeful outcome for states wishing to retain a traditional definition of marriage:

[T]he principles in *Windsor* of respect for state sovereignty and the authority of the people of the states to define marriage support the conclusion that the Court will affirm the constitutionality of those states that have reaffirmed the historic understanding of marriage—the union of one man and one woman.

Id.

⁴² These jurisdictions have recognized same-sex marriage through state court decisions, legislation, or popular vote. See *De Leon v. Perry*, 975 F. Supp. 2d 632, 644 (W.D. Tex. 2014). The current recognition states are California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *Id.*

On October 6, 2014, the U.S. Supreme Court denied certiorari in same-sex marriage cases from five states. Lyle Denniston, *Many More Same-Sex Marriages Soon, but Where?*, SCOTUSBLOG (Oct. 6, 2014, 3:35 PM), <http://www.scotusblog.com/2014/10/many-more-same-sex-marriages-soon-but-where/>. The Court let stand lower federal court rulings striking down same-sex marriage bans and effectively allowed same-sex marriage in Indiana, Oklahoma, Utah, Virginia, and Wisconsin. *Id.* Additionally, because the Supreme Court denied certiorari on federal circuit decisions, the jurisdictions affected are not only the states from which the cases originated, but all of the states in those circuits. *Id.* Consequently, Colorado, Kansas, North Carolina, South Carolina, West Virginia, and Wyoming, which did not recognize same-sex marriage at the state level, are now bound by their circuits’ undisturbed decisions allowing same-sex marriage. *Id.*

On October 8, 2014, in an amusing turn of events, the U.S. Supreme Court, through Justice Kennedy, accidentally halted same-sex marriage in Nevada, which had been

Windsor regarding states' stances towards same-sex marriage are any indication, it would seem that *Windsor's* federalism language is meaningless. In the sixteen months since the *Windsor* decision, twenty-one federal district court decisions by eighteen judges have modified states' definitions of marriage, and three federal appellate courts have affirmed, at least in part, the district court decisions.⁴³ Twenty-eight states have constitutional amendments and three have statutes that prohibit the recognition of same-sex marriage ("non-recognition states").⁴⁴

permitted just two days before. Lyle Denniston, *FURTHER UPDATE: Same-Sex Marriage OK in Nevada*, SCOTUSBLOG (Oct. 8, 2014, 1:04 PM), <http://www.scotusblog.com/2014/10/same-sex-marriages-in-nevada-maybe-yes-maybe-no/>. Idaho, not Nevada, had requested a stay on the implementation of the Ninth Circuit's previous ruling, but a typo in Justice Kennedy's order left hopeful Nevada couples and state officials confused. *Justice Kennedy Mistakenly Halts Gay Marriages in Nevada*, U.S. NEWS & WORLD REP. (Oct. 9, 2014, 1:14 PM), <http://www.usnews.com/news/articles/2014/10/09/justice-kennedy-mistakenly-halts-gay-marriages-in-nevada>. Later that day, Justice Kennedy issued a clarified order allowing same-sex marriage in Nevada. *Otter v. Latta*, No. 14A374, 2014 WL 5025970 (Oct. 8, 2014), *vacated by* 2014 WL 5094190 (mem.) (Oct. 10, 2014). Two days later, the Supreme Court lifted Idaho's stay on same-sex marriage.

⁴³ See *Baskin v. Bogan*, Nos. 14-2386, 14-2387, 14-2388, 14-2526, 2014 WL 4359059, at *21 (7th Cir. Sept. 4, 2014) (Posner, J.); *Bostic v. Schaefer*, 760 F.3d 352, 384 (4th Cir. 2014) (Floyd, J.); *Kitchen v. Herbert*, 755 F.3d 1193, 1229–30 (10th Cir. 2014) (Lucero, J.); *Bishop v. Smith*, 760 F.3d 1070, 1096 (10th Cir. 2014) (Lucero, J.); *Majors v. Jeanes*, No. 2:14-cv-00518 JWS, 2014 WL 4541173, at *6 (D. Ariz. Sept. 12, 2014) (Sedwick, J.); *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1292–94 (N.D. Fla. 2014) (Hinkle, J.); *Bowling v. Pence*, No. 1:14-cv-00405-RLY, 2014 WL 4104814, at *5 (S.D. Ind. Aug. 19, 2014) (Young, C.J.); *Burns v. Hickenlooper*, No. 14-cv-01817-RM-KLM, 2014 WL 3634834, at *5 (D. Colo. July 23, 2014) (Moore, J.); *Love v. Beshear*, 989 F. Supp. 2d 536, 550 (W.D. Ky. 2014) (Heyburn, J.); *Baskin v. Bogan*, Nos. 1:14-cv-00355-RLY-TAB, 1:14-cv-00404-RLY-TAB, 1:14-cv-00406-RLY-MJD, 2014 WL 2884868, at *16 (S.D. Ind.) (Young, C.J.), *aff'd*, 2014 WL 4359059; *Wolf v. Walker*, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014) (Crabb, J.), *aff'd sub nom. Baskin v. Bogan*, 2014 WL 4359059; *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (Jones, J.); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1147 (D. Or. 2014) (McShane, J.); *Latta v. Otter*, No. 1:13-cv-00482-CWD, 2014 WL 1909999, at *29 (D. Idaho May 13, 2014) (Dale, C. Mag. J.); *Henry v. Himes*, No. 1:14-cv-129, 2014 WL 1418395, at *18 (S.D. Ohio Apr. 14, 2014) (Black, J.); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014) (Friedman, J.); *Tanco v. Haslam*, No. 3:13-cv-01159, 2014 WL 997525, at *9 (M.D. Tenn. Mar. 14, 2014) (Trauger, J.); *De Leon v. Perry*, 975 F. Supp. 2d 632, 666 (W.D. Tex. 2014) (Garcia, J.); *Lee v. Orr*, No. 13-cv-8719, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014) (Coleman, J.); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014) (Allen, J.), *aff'd sub nom. Bostic v. Schaefer*, 760 F.3d 352; *Bourke v. Beshear*, 996 F. Supp. 2d 542, 550 (W.D. Ky. 2014) (Heyburn, J.); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252, 1296 (N.D. Okla. 2014) (Kern, J.), *aff'd sub nom. Bishop v. Smith*, 760 F.3d 1070; *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 1000 (S.D. Ohio 2013) (Black, J.); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1216 (D. Utah 2013) (Shelby, J.), *aff'd*, 755 F.3d 1193; *Gray v. Orr*, No. 13 C 8449, 2013 WL 6355918, at *6 (N.D. Ill. Dec. 5, 2013) (Durkin, J.).

⁴⁴ ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, §§ 1–2; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § 4, para. 1; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A;

Twenty of these states' constitutional amendments also explicitly prohibit recognition of alternate marriage-like institutions such as civil unions.⁴⁵ Justice Alito recognized in his dissenting opinion what each state as a "discrete community" has demonstrated in taking its own approach to the marriage question: the democratic process is the best way to implement the rapid changes in the understanding of marriage in American states.⁴⁶ Although the Court recently denied certiorari petitions from three federal circuits,⁴⁷ the Sixth Circuit more recently reversed six district court

MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13; IND. CODE ANN. § 31-11-1-1 (Westlaw through 2014 Pub. L. of 2d Reg. Sess. and 2d Reg. Technical Sess.), *invalidated by Baskin v. Bogan*, 2014 WL 4359059; W. VA. CODE ANN. § 48-2-603 (LEXIS through 2014, 2d Extraordinary Sess.); WYO. STAT. ANN. § 20-1-101 (LEXIS through 2014 Budget Sess.). Of those twenty-eight states, the following eight have constitutional amendments that allow for adoption of marriage-like institutions for same-sex couples: Alaska, Arizona, Colorado, Mississippi, Missouri, Montana, Nevada, and Tennessee. *See* ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; COLO. CONST. art. II, § 31; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEV. CONST. art. I, § 21; TENN. CONST. art. XI, § 18.

⁴⁵ The following states constitutionally prohibit any legal recognition of same-sex relationships: Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, Wisconsin. *See* ALA. CONST. art. I, § 36.03; ARK. CONST. amend. 83, §§ 1–2; FLA. CONST. art. I, § 27; GA. CONST. art. I, § 4, para. 1; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; NEB. CONST. art. I, § 29; N.C. CONST. art. XIV, § 6; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

⁴⁶ *See Windsor*, 133 S. Ct. at 2716 (Alito, J., dissenting) ("At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be. And judges are certainly not equipped to make such an assessment. The Members of this Court have the authority and the responsibility to interpret and apply the Constitution. Thus, if the Constitution contained a provision guaranteeing the right to marry a person of the same sex, it would be our duty to enforce that right. But the Constitution simply does not speak to the issue of same-sex marriage. In our system of government, ultimate sovereignty rests with the people, and the people have the right to control their own destiny. Any change on a question so fundamental should be made by the people through their elected officials.").

⁴⁷ Petition for Writ of Certiorari, *Bogan v. Baskin*, 766 F.3d 648 (7th Cir. 2014) (No. 14-277), *cert. denied*, 2014 WL 4425162 (U.S. Oct. 6, 2014); Petition for a Writ of Certiorari, *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014) (No. 14-124), *cert. denied*, 2014 WL 3841263 (Oct. 6, 2014); Petition for a Writ of Certiorari, *Shaefer v. Bostic*, 760 F.3d 352 (4th Cir. 2014) (No. 14-225), *cert. denied*, 2014 WL 4230092 (U.S. Oct. 6, 2014); Petition for Writ of Certiorari, *Smith v. Bishop*, 760 F.3d 1070 (10th Cir. 2014) (No. 14-136), *cert. denied*, 2014 WL 3854318 (U.S. Oct. 6, 2014); Petition for a Writ of Certiorari, *Walker v. Wolf*, *aff'd sub*

decisions that collectively struck down four states' bans on same-sex marriage.⁴⁸ With this development of a circuit split, it seems that Justice Scalia's "guess"—that the Court would decide in a following term that states cannot retain traditional definitions of marriage—is accurate.⁴⁹

Although the degree of reliance *Windsor* actually places upon federalism principles is unclear, one cannot deny that the Court is hesitant to override—even protective of—the states' ability to define marriage.⁵⁰ The Court illustrates this respect by approvingly citing the democratic process through which New York came to recognize same-sex marriage.⁵¹ Its lengthy description of "an area that has long been regarded as a virtually exclusive province of the States"⁵² makes clear that the States' roles as "discrete communit[ies]"⁵³ in defining marriage is of critical importance. Therefore, federal agencies implementing *Windsor's* holding should be cautious not to override the states' "exclusive sovereignty" in the area of domestic relations.⁵⁴ States should have the freedom to meaningfully engage in this "public controvers[y] [that] touch[es] an institution so central to the lives of so many, and . . . inspire[s] such attendant passion by good people on all sides."⁵⁵ As Ryan T. Anderson states, in *Windsor's* wake, "the federal government should look to each

nom. Baskin v. Bogan, 766 F.3d 648 (No. 14-278), *cert. denied*, 2014 WL 4425163 (U.S. Oct. 6, 2014).

⁴⁸ *DeBoer v. Snyder*, Nos. 14-1341, 14-3057, 14-3464, 14-5291, 14-5297, 14-5818, 2014 WL 5748990, at *2–5, *27 (6th Cir. Nov. 6, 2014).

⁴⁹ *See Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) ("My guess is that the majority, while reluctant to suggest that defining the meaning of 'marriage' in federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term). But I am only guessing." (footnote omitted)).

⁵⁰ *See supra* Part I.A.; *see also Windsor*, 133 S. Ct. at 2692 ("The State's power in defining the marital relation is of central relevance in this case . . .").

⁵¹ *See Windsor*, 133 S. Ct. at 2689 (discussing New York's codification of same-sex marriage).

⁵² *Id.* at 2691 (quoting *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)).

⁵³ *Id.* at 2692.

⁵⁴ The majority cites:

"[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce . . . [and] the Constitution delegated no authority to the Government of the United States on the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575, 26 S. Ct. 525, 50 L.Ed. 867 (1906); *see also In re Burrus*, 136 U.S. 586, 593–94, 10 S. Ct. 850, 34 L.Ed. 500 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States").

Id. at 2691 (alterations in original).

⁵⁵ *Id.* at 2710 (Scalia, J., dissenting).

state's definition of marriage as governing for federal law. This respects both federalism and democratic self-government. A bad Supreme Court ruling should not allow federal bureaucrats to redefine marriage across America for their agency."⁵⁶ However, at least one federal agency has foreclosed the possibility of states meaningfully engaging in democratic governance regarding the recognition of same-sex unions.⁵⁷

III. REVENUE RULING 2013-17 AND ITS IMPACT ON STATE SOVEREIGNTY

In the immediate aftermath of *Windsor*, practitioners greatly anticipated how federal agencies—and the IRS in particular⁵⁸—would implement the broader federal definition of marriage that *Windsor* requires.⁵⁹ One major concern left open by *Windsor* was how the IRS would treat couples validly married under the laws of one state but who later become domiciled in a state that does not recognize same-sex marriage.⁶⁰ Would the IRS allow a same-sex couple validly married in New York who later moved to Kansas, a non-recognition state, to file their taxes jointly? On August 29, 2013 the IRS answered this much anticipated question; Revenue Ruling 2013-17 (“the Ruling”) provided the much anticipated guidance.⁶¹ In three holdings, the Ruling answered questions raised by the

⁵⁶ Ryan T. Anderson, *The Obama Administration, Marriage, and the States*, DAILY SIGNAL (Aug. 29, 2013), <http://dailysignal.com/2013/08/29/the-obama-administration-marriage-and-the-states/>.

⁵⁷ See *infra* Part III.

⁵⁸ Tax issues are especially relevant in analyzing *Windsor*; the challenge to section 3 of DOMA originated from the estate tax that Edith Windsor was required to pay on the death of her longtime partner and “spouse,” as defined by New York law, but not applicable for federal purposes. *Windsor*, 133 S. Ct. at 2682.

⁵⁹ See, e.g., Howard M. Zaritsky, *Estate Planning Implications of the Supreme Court's DOMA Decision*, EST. PLAN., Sept. 2013, at 12, 17–18 (discussing, just prior to the issuance of Revenue Ruling 2013-17, the uncertain tax consequences of same-sex couples validly married in one state and subsequently domiciled in a state that does not recognize same-sex marriage).

⁶⁰ *Id.* at 17 (identifying the need for guidance regarding married same-sex couples who change domicile). Justice Scalia identified this problem in his dissenting opinion in *Windsor*:

Imagine a pair of women who marry in Albany and then move to Alabama, which does not “recognize as valid any marriage of parties of the same sex.” When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law?

Windsor, 133 S. Ct. at 2708 (Scalia, J., dissenting) (citation omitted).

⁶¹ Rev. Rul. 2013-17, 2013-38 I.R.B. 201; see also *Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes; Ruling Provides*

Windsor opinion: (1) whether the terms “marriage,” “spouse,” “husband and wife,” “husband,” and “wife” extended to same-sex marriages lawful under states’ authority; (2) whether the IRS would recognize the marriage of a same-sex couple validly married in one state who subsequently acquire domicile in a non-recognition state; and (3) whether the above listed terms extend to other marriage-like relationships recognized by states.⁶²

A. Interpreting Marital Terms as Gender-Neutral to Include Same-Sex Marriages

The Ruling’s first holding is:

[F]or Federal tax purposes, the terms “husband and wife,” “husband,” and “wife” include an individual married to a person of the same sex if they were lawfully married in a state whose laws authorize the marriage of two individuals of the same sex, and the term “marriage” includes such marriages of individuals of the same sex.⁶³

The IRS provided four rationales to support this conclusion pertaining to the “more than two hundred Code provisions and Treasury regulations relating to the internal revenue laws that include the[se] terms.”⁶⁴

First, the Ruling cites to the majority’s language in *Windsor* identifying the procedural burden that DOMA placed on same-sex couples in filing federal taxes and the expectation that *Windsor* would affect “tax administration in ways that extended beyond the estate tax refund at issue.”⁶⁵ Second, the Ruling posits that a literal interpretation of gender-specific terms—effectively excluding same-sex couples—would raise serious constitutional questions by “diminishing the stability and predictability of legally recognized same-sex marriages.”⁶⁶ Third, the IRS reasoned that “the text of the Code permits a gender-neutral construction of the gender-specific terms.”⁶⁷ Through citation to section 7701 of the Internal Revenue Code,⁶⁸ the Ruling makes reference to the Dictionary

Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples, IRS (Aug. 29, 2013), <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes%3B-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples>.

⁶² 2013-38 I.R.B. at 201.

⁶³ *Id.* at 203.

⁶⁴ *Id.* at 202.

⁶⁵ *Id.* (citing *Windsor*, 133 S. Ct. at 2694).

⁶⁶ *Id.* *But see infra* Part III.C. (discussing equal protection concerns raised by the Ruling’s holding to exclude state-created, marriage-like institutions from receiving federal tax benefits).

⁶⁷ 2013-38 I.R.B. at 202.

⁶⁸ “Section 7701 of the Code provides definitions of certain terms generally applicable for purposes of the Code when the terms are not defined otherwise in a specific Code

Act⁶⁹ “which provides, in part, that when ‘determining the meaning of any Act of Congress, unless the context indicates otherwise, . . . words importing the masculine gender include the feminine as well.’”⁷⁰ Also, the Ruling suggests that context and legislative history indicate that use of “the terms ‘husband and wife’ [in the Code] were used because they were viewed, at the time of enactment, as equivalent to the term ‘persons married to each other.’”⁷¹ Fourth, the Ruling cites “other considerations” that “strongly support this interpretation.”⁷² An appeal to fairness—treating similarly situated couples similarly regardless of gender—and administrative efficiency, absent an existing mechanism to “collect or maintain information on the gender of taxpayers,” comprise the whole of the Ruling’s “other considerations” in support of applying gender-specific marital terms, for federal tax purposes, to same-sex couples lawfully married in a recognition state.⁷³

This first holding of the Ruling has little direct impact on state sovereignty and federalism principles because it merely expands provisions within the Internal Revenue Code relating to marriage so as to apply to validly married same-sex couples.

B. Overlooking State of Domicile for “State of Celebration”

The Ruling’s second holding “adopts a general rule recognizing a marriage of same-sex individuals that was validly entered into in a state whose laws authorize the marriage of two individuals of the same sex even if the married couple is domiciled in a state that does not recognize the validity of same-sex marriages.”⁷⁴ It looks to the IRS’s “longstanding position expressed in Revenue Ruling 58-66”⁷⁵ and the anticipated administrative difficulty in adopting a rule that would favor the laws of a same-sex couple’s domiciliary state.⁷⁶ Revenue Ruling 58-66 makes

provision and the definition in section 7701 is not manifestly incompatible with the intent of the specific Code provision.” *Id.*

⁶⁹ *Id.*; 1 U.S.C. § 1 (2012); *see also* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (citing 1 U.S.C. § 1 as the “Dictionary Act”).

⁷⁰ 2013-38 I.R.B. at 202. Interestingly, a subsection cited, section 7701(17)(a), neuters the gender-specific terms “husband” and “wife” in two specific instances: sections 682 and 2516, both relating to tax treatment of former spouses. *Id.* The Ruling contemplates, yet dismisses, the principle of the maxim *expressio unius est exclusio alterius* in favor of a general neutering of provisions elsewhere in the Code citing the “circumstances presented[,] . . . *Windsor*[,] and the principle of constitutional avoidance.” *Id.*

⁷¹ *Id.* at 203.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 204.

⁷⁵ *Id.* at 203.

⁷⁶ *Id.*

express the IRS's reliance on state law definitions of marital status concerning common-law marriage.⁷⁷ It also makes marital recognition for federal tax purposes equally applicable "to a couple who entered into a common-law marriage in a state that recognized such relationships and who later moved to a state in which a ceremony is required to establish the marital relationship."⁷⁸ Achievement of uniformity, stability, efficiency, and certainty is cited in support of analogizing treatment of migratory common-law marriages and same-sex marriages.⁷⁹ After detailing the administrative headache that adopting a state-of-residence rule would cause to "[the IRS], employers, [employee benefit] plan administrators, and individual taxpayers[.]" the Ruling "amplifie[s]" the rule pronounced in Revenue Ruling 58-66 to apply to same-sex couples validly married in recognition states who later move to non-recognition states.⁸⁰

This may be the most practical approach for the IRS, but it is very impractical for same-sex couples who are validly married in one state but domiciled in a state that does not recognize their marriage.⁸¹ One reason the majority decided to declare the definitional provision of DOMA unconstitutional was that "[i]t force[d] [same-sex married couples in New York] to follow a complicated procedure to file their state and federal taxes jointly."⁸² But as Professor Anthony C. Infanti points out:

[T]he IRS's approach to recognizing same-sex marriage creates a mirror image of this problem. With valid same-sex marriages recognized regardless of the law of the couple's state of residence, same-sex couples living in states that do not recognize their marriages will be required to file as married filing jointly or married filing separately for federal purposes but will be prohibited from using those statuses when filing their state tax returns. This nonconformity will give rise to precisely the same complexity and administrative burden that existed pre-*Windsor*; it will just be a different group of same-sex couples that will be burdened (i.e., those who are already saddled with state nonrecognition of their relationships).⁸³

⁷⁷ *Id.* at 201.

⁷⁸ *Id.*

⁷⁹ *Id.* at 203.

⁸⁰ *Id.* at 204.

⁸¹ Anthony C. Infanti, *The Moonscape of Tax Equality: Windsor and Beyond*, 108 NW. U. L. REV. COLLOQUY 110, 126 (2013) (discussing the burden on same-sex couples without state recognition of their relationships).

⁸² *Windsor*, 133 S. Ct. at 2694.

⁸³ Infanti, *supra* note 81.

Beside the filing headache that a “[s]tate of celebration”⁸⁴ approach will create for same-sex married couples in non-recognition states,⁸⁵ one must wonder how this will affect the guarantee afforded by section 3 of DOMA to states wishing to retain a traditional definition of marriage. At least one federal district judge has recognized the Ruling’s inconsistency with the remaining, valid section of DOMA.⁸⁶

Professor Lynne Marie Kohm’s prediction regarding states’ authority after *Windsor* to define marriage only if states choose a more expansive definition of marriage⁸⁷ seems to be confirmed by this holding. Through this ruling, the IRS is effectively choosing to accept as more valid a recognition state’s expansive definition of marriage over a taxpayer’s non-recognition, domiciliary state’s definition. The Ruling places immense pressure on non-recognition states⁸⁸ to embrace an expansive definition of marriage by suggesting that non-recognition of valid out-of-state marriages violates the United States Constitution.⁸⁹ But even though the IRS’s adoption of a “state of celebration” approach is viewed as a victory for same-sex marriage, ambiguities and challenges remain for same-sex couples.⁹⁰

⁸⁴ *Windsor*, 133 S. Ct. at 2708 (Scalia, J., dissenting) (defining “state of celebration” approach).

⁸⁵ *Infanti*, *supra* note 81, at 125–26.

⁸⁶ *See* *Bishop v. United States*, 962 F. Supp. 2d 1252, 1270 (N.D. Okla. 2014) (Kern, J.) (“Section 3 of DOMA will no longer be used to deprive the Barton couple of married status for any federal tax purpose because (1) they have a legal California marriage, and (2) Oklahoma’s non-recognition of such marriage is irrelevant for federal tax purposes. Any ongoing threat of injury based upon deprivation of married status for tax purposes has been rendered moot by *Windsor* and the IRS’ response thereto.”).

⁸⁷ *See supra* note 40 and accompanying text.

⁸⁸ “[G]ay-marriage advocates [suggest] that the IRS decision will not only force non-gay-marriage states to figure out a way to align their tax policies with federal returns, it will also apply new public pressure on civil-union states to move toward recognizing same-sex marriage.” Peter Weber, *How the IRS Just Handed Gay Marriage a Huge Win*, WEEK (Aug. 30, 2013), <http://theweek.com/article/index/248984/how-the-irs-just-handed-gay-marriage-a-huge-win>.

⁸⁹ Although not related to the IRS’s ruling, the federal district court ruling in *Obergefell v. Wymyslo* is indicative of the pressure non-recognition states face. *See* *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 973 (S.D. Ohio 2013) (requiring Ohio, a non-recognition state, to recognize valid out-of-state same-sex marriages on Ohio death certificates).

⁹⁰ *See* *Infanti*, *supra* note 81, at 111. *Infanti* asks how the IRS will determine what “married” means:

But what about couples who enter into so-called evasive marriages? An evasive marriage occurs when a couple domiciled in a state that does not recognize same-sex marriage travels to another state to marry and immediately returns to their state of domicile to live. . . .

Are the many same-sex couples in evasive marriages now considered “married” for federal tax purposes? The IRS guidance does not even acknowledge—much less address—this category of marriages. Is it enough that

Although the IRS may have suffered administrative difficulties in applying a “state of residence”⁹¹ standard for administering federal tax benefits, that application would have been more appropriate and consistent with the extensive federalism language in the *Windsor* opinion and the remaining effectiveness of section 2 of DOMA.⁹²

C. “Marriage” Means “Marriage”

The Ruling concludes by excluding state-created, marriage-like institutions from receiving marriage-like federal tax treatment. No further explanation is given; the entire analysis is:

For Federal tax purposes, the term “marriage” does not include registered domestic partnerships, civil unions, or other similar formal relationships recognized under state law that are not denominated as a marriage under that state’s law, and the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals who have entered into such a formal relationship. This conclusion applies regardless of whether individuals who have entered into such relationships are of the opposite sex or the same sex.⁹³

This position surprised some commentators;⁹⁴ in 2011, the IRS indicated that it would allow joint filing for different-sex couples in civil unions treated by their states as legally equal to marriages.⁹⁵ Also, as Infanti

these couples satisfied the legal formalities imposed by the state where they were married?

Id. at 119–20 (footnote omitted).

⁹¹ Kathryn J. Kennedy, *DOMA Implications for Employee Benefit Plans*, TAX NOTES, Sept. 30, 2013, at 1571, 1572. Under this approach, eligibility for federal marital benefits is determined by the definition provided by the state in which a same-sex couple lives. *Id.* Currently, the Department of Labor and Social Security Administration have taken this approach. *See id.* at 1578.

⁹² *See* Joseph Henchman, IRS Issues “State of Celebration” Guidance for Same-Sex Couples—Further Guidance by 24 States May Be Required, in FISCAL FACT, at 1 (Tax Found., No. 393, Aug. 29, 2013), available at <http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff393.pdf> (“[*Windsor*] invalidated a federal definition of marriage as between one man and one woman, and general reaction at the time suggested that the definition of marriage would thus revert to state law: if a state recognized your marriage, the federal government would recognize it; however, if a state did not recognize your marriage, the federal government would not. This interpretation is supported by the fact that section 2 of DOMA, which permits states to refuse to recognize marriages that are at odds with their state’s public policy, was not struck down.”).

⁹³ Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204 (2013).

⁹⁴ Infanti, *supra* note 81, at 124.

⁹⁵ At the time, this indication was also surprising to some. *Id.* at 123.

Some commentators expressed surprise at this position, believing that the most important factor in determining whether a couple is married for federal tax purposes is whether their legal relationship carries the *marriage* label under state law. In its post-*Windsor* guidance, the IRS reversed course and embraced the commentators’ view by exalting the importance of the *marriage* label and ignoring the legal equivalence of these relationships.

points out, “[i]f any area of federal law were to recognize domestic partnerships and civil unions as *marriages*, one would expect it to be tax law because [t]he principle of looking through form to substance . . . is the cornerstone of sound taxation.”⁹⁶ It would seem that the principle of “substance over form” requires the IRS to treat civil unions and domestic partnerships as marriages.⁹⁷ Other commentators, however, were unsurprised by the IRS’s exclusion of marriage-like institutions from marriage-like treatment.⁹⁸

It is this final holding of the Ruling that most encroaches upon state sovereignty and the principles of federalism announced in *Windsor*. Infanti recognizes the pressure this holding places on civil union states and current non-recognition states wishing to grant benefits to same-sex couples without compromising a traditional definition of marriage:

The IRS guidance effectively crowds out all other relationships and permits marriage to occupy the field. In the short term, this creates a strong incentive for couples in states with only civil unions or domestic partnerships to travel to one of the states that will allow them to marry, so long as that marriage will be valid and recognized for federal tax purposes. In the long term, it creates a strong incentive for civil union and domestic partnership states to abandon those relationship recognition regimes in favor of same-sex marriage. Moreover, any state that currently refuses to recognize same-sex relationships but later considers a change in its legal treatment of same-sex couples will choose to extend marriage to those couples rather than explore alternative options that might be afforded to all couples. . . . In the future, states will be less likely to provide such different options for relationship recognition because the federal tax laws place a thumb firmly on the scales in favor of marriage.⁹⁹

Indeed, New Jersey, for example, has abandoned its civil union statutory scheme and its traditional definition of marriage due, in part, to the IRS’s refusal to recognize marriage-like institutions for federal tax

Id. at 124 (footnote omitted).

⁹⁶ *Id.* at 124 (alteration in original) (quoting *Estate of Weinert v. Comm’r*, 294 F.2d 750, 755 (5th Cir. 1961)).

⁹⁷ *See id.*

⁹⁸ *See, e.g.*, Patricia A. Cain, *IRS Ruling on Same-Sex Marriage and Six Impossible Things Before Breakfast*, Op-Ed, TAXPROF BLOG (Sept. 3, 2013), http://taxprof.typepad.com/taxprof_blog/2013/09/cain-.html (“[T]his position on RDPs and CUPs is not surprising. It is clear that the federal government wishes to apply as uniform a rule as possible and so the IRS is following the lead of other agencies”); *see also* Infanti, *supra* note 81, at 123–24 (noting the original surprise some commentators expressed before *Windsor* when the IRS indicated it might recognize those in marriage-like arrangements as married for federal tax purposes).

⁹⁹ Infanti, *supra* note 81, at 126–27.

benefits.¹⁰⁰ In support of its declaration that New Jersey's civil union statute was not a constitutional substitute for a same-sex marriage allowance, the New Jersey Supreme Court specifically cites and quotes the Ruling's decision not to extend federal marital tax benefits to same-sex couples whose relationship is not designated as a "marriage."¹⁰¹ The court found that designating same-sex couples' relationships as civil unions violated the equal protection guarantees of the New Jersey Constitution and did not reach the question of whether the State's refusal also violated the United States Constitution.¹⁰² But not much extrapolation is required to see that similar principles could be used to find a violation of the latter.¹⁰³ Commentators have noted that the IRS's refusal to recognize state designations of civil unions or domestic partnerships raises Equal Protection concerns on the federal level.¹⁰⁴

In fact, the Equal Protection concerns are very apparent when applying the majority's language regarding DOMA's effect on state sovereignty to the IRS's refusal to grant marital benefits to states' marriage-equivalent institutions. Borrowing from a word-processing technique utilized by Justice Scalia in his *Windsor* dissent,¹⁰⁵ by substituting the implications of the Ruling into the *Windsor* majority's language, the Ruling's Equal Protection concerns—in relation to states

¹⁰⁰ See *Garden State Equal. v. Dow*, 82 A.3d 336, 347, 367–69 (N.J. 2013) (holding that civil unions' inequality with marriage violated the state constitution's equal protection clause because married couples enjoyed the many federal benefits, including the ability to file joint federal income tax returns, that were not available to those in civil unions).

¹⁰¹ *Id.* at 347, 368–69.

¹⁰² *Id.* at 367–68.

¹⁰³ The language used by the New Jersey Superior Court judge is very broad:

The ineligibility of same-sex couples for federal benefits is currently harming same-sex couples in New Jersey in a wide range of contexts: civil union partners who are federal employees living in New Jersey are ineligible for marital rights with regard to the federal pension system, all civil union partners who are employees working for businesses to which the FMLA applies may not rely on its statutory protections for spouses, and civil union couples may not access the federal tax benefits that married couples enjoy. And if the trend of federal agencies deeming civil union partners ineligible for benefits continues, plaintiffs will suffer even more, while their opposite-sex New Jersey counterparts continue to receive federal marital benefits for no reason other than the label placed upon their relationships by the State.

Id. at 368–69.

¹⁰⁴ See, e.g., Cain, *supra* note 98; cf. Nicholas A. Mirkay, *Equality or Dysfunction? State Tax Law in a Post-Windsor World*, 47 CREIGHTON L. REV. 261, 283–84 (2014) (suggesting the Rulings' raising state equal protection issues (1) caused the New Jersey Superior Court to conclude New Jersey's civil union law was an insufficient substitute for same-sex marriage allowance and (2) might spell the end of civil unions).

¹⁰⁵ See *Windsor*, 133 S. Ct. at 2709–10 (Scalia, J., dissenting).

that wish to implement an alternate, marriage-like institution—become clear.

The majority announces:

Here the State's decision to give this class of persons the right to ~~marry~~ *engage in a civil union* conferred upon them a dignity and status of immense import. When the State used its historic and essential authority to define the ~~marital~~ relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community. ~~DOMA, Revenue Ruling 2013-17~~, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage.¹⁰⁶

And:

The ~~Federal Government~~ *IRS* uses this state-defined class for the opposite purpose—to impose restrictions and disabilities. That result requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment. What ~~the State of New York~~ *any state implementing a marriage-equivalent statutory scheme* treats as alike ~~the federal law~~ *Revenue Ruling 2013-17* deems unlike by a law designed to injure the same class the [s]tate seeks to protect.¹⁰⁷

Also:

~~DOMA's~~ *Revenue Ruling 2013-17's* unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage here operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their ~~marriages~~ *marriage-like institutions*. This is strong evidence of a law having the purpose and effect of disapproval of that class. The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex ~~marriages~~ *marriage-like institutions* made lawful by the unquestioned authority of the States.¹⁰⁸

And:

As the ~~title and dynamics of the bill~~ *lack of reasoning supporting the third holding of Revenue Ruling 2013-17* indicate[s], its purpose is to discourage enactment of state same-sex ~~marriage~~ *marriage-equivalent* laws and to restrict the freedom and choice of couples ~~married~~ *engaged in marriage-like institutions* under those laws if they are enacted. The ~~congressional~~ *IRS's* goal was “to put a thumb on the scales and influence a state's decision as to how to shape its own marriage laws.” The ~~Act's~~ *Ruling's* demonstrated purpose is to ensure that if any [s]tate decides to recognize same-sex ~~marriages~~ *marriage-like institutions*, those unions will be treated as second-class ~~marriages~~ *institutions* for

¹⁰⁶ *Id.* at 2692 (majority opinion) (author's alterations indicated in strikethrough and italic text).

¹⁰⁷ *Id.* (author's alterations indicated in strikethrough and italic text).

¹⁰⁸ *Id.* at 2693 (author's alterations indicated in strikethrough and italic text).

purposes of federal law. This raises a most serious question under the Constitution's Fifth Amendment.¹⁰⁹

Finally:

When ~~New York~~ *any civil union state* adopted a law to permit same-sex ~~marriage~~ *marriage-like institutions*, it sought to eliminate inequality; but ~~DOMA Revenue Ruling 2013-17~~ frustrates that objective through a system-wide enactment with no identified connection to any particular area of federal law. ~~DOMA Revenue Ruling 2013-17~~ writes inequality into the entire ~~United States Code~~ *Internal Revenue Code*.¹¹⁰

Clearly, the IRS's refusal to recognize state-created, marriage-like institutions and even marriage-equivalent institutions is not consistent with *Windsor's* federalism language. It effectively limits states' meaningful options to two in dealing with this "public controvers[y] [that] touch[es] an institution so central to the lives of so many, and . . . inspire[s] such attendant passion by good people on all sides."¹¹¹ The first option is for states to deny any and all benefits to same-sex couples by retaining a traditional definition of marriage and refusing to permit same-sex couples from engaging in any marriage-like institution. This option is extremely unpopular and untenable in the heated political climate surrounding the issue of LGBT rights.¹¹² The second option is for states to abandon their traditional definition of marriage to include same-sex couples. This option is not advisable by those concerned with preserving the traditional institution of marriage.¹¹³ As demonstrated above, unless states wish to defend against an imminent Equal Protection lawsuit, states will not compromise on this issue and permit marriage-like institutions. This demonstrated limitation imposed by the Ruling is an encroachment upon states' ability to meaningfully define marriage, "put[ting] a thumb on the scales and influenc[ing] a state's decision as to how to shape its own marriage laws."¹¹⁴

¹⁰⁹ *Id.* at 2693–94 (citation omitted) (author's alterations indicated in strikethrough and italic text).

¹¹⁰ *Id.* at 2694 (author's alterations indicated in strikethrough and italic text).

¹¹¹ *Id.* at 2710 (Scalia, J., dissenting).

¹¹² See Laurence H. Tribe & Joshua Matz, *The Constitutional Inevitability of Same-Sex Marriage*, 71 MD. L. REV. 471, 472–73 (2012) (footnotes omitted) (noting victories for both sides of the same-sex marriage debate and that there have been "high-profile, hard-fought legislative battles"); Charles Fried, *The Courts, the Political Process, and DOMA*, SCOTUSBLOG (Aug. 25, 2011, 12:23 PM), <http://www.scotusblog.com/2011/08/the-courts-the-political-process-and-doma/> (arguing that changing demographics make same-sex marriage inevitable in the absence of an event, such as a Supreme Court decision mandating it, that would galvanize opposition for a long fight).

¹¹³ See Sherif Girgis et. al., *What Is Marriage?*, 34 HARV. J.L. & PUB. POL'Y 245, 247 (2011).

¹¹⁴ *Windsor*, 133 S. Ct. at 2693 (quoting *Massachusetts v. U.S. Dep't of Health and Human Servs.*, 683 F.3d 1, 12–13 (2012)).

CONCLUSION

This Note has demonstrated the prolific federalism principles guiding the majority in its decision to strike down section 3 of DOMA in *Windsor*.¹¹⁵ These principles should be the primary guide for federal agencies in their implementation of the *Windsor* decision. The IRS has effectively ignored *Windsor*'s federalism principles in its second and third holdings of Revenue Ruling 2013-17.¹¹⁶ So what alternatives should the IRS implement?

Some have proposed drastic changes to the federal income tax system.¹¹⁷ This Note proposes a much simpler solution. First, the IRS should abandon its “State of celebration” standard for the “state of residence” rule. This approach most respects states’ authority to regulate marital relations in their respective sphere of sovereignty. Second, the IRS should allow federal marital benefits to extend to any marriage-like institution that a state establishes. This would give states a third, politically prudent option in giving benefits traditionally reserved for married couples to those engaged in marriage-like same-sex institutions. Sovereign states could choose to allow same-sex couples to participate in society in the functional equivalent of a marriage while retaining the traditional definition of marriage, and thereby satiate advocates on both sides of this debate. By adopting these approaches, the IRS will give the most latitude for the “people of each State to decide this question for themselves. Unless the [IRS] is willing to allow this to occur, the whiffs of federalism in the [*Windsor* opinion] will soon be scattered to the wind.”¹¹⁸

¹¹⁵ See *supra* Part I.

¹¹⁶ See *supra* Part III.

¹¹⁷ See Infanti, *supra* note 81, at 128 (“In light of the numerous problems associated with the IRS’s implementation of the *Windsor* decision, we should take this opportunity to pause and consider more fundamental reforms of the tax system—ones that might both better address these problems and improve the tax system for everyone. So long as the patchwork of legal recognition of same-sex relationships continues among the states, the IRS is going to find it impossible to come up with a workable and fair solution for addressing the tax treatment of same-sex couples. With this future in mind, it is worth recalling that commentators have for decades been leveling devastating critiques at the choice to adopt the married couple as a taxable unit. This literature suggests an easier and fairer approach than that adopted by the IRS—one that would address the plight of same-sex couples and improve the overall fairness of the federal tax system. Under this approach, we would eliminate the privileging of marriage in the federal tax laws by adopting the individual as the taxable unit. This approach avoids the need to determine when and how to take same-sex marriage into account for federal tax purposes. It also holds the promise of a relationship-neutral tax system that could recognize a wide array of human relationships.” (footnotes omitted)).

¹¹⁸ *Windsor*, 133 S. Ct. at 2720 (Alito, J., dissenting).

*Trevor J. Smothers**

* Special thanks to my wife, Paige, for inexplicably deeming me worthy of her continual encouragement, faithful support, and selfless love. Sincere thanks to my parents and brothers for their thoughtful input as I wrote this Note. Also, thank you to the *Regent University Law Review* editing team for its careful and diligent work in publishing this Note.