

MARRIAGE PLURALISM: TAXING MARRIAGE AFTER WINDSOR

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The purpose of the tax law is to collect as much revenue in as neutral a manner as possible. When the current Code was enacted in 1913 and it was determined that the appropriate taxable unit was the family, a series of patchwork solutions were required to bridge the gap between the civil and community property law regimes. Those solutions were not based on any fundamental principle of taxation, but, rather, dealing with the binary approach to marriage at that time. As the number of pluralistic approaches to family arrangements increased, the U.S. Department of the Treasury (Treasury) did not continue to examine the implications of those relationships. It was not until after U.S. v. Windsor, when the Court decided that the federal definition of marriage in Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional, that Treasury was faced with addressing, at the minimum, the state law differential in what it means to be married. As a formal matter, words like “marriage” or “spouse” do appear to require Treasury to investigate the law of a particular state. Treasury had to determine which state’s definition of marriage applies for federal tax purposes: the state where the couple married (state of ceremony) or the state where the couple resides (state of domicile). As a result of the state level distinctions, Treasury issued Revenue Ruling 2013-17, in which it (and thus the IRS) stated that, for federal tax purposes, same-sex couples legally married in jurisdictions that recognize their marriages will be treated as married regardless of whether the state of domicile recognizes that marriage.

But in making this distinction, Treasury failed to address the new menu of cohabitation arrangements that operate as the functional equivalent of marriage. Treasury limited its interpretation of “spouse,” “wife,” and

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“husband” to state marriage and not registered domestic partnership, civil unions, and other marriage like arrangements. This Article argues that the issue of the proper unit of taxation should be reexamined. A civil marriage ceremony merely bestows a bundle of rights to the participants. The bundle differs from state to state both during the marriage and after the marriage in either death or divorce. This Article explores if the purpose of the tax code is to levy on that bundle of rights, then the distinction for tax should not be “marriage” but all forms of commitment that share certain purposes consistent with the utilitarian premise of marriage. Unlike other articles that focus on the severing of the joint filing requirement, this Article advocates for a more expansive interpretation of the term marriage based on various prior Treasury positions and using the current utilitarian family law rubrics to develop a functional four-prong test for whether a cohabitation relationship will be treated as married for the purposes of the Code.

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INTRODUCTION

Family law has accommodated the new social pluralism through the creation of various new institutions to formalize cohabitation among both same-sex and heterosexual couples.¹ Until the *Windsor* decision,² the menu of state-level cohabitation recognition did not affect the implementation of the Internal Revenue Code of 1986, as amended (the Code) by Treasury because the Defense of Marriage Act (DOMA) provided a federal definition of marriage.³ After DOMA was held unconstitutional, the plethora of cohabitation arrangements became potentially available as potential marriage for the Code. Treasury is attempting to determine which, if any, of the arrangements will qualify. Because of the adamant natural family law norm of protecting the traditional notion of marriage, Treasury is faced with a number of institutions that have most of the rights and benefits of marriage without the name. After *Windsor*, there are two distinct, if at all related questions—the “mobile marriage” and the “marriage substitute” problems. Most commentators, including Justice Scalia, have focused on the mobile marriage problem, e.g., how to treat same-sex marriages that are recognized in the state the marriage was performed in (state of ceremony) but not recognized in the state the couple resides (state of domicile). The second related, but more profound and fundamental, question is how to tax the marriage substitute problem, e.g., how to treat relationships that are functionally similar to marriage. The marriage substitute and the mobile marriage problems beg the question of this Article, why marriage for the Code?

Federal agencies have to interpret the federal statutes including the word “marriage.” Without a federal definition of “marriage” commentators, including Justice Scalia in his dissent in *Windsor*, questioned how Treasury would interpret whether taxpayers were married for purposes of the Code.⁴ Justice Scalia pointed out what I will refer to as the mobile marriage problem in his dissent in *Windsor*, where

¹ William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules and Override Rules*, 100 GEO. L.J. 1881, 1884 (2012); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 CALIF. L. REV. 87, 90–91 (2014); Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43, 58–59 (2014).

² *United States v. Windsor*, 133 S. Ct. 2675 (2013).

³ Defense of Marriage Act, Pub. L. 104–199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996)).

⁴ *Windsor*, 133 S. Ct. at 2708.

he states, “[i]magine 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.’ Ala. Code § 30-1-19(e) (2011).”⁵ The question that was left unanswered in *Windsor* was which state law would apply for federal purposes. Because section 2 of DOMA, the full-faith and credit provision, was not ruled upon, states are still free to either recognize or not recognize valid same-sex marriages.

Justice Scalia envisioned a scenario in which the state of domicile offered lesser rights than the state of ceremony. He questioned whether the state of domicile would then be compelled to offer greater rights under the Full Faith and Credit Clause. This was the exact thought experiment leading to the enactment of DOMA post-*Baehr*. In deciding this question, e.g., which state’s definition of marriage would apply for federal tax purposes, Treasury ruled in Revenue Ruling 2013-17 that state of ceremony would control the mobile marriage.⁶ It appears that Treasury dealt with this distortion through application of state of ceremony with the thought that ceremony would always offer greater right recognition.⁷ If that were true, Treasury’s position would be in line with the position the administration had taken leading up to the *Windsor* decision.⁸ The mobile marriage problem is not much of a problem once Treasury decides to use state of ceremony or domicile.

However, let me use a better example to show the mobile marriage problem. Treasury assumed, like most commentators, that states of domicile would always offer a lesser legal status. This is not true: two states, Massachusetts and Connecticut, treat registered domestic partnerships (RDPs) and civil union partners (CUPs) from other states as married.⁹ Those couples would not be married for federal tax purposes under the state of ceremony approach in the 2013 Revenue Ruling.¹⁰ The state of ceremony did not grant them marriage although the state of domicile does provide marriage. Treasury envisioned a situation in the ruling that a couple would be validly married in a state of ceremony, but a domicile state would through a mini-DOMA

⁵ *Id.*

⁶ Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 2013 WL 4607583 [hereinafter 2013 Revenue Ruling].

⁷ *Id.*

⁸ See, e.g., Letter from Eric H. Holder, Jr., Att’y Gen., to the Hon. John A. Boehner (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html> (DOJ Pronouncement). Currently, the Department of Justice has followed-up on its pronouncement in a brief filed in the immigration context. See Defendants’ Opposition to Bipartisan Legal Advisory Group’s Motion to Dismiss, *Lui v. Holder*, No. 2:11-CV-01267-SVW (JCGx), 2011 WL 10653943 (C.D. Cal. Sept. 28, 2011) (stating that DOMA is unconstitutional even in the immigration context).

⁹ *Elia-Warnken v. Elia*, 972 N.E.2d 17, 22 (Mass. 2012); Inga Nelson, *Recognition of Civil Unions and Domestic Partnerships as Marriages in Same-Sex Marriage States*, 98 MINN. L. REV. 1171, 1187–89 (2014).

¹⁰ 2013 Revenue Ruling, *supra* note 6, at *12.

invalidate that marriage. Treasury could not possibly mean that this couple, one that obtained a greater status at the state level, would not be married for federal tax purposes. But Treasury's stated position is to ignore state of domicile. However, if Treasury concedes the couple is married, then the rationale of the 2013 Revenue Ruling, e.g., the state of domicile should be ignored for tax purposes, is less than persuasive. This could be easily fixed by modifying the ruling to take into account these alternative legal arrangements. But if recognizing these alternative arrangements can trigger marriage for the Code under certain circumstances, it begs the more important marriage substitute question: If someone can opt to convert a civil union or RDP to a marriage, why is that unit not a marriage from the start?

Most commentary to this point has centered around the aforementioned mobile marriage problem. Yet, the competing interests of uniformity in application of the Code, collection of revenue, deference to federalism, and consistency between the application of the law across agencies ensure that this problem will not be left to just the same-sex marriage context. Assuming that states either voluntarily abandon a definition of marriage that excludes same-sex marriage or such standards are judicially overturned either through the state or federal judiciary, then the next series of relationships will need to be examined.¹¹ This is the more important question that needs to be resolved; how to treat functionally similar relationships, especially those recognized under the post-*Baehr* domestic partnership laws and their ilk under the Code. I will be referring to this concept as the "marriage substitute" problem.

The second post-*Windsor* problem, marriage substitute, is much harder to resolve because it revolves around the proper family unit for taxation at the federal level.¹² In order to resolve this issue, all the baggage from the community property/common law debate of the early incarnation of the Code must be addressed. What is learned is that

¹¹ Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 580, 591 (2013) ("In 2009 and 2010, for the first time since the United States Census Bureau started to collect census information a hundred years ago, the number of adults between the ages of twenty-five and thirty-four who were never married surpassed the number of married individuals.").

¹² See, e.g., Boris I. Bittker, *Federal Income Tax and the Family*, 27 STAN. L. REV. 1389 (1975); Samuel D. Brunson, *Taxing Polygamy*, 91 WASH. U. L. REV. 113, 119 (2013); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 807-08 (2008); Lily Kahng, *One is the Loneliest Number: The Single Taxpayer in the Joint Return World*, 61 HASTINGS L.J. 651, 654 (2010); Marjorie E. Kornhauser, *Love, Money and the IRS: Family, Income-Sharing and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 74 (1993); Daniel J. Lathrope, *State-Defined Marital Status: Its Future as an Operative Tax Factor*, 17 U.C. DAVIS L. REV. 257, 261-63 (1983); Stephanie Hunter McMahon, *To Have and To Hold: What Does Love (of Money) Have to Do with Joint Tax Filing*, 11 NEV. L.J. 718, 723 (2011); Stanley S. Surrey, *Assignments of Income and Related Devices: Choice of the Taxable Person*, 33 COLUM. L. REV. 791, 813 (1933); Dennis J. Ventry, Jr., *Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459, 1468-69 (2011).

because there was so little consideration given to the proper unit for taxation at the federal level ab initio, it is impossible now to untangle and start afresh the resulting compromise of joint filing requirements.¹³ But since that grand compromise in 1948, there is now an entire growing list of state recognized family arrangements that function as marriage substitutes.¹⁴ That leaves the much more difficult question of how to resolve how a distinction can be made at the federal level when there is no distinction at the state level. When we situate this debate in the historic treatment of the family unit, e.g., the state level rights in property, it becomes hard to separate the marriage substitutes from marriage.

By trying to limit marriage to ceremony marriages, two distinct problems arise. First, since states have given couples freedom to structure relationships in manners other than formal marriage, a limitation may create a *Windsor*-like Equal Protection claim.¹⁵ One of the most common structures that is available to both heterosexual and same-sex couples is RDPs.¹⁶ RDPs are not recognized by the Code as a marriage.¹⁷ Thus, under current law, in most states, individuals who are in a RDP must file married at the state level and single at the federal level. This same distinction, e.g., filing jointly for state purposes and separately for federal purposes, was the part of the successful Equal Protection claim in *Windsor*. The analysis of the application in the context of *Windsor* will lend light on how to approach the new state approaches available for non-marital cohabitants.

Moreover, the extreme nature of the marriage substitute problem can be explained in a hypothetical surrounding Justin Wolfers and Betsey Stevenson. They are world famous economists; as is the case with many economists, economic theory has taken over their lives.¹⁸ After dating and obtaining their PhDs from Harvard, when most couples would decide to get married, Justin and Betsey did a cost-benefit analysis of marriage. Because their incomes were similar, they would be paying more taxes than if they filed separately. "I love Betsey and all, but is the marriage certificate worth thousands of dollars annually?"¹⁹ More telling, Justin says "so I prefer to remain unmarried, at least in the eyes of the tax man."²⁰ Justin and Betsey are even a more extreme

¹³ See *supra* note 12.

¹⁴ See, e.g., Eskridge, *supra* note 1, at 1884; see also Aloni, *supra* note 11, at 579–81; Widiss, *supra* note 1, at 58–59.

¹⁵ See Lathrope, *supra* note 12, at 261–63.

¹⁶ Eskridge, *supra* note 1, at 1884; Widiss, *supra* note 1, at 58–59.

¹⁷ 2013 Revenue Ruling, *supra* note 6, at *12.

¹⁸ Jenny Anderson, *Economists in Love: Betsey Stevenson and Justin Wolfers, IT'S NOT YOU, IT'S THE DISHES BLOG* (Mar. 10, 2011), <http://www.itsthedishes.com/2343/2011/03/economists-in-love-betsey-stevenson-and-justin-wolfers>.

¹⁹ *Id.*

²⁰ *Id.*

consideration of the marriage substitute problem. They have avoided even the state recognition by not entering into a state level recognition regime. They have opted out of the recognition and for the purposes of the Code, although they have the functional equivalent rights as a married couple, they would not be married for the Code. For the purposes of this Article, I will refer to these types of relationships as “symbiotic relationships.”

This fundamental problem with the construction of the family unit as the proper tax unit is ripe for examination. The ultimate conclusion of this analysis is that if the purpose of the Treasury is to raise revenue, then a more inclusive concept of the term marriage should be instituted.²¹ What this Article examines are the characteristics of “marriage” and how, in context of recent rulings, that term should be interpreted.

Setting aside marriage-like institutions for the moment, the term marriage itself means vastly different things. Each state has a different bundle of rights associated with marriage. These differing rights appear in a number situations, for example some appear during life such as, dower and curtesy, homestead and spousal privilege;²² some are not evident until divorce;²³ while some arise at death, e.g., intestacy. Moreover, even if marriage were ubiquitous, states have allowed modification of the assumed definition through alteration in ante- and post-nuptial agreements. If marriage means differing rights at the state level and states provide alternative arrangements as “marriage by a different name,”²⁴ a more comprehensive understanding of the pluralist array of family arrangements is needed to adequately interpret the term “spouse,” “husband,” and “wife” in the Code.

²¹ The IRS has at least once told opposite parties to a civil union that they are “husband and wife” for section 6013 of the Code purposes. Letter from Pamela Wilson Fuller, Senior Technician Reviewer, I.R.S. Office of Assoc. Chief Counsel (Procedure and Administration), to Robert Shair, Senior Tax Advisor, H&R Block (Aug. 30, 2011) [hereinafter 2011 Letter], available at <http://www.proskauer.com/files/uploads/Documents/IRS-Letter-2011-on-Civil-Unions-in-Illinois.pdf> (last visited Aug. 12, 2014) (letter on file with author); see also, Brunson, *supra* note 12, at 127; Amy S. Elliott, *IRS Memo Indicates Civil Unions Are Marriages for Tax Purposes*, 133 TAX NOTES 794, 794 (2011).

²² For spousal privilege see *Trammel v. United States*, 445 U.S. 40, 48–50 n.9 (with a fifty state survey, eight states have old mandatory rule, sixteen states have tough override rule) and Eskridge, *supra* note 1, at 1911. Also in this context, states have changed the rights of the members of the family, including the right to not consent to sex. The marital rape exception has been mostly abolished. Although some states still have exemptions and allowances. See Eskridge, *supra* note 1, at 1914–15; Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1380, 1484–85 (2000). Further, states have vastly different adultery laws. There are twenty-two states that still penalize adultery as a misdemeanor. Eskridge, *supra* note 1, at 1914 & n.121 (categorizing state statutes).

²³ For example, Georgia does not guarantee maintenance in the event of infidelity. See, e.g., Aloni, *supra* note 11, at 595–96.

²⁴ Aloni, *supra* note 11, at 577.

The argument proceeds in four parts. Part I examines and classifies the various pluralistic arrangements and the reasons states created such marriage equivalents. Part II discusses the evolution of the family unit taxation under the Code starting with the enactment of the modern income tax through current. In this section, I put the tax treatment of same-sex couples through *Windsor*, in the continuum of the family unit taxation. Part III examines Treasury's answer to the mobile marriage problem and the associated issues with its approach. Part IV looks at the use of the term marriage and the multitude of ways it may be interpreted, as well as the pitfalls associated with tethering tax policy on an outdated concept, and evaluates the correct choice for Treasury. I will identify these positive legal problems and show how they will be resolved. The Article will propose a definition of marriage that relies on utilitarian family law factors to objectively determine if a relationship rises to marriage.²⁵ The ultimate conclusion of the Article is that a more robust heuristic of the term "marriage" is needed from a tax policy and fairness perspective. The Article concludes by providing a functional four-prong test in examining whether a relationship should be considered marriage for the Code.

I. COHABITATION AGREEMENTS

A deeper understanding of the construct of marriage is needed to place the current debate on the proper family unit for federal tax purposes into perspective. For example, not only are there various forms of cohabitation recognized in the states, but marriage also means something substantively different from state-to-state. There are different inchoate rights among states. For example, each state has substantively different divorce, intestacy, antenuptual, and spousal privilege. After all, there are different politics and governance within the fifty states. The rise of nonmarried couples in the 1970s to legal recognition of cohabitation arrangements to same-sex couples demand for the underlying bundle of marriage rights in the 1980s coupled with the rise in a utilitarian norm of marriage created various new forms of state recognized cohabitation that are not tethered to the natural law norms of historic marriage.²⁶ Until *Windsor*, the only construct that Treasury had to consider was a traditional ceremonial marriage. After *Windsor*, Treasury is faced with both the mobile marriage problem and the marriage substitute problem.²⁷ In the next section, I will address the

²⁵ Eskridge, *supra* note 1, at 1886.

²⁶ Aloni, *supra* note 11, at 593.

²⁷ See *United States v. Windsor*, 133 S. Ct. 2675, 2708 (2013) (Scalia, J., dissenting); 2013 Revenue Ruling, *supra* note 6, at *1.

historical tax treatment of the family. In this section, I will provide a taxonomy to contextualize the discussion.

The issue of same-sex marriage came to the forefront of national consciousness when in 1993 a Hawai’ian state court in *Baehr*, decided that refusing to grant marriage licenses to same-sex couples was sex-based discrimination.²⁸ This decision created an issue of whether other states would have to recognize the marriage under the Full Faith and Credit Clause. Congress, under the Effects Clause, in 1996 enacted DOMA to preempt the argument that states would have to recognize same-sex unions from other states.²⁹ DOMA has two key sections: section 2 gave states the power to recognize or not recognize a same-sex marriage; and section 3 created a federal definition of marriage for the purposes of federal law.

In June 2013, the U.S. Supreme Court in *Windsor*, held that section 3 of DOMA was unconstitutional.³⁰ After *Windsor*, every federal statute that refers to marriage will no longer be tied to the unconstitutional Section 3 definition. The Court emphatically decided that the issue of marriage was exclusively the purview of the states.³¹ Although *Windsor* held DOMA unconstitutional, the Court did not prohibit restrictions on same-sex marriage at the state level.³²

Within the mobile marriage context, states are now struggling with the implication of *Windsor*. Some states, such as Indiana, are attempting to strengthen their state level prohibitions.³³ Others, such as Illinois and New Jersey, have legislatively approved same-sex marriage based on the decision.³⁴ Still others, such as Utah are seeing the state level prohibitions held unconstitutional by the federal courts.³⁵ As the Utah challenge makes clear through the expedited grant of appeal to the

²⁸ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

²⁹ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (1996)).

³⁰ *Windsor*, 133 S. Ct. at 2693-95.

³¹ *Id.* at 2693 (“The responsibility of the States for the regulation of domestic relations is an important indicator of the substantial societal impact the State’s classifications have in the daily lives and customs of its people.”).

³² *Id.*

³³ See, e.g., Abdul-Hakim Shabazz, *Indiana Vote on Constitutional Ban on Gay Marriage Faces Hurdle*, CHI. TRIB. (Jan. 28, 2014), http://articles.chicagotribune.com/2014-01-28/news/sns-rt-us-usa-gaymarriage-indiana-20140122_1_gay-marriage-proposed-amendment-doma.

³⁴ S.B. 10, 98th Gen. Assemb., Reg. Sess. (Ill. 2013), available at <http://legiscan.com/IL/text/SB0010/2013>; *Garden State Equal. v. Dow*, 434 N.J. Super. 163 (Super. Ct. Law Div. 2013); Monique Garcia, *Quinn Signs Illinois Gay Marriage Bill*, CHI. TRIB. (Nov. 20, 2013), http://articles.chicagotribune.com/2013-11-20/news/chi-illinois-gay-marriage-bill-signing-20131120_1_civil-unions-gay-marriage-gay-rights; Kate Zernike & Marc Santora, *As Gays Wed in New Jersey, Christie Ends Court Fight*, N.Y. TIMES (Oct. 21, 2013), http://www.nytimes.com/2013/10/22/nyregion/christie-withdraws-appeal-of-same-sex-marriage-ruling-in-new-jersey.html?_r=0.

³⁵ *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013), *aff’d*, 755 F.3d 1193 (10th Cir. 2014).

Tenth Circuit and the stay granted by the Supreme Court,³⁶ it seems likely that the constitutional challenges to state level DOMAs, e.g., marriage prohibitions, will go before the Court in the near future.

More importantly, a new social pluralism has been fostered through the creation of various new institutions to formalize cohabitation among both same-sex and heterosexual couples.³⁷ These marriage substitutes fall within two broad categories: (i) civil unions and broad domestic partnerships that carry rights and obligations equivalent to marriage and (ii) limited domestic partnerships, reciprocal beneficiary registrations, and designated beneficiary agreements which carry lesser rights than marriage.³⁸ These alternative institutions to marriage can be traced to a shift in family law from natural law norms to utilitarian norms.³⁹ The natural law norm of marriage is a gateway for family formation, and from marriage into procreative marriage.⁴⁰ A more modern perspective of the concept is of an “individual flourishing and the value of family for both partners as well as children they are rearing”⁴¹—a utilitarian norm.

This conceptual reimaging of marriage is not unique; the marriage is not static. Marriage generally is examined through the lens of a historic and cultural time frame. For example, in the early twentieth century, the conceit marriage generally meant a husband and wife of the same race, same ethnicity, religion, politics, and socio-economic background. These mandatory rules were designed under the mandatory natural law norms to encourage couples to procreate and rear children for the benefit society as defined at the time. Almost all states had race-based restrictions⁴² and restrictions for mentally-handicapped individuals from both marrying and reproducing.⁴³

³⁶ *Herbert v. Kitchen*, 134 S. Ct. 893 (2014).

³⁷ Eskridge, *supra* note 1, at 1884.

³⁸ M.V. LEE BADGETT & JODY L. HERMAN, WILLIAMS INST., PATTERNS OF RELATIONSHIP RECOGNITION BY SAME-SEX COUPLES IN THE UNITED STATES (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Herman-Marriage-Dissolution-Nov-2011.pdf>.

³⁹ Eskridge, *supra* note 1, at 1887; see also *Levy v. Louisiana*, 391 U.S. 68, 71–72 (1986) (finding the state’s interest in discouraging extra-marital procreation to be insufficient).

⁴⁰ Eskridge, *supra* note 1, at 1887; Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1252 (2010); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497–98 (1992).

⁴¹ Eskridge, *supra* note 1, at 1887; see also Ristroph & Murray, *supra* note 40, at 1252; Schneider, *supra* note 40, at 497–98.

⁴² Brief of NAACP Legal Defense and Educational Fund as Amicus Curiae at 1–6, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) (describing the campaign to repeal anti-miscegenation laws and arguing that their invalidation was essential to confirm the antiracism agenda of the Court’s civil rights precedents).

⁴³ Eskridge, *supra* note 1, at 1905.

These constructs have broken down through cultural shifts of the utilitarian norm base.⁴⁴ This is supported through court decisions reflecting societal preferences. In *Loving v. Virginia*,⁴⁵ race-based restrictions on marriage were held unconstitutional. The idea that couples have to procreate has broken down in *Lawrence*.⁴⁶ A large majority of states have narrowed their rules prohibiting marriages among those with mental disabilities. Moreover, various laws surrounding marriage have changed radically, such as the marital rape rules.

A. *Domestic Partnerships*

The first recognized form of cohabitation outside of marriage, whether state sanctioned or common law, were domestic partnerships.⁴⁷ In the 1980s same-sex marriage recognition was not a viable political option. Therefore, leaders of the community drafted rights at the municipal level.⁴⁸ Because these statutes were at the municipal level few substantive rights could be granted. The primary goal of these ordinances was to ensure that couples could receive health insurance, employment benefits, and hospital visitation privileges.⁴⁹

Currently, there are dozens of municipal domestic partnership registries.⁵⁰ These domestic partnership registries are not limited to same-sex couples and have increased the alternatives available to traditional marriage. But domestic partnerships have limited substantive rights and no inchoate rights.

B. *Reciprocal Beneficiaries*

As the same-sex couple civil rights movement gained political and cultural momentum in the early 1990s, a demand for greater rights, e.g., the right to marry, gained momentum.⁵¹ In 1993, the Hawaiian Supreme

⁴⁴ *Id.*

⁴⁵ 388 U.S. 1 (1967).

⁴⁶ *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); see also Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1501 (2014); Margo Kaplan, *Sex-Positive Law*, 89 N.Y.U. L. REV. 89, 142 (2014).

⁴⁷ See Eskridge, *supra* note 1, at 1936–37.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ For a listing of most of these registries, see *City and County Domestic Partner Registries*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/city-and-county-domestic-partner-registries> (last visited Mar. 12, 2014).

⁵¹ BADGETT & HERMAN, *supra* note 38; Aloni, *supra* note 11, at 581; Eskridge, *supra* note 1, at 1938.

Court in *Baehr* ruled that it was unconstitutional under the state constitution to exclude same-sex couples from civil marriage.⁵²

Rather than open the state up for same-sex marriage, Hawai'ian legislators included a ballot measure amending the state constitution to prohibit same-sex marriage.⁵³ However, as a compromise, the ballot included a reciprocal beneficiary provision. Both matters passed. Although, the restriction on the traditional marriage concept was restricted, this was the first time a state offered a legal recognition to same-sex couples.⁵⁴

The Reciprocal Beneficiaries Act of 1997 gave recognition to approximately sixty rights generally associated with marriage.⁵⁵ Some of the most important marriage-like rights under the act were inheritance rights; right to own property as “tenants in the entirety,” health insurance, pension, and other typical benefits an employer would provide for a spouse.⁵⁶ Despite including some of the rights associated with marriage, other important marital rights are lacking. For example, there are no support and property division rights upon separation.⁵⁷

The domestic partnership regime has been adopted in a number of states.⁵⁸ In 2000, Vermont passed a similar law open to both heterosexual and same-sex couples. Colorado then in 2009 passed a law, followed by Maine, Maryland, and Wisconsin.⁵⁹ These laws all share similar characteristics that a designated person should be the presumption intestate or testate taker, the health care surrogate, the right to preference as a decision maker in the event of incapacity and the primary claimant for workers compensation benefits and wrongful death suits.

⁵² *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

⁵³ Eskridge, *supra* note 1, at 1938.

⁵⁴ BADGETT & HERMAN, *supra* note 38; Aloni, *supra* note 11, at 581; Eskridge, *supra* note 1, at 1938.

⁵⁵ HAW. REV. STAT. § 572C (2014).

⁵⁶ BADGETT & HERMAN, *supra* note 38; Aloni, *supra* note 11, at 581; Eskridge, *supra* note 1, at 1938.

⁵⁷ See HAW. REV. STAT. § 572C-1 to -7 (2014).

⁵⁸ *Id.*

⁵⁹ See Colorado Designated Beneficiary Agreement Act, 2009 Colo. Legis. Serv. ch. 107 (codified at COLO. REV. STAT. §§ 15-22-101 to -112 (2011)); An Act To Promote the Financial Security of Maine's Families and Children, 2004 Me. Legis. Serv. ch. 672 (West) (codified in various parts of Maine Laws) (new institution of “registered domestic partners”); 2009 Md. Laws ch. 602; 2008 Md. Laws chs. 590, 599 (new institution of “domestic partnership”); VT. STAT. ANN. tit. 15, § 1303 (West 2011); WIS. STAT. § 770.001 (2011) (new institution of “domestic partnership”).

C. *Civil Unions and Registered Domestic Partnerships*

The next category encompasses civil unions and broad domestic partnerships that carry rights and obligations comparable to marriage under state law. This new marriage-like institution was created in Vermont in 2000, and bestowed the legal duties and rights of marriage without the name.⁶⁰ Although these statutes offer the same or substantively similar benefits to full marriage, they have been described despairingly by Justice Kennedy as “second-tier marriage[s].”⁶¹

Initially, nine states had civil union laws. However, the four states that provided civil unions for same-sex couples only, repealed those laws upon recognition of same-sex marriage.⁶² Currently, four states recognize civil unions: Illinois, Hawaii, Colorado, and New Jersey.⁶³ The District of Columbia and four states, Nevada, California, Washington, and Oregon, offer full-benefits domestic partnership laws.

D. *Marriage*

In 2003, the path was paved for same-sex marriage when the Massachusetts Supreme Judicial Court decided *Goodridge v. Department of Public Health*.⁶⁴ In *Goodridge*, the court held that denying a marriage license to same-sex couples violated the Equal Protection Clause.⁶⁵ The court went further, stating that a civil union alternative would not remedy the constitutional prohibition. After the Massachusetts decision, twelve states and the District of Columbia recognized same-sex marriage.⁶⁶

Since *Windsor* was decided in June 2013, a further shift in the approach by states has become evident. Emboldened by the equal protection language in *Windsor*, two more states have added marriage to the menu of options available to same-sex couples.⁶⁷ In Connecticut,

⁶⁰ VT. STAT. ANN. tit. 15, § 1201–1207 (West 2012); see Eskridge, *supra* note 1, at 1940.

⁶¹ United States v. Windsor, 133 S. Ct. 2675, 2694 (2013). Moreover, there are stigmas to having a separate but equal regime. See Aloni, *supra* note 11, at 612. But see Robin West, *The Incoherence of Marital Benefits*, 161 U. PA. L. REV. ONLINE 179 (2013), <http://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-179.pdf>.

⁶² See Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 257, 270 (2013).

⁶³ *Id.*

⁶⁴ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁶⁵ *Id.* at 950.

⁶⁶ The opening of marriage took various forms of action. In Iowa and California, court decisions provided the way. Through legislative action same-sex marriage resulted in Vermont, the District of Columbia, New Hampshire, New York, Rhode Island, Delaware, and Minnesota. While in Washington and Maryland a combination of legislative action and popular vote resulted in same-sex marriage. In Maine, a ballot measure enacted same-sex marriage. See Feinberg, *supra* note 62, at 269.

⁶⁷ See *supra* note 34 regarding same-sex marriage in Illinois and New Jersey.

Vermont, New Hampshire, Rhode Island, and Delaware civil union laws were repealed after legalization of same-sex marriage.⁶⁸

E. *Inchoate Rights*

Same-sex couples and opposite-sex couples have a variety of choices depending on the jurisdiction. The menus change and continue to evolve. The traditional defense of the concept of marriage created the alternative choices outlined above. These choices create competition in the marketplace which then not only elevates these choices but also undermines the older institution.⁶⁹ Now that the list of choices has expanded, the likelihood of contraction is slim. Further, it is argued that the list should be expanded. There are many types of relationships that should be considered, such as friends and siblings that live in long-term non-conjugal relationships, extended families, and adult children living with and caring for their parents.

One problem with a theoretical examination of the construct is that marriage is very sticky. Despite the availability of equivalent status, same-sex couples prefer marriage to civil unions or registered domestic partnerships.⁷⁰ “An average of 30% of same-sex couples married in the first year that their state allowed them to marry, while only 18% entered into civil unions or broad domestic partnerships in the first year states offered these statuses.”⁷¹

More importantly going forward is a thesis that these institutional labels really represent a core bundle of rights. That bundle focuses on traditional family law principles. Rather than looking at the labels associated at these institutions, it would be better to use a framework of utilitarian premises.

There are three main goals of state recognition of the family unit. First, is encouragement of committed relationships for the benefit and happiness of the partners and the children. Second, a system of standardized default rights and standards such as inheritance rights and health care decisions. Finally, the recognition provides protection for the family unit, such as children.

If the menu expands, or at least does not contract, how should we think about these alternatives in the context of the Code? The core tenets of a utilitarian approach to family law relationship recognition ignores the necessity for social conventions and focuses on the bundle of rights associated with that recognition. If the new family law paradigm

⁶⁸ Feinberg, *supra* note 62, at 270.

⁶⁹ Eskridge, *supra* note 1, at 1957–58.

⁷⁰ BADGETT & HERMAN, *supra* note 38, at 1.

⁷¹ *Id.*

shifts to cohabitation arrangements, then the next question is how these relationships should be treated under the Code. In order to make this determination, a brief examination of the history of the taxation of the family unit is needed.

II. HISTORIC TAX DEFINITION OF FAMILY UNIT

If someone can opt to convert a civil union or RDP to a marriage, why is that unit not a marriage from the start? When we situate this debate in the historic treatment of the family unit, e.g., the state level rights in property, it becomes hard to separate the marriage substitutes from marriage. First, the same fundamental principles that lead to the current joint return system in place today, offer a rationale as to why Treasury is correct in resolving the mobile marriage problem by using state of ceremony for marriage. However, we can also see, through the *Borax* divorce cases, that the rule cannot be rigid but must bend to situations, e.g., when the domicile state offers greater rights.⁷² Second, it can also help in sorting out if there was any rationale for Treasury explicitly exempting the marriage substitute problem from the 2013 Revenue Ruling.

The historic treatment of the family unit sheds light on why the marriage substitute problem will be much harder to resolve: it revolves around the proper unit for taxation at the federal level. When the modern income tax was introduced in 1913, there was little to no consideration of whether the appropriate tax unit should be isolated individuals or a social group with family ties.⁷³ Treasury was faced with a myriad of issues of how to interpret and implement the rule that it should tax the “net income of every individual.”⁷⁴ Initially, Treasury interpreted the term “individual” utilizing the construct of the time as a family unit.⁷⁵ Within a year, Treasury reversed course and required husbands and wives to file separately.⁷⁶

This seemingly practical decision met with the harsh reality of state law treatment of marriage. Through the application of community

⁷² See, e.g., George C. Fisher, *Invalidated Divorce Recognized for Federal Tax Purposes*, 18 STAN. L. REV. 750 (1966) (discussing state claims); see also David P. Currie, *Suitcase Divorce in the Conflicts of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26, 65 (1966); Lathrope, *supra* note 12, at 298–306.

⁷³ Bittker, *supra* note 12, at 1391; McMahon, *supra* note 12, at 723.

⁷⁴ U.S. DEP'T OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF FINANCES, H.R. DOC. NO. 63-358, at 5 (1913); McMahon, *supra* note 12, at 723.

⁷⁵ “The husband, as the head and legal representative of the household and general custodian of its income, should make and render the return of the aggregate income of himself and wife.” STANDARD MANUAL OF THE INCOME TAX 174 (Standard Statistics Co., Inc., rev. ed. 1916); McMahon, *supra* note 12, at 723 (quoting T.D. 1923, 15 Treas. Dec. Int. Rev. 298, 298 (1913)).

⁷⁶ T.D. 2090, 16 Treas. Dec. Int. Rev. 259 (1914); McMahon, *supra* note 12, at 723.

property principles, families were required to split income. The concept of community property is fundamentally that all property acquired during the marriage is owned equally by each spouse. Thus, the income tax consequences of community property law are that each spouse has the right to half the income regardless of the spouse who earns the money. This income splitting created a distortion among community property states and common law states. As more and more states moved to take advantage of how the community property regime interacted with the federal tax law at the time, Congress responded by attempting to smooth the treatment of the states through a revision in 1948 creating the current joint return requirements. Essentially, imposing the same liability regardless of the manner income was generated.⁷⁷ Once again, the decision to use a married couple was not achieved through a reasoned analysis of proper tax policy but out of political expediency.⁷⁸

The continued lack of a focus on the proper unit of taxation for the family then led to a functional misapplication of the rules in the context of divorce and marriage recognition during pre- and post-*Windsor*. This section will discuss the evolution of the rules regarding how the family unit is defined for purposes of the Code and situate the current menu of choices within the continuum. The section will conclude by articulating the policy that should be taken forward.

A. Pre-1942

The modern income tax was enacted in 1913.⁷⁹ But it was not the first time an income tax had been implemented. The first income tax was part of the Revenue Act of 1861.⁸⁰ The tax was thought of as provisional because of the Civil War. The tax continued in one form or another until 1894.⁸¹ The first incarnations of the income tax were brought to a halt when they were held unconstitutional by the Supreme Court in *Pollock v. Farmers' Loan & Trust Co.*⁸²

⁷⁷ Bittker, *supra* note 12, at 1395.

⁷⁸ Kahng, *supra* note 12, at 651.

⁷⁹ Tariff of 1913, Pub. L. No. 63-16, 38 Stat. 114, 166 (1913).

⁸⁰ Revenue Act of 1861, ch. 45, § 49, 12 Stat. 292 (1861); David J. Herzig, *Justice for All: Reimagining the IRS*, 33 VA. TAX REV. 1, 17 (2013).

⁸¹ The original income tax was allowed to expire in 1872, and then reintroduced in the Tariff Act of 1894. See Herzig, *supra* note 80, at 18.

⁸² 158 U.S. 601 (1895); see also Herzig, *supra* note 80, at 18.

It was not until the necessity to raise revenue that Congress enacted the Sixteenth Amendment and the Tariff Act of 1913.⁸³ In creating the modern income tax, tax policy makers were certainly aware of the various techniques wealthy taxpayers utilized to avoid the income tax.⁸⁴ One of the most common techniques was the use of the family to arbitrage rates. This was especially true because the pre-1913 tax was not our current progressive structure but rather a tax on the wealthy.⁸⁵

Against the backdrop of the necessity of a constitutional amendment in order to enact an income tax, there was a concern about the language used to determine the proper unit for taxation. Although not examined in detail about the merits of the best unit for taxation, there was discussion about the use of joint filing. Congressman Cordell Hull introduced the concept of using joint filing.⁸⁶ Without widespread debate, the proposal was tabled because of concern regarding the women's property acts.⁸⁷ It was thought that the income tax would be held unconstitutional because a joint filing regime would ignore the separate property interests of those acts. Therefore, the unit of taxation was the individual.

The problem was not drafting the outline of an income tax but as in the Civil War, an implementation of the tax.⁸⁸ Congress left the interpretation of the rules to the Commissioner of Internal Revenue approved by Secretary of Treasury.⁸⁹ Treasury was left with only one month to make very important decisions regarding the interpretation of these new rules.⁹⁰ Within the context of the discussion of the definition of the term "individual," Treasury took a position that the convention of the time that individual was meant to be the married couple as a unit. "The husband, as the head and legal representative of the household and general custodian of its income, should make and render the return of the aggregate income, should make and render the return of the aggregate income of himself and wife."⁹¹

⁸³ Herzig, *supra* note 80, at 18.

⁸⁴ See Stephanie Hunter McMahon, *A Law With a Life of its Own: The Development of the Federal Income Tax Statutes Through World War I*, 7 PITT. TAX REV. 1, 13 (2009) [hereinafter McMahon Development]; McMahon, *supra* note 12, at 723 (citing Cong. Globe, 38th Congress, 1st Sess. 2515–16 (1864) (remarks of Senator Henry Wilson)).

⁸⁵ Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 737 (2001).

⁸⁶ McMahon, *supra* note 12, at 723.

⁸⁷ *Id.*; see also ROBERT H. MONTGOMERY, FEDERAL TAX HANDBOOK SUPPLEMENT 1941–42 § 1016 (1941).

⁸⁸ McMahon, *supra* note 12, at 34.

⁸⁹ Revenue Act of 1913, ch. 16, § 2, 38 Stat. 166, 167–68; McMahon, *supra* note 12, at 35.

⁹⁰ McMahon, *supra* note 12, at 723 (citing U.S. DEP'T OF THE TREASURY, ANNUAL REPORT OF THE SECRETARY OF THE TREASURY ON THE STATE OF THE FINANCES, H.R. DOC. NO. 63-358, at 5 (1913)).

⁹¹ McMahon, *supra* note 12, at 723 (quoting T.D. 1923, 15 Treas. Dec. Int. Rev. 298 (1913)).

Treasury's interpretation was consistent with the norms of the family unit held by the majority of Americans.⁹² Moreover, Treasury knew that the interpretation would cause couples to pay taxes even if they would not have had to pay separately.⁹³ As Treasury had time to contemplate the decision to treat individuals as a family unit, it became unclear that their interpretation was correct. Treasury reversed course and the next year required husbands and wives to file separately.⁹⁴

From that point on, the debate began about the appropriate unit of taxation. Starting in 1916, proposals were made in Congress to treat married couples as a single taxable unit.⁹⁵ Although they failed to gain the necessary momentum, it began a process of thinking about the tension between the two alternatives. Taxpayers engaged in many games to attempt to split income among the spouses to take advantage of the separate rate schedules. As individuals, a more equal sharing of the family income resulted in a lower effective rate. Most of the attempts failed.⁹⁶

Treasury in 1918, provided taxpayers with an optional joint return that allowed married couples to file jointly.⁹⁷ As rates continued to skyrocket during the war, the incentive to shift income became more and more important.⁹⁸ The courts agreed where Treasury prevented taxpayers from assigning the income, even if the transfer was effective under state law.⁹⁹ The ability of Treasury to hold the line was tested with two Supreme Court decisions, *Poe v. Seaborn*¹⁰⁰ and *Lucas v. Earl*.¹⁰¹ In those cases, the Court had to examine whether the state community property law would trump the prohibition against income shifting. The Court concluded that the income vested in the marital unit, not the individual, and therefore half belonged to each spouse.¹⁰²

The first case to determine the wife's interest under community property was *Poe v. Seaborn*. In *Seaborn*, H.G. Seaborn and his spouse lived in Washington, a community property state.¹⁰³ The income generated by the couple was held solely in Mr. Seaborn's name.¹⁰⁴ The

⁹² Eskridge, *supra* note 1, at 1891; McMahon, *supra* note 12, at 723.

⁹³ T.D. 1923, 15 Treas. Dec. Int. Rev. 298 (1913).

⁹⁴ T.D. 2137, 17 Treas. Dec. Int. Rev. 48 (1915); T.D. 2090, 16 Treas. Dec. Int. Rev. 259 (1914); McMahon, *supra* note 12, at 723.

⁹⁵ 56 Cong. Rec. 10,419–22, 11,312 (1918); 53 Cong. Rec. 10,663–64 (1916); McMahon, *supra* note 12, at 723.

⁹⁶ Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 278 (1988).

⁹⁷ Brunson, *supra* note 12, at 119; Cain, *supra* note 12, at 807–08.

⁹⁸ Ventry, *supra* note 12, at 1468–69.

⁹⁹ Bittker, *supra* note 12, at 1408; Brunson, *supra* note 12, at 119.

¹⁰⁰ 282 U.S. 101 (1930).

¹⁰¹ 281 U.S. 111 (1930).

¹⁰² Brunson, *supra* note 12, at 120; Kahng, *supra* note 12, at 654.

¹⁰³ *Seaborn*, 282 U.S. at 108; Brunson, *supra* note 12, at 120; Ventry, *supra* note 12, at 1503.

¹⁰⁴ *Seaborn*, 282 U.S. at 108–09.

Seaborn's each reported half of the income and half of the deductions.¹⁰⁵ The taxpayer's position was consistent with the state law treatment of ownership. The Commissioner took the position that although the law vested half the property, because he had so much control over the property all the income belonged to him.¹⁰⁶

The Court disagreed with the Commissioner's position stating that although the Mr. Seaborn had broad powers over the property, his power was "subject to restrictions which are inconsistent with denial of the wife's interest as co-owner."¹⁰⁷ The Court reasoned that the property was no more the husband's than the wife's. Thus, married couples in Washington could file separate returns splitting the income.¹⁰⁸ These rights were quickly extended to other community property states.¹⁰⁹

In a companion case, a couple in a common law state attempted to mimic the treatment of community property states through contract law. Mr. and Mrs. Earl entered into a contract that allocated all current and future property and income as joint tenants with rights of survivorship.¹¹⁰ Since the contract was valid under California law, the Earl's took the position on their tax returns that half of the income should be allocated to each taxpayer. Treasury disagreed.

The Court concluded that the contract would not relieve Mr. Earl's obligation to pay. All the income was vested in Mr. Earl and therefore taxable to him.¹¹¹ Justice Holmes in his famous quote stated, "no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."¹¹²

Given the timing of the two cases, it was questionable whether the ruling in *Seaborn* overruled the *Earl* decision.¹¹³ But the Court distinguished the two cases stating that *Earl* was not a community property case but a contract case. While in *Seaborn*, Mr. Seaborn never owned Mrs. Seaborn's half. It was always hers and could not be contracted away. While Mr. Earl could only create ownership through an assignment.

Legislative attempts at tax equalization among community property spouses and common law spouses continued during the years following the historic cases. These reform measures took the form of

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; see also Brunson, *supra* note 12, at 121.

¹⁰⁷ *Seaborn*, 282 U.S. at 110–12; Ventry, *supra* note 12, at 1503.

¹⁰⁸ *Seaborn*, 282 U.S. at 118; Ventry, *supra* note 12, at 1504.

¹⁰⁹ Arizona through *Goodell v. Koch*, 282 U.S. 118, 121 (1930), Louisiana through *Bender v. Pfaff*, 282 U.S. 127, 131 (1930), Texas through *Hopkins v. Bacon*, 282 U.S. 122, 126–27 (1930), and California through *United States v. Malcolm*, 282 U.S. 792 (1931).

¹¹⁰ *Lucas v. Earl*, 281 U.S. 111, 113–14 (1930); Brunson, *supra* note 12, at 120.

¹¹¹ *Lucas*, 281 U.S. at 113–14; Brunson, *supra* note 12, at 120; Kahng, *supra* note 12, at 654.

¹¹² *Lucas*, 281 U.S. at 115.

¹¹³ *Surrey*, *supra* note 12, at 813; Ventry, *supra* note 12, at 1505.

two approaches. One tact was in community property cases to attach the income to the spouse having management and control over such community income.¹¹⁴ Another proposal was through compulsory joint returns by husbands and wives.¹¹⁵

B. 1941–1948

In 1941 and 1942, there was a concerted drive to end the community property income discrimination.¹¹⁶ This drive came to a dead end in the Revenue Act of 1942.¹¹⁷ In the Act, Congress came to a compromise. The community property states would keep their income tax benefits at the cost of the estate and gift tax advantages.¹¹⁸ This compromise plus the *Seaborn* and *Lucas* decisions created a road map for income splitting among taxpayers.

Originally, the disparity was limited to eight states.¹¹⁹ In each of these states, the community property rules originated through their Spanish or French antecedents and existed prior to the enactment of the modern income tax.¹²⁰ But after the 1942 compromise, states engaged in a vicious competition to draw taxpayers.

A number of states, including Oklahoma, Oregon, Michigan, Nebraska, and Pennsylvania, shifted from a common law to a community law property system.¹²¹ The federal income tax benefits were a motivation for the shift.¹²² Despite the extra work necessary for a state to modify the property law regime across all bounds, state officials could see the benefit. “Because there was no significant difference

¹¹⁴ See, e.g., H.R. 5417, 77th Cong., 1st Sess. § 119 (1941); *Community Property and Family Partnerships: Hearing Before the H. Comm. on Ways & Means*, 80th Cong., 1st Sess. 852 (1947); *Hearings Before a Subcomm. of the Comm. on Ways & Means on H.R. 8392*, 73d Cong., 2d Sess. 6 (1934); U.S. DEP’T OF THE TREASURY, DRAFT OF THE REVENUE ACT OF 1924 § 21(a) (1924).

¹¹⁵ H.R. 5417, 77th Cong., 1st Sess. § 111 (1941); *Hearings Before the Comm. on Ways and Means on Revenue Revision of 1942*, 77th Cong., 2d Sess. 10, 85, 1612 (1942); *Hearings Before the Joint Comm. on Tax Evasion and Avoidance*, 75th Cong., 2d Sess. 309–13 (1937); Letter to L.H. Parker, Chief of Staff of the Joint Committee on Internal Revenue Taxation (Dec. 15, 1933), reprinted in *Hearings Before a Subcomm. of the Comm. on Ways and Means on Community Property Income*, 73d Cong., 2d Sess. 24 (1934); Statement of the Acting Secretary of the Treasury regarding the Preliminary Report of a Subcommittee of Ways and Means.

¹¹⁶ Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1118 (1948) [hereinafter Surrey 1948 Act].

¹¹⁷ Revenue Act of 1942, Pub. L. No. 753, ch. 619, 56 Stat. 798; Surrey 1948 Act, *supra* note 116, at 1118.

¹¹⁸ Surrey 1948 Act, *supra* note 116, at 1118.

¹¹⁹ Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington. See ALGER B. CHAPMAN, A REPORT ON THE ADVISABILITY OF ADOPTING A COMMUNITY PROPERTY LAW IN NEW YORK STATE 22 (1947) [hereinafter REPORT].

¹²⁰ *Id.*

¹²¹ Surrey 1948 Act, *supra* note 116, at 1104.

¹²² REPORT, *supra* note 119, at 23; Surrey 1948 Act, *supra* note 116, at 1104.

between the impact of the federal income tax in community property regimes compared to common law jurisdictions, it seemed to be inevitable that states would move to the preferential community property regime.”¹²³

The competition among states was only going to continue to grow as adjacent states adopted community property regimes.¹²⁴ This can be seen in a state, such as New York, which was preparing to move to a community property regime if it became necessary.¹²⁵ States were waiting to see if there would be a congressional solution to the community property quandary.

C. After 1948

The aftermath of *Seaborn, Earl*, and the 1942 Act was that for income tax purposes, married couples in community law property states would split the income while married couples in common law property states would be required to allocate income to the earner. Since rates at the time were steeply progressive, this would result in a severe difference. This difference would be the greatest when one spouse earned the entire earnings.¹²⁶ At the peak of the marginal rate disparity, a similarly situated married couple in a common law property state would pay about forty-one percent more than the community property couple.¹²⁷

Therefore, in 1948, Congress enacted the Revenue Act of 1948 that adopted the joint return and allowed for income splitting.¹²⁸ The theme of the rhetoric for the passage of the act was “equalization.”¹²⁹ A theme was clearly needed because the act prior to passage had been vetoed three times on the basis that it would be a tax-reduction measure.¹³⁰

At the time, the tax reduction element to the 1948 Act was not the most important component.¹³¹ Rather, the 1948 Act made “fundamental changes in the federal taxation of the family group.”¹³² Unfortunately, the theme that is consistent from prior attempts at

¹²³ REPORT, *supra* note 119, at 23; Surrey 1948 Act, *supra* note 116, at 1105–06.

¹²⁴ REPORT, *supra* note 119, at 23.

¹²⁵ Surrey 1948 Act, *supra* note 116, at 1104 (citing PRESIDENT OF THE NEW YORK STATE TAX COMM’N, REPORT ON THE ADVISABILITY OF ADOPTING A COMMUNITY PROPERTY LAW IN NEW YORK STATE (1947)).

¹²⁶ REPORT, *supra* note 119, at 21.

¹²⁷ *Id.*

¹²⁸ Kahng, *supra* note 12, at 654; Surrey 1948 Act, *supra* note 116, at 1103–04.

¹²⁹ Lathrope, *supra* note 12, at 1154.

¹³⁰ Surrey 1948 Act, *supra* note 116, at 1097.

¹³¹ *Id.* at 1098.

¹³² *Id.*

addressing the family unit, e.g., the 1913 Act, is that very little thought was put into the change by Congress.¹³³

The 1948 Act permitted married couples, regardless of the community or common law distinction to file jointly. Moreover, Congress set the amount for each bracket at double the individual rates.¹³⁴ The net effect of that was that all couples, regardless of state law property rights, would get the benefit of income splitting.¹³⁵ As long as rates stay proportionate, a married couple would never pay more than individual taxpayers.¹³⁶ Essentially, married couples never paid more than an equivalent individual but often paid less. Unfortunately, this new category left unmarried taxpayers with a disproportionately high tax burden.¹³⁷ Tax on single filers ranged from twenty to forty percent higher than that of a joint filing couple.

This treatment of the family unit continued until 1969. If there were underlying justifications, e.g., promotion of the natural law norms, for the treatment, the potential policy justifications for benefit bestowed on the married couples. But, since, there was not really justification, merely happenstance, the pressures mounted to at least equalize the treatment of all versions of a family unit. By 1969, Congress enacted a new rate schedule for married couples. The schedule, for the first time, imposed a higher rate on married couples than unmarried individuals.¹³⁸

After 1969, a wide array of outcomes occurred for married individuals and an unmarried couple with comparable income. At times, a single individual would pay less tax than a married couple; at times they would pay more. The uneasy compromise of 1969 has continued to today. Joint filing has caused three significant changes from what would appear to be the basis of the 1948 and 1969 reform: marriage and couple neutrality.

III. THE TAXING OF MOBILE MARRIAGE

In 1993, after *Baehr*, there was a real question regarding the interpretation of the words “spouse,” “husband,” “wife,” and “married” for the purposes of the Code. Would the word “husband” apply to a same-sex male couple if they were married in Hawaii? In 1996, the enactment of DOMA by Congress short-circuited this decision through

¹³³ *Id.*

¹³⁴ Brunson, *supra* note 12, at 123; Kahng, *supra* note 12, at 654.

¹³⁵ Kahng, *supra* note 12, at 654.

¹³⁶ *Id.*

¹³⁷ Kahng, *supra* note 12, at 655; Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as Tax Determinant*, 8 VA. TAX REV. 773, 776–87 (1989).

¹³⁸ Brunson, *supra* note 12, at 123; Kahng, *supra* note 12, at 655.

the application of a federal definition of “marriage” as limited to a man and a woman.

After *Windsor*, the waters were muddied again, because there was no federal definition of marriage. All the potential issues around the federal interpretation of “marriage” for the purpose of the Code after *Baehr* resurfaced. Therefore, Treasury was faced with interpreting the decision. Scalia in his dissent discussed the important choice of law question determining which state’s definition of marriage would apply for federal tax purposes: the state where the couple married (state of ceremony) or the state where the couple lived (state of domicile). This was especially true since section 2 of DOMA that permitted states to not give Full Faith and Credit Clause to other state’s marriage definitions was still valid. Either choice would bring challenges and benefits for Treasury and taxpayers.

How, after *Windsor*, should the Internal Revenue Service (Service) recognize the marriage for the purposes of the Code? There are almost 200 provisions of the Code that turn on the definition of marriage.¹³⁹ The problem facing the Service is, after section 3 of DOMA was held unconstitutional in *Windsor*, there is no federal statutory or common law definition of marriage, nor is there a federal choice of law statute to guide the Service in choosing the correct law.¹⁴⁰ Unless and until there is a federal choice of law statute or a federal common law choice of law, how should the Service, as an administrative agency, deal with Justice Scalia’s hypothetical couple?

The default rule should be to incorporate state law in the absence of a controlling federal rule. This is supported by three principles: (1) section 2 of DOMA was not held unconstitutional; (2) the Service historically has used the state of domicile when deciding on the taxation of community property; and (3) in the tax abuse case law, the Service historically also utilized the state of domicile. Under those principles, it would seem that the Service should apply the state of domicile for the purposes of the Code. But application of state of domicile might also violate the principles under *Windsor*. For example, more than half of same-sex couples who identify as married reside in states that do not recognize the marriage.¹⁴¹ Thus, applying the state of domicile for

¹³⁹ MARGOT L. CRANDALL-HOLICK ET AL., CONG. RESEARCH SERV., R43157, THE POTENTIAL FEDERAL TAX IMPLICATIONS OF *UNITED STATES V. WINDSOR* (STRIKING SECTION 3 OF THE DEFENSE OF MARRIAGE ACT (DOMA)): SELECTED ISSUES (2013) (citing a 2011 American Community Survey), available at <http://fas.org/sgp/crs/misc/R43157.pdf>; Herzig, *supra* note 80, at 130 (citing GAO report of 2004 where there were 198 sections of the Code in which marital status was a factor); In addition, see Appendix 1 and Appendix 2 in GAO-04-353R and Enclosure II in U.S. General Accounting Office, Defense of Marriage Act, OGC-97-16 (Jan. 31, 1997).

¹⁴⁰ William Baude, *Beyond DOMA: Choice of Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2013).

¹⁴¹ CRANDALL-HOLICK ET AL., *supra* note 139, at 2.

federal purposes would fail to give effect to the Court's ruling in *Windsor*.

In a recent article that predated *Windsor*, Professor William Baude discussed these very second order problems once DOMA was no longer applicable.¹⁴² Baude advocates that if Congress or administrative agencies were to act by a choice of law interpretation, the applicable rule should be state of ceremony. While if the courts were to act through the creation of a federal common law definition of marriage, the applicable rule should be state of domicile. Since we are dealing with an agency action here, e.g., Treasury, Baude points to previous actions by the Veterans Administration in the 1940s, in Immigration and Tax for support that the agency is within the scope of authority to act.¹⁴³ There are nonetheless serious administrative law issues regarding the ability of the agency to act. For example, is this merely an interpretation of the statute?

A. *Revenue Ruling 2013-17*

Rather than leave taxpayers in a state of flux, in August 2013 Treasury issued the 2013 Revenue Ruling. The 2013 Revenue Ruling, dealt with the mobile marriage problem by following the logic of Baude's argument. It states that for federal tax purposes, same-sex couples legally married in jurisdictions that recognize their marriages will be treated as married for federal tax purposes regardless of whether their state of domicile recognizes that marriage.¹⁴⁴ In other words, Treasury chose the state of ceremony as determinative for federal tax purposes. This was not surprising based on numerous prior statements by the administration and the actions of other administrative agencies.

The ruling holds that for the purposes of the Code the word "marriage" includes same-sex couples.¹⁴⁵ The ruling continues to then state that Treasury will treat a couple as married by looking to the state of ceremony regardless of whether that marriage is recognized in the state of domicile.¹⁴⁶

In order to reach that conclusion, Treasury has to demonstrate why this is within its interpretive powers. The ruling begins with Revenue Ruling 58-66.¹⁴⁷ Using this as a starting point, the ruling goes forward to

¹⁴² Baude, *supra* note 140.

¹⁴³ *Id.* at 1405.

¹⁴⁴ 2013 Revenue Ruling, *supra* note 6, at *9-12.

¹⁴⁵ *Id.* at *9.

¹⁴⁶ *Id.*

¹⁴⁷ Rev. Rul. 58-66, 1958-1 C.B. 60 (the Service held that a taxpayer who enters into a common-law marriage in a state that recognizes such marriages is married whether or not their state of domicile also recognizes the marriage); David J. Herzig, *The Tax Implications of Windsor*,

conclude that for over half a century the state of ceremony has been the position of the Service. The ruling continues to state that “the Service has recognized marriages based on the laws of the state in which they were entered into, without regard to subsequent changes in domicile, to achieve uniformity, stability, and efficiency in the application and administration of the Code.”¹⁴⁸

The problem with Treasury’s one-size fits all answer is that the mobile marriage problem is not so tidy as Treasury envisions it. Treasury has not been as generous for using state of ceremony for divorce or other similar potential situations that may benefit a taxpayer. There are long lines of cases starting in the 1940s addressing the divorce rules. In the 1940s, most states required infidelity as a prerequisite for divorce.¹⁴⁹ Thus began the long line of “suitcase divorce” cases. The question surrounding the cases was whether one party in a divorce could go to a state, like Nevada, obtain a divorce and have the domicile state recognize the divorce. These cases created quite a controversy at the time because the proceedings were *ex parte*. Substantive legal rights were severed and only one party was present at the proceedings to advocate.¹⁵⁰ The Supreme Court held in *Williams v. North Carolina* that full faith and credit was required for the *ex parte* divorce even though there was no personal jurisdiction over one spouse.¹⁵¹

At the time, the results were harmonized, because there was a separate right to claim custody or support than the union of “marriage.”¹⁵² The divorce, it was argued, only freed the spouse to remarry. Therefore, there was no harm to the recognition of the divorce or to state recognition of the divorce. The rulings evolved through the 1960s. In the 1960s tax law and divorce law intersected in the case involving Herman Borax. Mr. Borax left New York for Chihuahua, Mexico for a divorce and a new wife. Upon arriving back in New York, the original Mrs. Borax went to the New York courts and had the Mexican divorce held invalid.¹⁵³

However, the new Borax couple filed joint tax returns claiming dependence deductions for her children and alimony paid to the first Mrs. Borax.¹⁵⁴ The Commissioner denied the deductions, as he was not

TAXPROF BLOG (June 27, 2013), http://taxprof.typepad.com/taxprof_blog/2013/06/herzig-tax.html.

¹⁴⁸ 2013 Revenue Ruling, *supra* note 6, at *12.

¹⁴⁹ Currie, *supra* note 72, at 44.

¹⁵⁰ *Id.*

¹⁵¹ *Williams v. North Carolina*, 317 U.S. 287 (1942).

¹⁵² Currie, *supra* note 72, at 29.

¹⁵³ *Id.* at 65.

¹⁵⁴ *Id.*

validly married and the alimony because he was not validly divorced.¹⁵⁵ The Tax Court held that the Mexican divorce did not qualify.¹⁵⁶

There was substantial precedent to the Borax's position. The Third Circuit, in *Feinberg v. Commissioner*, was faced with an ex parte divorce that was set aside.¹⁵⁷ In that case, the circuit court relied on a 1947 memorandum from the General Counsel which declared that alimony was deductible even if a foreign divorce would be struck down by home state.¹⁵⁸ The state domicile of the divorce was the controlling position. If the parties "in good faith" rely on the decree, the recognition of the divorce was valid for tax purposes.¹⁵⁹

The Second Circuit held that "divorce" does not refer to marital status under state law. Specifically, the court held that the "subsequent declaration of invalidity by a jurisdiction other than the one that decreed the divorce is of no consequence under these provisions of the tax law."¹⁶⁰ Was a federal definition established?

Seemingly the decision was made in divorce context that the state of ceremony would control. The Service was happy with this position until taxpayers started gaming the mechanical rules in the 1980s. Marital status for tax purposes is determined at year-end.¹⁶¹ Specifically, section 7703 states, "the determination of whether an individual is married shall be made as of the close of his taxable year . . ."¹⁶² There are two specific exceptions to the marriage rule covered by the provisions of section 7703: for alien non-resident spouses and for those that are legally separated. In the 1980s couples started taking advantage of the rules to selectively get divorced at year-end and then remarry in the next tax year.

In order to achieve this quick divorce and avoid state law requirements, couples would go to foreign jurisdictions where residency and separation rules were more lenient. The courts and the Service continuously relied on the use of the state of domicile rules to invalidate the divorces.¹⁶³ But in that context, although courts used language such

¹⁵⁵ *Id.*

¹⁵⁶ *Borax v. Comm'r*, 40 T.C. 1001 (1963) (citing *Estate of Daniel Buckley*, 37 T.C. 664 (1958)).

¹⁵⁷ *Feinberg v. Comm'r*, 198 F.2d 260, 263 (3d Cir. 1952).

¹⁵⁸ *Id.*; *Currie*, *supra* note 72, at 67.

¹⁵⁹ *Feinberg*, 198 F.2d at 263.

¹⁶⁰ *Estate of Borax v. Comm'r*, 349 F.2d 666, 670 (2d Cir. 1965).

¹⁶¹ I.R.C. § 7703 (2012).

¹⁶² *Id.*

¹⁶³ See *Calhoun v. Comm'r*, 63 T.C.M (CCH) 2875 (1992) (citing *Eccles*, *infra* and *Sosna v. Iowa*, 419 U.S. 393, 404 (1975)) (noting that domestic relations is "an area that has long been regarded as a virtually exclusive province of the States"); *Eccles v. Comm'r*, 19 T.C. 1049, 1051 (1953), *aff'd per curiam*, 208 F.2d 796 (4th Cir. 1953) (holding that for federal income tax purposes, the determination of marital status must be made in accordance with the law of the State of marital domicile); Rev. Rul. 83-183, 1983-2 C.B. 220 ("Taxpayers who meet the requirements in their state of residence for a valid marriage may file a joint return even though they have never been legally declared married by a court of law."); *id.* (citing *Ross v. Comm'r*, 31

as, “state of marital domicile,” they were not addressing the more nuanced meaning. There was not much thought into the more complicated question of state of domicile and state of ceremony. The cases were all over the map based on the outcome that seemed desirable to the court at the time. Not since *Eccles* and *Borax*, was much thought given on the federal definition of the term marriage.

Does the word “married” mean in the state of domicile or state of ceremony? The regulations do not lend light on the proper interpretation addressing marriage only in the context of divorce. Thus, neither the Code nor the regulations address many questions but most importantly if there is a conflict of law problem, e.g., a valid same-sex marriage in one state but living in a state which does not recognize the marriage, which state’s law controls.

While the meaning of the word marriage is a federal question, the courts have consistently looked to how the state defined terms to determine whether a taxpayer was married for federal purposes.¹⁶⁴ The Supreme Court in *Burnet v. Harmel* held that state law may control the definitions in the Code “by express language or necessary implication, makes its own operation dependent upon state law.”¹⁶⁵ Thus, the absence of a federal definition of marriage implied that the state law definition would control.¹⁶⁶ Historically, this has meant that a couple is considered married if they are in the state of domicile.¹⁶⁷ This historic treatment is supported through a brief review of the statutes, cases, and various interpretations by the Service.

The ruling then goes on to discuss why the state of domicile would be the incorrect position because of inherent problems associated with the issuance of the ruling, e.g., the related party rules.¹⁶⁸ Moreover, the ruling posits that the most important criteria, in addition to fairness, is ease of administration. For example, a “rule of recognition based on the state of a taxpayer’s current domicile would also raise significant challenges for employers that operate in more than one state, or that have employees (or former employees) who live in more than one state, or move between states with different marriage recognition rules.”¹⁶⁹ The principal problem with the ruling is the failure to address how this

T.C.M. (CCH) 488 (1972) and Rev. Rul. 58-66, 1958-1 C.B. 60).

¹⁶⁴ See *Ensminger v. Comm’r*, 610 F.2d 189, 191 (4th Cir. 1979); *Boyster v. Comm’r*, 74 T.C. 989 (1980), *remanded*, 668 F.2d 1382 (4th Cir. 1981); *VonTersh v. Comm’r*, 47 T.C. 415 (1967); *Eccles*, 19 T.C. 1049; Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 513–14 (2009) [hereinafter Cain DOMA]; Lathrope, *supra* note 12, at 272.

¹⁶⁵ *Burnet v. Harmel*, 287 U.S. 103, 110 (1932).

¹⁶⁶ *Lee v. Comm’r*, 64 T.C. 552, 558 (1975), *aff’d per curiam*, 550 F.2d 1201 (9th Cir. 1977); Cain DOMA, *supra* note 164, at 514; Lathrope, *supra* note 12, at 272.

¹⁶⁷ See Cain DOMA, *supra* note 164, at 514.

¹⁶⁸ David J. Herzig, *Rev. Rul. 2013-17, Gay Marriage and Taxes*, TAXPROF BLOG (Aug. 30, 2013), http://taxprof.typepad.com/taxprof_blog/2013/08/herzig.html.

¹⁶⁹ 2013 Revenue Ruling, *supra* note 6.

is different than prior rulings and Service positions. Does this ruling only apply to marriage of same-sex couples? Or is this a broader policy change? For example, the ruling does not address prior precedent, such as *Eccles*, where the Fourth Circuit decided for federal income tax purposes, the determination of marital status must be made in accordance with the law of the state of the marital domicile.¹⁷⁰

B. *Underlying Policy*

In order to keep marriage consistent with natural law norms, advocates of traditional marriage fought vigorously to limit marriage to a man and a woman. Through this fight, alternative forms of legal recognition of rights were required. The menu of legal arrangements individuals can engage in has expanded beyond marriage. Therefore, the proper federal policy is that the choice is no longer marriage or not marriage under the Code, but, rather, how that relationship matches up to state law.

Moreover, marriage as a construct should not be the overarching driver because marriage represents vastly different rights in each state. In community property states, there are vastly different property rights married couples obtain through marriage. For example, in California, the husband and wife have equal management and control over the property and either spouse may manage it.¹⁷¹ While in Texas, spouses have joint control over property but each spouse has sole management rights over that spouse's property if they were single.¹⁷² Moreover, in civil property states, there are vastly different rights in marriage. For example, at death, states have very different approaches to intestacy or electing against the estate.

If we are to learn anything from the evolution of the family law and the tax law since 1913, it is that marital status is "both overinclusive and underinclusive as an indicator of economic circumstances."¹⁷³ An ideal would be that we tax each individual on their share of the income and expenses.¹⁷⁴ This concept is advocated often in the scholarship to remove the gaming and smooth the distributive share. Unfortunately, that untethering of marital status from tax liability is politically

¹⁷⁰ *Eccles v. Comm'r*, 19 T.C. 1049, 1051 (1953), *aff'd per curiam*, 208 F.2d 796 (4th Cir. 1953); see also *Von Tersch v. Comm'r*, 47 T.C. 415 (1967); Rev. Rul. 58-66, 1958-1 C.B. 60; Cain DOMA, *supra* note 164, at 513-14.

¹⁷¹ CAL. FAM. CODE § 1100 (West 1994) (prior statute CAL. CIV. CODE § 5125 (West 1983)); Kornhauser, *supra* note 12, at 74.

¹⁷² TEX. FAM. CODE ANN. § 5.22 (West 1993).

¹⁷³ Lathrope, *supra* note 12, at 259.

¹⁷⁴ McMahon, *supra* note 12, at 161-62 (pointing out other countries have moved to individual filing); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 4 (2000).

untenable. Therefore, a better approach is to make the definition of marriage more inclusive and use the utilitarian framework of core relationship tenants as the foundation for the economic unit eligible for taxation.

“It is a proper tax goal to impose the same income tax burden on all similar family groups having the same total income.”¹⁷⁵ The key factors determining a family group under the utilitarian family law construct are: (1) encouragement of committed relationships for the benefit and happiness of the partners and the children part of the relationship; (2) a system of standardized default rules such as inheritance rights and health care decisions; and (3) the recognition provides protection for the family unit, such as children.¹⁷⁶ A form of tax recognition for a family group pooling of resources is the fairest approach. This would allow family arrangements that are currently not afforded state level recognition to be treated for tax purposes as a single economic unit. For example, assume brother with child from previous relationship lives together with sister after graduate school. They pool income and resources. They raise the child together. Why would this arrangement not be treated the same as a married couple with similar income? The fact that there is legal recognition should not be dispositive, as a married couple could sever marital ties almost as easily as this couple.

C. *Implementation Problems with the 2013 Revenue Ruling*

Treasury decided in a time-pressured situation on a narrow state of ceremony rule. At the time, Treasury had three options (1) use state of ceremony; (2) use state of domicile; or (3) use state of domicile or ceremony, whichever resulted in the marriage being recognized.¹⁷⁷ In the reading of the 2013 Revenue Ruling, it was clear that Treasury believed that it was a binary war of choice one or two. Never was choice three contemplated. It seemed that Treasury was addressing and solving Justice Scalia’s envisioned problem where the state of domicile provided the couple lesser standing than the state of ceremony. But by limiting the mobile marriage problem solution to the state of ceremony there are a number of second order problems that will come to the forefront in short order.

¹⁷⁵ Surrey 1948 Act, *supra* note 116, at 1114.

¹⁷⁶ *Id.*

¹⁷⁷ 2013 Revenue Ruling, *supra* note 6; see also David J. Herzig, *The Tax Implications of Windsor*, TAXPROF BLOG (June 27, 2013), http://taxprof.typepad.com/taxprof_blog/2013/06/herzig-tax.html.

Despite the incorrect analysis provided in the ruling and the lack of real authority for the position, if we look at what was happening from both legal and policy reasons, the federal government ultimately was going to use place of ceremony for tax collection. Treasury issued Revenue Ruling 2013-17 to attempt to short circuit these potential issues.¹⁷⁸ The Revenue Ruling states for federal tax purposes, same-sex couples legally married in jurisdictions that recognize their marriages will be treated as married for federal tax purposes regardless of whether their state of domicile recognizes that marriage. In other words, Treasury chose the state of ceremony as determinative for federal tax purposes. This was not surprising based on numerous prior statements by the administration and the actions of other administrative agencies.

Treasury was concerned with the hypothetical couple brought up in Scalia's dissent. Justice Scalia, in his dissent, states, "[i]magine 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.' Ala. Code § 30-1-19(e) (2011)."¹⁷⁹ Would that couple be married for purposes of the Code? Under the Revenue Ruling, since state of ceremony controls, then they would be married for the purposes of the Code.

It would seem wholly reasonable from a federal perspective that state rules, such as in *Williams*, should not govern federal positions. Moreover, there has never been a push to limit the federal treatment of marriage based on state of domicile aberrations. For example, the Service has never challenged couples that were married where the state of domicile did not recognize the marriage in contexts such as underage marriages, cousin marriages, and common law marriages, among others.¹⁸⁰

First, the rule was designed to prevent the degradation of marriage to something less. It was anticipated that the only binary choice available was the Scalia example. Unfortunately, since the marriage like menu has been expanded, there are situations where moving to another state actually takes a recognition that is less than marriage-to-marriage. For example in New Jersey an RDP from another state will be recognized as marriage in the state. So under the principal of the ruling, is the couple not married for purposes of the Code? These questions lead back to the underlying thesis of this Article, that the test is not state of domicile or state of ceremony but what types of relationships should be recognized by the Code as marriage equivalents. In order to accomplish that determination, a discussion of the universal policy that

¹⁷⁸ 2013 Revenue Ruling, *supra* note 6.

¹⁷⁹ *United States v. Windsor*, 133 S. Ct. 2675, 2708 (2013).

¹⁸⁰ Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 Nw. U. L. REV. COLLOQUY 131, 138–39 (2013).

can be gleaned from the available data points of treatment of the family unit since 1913.

Second, by Treasury getting involved in the complicated full-faith and credit web of constitutional law by picking a side, it ignores the more difficult *Borax* like cases. In the *Borax* hypothetical, the couple gets divorced and it is not recognized in the state of celebration. For example, a couple would get divorced in Nevada and the state of celebration of the marriage, e.g., in *Borax* New York, would not recognize the divorce. Would this couple still be married under the 2013 Revenue Ruling? If state of ceremony controls, should it control for all purposes? If no, then when does state of domicile control? What if that creates another distortion?

The problem that Treasury is facing is that since there was not much thought put into the proper family unit for taxation, and that the current rules are a compromise to distortions of the state property system, they are faced with an unanswerable question. If Treasury chooses state of ceremony then it will be bound to two clearly unintended results. If Treasury decides to reverse course, much as it did in the Mexican divorce cases in the 1980s, to use state of domicile, then it will be whipsawed by application of the Scalia hypothetical for marriage. What Treasury, really, should want is at worst a complicated hybrid approach that would take into all the variables for marriage and divorce in the various contexts involving state of ceremony and domicile. This would involve a very nuanced and complex thought experiment that would not be accurate until much later once various strategic taxpayers would sort out the margins.

This reactionary and unpersuasive opinion will never be a salient answer. The problem is not the recognition; it is Treasury's steadfast determination to try to answer the mobile marriage question when the real question is what do we mean by marriage. The problem that Treasury is trying to answer, and has been trying to answer since 1913, is what do we mean by marriage. What relationships should be subject to tax as an economic unit? The more fundamental question is marriage substitutes.

IV. THE TAXING OF MARRIAGE SUBSTITUTES

The frame of this Article resolves the two distinct, but related, problems (1) the mobile marriage and the (2) marriage substitute. The Code must deal with both of these problems. Most of the problems of full-faith and credit that Justice Scalia articulates at the core of his dissent affect both sets of problems. The resolution to the Scalia questions, unfortunately, cannot resolve both sets of problems. The solutions are much more easily dealt with at the mobile marriage level.

Once the difficult decision on applying the state of domicile test for the federal definition of marriage is made, it may be able to be expanded upon to deal with the more nuanced problems associated with the application. However, the marriage substitute problem that Treasury avoided in the 2013 Revenue Ruling, is the more difficult to resolve.

Remember the previous discussion of Justin Wolfers and Betsey Stevenson. Justin is Professor at the University of Michigan having also worked at the National Bureau for Economic Research.¹⁸¹ Betsy is maybe more famous than her partner. She is also at the University of Michigan and from 2010 to 2011 served as Chief Economist of the Department of Labor.¹⁸² Theirs was the pure economic choice. Recall that since their incomes were similar, they would be paying more taxes than if they filed separately. Betsey adds that marriage is merely “a contract between two people about how to organize their lives together.” But the state contract only allows for an off-the-shelf solution. So Justin and Betsey analyzed the alternatives and came to the conclusion that the most enduring aspect of the family relationship is having a child. “We have an amazing daughter, who will bind us together for, well, until death do us part.”¹⁸³

A. *Marriage Characteristics*

Justin and Betsey are a great example of a relationship that should be treated as married for the purposes of the tax Code. The discussion of the proper family unit is well rooted and well discussed going back to eminent tax scholars such as Boris Bittker and Stanley Surrey. Bittker established the most used framework for determination of the proper tax unit.¹⁸⁴

Bittker starts with the premise that married couples with equal income should pay the same amount of tax. If this is true, then the married couple is the proper baseline for all comparisons. Under that framework, the distortions caused after 1948 were not distortions because the married common law couple and the married civil law couple were treated equally. The fact that single taxpayers had differing treatment is insignificant. Bittker believed that the three main ideals,

¹⁸¹ *Justin Wolfers—Biography*, U. MICH., FORD SCH. OF BUS., http://www.fordschool.umich.edu/faculty/Justin_Wolfers (last visited July 24, 2014).

¹⁸² *Betsey Stevens—Biography*, U. MICH., FORD SCH. OF BUS., http://www.fordschool.umich.edu/faculty/Betsey_Stevenson (last visited July 24, 2014).

¹⁸³ Jenny Anderson, *Economists in Love: Betsey Stevenson and Justin Wolfers*, IT'S NOT YOU, IT'S THE DISHES BLOG (March 10, 2011), <http://www.itsthedishes.com/2343/2011/03/economists-in-love-betsey-stevenson-and-justin-wolfers>.

¹⁸⁴ Kahng, *supra* note 12, at 661.

horizontal equity, progressive rates, and marriage neutrality could not be harmonized.¹⁸⁵

A tax system based on joint filing must choose which of the three ideals must be disregarded. Under modern sensibilities, progressivity will not be sacrificed. Therefore, if joint filing were the base, either horizontal equity, i.e., treating all married couples with the same income equally, or marriage neutrality will have to be sacrificed.

Depending on the baseline, horizontal equity can be affected in a multitude of ways. We can ensure that all married couples with the same income are taxed equally. That was the principle of the 1948 Act. The revision to splitting-income was to make sure that common law and civil law couples were treated the same under the Code. However, if the baseline shifts, there can be alternative horizontal equity problems.

If the baseline is a similar unmarried family unit, e.g., Betsey and Justin, then either the singles penalty, the marriage penalty or the marriage bonus, depending on the income splits end up violating horizontal equity. The singles penalty applies when an individual has the comparable amount of income as a married couple. In that event, the individual owes more in tax. The marriage penalty applies for married couples that are comparable to Justin and Betsey, e.g., equal wage earners. In that case, the married couple pays more in tax than the unmarried couple. Finally, the marriage bonus, applies when spousal income is unequal. In that case, the marriage reduces the brackets. All outcomes violate horizontal equity if we compare to individuals.

Then we still have to address marriage neutrality. Betsey and Justin demonstrate the tax doctrine that taxpaying ability has little to do with the individual members but rather by the total family income.¹⁸⁶ You need to take into account the entire family unit not the individual without reference to the other members of the family. “[A]dvocacy of a marriage-neutral tax system collides directly and irretrievably with a dominant theme of tax theory for at least 50 years—the irrelevance of ownership within intimate family groups.”¹⁸⁷

According to Bittker and others, having a facts and circumstances test for the determination of marriage neutrality makes it “difficult if not impossible to administer a law that employed such squishy phrases.”¹⁸⁸ Rather, Bittker advocated for “[t]he most objective boundary lines are those based on legal characteristics such as marital status, obligation to support, or right to inherit. Under existing law, the principal determinant of the tax burden is marriage, a status that is usually

¹⁸⁵ *Id.* at 660–61.

¹⁸⁶ Bittker, *supra* note 12, at 1392.

¹⁸⁷ *Id.* at 1396.

¹⁸⁸ *Id.* at 1398.

unambiguous.”¹⁸⁹ Words such as “marriage” or “spouse” do not require the federal court to investigate the law of a particular state. However, what distinguishes marriage from other emotional, financial, and sexual relationships is largely its ceremonial formality. Since 1975, when the article came out, those boundary lines have ceased to exist. Civil unions, RDPs, and other marriage-like institutions provide the objective boundary that Bittker desired.

With the new menu of relationship recognition choices, the narrow definition of “marriage” provided by the 2013 Revenue Ruling should be reevaluated. It becomes too far of a political stretch, currently, to advocate for all income pooled relationships as equal under the Code. For example, polygamy could qualify but it would be politically untenable.¹⁹⁰ Rather, looking at the current variety of marriage-like institutions, there is no reason that under an objective test advocated by Bittker, that Civil Union and RDPs should not count as marriage under the Code.

B. *States Promote Civil Unions and RDPs as Marriage Equivalent*

A quick case study of legal recognition of property rights in Washington can help frame the problem with the current Treasury approach. Washington is an important state in the development of a robust menu of cohabitation choices that the American Law Institute relies on extensively for its recommendations in the field of domestic relations law.¹⁹¹ From the ever-expanding list of choices to the court’s interpretation of the rights that create community property rights in the property regardless of the nomenclature attached, these relationships are marital equivalents.

In 1869, twenty years prior to statehood, Washington adopted a community property system.¹⁹² In order to participate in the community property system, Washington couples must either get married in Washington or enter into a common law marriage in another state.¹⁹³ As the menu of cohabitation choices expanded and marriage as an institution became less and less important to inure

¹⁸⁹ *Id.* at 1399.

¹⁹⁰ Brunson, *supra* note 12, at 170.

¹⁹¹ AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, ANALYSIS AND RECOMMENDATIONS § 6.03 Reporter’s Note to cmt. B (2002).

¹⁹² Tom Andrews, *Not So Common (Law) Marriage: Notes from a Blue State*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 1, 12 (2013); Kelly M. Cannon, *Beyond the “Black Hole”—A Historic Perspective on Understanding the Non-Legislative History of Washington Community Property Law*, 39 GONZ. L. REV. 7, 8 (2003).

¹⁹³ See Andrews, *supra* note 192, at 12; see also *In re Gallagher’s Estate*, 213 P.2d 621, 623 (Wash. 1950).

inchoate rights to the residents of the states, courts were faced with how property rights were to be distributed.

In 1984, the Washington Supreme Court addressed whether couples who were in a committed relationship but not married had community property rights. The Court adopted a rule that courts must examine the committed relationship and property accumulated during the relationship and make an equitable division of the property.¹⁹⁴ By 1995, the Court had defined the factors for a committed relationship to include: continuous cohabitation, duration of relationship, purpose of the relationship, pooling of resources and services for joint projects, and intent of parties.¹⁹⁵ By 1995, all property owned by individuals in committed relationships in Washington is presumed to be owned by both parties regardless of whether they were married under state law.

Essentially Washington had created a common law marriage regime within the state. However, this regime was something of community property light, as it limited the application of the community property regime to qualifying property. The primary difference between the committed intimate relationship and community property marriage in Washington is at divorce. Upon divorce in the committed intimate relationship arrangement, courts may not divide separate property unless there is a specific separate legal theory.¹⁹⁶ Although, some argue that that difference is without distinction. In practice, Washington courts do not divide separate property in a community property divorce, but rather, leave the property with the separate property owner.¹⁹⁷

From this expansive base, Washington in 2008, recognized registered domestic partnerships for same-sex couples and couples with partners over age sixty-two.¹⁹⁸ Moreover, in 2012, the Washington legislature legalized same-sex marriage through a referendum process.¹⁹⁹ But at no time has Washington modified the existing menu of choices available to its citizens. In Washington, a couple can choose from (i) community property marriage available to both heterosexual and same-sex couples, (ii) committed intimate relationship marriage; and (iii) registered domestic partnerships.²⁰⁰ All three of these legal formalities essentially offer the exact same property rights in Washington as marriage. Yet, under the 2013 Revenue Ruling, only the couple that

¹⁹⁴ *In re Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984).

¹⁹⁵ *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995).

¹⁹⁶ WASH. REV. CODE ANN. § 26.09.080 (West 2013); Andrews, *supra* note 192, at 14–15.

¹⁹⁷ *Konzen v. Konzen*, 693 P.2d 97, 101 (Wash. 1985); Andrews, *supra* note 192, at 15.

¹⁹⁸ 2008 Wash. Sess. Laws 53–60 (codified at WASH. REV. CODE ANN. § 26.16.030).

¹⁹⁹ 2012 Wash. Sess. Laws 199–200 (codified at WASH. REV. CODE ANN. § 26.04.010).

²⁰⁰ NAT'L CTR. FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES 15 (2014), available at http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf.

chose marriage would be treated as married for the purposes of the Code.

Contemporary cohabitation statutes are a bridge designed to provide recognition of legal rights in various forms to a sector of society closed off to legal recognition through traditional marriage. When courts interpret marriage equality, e.g., traditional marriage recognition, for same-sex couples, they are importing a model of marriage that focuses on the bundle of rights that are applicable to both same-sex and different sex relationships.²⁰¹

Although, Justice Kennedy in *Windsor* attacked civil unions and broad domestic partnerships as “second tier marriage[s],” Justice Kennedy makes the false assumption that there is some innate priority of marriage. Not all of society believes in marriage as an institution. Although there is some strong evidence of the stickiness of the institution of marriage, there is evidence of detrimental nature of the institution.²⁰² What instead Justice Kennedy should be focused on is the underlying rights associated with these alternative recognitions.

States sold their citizens that these institutions were marriage equivalents. Not only were they sold that way, but the statute also was designed to mirror the marriage statute. In Nevada, for example, domestic partners have “the same rights, protections and benefits” as are “imposed upon spouses.”²⁰³ In Illinois and Oregon, similar statutes exist under the name civil union.²⁰⁴

After the *Windsor* decision, some states reexamined their marriage statutes in light of the Court’s reasoning. There are two examples that highlight why Justice Kennedy and Treasury are incorrect in the approach that civil unions and registered domestic partnerships are not marriage equivalents. First, in Illinois same-sex couples are permitted to marry after *Windsor*.²⁰⁵ But the civil union statute was not repealed. Rather, because couples may not want to subject themselves to the institution, civil unions are still available to both same-sex and different-sex couples. So, a couple can choose between both statutes. But, if you entered into a civil union, presumably because of the previous bar on your marriage, you may convert the civil union to marriage. The date of the marriage then is retroactive to the date of the civil union. Does this mean that now, those couples should go back and file returns as married? In the 2013 Revenue Ruling this was optional, but this

²⁰¹ See NeJaime, *supra* note 1, at 90–91.

²⁰² BADGETT & HERMAN, *supra* note 38, at 1.

²⁰³ NEV. REV. STAT. § 122A.200 (2013).

²⁰⁴ 750 ILL. COMP. STAT. 75/20 (2011); OR. REV. STAT. § 106.340 (2008).

²⁰⁵ *Illinois Marriage Law—Frequently Asked Questions*, ILL. ACLU (Nov. 6, 2013, 10:48 AM), <http://www.aclu-il.org/illinois-marriage-law-frequently-asked-questions> (technically, marriages cannot take place until June, but in at least Cook County, there are marriage ceremonies occurring).

construct was not considered in the ruling. Theoretically, those couples should go back and amend the returns. Although, it can be argued that the return was properly filed.

In 2006, the New Jersey Supreme Court held that same-sex couples were entitled to all the same rights as marriage in *Lewis v. Harris*.²⁰⁶ This led to the enactment of the New Jersey civil union statute in 2006 for same-sex couples. Because of the case, the rights and benefits under the New Jersey civil union statute differed from marriage in name only. Finally, in late 2013 in *Garden State Equality, et al., v. Dow*, the New Jersey Supreme Court held that after *Windsor*, “[s]ame-sex couples must be allowed to marry.”²⁰⁷ It was anticipated that shortly after *Windsor*, the New Jersey Court would want to hear another marriage equality case because of the previous *Lewis* case.

In New Jersey, the new marriage law changed the civil union statute. New Jersey is debating the effects of the new statute. For example, can civil unions be performed in New Jersey? Can couples that had prior New Jersey civil unions opt to have that union treated as marriage? How should other state civil unions be recognized in New Jersey? New Jersey takes the position that if the civil union is the functional equivalent of marriage then it will be a marriage in New Jersey. While if it is something less, it will be a domestic partnership.

The menu of choices available for state recognition is broad. However, within the context of state recognized status that shares the inherent characteristics of marriage, those statuses should rise to the level of marriage for the purposes of the Code. Justice Alito attempts to categorize this perspective in his *Windsor* dissent as one that “defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons.”²⁰⁸

C. *Implication of Treasury Enforcement of Revenue Ruling 2013-17*

If Treasury decides, in spite of all evidence to the contrary, to enforce the 2013 Revenue Ruling and limit application to marriage as state level marriage, then they will violate the same equal protection principals that won the day in *Windsor*. The application of the *Windsor* ruling at the state level has shown that same-sex couples have a right to marry. In the New Jersey case, the court held that the “ineligibility of

²⁰⁶ 188 N.J. 415 (2006).

²⁰⁷ Kate Zernike and Marc Santora, *Judge Orders New Jersey to Allow Gay Marriage*, N.Y. TIMES (Sept. 27, 2013), http://www.nytimes.com/2013/09/28/nyregion/new-jersey-judge-rules-state-must-allow-gay-marriage.html?_r=0.

²⁰⁸ *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting).

same-sex couples for federal benefits is currently harming same-sex couples in New Jersey.”²⁰⁹ If Treasury means that the federal government must recognize marriage for the purposes of the Code, for fear of violating *Windsor*, then the functional equivalent of marriage should be afforded the same recognition. This part will first discuss the equal protection argument building on the *Perry* and *Windsor* decisions. Then it will continue to discuss whether Treasury decides to expand the base and discuss the various chief counsel advice on the topic.

1. If Treasury Enforces

In New Jersey, a civil union had the same set of rights and benefits as a traditional marriage; it differed in name only. The Supreme Court decided that recognition of the civil unions and not marriage caused equal protection problems. It would seem that a union with the same characteristics would cause the same problems.

As discussed in this Article, when confronted with marriage equality, courts consistently look at the attributes of marriage.²¹⁰ Often the standard articulated is the domestic partnership term that is expressed in the utilitarian frame. In finding that Proposition 8 was unconstitutional, the district court in *Perry*, used the domestic partnership construct of marriage including “to join in an economic partnership and support one another and any dependents.”²¹¹

In *Windsor*, a more elaborate understanding of marriage was articulated. The majority in *Windsor* did not focus on the natural law norm construct of marriage, e.g., procreation, but instead on core attributes.²¹² Justice Alito recognized the more expansive viewpoint of the majority as he articulated in his dissent. Exactly, then what is the majority viewpoint of marriage?

Justice Kennedy in writing for the majority views marriage as both a private welfare function and the public recognition.²¹³ Building on the evolution of the alternative menu of options available for relationship recognition, Justice Kennedy starts with the idea that marriage involves “benefits and responsibilities” including various state “statutory benefits.”²¹⁴ The rationale is common to the struggle. After *Baehr*, for example, there was a need to ensure that couples could have certain

²⁰⁹ Garden State Equal. v. Dow, No. L-1729-11, *53 (N.J. Super. Sept. 27, 2013), available at http://www.judiciary.state.nj.us/samesex/Decision_Summary_Judgment.pdf.

²¹⁰ NeJaime, *supra* note 1, at 165.

²¹¹ *Perry v. Schwarzenegger (Perry I)*, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010), *aff'd sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

²¹² Douglas NeJaime, *Windsor's Right to Marry*, 123 YALE L.J. ONLINE 219, 230–31 (2013).

²¹³ *Id.*

²¹⁴ *United States v. Windsor*, 133 S. Ct. 2675, 2692–93 (2013); NeJaime, *supra* note 1, at 168.

state rights recognized and thus the genesis of the domestic partnership rule in Hawaii.

Windsor was only a marriage case. It was not a case about the current menu of marriage alternatives. Justice Kennedy was clearly affected by the “stigma” associated with DOMAs non-recognition. But there was not a decision on the menu. The better case to have a more full understanding of the Court’s view of the marriage equivalent statutes was *Perry*.

Perry was about the constitutional status of domestic partnerships. Unfortunately, *Perry* was struck down on procedural grounds so not much can be gleaned from the Court’s perspective. However, from the use of the utilitarian frame of marriage by the lower courts one might see a similar equal protection argument arising in the context of the failure of Treasury to recognize these marriage equivalents.

Couples in civil unions and domestic partnerships should contest Treasury’s position. Unlike when Treasury previously opined on the meaning of marriage, today there is no tax policy justification for affording radically different tax treatment to couples who are in legally similar relationships that differ in name only. Treasury made no attempt to justify the distinction. The focus was on the state of ceremony versus the state of domicile distinction and the justification Treasury had for using state of ceremony. It was not until the last sentence that Treasury limited the ruling to marriage. In fact, the only time that Treasury discussed labels was to argue that labels do not matter.

Assume that a couple was engaged in a civil union in a state that has a functional equivalent of marriage, e.g., Massachusetts. If an exact *Windsor* situation occurred where one spouse passed and the surviving spouse wanted to claim the estate tax exemption equivalent, it would be hard to see how this revenue ruling as applied is at all different to the result in *Windsor*.

2. If Treasury Expands Definition

Maybe what the Treasury was really doing was preparing to expand on the federal definition of marriage in a more incremental manner. Assuming that the Treasury thought it was overly expansive in the interpretation of marriage as state of ceremony and not domicile, then also including all domestic partnerships and civil unions without an objective criteria was a step too far. There is support for this position. In 2010 Chief Counsel entered into a series of opinions that the California registered domestic partnerships were the equivalent of marriage. Further, in 2011 a letter appeared that demonstrated Treasury was open to recognizing cohabitation arrangements that were the functional equivalent of marriage for the Code.

In 2010, the IRS Chief Counsel, through an advisory and a private letter ruling opined, “the federal tax treatment of community property should apply to California registered domestic partners.”²¹⁵ This treatment was subsequently extended to Nevada and Washington registered domestic partnerships, as those were community property marriage equivalent statutes.²¹⁶ Thus, in 2010 even though DOMA was in effect at the time in community property jurisdictions, same-sex couples were able to split income even though they were not married and even if they were married under DOMA the Code would not recognize the marriage. Seemingly Treasury was open to in at least limited circumstances of treating a marriage equivalent statute as marriage for the purposes of the Code. The ruling seemed to heavily rely on the principle that “ownership equals taxability.”

The ruling although was limited. First, it has no precedential value. As merely interpretive guidance by the agency, it is not binding authority. The ruling applies exclusively to the specific taxpayer who requested the ruling. Further the Chief Council Advisory (CCA) merely analyzes the specific facts of the taxpayer and is not a general application of state law to federal taxation.²¹⁷ Both are persuasive but not binding authority.

More importantly, the ruling applies only to domestic partners in community property states. The ruling only required registered domestic partnerships in California, Nevada, and Washington to split income.²¹⁸ What about other state registered domestic partnerships or civil unions that offer marriage equivalence? For example, New Jersey at the time offered a civil union that was by state constitutional mandate, a marriage equivalent.

Although, the ruling was limited, it shows an expansive view of Treasury on this issue. From these rulings, we can then look to a 2011 letter to a taxpayer from the IRS Office of Chief Counsel.²¹⁹ In the letter, the IRS told the taxpayer that the Illinois opposite-sex civil union statute would file jointly. The facts were limited because DOMA was not in play as the ruling applied to an opposite-sex couple. But more relevant for

²¹⁵ Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1558–60 (2008); Ventry, *supra* note 12, at 1519; Memorandum from the Internal Revenue Serv. Office of Chief Counsel 201021050, at 2 (May 5, 2010), available at <http://www.irs.gov/pub/irs-wd/1021050.pdf>.

²¹⁶ Ventry, *supra* note 12, at 1462 n.15 (“The IRS recognized this reality subsequent to its 2010 ruling pertaining to California.” (citing INTERNAL REVENUE SERV., TAX GUIDE 2013: YOUR FEDERAL INCOME TAX FOR INDIVIDUALS 5 (2013), available at <http://www.irs.gov/pub/irs-pdf/p17.pdf>)); see also INTERNAL REVENUE SERV., 1040EZ INSTRUCTIONS 2010, at 19 (2010), available at <http://www.irs.gov/pub/irs-prior/i1040gi--2010.pdf> (extending treatment to same-sex spouses in California).

²¹⁷ Seto, *supra* note 215, at 1558; Ventry, *supra* note 12, at 1521.

²¹⁸ Seto, *supra* note 215, at 1558; Ventry, *supra* note 12, at 1522.

²¹⁹ 2011 Letter, *supra* note 21.

these purposes is the treatment of something less than marriage as marriage for the Code.

The letter conveying this position stated:

In general, the status of individuals of the opposite sex living in a relationship that the state would treat as husband and wife is, for Federal income tax purposes, that of husband and wife [T]he Illinois Religious Freedom Protection and Civil Union Act provides that “[A] party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognizes [sic] by the law of Illinois to spouses” Accordingly, if Illinois treats the parties to an Illinois civil union who are of opposite sex as husband and wife, they are considered “husband and wife” for purposes of Section 6013 of the Internal Revenue Code, and are not precluded from filing jointly, unless prohibited by other exceptions under the Code.²²⁰

At the time of this position, many were surprised because it had been a foregone conclusion that without marriage, you were not married for the purposes of the Code. Only in the very limited 2010 CCAs was there an exception to that rule.²²¹ Thus, taken together, the groundwork for an expansive view of marriage was being cobbled together by Treasury. Yet, since the issuance of the guidance, Treasury has reversed course in its 2013 Revenue Ruling by ignoring the legal equivalences of these relationships. With absolutely no analysis at all, the IRS concluded:

[f]or Federal tax purposes, the terms “spouse,” “husband and wife,” “husband,” and “wife” do not include individuals (whether of the opposite sex or the same sex) who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law that is not denominated as a marriage under the laws of that state, and the term “marriage” does not include such formal relationships.²²²

If the premise of the tax law is to collect the maximum amount of revenue with the highest compliance, it would seem strange to allow couples the freedom to elect out of or in to the splitting of income. For example, in form, Betsey and Justin are married. But they are not married, or in a marriage substitute. Yet, they pool income and resources, live together, and co-raise their child. They are only not availing themselves of a state recognized contractual form to avoid taxation. In any other application of the tax law, Treasury would look to the substance of the transaction and not follow form. “Looking to

²²⁰ *Id.*; see also Anthony C. Infanti, *The Moonscape of Tax Equality: Windsor and Beyond*, 108 NW. U. L. REV. COLLOQUY 110, 123–24 (2013).

²²¹ Elliott, *supra* note 21, at 794; Infanti, *supra* note 220, at 124.

²²² 2013 Revenue Ruling, *supra* note 6, at *12.

substance rather than to form, domestic partnerships and civil unions that are marriages all but in name *should* be treated as marriages for federal tax purposes.”²²³

The best rationale that exists for a ruling bereft of analysis on this distinction is that there is no distinction. Under this line of analysis, Treasury was pressured to make a decision on the choice of law problem that affected taxpayers and employers immediately after the *Windsor* ruling. Treasury made the decision to take the more aggressive position that state of ceremony would control. This was clearly the more fair result in application. But because an immediate decision was not needed on the issue of alternative arrangements, Treasury decided to punt on the issue. Knowing full well that any decision made would be challenged, Treasury merely stated a position with comparative lack of analysis supporting it. Conversely, “[t]he IRS’s post-*Windsor* guidance is quite detailed—much more than is typical of a revenue ruling—and actually contains pages of analysis justifying the IRS’s decision to adopt a gender-neutral reading of the gendered terms *husband* and *wife*.”²²⁴

It is curious that after the 2010 CCAs and the 2011 IRS letter that Treasury would not reaffirm a newer position of recognition of the marriage equivalent statutes. Moreover, the total lack of reasoning brought to this portion of the revenue ruling leaves one questioning the motives of Treasury. There seems to be three possible readings of the ruling. First, is that Treasury sees recognition of the marriage alternatives as a step too far and refuses to recognize them as marriage for the Code. This argument is not particularly salient given the prior guidance, the substance over form argument, and the rather un-Treasury like lack of reasoning.

The more consistent reasoning is from a position of fairness; by omitting these relationships Treasury allows a challenge to the ruling to have the court decide the issue. Treasury may feel, as in the DOMA context, that the proper venue for the interpretation of the terms of the Code belong to either Congress or the Courts. While Treasury may feel out on a limb for using the state of ceremony interpretation for marriage, it felt that adding the class of alternative arrangements, especially marriage equivalents, was just too much to handle at the time.

A third reading may be that Treasury believes that at the minimum the marriage equivalent relationships qualify. However, given the uncertainty surrounding the aftermath of *Windsor* and the inevitable movement, time was needed to absorb the impact of the decision. A most favorable example for Treasury would be a state that since *Windsor* allowed same-sex marriage and converts civil unions to marriage for the purposes of that state. This may mean that recognition

²²³ Infanti, *supra* note 220, at 124.

²²⁴ *Id.*

of the union would not be needed as marriage replaces the prior menu. Moreover, if Treasury was unsure of the landscape and what state recognized cohabitations would qualify, then it needed time to determine the factors that would be marriage for the purposes of the Code.

D. *Four-Part Criteria for Tax Marriage*

No matter the rationale, Treasury is attempting to limit marriage, as state marriage only; there is no going back on the menu of cohabitation choices offered by the states.²²⁵ The Washington menu gives individuals a full array of choices and the availability of even more choices seems inevitable. It would seem that in the near future, there are state level recognition for various Symbiotic Relationships, such as sibling pooling of resources; grandparents taking care of grandchildren; committed, loving households in which there is more than one conjugal partner; extended families (especially in particular immigrant populations) living under one roof, whose members care for one another, just to name a few.²²⁶

Treasury, it should be pointed out, is not alone in its limited approach in interpreting that registered domestic partnership and civil unions are not marriage. The State Department has also stated that it will not consider civil unions or domestic partnerships as marriage.²²⁷ Unlike Treasury, the State Department has a rich history of recognizing cohabitation as the functional equivalent of marriage.²²⁸ In order to rise to marital status, the local laws must treat the “cohabitation as being fully equivalent in every respect to a traditional legal marriage.”²²⁹ For example, in New Jersey the word “spouse” and “marriage” cover civil union relationships. It would not seem unlike an immigration official extending spousal recognition to those couples.²³⁰

²²⁵ There have been various questions posed whether this test would be an affirmative responsibility of Treasury to bring Symbiotic Relationships into the marriage definition or if this would be an elective option for the taxpayers. The policy decisions related to this decision are beyond the scope of this Article. However, my pragmatic thought is that the most likely result is an election by taxpayers. The more fair result is a uniform rule for all taxpayers.

²²⁶ Eskridge, *supra* note 1, at 1982–83.

²²⁷ Scott Titshaw, *Revisiting the Meaning of Marriage: Immigration for Same-Sex Spouses in a Post-Windsor World*, 66 VAND. L. REV. EN BANC 167, 176 (2013); U.S. DEP’T OF STATE, U.S. VISAS FOR SAME-SEX SPOUSES: FAQs FOR POST-DEFENSE OF MARRIAGE ACT (2014), available at http://travel.state.gov/visa/frvi/frvi_6036.html.

²²⁸ 9 U.S. DEP’T OF STATE, FOREIGN AFFAIRS MANUAL § 40.1 N1.2 (2012) [hereinafter FOREIGN AFFAIRS MANUAL], available at <http://www.state.gov/documents/organization/86920.pdf>; see also Titshaw, *supra* note 227, at 176.

²²⁹ See FOREIGN AFFAIRS MANUAL, *supra* note 228.

²³⁰ N.J. STAT. ANN. § 37:1–33 (West 2013); Titshaw, *supra* note 227, at 176.

Nonetheless, Treasury cannot enforce a rule defining marriage for the Code in a way that separates state marriage from a state marriage equivalent statute without violating traditional equal protection principles. Moreover, the simple solution of replacing joint filing with individual level filing is politically untenable. Treasury, thus, faces either a defense of a distortive position or formulating a standard for when a civil union, domestic partnership, or other form of relationship should be recognized as marriage under the Code.

Treasury is open to recognition of alternative marriage constructs as evidenced by the prior interpretations. A facts and circumstances test that would allow Treasury to look at each statute and decide how close to marriage it is a viable option. But to interpret such statutes, Treasury would be measuring against a standard. For example, the *Perry* courts named qualities of marriage: emotional commitment and economic support that have come to define domestic partnerships and linked those qualities as mutually constitutive.²³¹ Bittker and others would argue that “objective boundary lines are those based on legal characteristics such as marital status, obligation to support, or right to inherit,” and they are needed.²³² In this portion I propose the object boundary lines using the utilitarian family law principals. In examination of the various statutes, e.g., Washington, and the court interpretation of marriage in the marriage equality battle, it becomes clear that these core factors are used again and again as the fundamental principles of a taxable unit.

To be marital-like a union should be stable, continuous, and involve a sharing of resources. From this base line, four objective factors Treasury should apply in determining if an economic unit is a marriage equivalent are (i) continuous cohabitation; (ii) the purpose and intent of the relationship; (iii) the pooling of resources and services; and (iv) children of the unit. These factors, one subjective and three objective, are meant to reach all relevant evidence helpful in establishing whether a relationship exists. No single factor is dispositive. For example, many couples cohabit without ever rearing children. The lack of children should be taken in context with the other factors.

The continuous cohabitation requirement would eliminate couples that were transient in nature. The state cases that deal with this factor focus on relationships that were on and off and did not import characteristics of marriage. The ability to slip in and out of the relationship is antithesis of marriage. Did you separate and reconcile?²³³ Long-term relationships should not *per se* meet the test. But short-term

²³¹ NeJaime, *supra* note 1, at 167.

²³² Bittker, *supra* note 12, at 1399.

²³³ See, e.g., *In re Marriage of Pennington*, 14 P.3d 764 (Wash. 2000).

relationships should raise a specter of something less than marriage for the Code.

What is the purpose of the relationship? Did the purpose include companionship, friendship, love, sex, and mutual support and caring? What is the couple's intent? For example, if a couple hold themselves out as husband and wife and felt as if they were married. If a couple were cohabitating in a manner that outwardly would indicate that they were in a committed permanent relationship and that the purpose was to be a married couple. Did one partner want the other partner to be the primary intestate taker? Was the other party the primary health care decision maker? Ideally the state would provide these off-the-rack default rules.²³⁴ But as David Boaz and the Cato Institute promote, that marriage should be exclusively contractual.²³⁵ The one-size-fits-all rules are insufficient for dealing with a complex arrangement between the two parties.

Pooling of resource and services. Did the couple allocate work/home division of labor in a traditional manner? Were joint bank accounts maintained? Did the couple share a home and pool payment of mortgages, electric, and other incidents of ownership? Did the couple live off a pension? Were there joint credit cards? Who paid for school for the children? Were wills, trusts, or other estate planning documents created to pass resources on post-death?

The joint rearing of children may ultimately play the most important factor for Treasury. Under both the natural law norm and the utilitarian norm, this is a primary factor for determining the existence of a relationship. Even under utilitarian norms, the best interest of the child is central.²³⁶ Since this factor intersects, the presence of children should influence Treasury. If a couple has children together and co-parent them, should this be conclusive evidence of a marriage equivalent? In the context of committed intimate relationship jurisprudence, the American Law Institute recommends yes in section 6.03,²³⁷ while for the Washington court in *Hobbs v. Bates* the answer is no.²³⁸ It is just part of the test. The court continued to examine the need for pooled resources and function as an economic unit.²³⁹

Interestingly enough, the test for marriage equivalent is broad enough that formal state recognition of the relationship is not necessary. This may run afoul of some privacy concerns. Do we really want the IRS in our lives even more? Moreover, other commentators focus on some

²³⁴ See Eskridge, *supra* note 1, at 1947.

²³⁵ *Id.* at 1972.

²³⁶ *Id.* at 1901.

²³⁷ AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.03 (2002).

²³⁸ *Hobbs v. Bates*, No. 51463-6-I, 2004 WL 1465949 (Wash. Ct. App. June 28, 2004).

²³⁹ *Id.* at *8.

level of property rights recognition by a state before recognition can take place.²⁴⁰ But these distinctions need not be the case. If the fundamental tax principal of substance over form has any application, marriage is a perfect context. For example, by opting to not participate in any state recognition regime, our prior example of Justin and Betsey would continue to be exempt from the marriage penalty, e.g., the bubble in the tax rates at their rate schedule. But under this new regime, they would be married for the purposes of the Code. Under either normative viewpoint, modern natural law or utilitarian, this couple would not be required to be married.²⁴¹ Once the concept of marriage is untethered from the state regulatory regime, a proper analysis can be accomplished. Let's run the Betsey/Justin relationship through the four factors with the as much information as can be gleaned from various interviews they have given on the topic.

First, we need to consider the continuous cohabitation requirement. From all accounts they have been together continuously since graduate school.²⁴² There is no indication that either was married or in an alternative marriage relationship at any time during the continuous cohabitation. There is no readily ascertainable information that would indicate that they would fail this factor.

The second factor is the purpose of the relationship. In various interviews, Justin has indicated that they are married except in the eyes of the taxman. Betsey has said that they have constructed through contract the same rights in property that existed under any state marriage statute. This is persuasive that the purpose of the relationship is to inure to marriage like rights and responsibilities in each other's property. The party's intent is to be the primary intestate taker and decision maker of the each other. In fact they do what most married couples do, sacrifice job and location for the other. After graduating Harvard, she "turned down a faculty position at the University of Michigan and moved to California with Mr. Wolfers, who had accepted a job at the Stanford business school. Ms. Stevenson went to work for Forrester Research, the technology consulting firm."²⁴³

Finally with this factor, "[n]ow Justin Wolfers—and his partner Betsey Stevenson—they did draw up a marriage contract. It spells out [the] terms of their finances and inheritance, hospital visitation rights,

²⁴⁰ See, e.g., Seto, *supra* note 215; Ventry, *supra* note 12.

²⁴¹ Under a pure natural law viewpoint, procreation outside marriage is forbidden. However, a pure viewpoint is not influential today, as it would, among other items, prevent couples from divorcing, from marrying if one partner was unable to have children, or permit marital rape. See, e.g., Eskridge, *supra* note 1, at 1912–13.

²⁴² Motoko Rich, *It's the Economy, Honey*, N.Y. TIMES, Feb. 12, 2012, at BU1.

²⁴³ *Id.*

issues related to their two kids.”²⁴⁴ Clearly, they have entered into a relationship that is the functional equivalent of marriage.

To this point, the third factor—the pooling of resources and services—supports this hypothesis. Obviously, we do not have the financial records of the couple at issue. However, in various interviews, they have gone to great lengths to show through an economic lens the sharing of all normal responsibilities of running a household. For example,

I’m more concerned about having a lot of savings because I grew up with a family that had money problems later in life. Justin is less so. But Justin’s goal is to give a lot of our money to charity, which I agree with. But we give less now so that I can feel more confident with the money in the bank.²⁴⁵

This is a decision that a couple with pool resources and allocations makes. They both have a concept and an agreed plan on the managing of their joint income. Further, Betsey claims, “I do all the bills and taxes. . . .” while Justin states, “I have no idea how much money I have[.]”²⁴⁶

Most importantly the final factor influences both of their views of the relationship. They have two children together. As Betsey states, “[w]e have an amazing daughter, who will bind us together for, well, until death do us part.”²⁴⁷ The children became a crucial part of their contract agreement. All these factors seem to indicate that Justin and Betsey should be married for the purposes of the Code with any benefits and detriments that supplies. They themselves argue in a great essay that “the long-run trend in U.S. family policy has been to deregulate the marriage market, and the book of rules governing who can get married or divorced where and when has become much thinner.”²⁴⁸ If marriage is evolving, then they should be subjected to a modern taxation approach to marriage.

This approach may also open more unconventional relationships to the marriage rules. For example, polygamy, adult children living with and caring for the parents, grandparents and other family members caring for relatives children, and close friends and siblings living together in non-conjugal relationships among others. One critique of

²⁴⁴ *Why Marry? (Part 2): Full Transcript*, FREAKONOMICS BLOG (Feb. 20, 2014), <http://freakonomics.com/2014/02/20/why-marry-part-2-full-transcript>.

²⁴⁵ Anderson, *supra* note 18.

²⁴⁶ Elizabeth Weingarten, *Love and the “Consumption Complementarities:” The Economics of Marriage*, NEW AM. FOUND. BLOG (June 13, 2013), <http://inthewalk.newamerica.net/blog/2013/06/love-and-consumption-complementarities-economics-marriage>.

²⁴⁷ Anderson, *supra* note 18.

²⁴⁸ Betsey Stevenson & Justin Wolfers, *Marriage and the Market*, CATO UNBOUND (Jan. 18, 2008), <http://www.cato-unbound.org/2008/01/18/betsey-stevenson-justin-wolfers/marriage-market>.

polygamy that I find curious is that we often in today's society have poly parenting. Assume Party A and Party B has a child together. Party A then gets married to Party C and Party B gets married to Party D. At that point we have two distinct groups with equal parental and legal responsibilities to the child. Effectively the child has four parents. This structure, although, not wholly common is not from a utilitarian family law perspective inherently bad. Although, from a tax perspective, as Professor Samuel Brunson has pointed out, the Code is currently unable to deal with the various credit and bracket perspective from a tax return with multiple spouses.

E. *Critiques of Approach*

A primary critique of this four-factor approach is that there is no longer a need for any state recognition of marriage for a joint tax return to be filed at the federal level. To build upon this, it is likely that states will maintain a formal recognition of the relationship in order to be married for the purposes of the state taxation system. If this is true, then couples would be treated as married for federal purposes, yet not for state purposes.

This disjunctive treatment may result in what Ruth Mason has referred to as conforming up.²⁴⁹ Because states rely so heavily in the taxation arena on the federal approach, a break from the underlying rules would either force the states to conform or opt-out.²⁵⁰ The problem with opting out of the federal regime is that it is extremely costly.²⁵¹ This can be seen in the recent initiative in the Affordable Care Act. Therefore, ultimately states will conform unless it violates a significant state preference.²⁵²

It has been argued that this marriage recognition is significant to cause a break from the federal rule set.²⁵³ I am skeptical that this is true for a number of reasons. Primarily, the costs of opting out and creating a mirrored regime seem to be high compared to the actual negative benefit of collections. Specifically, more often than not, this will result in less tax collection while increasing the compliance costs. Second, states tend to not add costs. With balanced budget requirements in some states and a lack of borrowing capacity in others, it is hard to believe states would voluntarily decide to create and fund a functioning state equivalent of the IRS. Finally, if a state wanted to accomplish such a

²⁴⁹ Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267 (2013).

²⁵⁰ *Id.* at 1301–02.

²⁵¹ *Id.*

²⁵² *Id.* at 1337.

²⁵³ *Id.*

task, the stated rationale would have to revolve around the desire to break from the federal rules.²⁵⁴ This articulated break may end up being challenged, depending on the wording, as a violation of equal protection principles. If the state interest is to discriminate against a certain group, that could easily rise to an equal protection claim under even a rational basis analysis.²⁵⁵

If this principle stands true, the approach advocated in this Article would result in a complete destruction of the need for any state recognition of marriage. For tax purposes, one could marry or not and still be subject to the federal and state tax regimes. The formalistic concept of marriage, civil union, registered domestic partnership, and other unions would be eviscerated and replaced with a utilitarian type analysis of the relationship of the parties. Depending on your point of view, this is either a step forward or backward.

There are many who argue that the reality is citizens of most states agree that the state should require couples to engage in marriage.²⁵⁶ If that is true, and the federal government desires to encourage traditional marriage, the Code could accommodate that wish as well. Tax deductions and credits can be increased for those who desire to engage in traditional marriage. There are mechanisms that allow for encouragement of behaviors. Yet, by adopting an expansive list, Treasury has sought to not only limit the states' rights. Further, Congress—by not enacting specific legislation to adopt the natural law norm of marriage—has taken away the ability of the state to opt-out of the regime.

The cost to conforming up seemingly is a loss of popular will at the state level. Nonetheless, I favor the utilitarian approach as it starts with a baseline of nondiscrimination. The purpose of family law is to protect children of a relationship and encourage a happy cohabitation of the adults so that the children can flourish.²⁵⁷ The underlying concept under this paradigm is that happy humans flourish in relationships. The law should support that ultimate goal and the rearing of children therein. This baseline ignores externalities that are outside of that core conceit of happiness. This would allow not only marriage equality, but also form complex intrafamily relationships and more complex interfamily arrangements.²⁵⁸

A second critique is that there are two ways to expand the reach of marriage for the purposes of the Code. First is to apply it only when

²⁵⁴ David J. Herzig, *Same-Sex Marriage and Estate Taxes: Why Windsor is Still at Issue*, 141 TAX NOTES 79 (2013).

²⁵⁵ David J. Herzig, *DOMA and Diffusion Theory: Ending Animus Legislation Through a Rational Approach*, 44 AKRON L. REV. 621 (2011).

²⁵⁶ Eskridge, *supra* note 1, at 1967.

²⁵⁷ *Id.* at 1949.

²⁵⁸ Stevenson & Wolfers, *supra* note 248.

individuals have opted for some sort of state level legal recognition that is a marriage substitute. Treasury would investigate and publish lists of state level regimes that are considered marriage for the Code. The second way is to use the proposed four-part functional test articulated here. The question that should be asked is, “why is the latter superior to the former?”²⁵⁹

The functional test best achieves the goal of the neutrality in the Code. Let’s assume that I am incorrect and we can cobble together a tapestry of marriage piece-meal from the state menu of cohabitation arrangements. What would this look like? Treasury would be forced to keep track of all fifty state laws and cases to ensure that the net was cast wide enough to capture marriage like institutions. Could this be done? The compliance that would be shifted to Treasury would create the type of burden that has been avoided in the tax context. Treasury would have to not only understand the various state laws, but also give weight to various state level decisions that interpret the law. This would be an unusual burden to place on Treasury for the seemingly simple determination of marriage. For example, states change the laws regularly and couples that were not married can become married overnight.

But more importantly, how would Treasury deal with a state giving a couple an option of choosing the state level recognition? For example, when New Jersey is proposing to give couples the option of converting another state civil union to marriage for the sake of New Jersey is that option enough to trigger marriage? Wherever Treasury draws the line, litigation would ensue depending on the increase or decrease tax burden.

What is more likely is that strategic actions would become more pervasive by taxpayers. Pick a state that has a recognition level you like but that triggers or does not trigger marriage. This type of taxpayer action in the marriage context has been seen over and over again. In the suitcase divorce cases in the 1940s, in the tax year divorce cases in the 1980s, and with Justin and Betsey we can see those results. If we care about equity and are truly looking to the substance of the relationship, then the functional test solves more problems.

Is this just another way of inviting litigation? The answer to this question revolves around who would institute the litigation. If the functional test sweeps into the fold outliers such as the suitcase divorcees, they will bring litigation that brings themselves out of the definition. This litigation would most likely not prove fruitful and thus

²⁵⁹ I will put to the side the issue of revenue, as that is a slippery issue that depends on too many variables for this Article. But I would say that the functional test seemingly would increase the number of married taxpayers and most likely move them to the marriage penalty section of the Code.

actually help the nuanced rule now in place. The problems in the mobile marriage and the marriage substitute debate become meaningless because marriage for the Code looks to the relationship. The formalistic state rubric only applies for state level decisions. For federal decisions, a functional test is applied. This fluid approach will allow Treasury to address the new Pandora's Box of state level relationships and contract-based relationships opened up after *Windsor*, and as a result of the natural family law norm movement to protect marriage.²⁶⁰ The early fights in the interpretation of the Code in the community property and civil property context would have not been necessary, the modifications in 1948 again moot. We are headed toward another compromise. Rather, than merely compromise, a more efficient answer is needed. The addition of alternative relationships is a compromise. The new test is an answer.

CONCLUSION

During the 1970s as debate about the status and marriage came to the national forefront, the traditional legal distinctions between men and women and the cohabitation arrangements were questioned.²⁶¹ Any approach outside the natural law norm was quickly dismissed and the Anita Bryant's of the country pushed prohibition against alternative marriage arrangements forward. Regardless of the prohibitions, it was recognized that there needed to be some recognition of the relationship of same-sex couples. Thus, a menu of alternative legal relationships has been enacted by states. None of this mattered in the application of the Code until the recent *Windsor* decision. Prior to the decision, DOMA created a federal definition of "marriage" as between a man and a woman regardless of whether you were married for state law purposes. After *Windsor*, we are no longer tethered to a federal definition of marriage and thus the state definition will become the starting point for a discussion. Because of the aggressive attempts to provide alternative marriage-like institutions by traditional marriage advocates, the Code's current answer to the question of marriage is ripe for reexamination.

The IRS tried to short circuit this problem by using in the 2013 Revenue Ruling a place of ceremony rule.²⁶² Thus, for federal purposes, same-sex marriage always counts. However, this creates a separate concern for states that rely on the federal rules and policies for tax administration. States are generally required to conform with the federal

²⁶⁰ See Aloni, *supra* note 11.

²⁶¹ Bittker, *supra* note 12, at 1392.

²⁶² 2013 Revenue Ruling, *supra* note 6.

preference because opting out (e.g., creating an independent income, gift, and estate tax regime) is both costly, and impractical.²⁶³

If we really don't mean that marriage is a specific set of property rights and privileges, then what does it mean? It means an arrangement of individuals to meet the societal goals of raising children in a happy and healthy environment for both the children as well as the parties to the relationship. These goals ignore state law distinctions between civil and community property; they ignore state law distinctions over intestacy rights or divorce rights; they ignore the concept of natural law constructs of marriage. Rather, it focuses on the four-prong test proposed here. If we act like an economic unit by pooling resources for the benefit of each other and the children, we should be taxed as a married couple.

The establishment of this rubric is an important first step in constructing a framework for the proper taxation of the pluralistic relationships that now exist. From this starting point, there is an ability to run alternative taxes through this framework to see if the desired result will be achieved. For example, running all possible cohabitation arrangements, including, grandparent parenting and sibling or friend cohabitation through the rubric may provide additional support for the approach. Moreover, the approach may end up being more progressive than the current system. For example, low income taxpayers are denied many benefits that may be imported if there is no need for formal marriage under the Code.

Another interesting future examination would focus on the application of this objective test in other areas of the tax law. For example, the same 1948 revision of the Code, which led to the joint return, also encompassed a large estate and gift tax revision. If we examine the rationale for the modification and then run various relationships through the current rubric, I believe that we will get a result that more closely mirrors the intention of the estate and gift tax than the current system. As this tax is more closely aligned with family law norms, it is even more important to align the normative frame around those rules.

²⁶³ Mason, *supra* note 249, at 1347-48.