

Income Tax Treatment of Same-Sex Couples: *Windsor* vs State Marriage Bans

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INCOME TAX TREATMENT OF SAME-SEX COUPLES: WINDSOR VS STATE MARRIAGE BANS

In 1996 the United States Congress passed the Defense of Marriage Act, which codified the federal definition of marriage as between one man and one woman. But in 2013 the United States Supreme Court struck down this definition of marriage and, for the first time, the federal government began recognizing same-sex marriages. However, many states, including Wisconsin, continued to have state bans on same-sex marriage, and many of these bans have recently been challenged in state and federal courts. The effect of this has been a patchwork of laws that provide same-sex couples different rights based upon the state in which they live. One area where the definition of marriage has had a profound impact on the lives of same-sex couples has been in tax law—specifically income tax law. Since 2013, the federal government has allowed same-sex married couples to file their federal income taxes jointly. However, many state governments have continued to require these same couples to file their state income taxes separately. Thus, many married same-sex couples have been denied the rights and benefits afforded to married couples under state tax codes. This Comment urges the Wisconsin legislature to continue to allow married same-sex couples to file their Wisconsin state income tax returns jointly, regardless of any future Supreme Court decision regarding the legality of state marriages laws banning same-sex marriages.

I.	INTRODUCTION.....	1806
II.	PRE-DOMA AND DOMA: MARRIAGE AND THE INCOME TAX	1809
	A. <i>History of the Income Tax Status and Marriage</i>	1809
	B. <i>Defense of Marriage Act</i>	1812
III.	WINDSOR AND ITS AFTERMATH	1816
	A. <i>Down Goes DOMA: United States v. Windsor</i>	1817
	B. <i>Revenue Ruling 2013-17 and Its Implications on Federal Income Taxes for Same-Sex Couples</i>	1821
	C. <i>Wisconsin State Income Taxes Post-Windsor</i>	1825
	D. <i>Was the Wisconsin Department of Revenue’s Decision Constitutional?</i>	1827

1. Wisconsin's Marriage Amendment	1827
2. Wisconsin's Uniformity Clause	1829
IV. RECENT DEVELOPMENTS IN INCOME TAX FILING	
FOR SAME-SEX COUPLES	1830
A. <i>A Circuit Split</i>	1831
B. <i>The Seventh Circuit and Wisconsin Income Taxes</i>	1834
V. WHY THE SEVENTH CIRCUIT'S DECISION IS GOOD	
FOR WISCONSIN	1836
A. <i>Many of Wisconsin's Neighboring States Now</i> <i>Recognize Same-Sex Marriages</i>	1836
B. <i>Wisconsin's History Prior to the Marriage Amendment</i> <i>Supported the Protection of Individuals Based on</i> <i>Sexual Orientation, and Wisconsin Should Return</i> <i>to History of Protection</i>	1837
VI. CONCLUSION	1840

I. INTRODUCTION

The first statutory ban on same-sex marriages was enacted in 1973.¹ From then on, an almost constant battle has ensued in state legislatures and courthouses across the country over the rights, privileges, benefits, and dignities bestowed by governments on heterosexual couples but not on same-sex couples. For supporters of same-sex marriage, the battle has been largely lost within the confines of state legislatures, as many states went on to pass constitutional amendments or to enact statutes that banned same-sex marriages.² Thus, supporters have turned to courtrooms as their battleground of choice; here, they have been largely successful, especially in the most recent years and months.³ However, not every challenge to a ban on same-sex marriage has been won.⁴

1. MD. CODE ANN., FAMILY LAW § 2-201 (LexisNexis 2012) ("Only a marriage between a man and a woman is valid in this State."); see also *History and Timeline of the Freedom to Marry in the United States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/history-and-timeline-of-marriage> (last updated Apr. 29, 2015), archived at <http://perma.cc/K9V9-N96R>.

2. See, e.g., NEB. CONST. art. I, § 29; WIS. CONST., art. XIII, § 13; see also, Joel Roberts, *11 States Ban Same-Sex Marriage*, CBS NEWS (Sept. 30, 2004, 5:53 PM), <http://www.cbsnews.com/news/11-states-ban-same-sex-marriage/>, archived at <http://perma.cc/9BT6-RBY9>.

3. See, e.g., *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

4. See, e.g., *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014).

Thus, the litigation strategy of same-sex marriage advocates has been described as the following: “The strategy was that we had to win a critical mass of support. That would give the comfort and impetus to the appellate courts or the Supreme Court to finish the job.”⁵

For same-sex couples, government recognition of their marriage is not just about bestowing their relationship with the same respect and dignity conferred upon heterosexual couples; it is also about the economic and legal ramifications of being a partner in a legal marriage. Marital status plays a role in laws relating to all aspects of everyday life—from Social Security benefits, child support enforcement, housing, and food stamps, to Veterans’ benefits, employment benefits, loans, and immigration laws.⁶

The implications do not end there. Marital status also has profound impact on tax law, especially on income taxes.⁷ This is because income taxes are filed under statuses of either (a) married or (b) single, and those statuses then have even further implications ranging from how much an individual is taxed to whether employers may exclude from an employee’s income the cost of a health plan for the employee’s spouse.⁸

At the time of this Comment, there exists a circuit split regarding the constitutionality of state bans on same-sex marriages.⁹ To address this split, the Supreme Court has consolidated and granted certiorari on a group of cases out of the Sixth Circuit.¹⁰ This may likely lead to a

5. David A. Graham, *Gaming Out the End of the Gay-Marriage Fight*, ATLANTIC (Oct. 29, 2014, 4:51 PM), <http://www.theatlantic.com/politics/archive/2014/10/gaming-out-the-end-of-the-gay-marriage-fight/382103/>, archived at <http://perma.cc/B4GE-FBRS>. Evan Wolfson, New York Lawyer and leader of the group Freedom to Marry, has further emphasized, “We are winning, but winning is not won The strategy [of the gay rights] movement has always been using was not that we were going to have to win in every state or every court” *Id.*

6. Letter from Barry, R Bedrick, Assoc. Gen. Counsel, U. S. Gen. Accounting Office, to Henry J. Hyde, Chairman, Comm. on the Judiciary, House of Representatives 3, enclosure I, at 2 (Jan. 31, 1997) [hereinafter U.S. GAO Letter], available at <http://www.gao.gov/assets/230/223674.pdf>, archived at <http://perma.cc/3ZF8-Y3XP>.

7. *See id.* at 1–2.

8. *Id.* enclosure I, at 3–5.

9. *See, e.g.*, *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014). *But see DeBoer*, 772 F.3d 388 (upholding four state bans on same-sex marriage).

10. *See Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (mem.) (cert. granted); *Tanco v. Haslam*, 135 S. Ct. 1040 (2015) (mem.) (cert. granted); *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015) (mem.) (cert. granted); *Bourke v. Beshear*, 135 S. Ct. 1041 (2015) (mem.) (cert. granted). Writ of certiorari was granted and limited to the following questions: “1) Does the

Supreme Court decision that could ultimately put to rest the debate.¹¹ However, until such time, many states will continue to enforce bans on same-sex marriage, and these bans will continue to have significant tax implications on same-sex couples.¹²

This Comment discusses the history of income tax filing statuses with regard to federal and state recognition of same-sex marriages throughout three different stages in recent history. Part II focuses on the time period leading up to and during the enactment of the Defense of Marriage Act (DOMA). Part III discusses the United States Supreme Court decision in *United States v. Windsor*¹³ and the responses from both the Internal Revenue Service (IRS) and the Wisconsin Department of Revenue and also analyzes the constitutionality of the Wisconsin Department of Revenue's response. Part IV then discusses the most recent developments in same-sex marriage litigation, focusing on the Sixth and Seventh Circuits' decisions and their implications on income tax filing status. Finally, Part V presents arguments for why Wisconsin's new equality in income tax status is a positive move for the state.

Fourteenth Amendment require a state to license marriage between two people of the same sex? 2) Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?" *Obergefell*, 135 S. Ct. at 1039–40. Oral arguments were held on Tuesday, April 28, 2015. *Supreme Court of the United States October Term 2014 For the Session Beginning April 20, 2015*, SUP. CT. U.S. (Mar. 5, 2015), http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalApr2015.pdf, archived at <http://perma.cc/WP3Y-F7XQ>.

11. Erik Eckholm, *Court Upholds Marriage Bans in Four States*, N.Y. TIMES, Nov. 7, 2014, at A1.

12. *See id.* For example, despite a federal judge ruling unconstitutional Alabama's ban on same-sex marriages, the Alabama Supreme Court issued a special order banning probate judges from issuing marriage licenses to same-sex couples. State of Alabama *ex rel.* Ala. Policy Institute, No. 1140460, 2015 WL 892752 (Ala., March 3, 2015) (granting an emergency petition for writ of mandamus that prohibited all probate judges in Alabama from issuing marriage licenses to same-sex couples); *see also* Searcy v. Strange, Civil Action No. 14-0208-CG-N, 2015 WL 328728 (S.D. Ala., Jan. 23, 2015) (holding Alabama's prohibition against same-sex marriage violated a same-sex couple's rights under the Due Process and Equal Protection Clauses).

13. 133 S. Ct. 2675 (2013).

II. PRE-DOMA AND DOMA: MARRIAGE AND THE INCOME TAX

A. *History of the Income Tax Status and Marriage*

In the United States, taxes on earned income are imposed by the federal government, as well as most state governments and some local governments.¹⁴ An income tax may be imposed on an individual, as well as corporations, trusts, and estates.¹⁵ The amount of income tax paid by an individual is based partly on the individual's tax status, and an individual's tax status is determined primarily upon marital status.¹⁶ Income tax statuses, then, as well as an individual's yearly income, are the basis for determining which tax bracket an individual falls under; an individual's tax bracket determines how much of the individual's income will be taxed.¹⁷ When income taxes were first introduced in the United States, however, there was only one tax status, and each of America's workers paid the same, progressive tax rate.¹⁸

The first major change affecting filing status for married individuals came after the United States Supreme Court's decision regarding federal taxes in community property states.¹⁹ In *Poe v. Seaborn*,²⁰ the Court held that in community property states all income would be treated as if it were earned equally for tax purposes, thereby allowing each spouse to claim one-half of the combined income that was earned through wages and investments.²¹ Allowing couples to file taxes that

14. See INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, PUB. NO. 17, TAX GUIDE 2013 FOR INDIVIDUALS (2013) [hereinafter TAX GUIDE], available at <http://www.irs.gov/pub/irs-prior/p17--2013.pdf>, archived at <http://perma.cc/8MYQ-TG26>.

15. *Id.*

16. See SAMUEL A. DONALDSON & DONALD B. TOBIN, FEDERAL INCOME TAX: A CONTEMPORARY APPROACH 10-17 (2d ed. 2012).

17. *Id.* at 10.

18. *Tax History Museum: 1861-1865, The Civil War*, TAX ANALYSTS, <http://taxhistory.org/www/website.nsf/Web/THM1861?OpenDocument> (last visited June 8, 2015), archived at <http://perma.cc/X2JD-MNAL>; *U.S. Federal Individual Income Tax Rates History, 1862-2013 (Nominal and Inflation-Adjusted Brackets)*, TAX FOUND., <http://taxfoundation.org/article/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets> (last visited June 10, 2015), archived at <http://perma.cc/S3GP-8Q3S>

19. See *Poe v. Seaborn*, 282 U.S. 101 (1930).

20. *Id.*

21. *Id.* at 111. Here, Seaborn and his wife, both citizens of the State of Washington, filed separate income tax returns for the 1927 year. *Id.* at 108. Because Washington was a community property state, and thus all income and assets acquired during the marriage are subject to joint ownership, the couple each returned one-half of the community property as income and each deducted one-half of the community property as expenses. *Id.* at 109. However, the IRS Commissioner alleged that all of the income should have been reported in

reflected an equality in ownership had the effect of benefiting those marriages in community property states because the Tax Code at the time did not contemplate couples splitting their income.²² For example, a couple with a joint income of \$25,000 would have paid \$9,082 in federal income taxes in a common law state, while an identical couple would pay \$6,460 in a community property state by filing jointly.²³ Thus, in the aftermath of *Seaborn*, a discrepancy existed between married couples in community property states and married couples in common law states.²⁴

Congress responded to the *Seaborn* decision by passing the Revenue Act of 1948.²⁵ The Revenue Act of 1948 created the tax status of “married filing jointly,” which allowed married couples to split their income equally in a joint tax return.²⁶ The enactment of the Revenue Act helped to unify tax rates in both community property and non-community property states by allowing married couples in all states the choice of filing their taxes separately or jointly.²⁷ Today there are four main filing statuses for federal income tax returns and two specifically for married individuals: single,²⁸ head of household,²⁹ married filing jointly,³⁰ and married filing separately.³¹

the husband’s name. *Id.* The Court sided with the Seaborns and determined that state law controlled in this matter. *Id.* at 110–11. Because Washington was a community property state, “the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife.” *Id.* at 113.

22. See *Revenue Revisions, 1947–48: Hearings Before the H. Comm. on Ways and Means*, 80th Cong. 849 (1947).

23. *Id.*

24. See Dennis J. Ventry, Jr., *Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1460 (2011); Bruce Bartlett, *The Marriage Penalty 5–7* (Nat’l Ctr. For Policy Analysis, Policy Backgrounder No. 145, 1998), <http://www.ncpa.org/pdfs/bg145.pdf>, archived at <http://perma.cc/84W3-HUA3>.

25. Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 110. For further discussion regarding the Revenue Act of 1948, see George S. Goodell, Comment, *Taxation—Joint Returns and the Revenue Act of 1948*, 32 MARQ. L. REV. 213 (1948).

26. Revenue Act of 1948, § 303, 62 Stat. at 115–116; DONALDSON & TOBIN, *supra* note 16, at 10–12.

27. See Revenue Act of 1948, § 303, 62 Stat. at 115–116; see also *Poe v. Seaborn* 282 U.S. 101 (1930).

28. A person must file as single if he or she is considered unmarried and does not qualify for another filing status. INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, PUB. NO. 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION 6 (2014).

29. A person may file as a head of household if he or she meets the following requirements: (1) he or she is “unmarried or considered unmarried on the last day of the year”; (2) he or she “paid more than half the cost of keeping up a home for that year”; and (3) “a qualifying person lived with [him or her] in the home for more than half of the year.”

Marriage status is especially relevant for tax purposes because marriage is considered to be an “income-sharing and resource-sharing arrangement that the [Tax] Code treats differently than other such arrangements.”³² Accordingly, when a couple is married and files under the status of married filing jointly, the two each report their combined income together and deduct the combined allowable expenses.³³ This combining of incomes “reflect[s] the social assumption that a husband and wife are one economic unit,” and in the “vast majority of cases,” married couples who file a joint tax return pay less total taxes than those who file separately.³⁴ A married couple may also choose to file their income taxes separately; however, each is then responsible for his or her own taxes according to his or her own income and expenses, and each is generally taxed at a higher rate than those with an equal amount of income filing under the tax status of single.³⁵

Although there may be multiple options for filing status, individuals do not have much choice in deciding how to file.³⁶ An individual who is married *must* file his or her income tax returns as either married filing separately or married filing jointly.³⁷ And an individual who is not legally married *must not* file his or her tax returns in one of the married statuses.³⁸ Thus, prior to the United States Supreme Court’s recent decision in *United States v. Windsor* and the Internal Revenue Service’s subsequent decision to allow same-sex couples to file income taxes under a married status, legally married same-sex couples were not

minus temporary absences. *Id.* at 8. Examples of people who may constitute a qualifying persons are a child, mother, father or grandparent. *Id.* at 10.

30. A couple is considered married if, on the last day of the tax year, they are either: (1) married and living together; (2) “living together in a common law marriage recognized in the state where [they] now live or in the state where the common law marriage began”; (3) “married and living apart but not legally separated under a decree of divorce or separate maintenance”; (4) “are separated under an interlocutory . . . decree of divorce.” *Id.* at 6.

31. If two spouses agree to file separate returns, they must file as married filing separately, unless one qualifies for head of household status. *Id.* at 7.

32. William P. Kratzke, *The Defense of Marriage Act (DOMA) is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399, 406 (2005).

33. TAX GUIDE, *supra* note 14, at 21.

34. DONALDSON & TOBIN, *supra* note 16, at 14.

35. *Id.* at 14–15. Additionally, tax brackets for those filing under a tax status of married filing separately are less than those for unmarried taxpayers because “married couples enjoy an economy of scale by sharing certain household expenses that unmarried taxpayers also incur.” *Id.* at 14.

36. See TAX GUIDE, *supra* note 14, at 20.

37. *Id.*

38. See *id.*

eligible to file their federal taxes under the status of married filing jointly or married filing separately because the IRS did not recognize same-sex marriages.³⁹ Rather, when filing federal income taxes, married couples who were of the same sex were required to file separately, under the status of either single or head of household.⁴⁰

Consequently, and as discussed more fully below, the definition of “marriage” at both the state and federal level has had a significant impact on how some couples file their income taxes.

B. Defense of Marriage Act

In 1991 no state in the United States recognized same-sex marriage, nor was any state legislature showing signs of moving in the direction of recognizing same-sex marriage.⁴¹ However, the issue was brought to the forefront of our political discourse when three same-sex couples in Hawaii filed a lawsuit after they were denied marriage applications on the basis of their sexual orientation.⁴² The three couples had each applied for a marriage license in 1990 and each met all of the required criteria for marriage in Hawaii—all except that they were not of the opposite sex.⁴³ When the Hawaii Department of Health denied their marriage licenses based on an attorney general opinion that the right to marriage was a fundamental right, but only for those of the *opposite sex*, the couples took to challenging the law in court as a violation of the Hawaiian Constitution.⁴⁴

39. See Kay Bell, *Same Tax Issues Now for Same-Sex Couples*, BANKRATE, <http://www.bankrate.com/finance/taxes/3-tax-traps-same-sex-couples-can-avoid-1.aspx> (last visited June 8, 2015), archived at <http://perma.cc/9ATR-JNWW>.

40. *Id.*

41. See Clare Kim, *10 Years After Legalization in Massachusetts, Marriage Equality Expands*, MSNBC (Nov. 18, 2013, 3:30 PM), <http://www.msnbc.com/msnbc/10th-anniversary-marriage-equality-ma> (last updated Jan. 23, 2014, 2:19 PM), archived at <http://perma.cc/YM2Q-T986>; *History and Timeline of the Freedom to Marry in the United States*, *supra* note 1; see also *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (declaring that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violate[d] the Massachusetts Constitution”)

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

43. *Id.* at 49–50.

44. See *id.* at 49–51. The plaintiffs’ argued that the Department of Health’s interpretation of the law both violated the plaintiffs’ right to privacy under article I, section 6 of the Hawaii constitution, and the equal protection and due process of the law guaranteed by article I, section 5 of the Hawaii constitution. *Id.* at 50; HAW. CONST. art. I, § 5.

The case was *Baehr v. Lewin* (later renamed *Baehr v. Miike*),⁴⁵ and it was here that the Supreme Court of Hawaii came to—what was then—a startling conclusion that while no fundamental right to *same-sex* marriage existed under Hawaii’s constitution, denying same-sex couples the right to marry violated Hawaii’s Equal Protection Clause.⁴⁶ In a plurality decision, the court held that sex-based classifications were “suspect categories”;⁴⁷ accordingly, laws using sex-based classifications were subject to strict scrutiny analysis.⁴⁸ Furthermore, when reviewed under strict scrutiny, Hawaii’s requirement that marriage be between one man and one woman would be presumed unconstitutional.⁴⁹ However, rather than complete the analysis themselves, the court remanded the case for a complete strict scrutiny review.⁵⁰

While the *Baehr* decision did not lead to the immediate recognition of same-sex marriage in Hawaii, it did initiate a wave of paranoia that began to creep through the halls of the U.S. Congress.⁵¹ Many congressional representatives feared that the Hawaiian court case might lead to other states considering the possibility of same-sex marriage.⁵² Furthermore, they feared that if individual states began to recognize same-sex marriages, other states and the federal government might then be forced to recognize same-sex marriage as well.⁵³

Ultimately, the *Baehr* decision led to calls for action in Congress. Acknowledging that there was “a strong possibility that the Hawaii

45. *Baehr*, 852 P.2d 44; *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996).

46. *Baehr*, 852 P.2d at 55–68.

47. “A suspect classification exists where the class of individuals formed has been ‘saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.’” *Nagle v. Bd. of Educ.*, 629 P.2d 109, 112 n.2 (Haw. 1981) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

48. *Baehr*, 852 P.2d at 63–65.

49. *Id.* at 63–64. Under strict scrutiny analysis, “laws are ‘presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications.’” *Id.* at 64 (quoting *Holdman v. Olim*, 581 P.2d 1164, 1167 (Haw. 1978)).

50. *Id.* at 68. The court explained that, “[o]n remand, in accordance with the ‘strict scrutiny’ standard, the burden will rest on [the State] to overcome the presumption that HRS § 572–1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.” *Id.*

51. See HAW. CONST. art. I, § 23. The residents of Hawaii voted to amend the Hawaiian constitution to give the legislature “the power to reserve marriage to opposite-sex couples.” *Id.*

52. H.R. REP. NO. 104-664, at 2 (1996).

53. *Id.*

courts [would] ultimately require the State to issue marriage licenses to same-sex couples” and that gay rights organizations and their lawyers would continue to push for state recognition of same-sex marriages in Hawaii and beyond, many congressmen began to push for the passage of the Defense of Marriage Act (DOMA)—a piece of legislation that would formally squash the idea of federal recognition of same-sex marriage.⁵⁴

Supporters of DOMA believed that the government had a “special obligation to ensure . . . [the] preserv[ation] and protect[ion] [of] the institution of marriage” as that between one man and one woman because the federal government has a “deep and abiding” interest in procreation and child-rearing.⁵⁵ They argued that the federal government should statutorily define marriage as between only one man and woman to both protect the institution of marriage and to preclude same-sex couples from receiving federal rights and benefits.⁵⁶ Additionally, following the *Baehr* decision, supporters of DOMA remained fearful that individual states would recognize same-sex marriage.⁵⁷ Their fears grew upon the belief that the Full Faith and Credit Clause⁵⁸ would then force all states to recognize same-sex marriages, and they argued that an exception to Full Faith and Credit needed to be codified to ensure individual state sovereignty over domestic relations.⁵⁹

54. *Id.* at 5. The report explained that “[t]he prospect of permitting homosexual couples to ‘marry’ in Hawaii threatens to have very real consequences both on federal law and on the laws (especially the marriage laws) of the various States.” *Id.* at 2.

55. *Id.* at 13–14.

56. *Id.* at 2. The report argued that the preventing same-sex couples from marrying advanced the governments interest in preserving scarce government resources by denying same-sex couples the federal marriage benefits that opposite-sex couples received. *Id.* at 18.

57. *Id.* at 2.

58. “Full Faith and Credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.” U.S. CONST. art. IV, § 1.

59. H.R. REP. NO. 104-664, at 17.

More specifically, if Hawaii (or some other State) recognizes same-sex “marriages,” other States that do not permit homosexuals to marry would be confronted with the complicated issue of whether they are nonetheless obligated under the Full Faith and Credit Clause of the United States Constitution to give binding legal effect to such unions. With regard to federal law, a decision by one State to authorize same-sex “marriage” would raise the issue of whether such couples are entitled to federal benefits that depend on marital status.

Id. at 2.

Thus, in 1996 Congress enacted DOMA.⁶⁰ Section 2 of the Act addressed the concerns raised by the Full Faith and Credit Clause:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.⁶¹

Additionally, section 3 codified the federal definition of marriage as between one man and one woman:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.⁶²

It was the definition of marriage that directly precluded same-sex couples from receiving the important benefits bestowed by the federal government upon married couples.⁶³ Specifically, the United States General Accounting Office noted that, in 1996, there were 1,049 federal laws in the United States Code that took into account marital status.⁶⁴ These included laws relating to Social Security benefits, child support enforcement, housing, food stamps, Veterans’ benefits, employment benefits, loans, and immigration laws, among others.⁶⁵

More specifically, the General Accounting Office noted that the marriage distinction created by DOMA was particularly pervasive in federal tax law, given that marital status was taken into account in 179

60. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). The Congress interpreted Justice Scalia’s statement in *Romer v. Evans*—“I would not myself indulge in such official praise of heterosexual monogamy, because I think it is no business of the courts (*as opposed to the political branches*) to take sides in this culture war”—as being a green light for Congress to take action “defend[ing] the institution of traditional heterosexual marriage.” H.R. REP. NO. 104-664, at 12 (quoting *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting)); *see also* 1 U.S.C. § 7 (2012); 28 U.S.C. § 1738C (2012).

61. Pub. L. No. 104-199, § 2, 110 Stat. 2419, 2419 (codified at 28 U.S.C. § 1738C (2012)).

62. *Id.* § 3, 110 Stat. at 2419 (codified at 1 U.S.C. § 7 (2012)).

63. *See id.*

64. U.S. GAO Letter, *supra* note 6, at 1-2.

65. *Id.* at 3, enclosure I, at 2.

different federal tax provisions.⁶⁶ The General Accounting Office further noted fifty-nine different provisions in income tax law alone that were dependent on whether a taxpayer was designated as married or single; this distinction affected whether the taxpayer filed jointly or separately and further affected how much of the individual's income would be taxed.⁶⁷ Moreover, marital status affected estate and gift taxes because the passing of property from one spouse to another as either an inter vivos gift or alienated through a will is tax deductible.⁶⁸ Under DOMA, none of these tax benefits were applicable to same-sex couples.⁶⁹

III. WINDSOR AND ITS AFTERMATH

However, in 2013 the United States Supreme Court heard the case of *United States v. Windsor*,⁷⁰ which directly challenged the federal definition of marriage as it was defined in DOMA.⁷¹ The Court struck down the definition on federalism and equality grounds, thereby paving the way for changes in income tax filing for same-sex couples.⁷² Following the *Windsor* decision, the Internal Revenue Service issued Revenue Ruling 2013-17, which expressly allowed same-sex married couples to file their federal tax returns under a married status.⁷³ Following the federal government's decision, state governments had to make a decision whether to follow the Revenue Ruling for state tax purposes.⁷⁴ The Wisconsin Department of Revenue decided not to follow the Revenue Ruling and issued its own guidance to same-sex

66. *Id.* enclosure I, at 3.

67. *Id.* enclosure I, at 4.

68. *Id.* The law permitted the transfer of property from one spouse to another without any recognition of gain or loss for tax purposes. *Id.*

69. *See* 1 U.S.C. § 7.

70. 133 S. Ct. 2675 (2013).

71. *Id.*

72. *See id.*

73. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

74. Forty-three states impose an individual state income tax. Kay Bell, *7 States That Don't Have a State Income Tax (And Two That Don't Tax Wage Income)*, ABC NEWS (Jan. 14, 2014), <http://abcnews.go.com/Business/states-income-tax-us/story?id=21490926>, archived at <http://perma.cc/U4LS-JMR7>; Herb Weisbaum, *What Same-Sex Couples Need to Know About Taxes*, TODAY (Jan. 18, 2014, 11:44 AM), <http://www.today.com/money/what-same-sex-couples-need-know-about-taxes-2D11929571>, archived at <http://perma.cc/2C7H-M4UK>.

couples for filing Wisconsin income taxes.⁷⁵ The implications of all of these developments are discussed below.

A. *Down Goes DOMA: United States v. Windsor*

In 2013, DOMA's definition of marriage met its downfall in *United States v. Windsor*.⁷⁶ Here, New York resident Edith Windsor challenged the constitutionality of DOMA section 3 after her partner, Thea Spyer, passed away in 2009.⁷⁷

The story of Ms. Windsor and Dr. Spyer dates back to the 1960s.⁷⁸ Ms. Windsor was a "highly successful computer programmer at IBM," and Dr. Spyer maintained a private practice in psychology.⁷⁹ The two met in 1963 at one of the few restaurants in New York City that was friendly to the gay and lesbian community.⁸⁰ Four years later they were engaged.⁸¹ However, in 1977 Dr. Spyer was diagnosed with progressive multiple sclerosis, a disease that would slowly lead to her paralysis.⁸²

In 1993, when New York first recognized domestic partnerships, Ms. Windsor and Dr. Spyer entered into a domestic partnership.⁸³ And as Dr. Spyer's health began to deteriorate in 2007, the two traveled to Canada and were legally married there before returning to New York City.⁸⁴ Shortly thereafter, Dr. Spyer passed away, leaving her entire estate to Ms. Windsor.⁸⁵

75. *Tax Guidance for Individuals in a Same-Sex Marriage*, WIS. DEP'T REVENUE, <http://www.revenue.wi.gov/taxpro/news/2013/130906.html> (last updated Sept. 6, 2013), archived at <http://perma.cc/NP6L-TSN8>.

76. 133 S. Ct. 2675.

77. *Id.* at 2682.

78. *Id.* at 2683.

79. Brief on the Merits for Respondent Edith Schlain Windsor at 2–3, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 701228. As a government contractor, IBM was prohibited from employing gay men or lesbians at the time of Ms. Windsor's employment. *Id.* at 2 (citing Exec. Order No. 10450, 18 Fed. Reg. 2489 (1953) (banning gays and lesbians from working for any agency of the federal government)). IBM was unaware of Ms. Windsor's sexuality at the time, as both she and Dr. Spyer kept their relationship a secret. *Id.*

80. *Id.*

81. *Id.* at 2–3. To maintain the secrecy of their relationship, Dr. Spyer proposed to Ms. Windsor with a diamond brooch rather than a diamond ring. *Id.* at 3.

82. *Id.*

83. *Windsor*, 133 S. Ct. at 2683.

84. *Id.*

85. *Id.*

However, although New York recognized the couple's Canadian marriage as valid, the federal government, under the DOMA regime, did not.⁸⁶ So, while the marital tax exemption exempted from federal taxation "any interest in property which passes or has passed from the decedent to his surviving spouse," the exemption was not applicable to Dr. Spyer's estate because the federal government did not view Ms. Windsor as a "surviving spouse."⁸⁷ This was because, under DOMA's marriage definition, "spouse" referred "only to a person of the *opposite* sex."⁸⁸ Consequently, Dr. Spyer's estate, upon passing to Ms. Windsor, did not qualify for the federal marital tax exemption; rather, the estate was subjected to \$363,053 in federal estate taxes.⁸⁹ Ms. Windsor paid these taxes, and then promptly filed suit for the refund; she argued that DOMA's definition of marriage violated the Equal Protection Clause of the Fifth Amendment.⁹⁰

Somewhat paradoxically, the Executive Branch both refused to defend DOMA in court and continued to enforce DOMA in practice as Ms. Windsor's lawsuit made its way to the U.S. Supreme Court.⁹¹ In place of the federal government, the Bipartisan Legal Advisory Group (BLAG) defended DOMA.⁹² Both the District Court for the Southern District of New York and the U.S. Court of Appeals for the Second Circuit ruled in favor of Ms. Windsor and ordered the federal government to refund the \$363,053 in federal estate taxes—which the

86. *Id.*

87. 26 U.S.C. § 2056(a) (2012); *Windsor*, 133 S. Ct. at 2683.

88. 1 U.S.C. § 7 (2012) (emphasis added).

89. *Windsor*, 133 S. Ct. at 2683.

90. *Id.*

91. *Id.* at 2683–84. The decision by the federal government to not defend DOMA in court was warranted. See 28 U.S.C. § 530D(a)(1)(B) (2012). The Attorney General is required to submit to Congress a report detailing when the Attorney General or any officer of the Department of Justice determines

to refrain (on the grounds that the provision is unconstitutional) from defending or asserting, in any judicial, administrative, or other proceeding, the constitutionality of any provision of any Federal statute, rule, regulation, program, policy, or other law, or not to appeal or request review of any judicial, administrative, or other determination adversely affecting the constitutionality of any such provision.

Id. However, the Court noted that the use of § 530D in this case was "unusual . . . because the § 530D letter was not preceded by an adverse judgment" but rather "reflected the Executive's own conclusion . . . that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation." *Windsor*, 133 S. Ct. at 2683–84.

92. *Windsor*, 133 S. Ct. at 2684.

government refused to do.⁹³ A petition for certiorari was then filed at and granted by the United States Supreme Court.⁹⁴

Upon review, the Supreme Court struck down the federal definition of marriage as codified in section 3 of DOMA.⁹⁵ Combining both federalism and equality arguments, the majority opinion, written by Justice Kennedy⁹⁶ and joined by Justices Ginsburg, Breyer, Sotomayor and Kagan, held that the definition was unconstitutional.⁹⁷

To begin, Justice Kennedy addressed the issue of federalism by highlighting the history of state control of domestic relations.⁹⁸ Marriage has traditionally been considered within the realm of state regulation; in fact, “[t]he recognition of civil marriages is central to state domestic relations law.”⁹⁹ The federal government also has a history of deferring to state laws and policies regarding domestic relations that dates back to the time the Constitution was written.¹⁰⁰

However, DOMA’s definition of marriage broke with the tradition of deferring to state governments in domestic relations because it was actually *interfering* with state recognition of marriages.¹⁰¹ Rather than respecting a state’s decision to recognize same-sex marriage, the federal government, through its own more narrow definition of marriage, had taken the very class of people that some states had chosen to *protect*—same-sex couples—and imposed “restrictions and disabilities” upon them.¹⁰² This impermissibly cut against a clear history of deferring to

93. *Id.*; see *Windsor v. U.S.* 699 F.3d 169 (2d Cir. 2012); *Windsor v. U.S.* 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

94. See *Windsor*, 133 S. Ct. at 2684.

95. *Id.* at 2689–93.

96. Justice Kennedy has come to be known as “the most important judicial champion of gay rights in the nation’s history” while authoring the three biggest Supreme Court cases extending rights to same-sex individuals: *Romer v. Evans*, *Lawrence v. Texas*, and *United States v. Windsor*. Adam Liptak, *Surprising Friend of the Gay Rights Movement in the Highest of Places*, N.Y. TIMES, Sept. 2, 2013, at A10. Said professor Michael Dorf of Justice Kennedy, “What Earl Warren was to civil rights and what Ruth Bader Ginsburg was to women’s rights, . . . Kennedy is to gay rights.” *Id.*; see also *Lawrence*, 539 U.S. 558; *Romer*, 517 U.S. 620.

97. *Windsor*, 133 S. Ct. 2675.

98. *Id.* at 2689–93.

99. *Id.* at 2691.

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

101. *Id.* at 2692.

102. *Id.* at 2691–93.

the states in the domestic sphere and respecting the different dignities conferred on individuals by their state governments.¹⁰³

Second, the majority continued, the definition violated the principles of due process and equal protection as provided by the Fifth Amendment.¹⁰⁴ Using heightened scrutiny, the Court held that the government's definition of marriage violated principles of equal protection because there was "strong evidence" that it had the purpose and effect of showing federal disapproval of a particular class of persons by denying federal marriage benefits to those in state-sanctioned marriages.¹⁰⁵ Moreover, a House Report prior to the passage of DOMA provided further evidence that the law was born out of a desire by Congress to express a moral disapproval of same-sex marriage, thereby ensuring "that if any State decide[d] to recognize same-sex marriages, those unions [would] be treated as second-class marriages for purposes of federal law."¹⁰⁶

With regard to the facts before the Court—specifically, how the definition of marriage interacted with federal tax laws—the Court found that the definition of marriage discriminated against those whom individual states had sought to offer protection.¹⁰⁷ The law effectively wrote "inequality into the entire United States [Tax] Code," as DOMA controlled over 1,000 different federal statutes that affected same-sex couples in important areas of their lives—from estate taxes, to Social Security and veteran's benefits.¹⁰⁸ In doing so, DOMA undermined the dignity bestowed on these couples by their respective states, "for it [told] those couples, and all the world, that their otherwise valid marriages [were] unworthy of federal recognition."¹⁰⁹

Thus, by combining principles of federalism—the power vested in individual states to determine their own domestic relations laws—with due process and equal protection—the heightened scrutiny used when an individual liberty interest is at issue—the Supreme Court declared section 3 of DOMA, the federal definition of marriage, unconstitutional.

103. *Id.* at 2691–96.

104. *Id.* at 2693.

105. *Id.*

106. *Id.* at 2693–94 ("[B]oth moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality." (quoting H.R. REP. NO. 104-664, at 6 (1996)) (internal quotation marks omitted)).

107. *Id.*

108. *Id.* at 294

109. *Id.*

In so doing, the Court forced the hand of the Internal Revenue Service to address the treatment of same-sex couples under federal tax law.

B. Revenue Ruling 2013-17 and Its Implications on Federal Income Taxes for Same-Sex Couples

In the aftermath of the *Windsor* decision, the IRS announced that all same-sex marriages would be recognized for federal tax purposes.¹¹⁰ In Revenue Ruling 2013-17, the IRS answered three questions: (1) “[w]hether, for Federal tax purposes, the terms ‘spouse,’ ‘husband and wife,’ ‘husband,’ and ‘wife’ include” individuals who are lawfully married and who are of the same sex; (2) “[w]hether, for Federal tax purposes, the . . . [IRS] recognizes a marriage of same-sex individuals [that was] validly entered into in a state” that recognizes such marriage, “even if the state in which they are domiciled does not recognize the validity of” the marriage; and (3) “[w]hether, for Federal tax purposes, the terms ‘spouse,’ ‘husband and wife,’ ‘husband,’ and ‘wife’ include individuals . . . who have entered into a registered domestic partnership, civil union, or other similar formal relationship recognized under state law.”¹¹¹

The Revenue Ruling answered the first two questions in the affirmative.¹¹² The IRS recognized that the majority in the *Windsor* decision “understood that its decision . . . would affect tax administration in ways that extended beyond the estate tax refund at issue”¹¹³ and that an interpretation of the Tax Code as excluding same-

110. *Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized For Federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections Under Federal Tax Law for Same-Sex Married Couples*, INTERNAL REVENUE SERV. (Aug. 29, 2013), <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes;-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples>, archived at <http://perma.cc/F2RZ-EJRT>. The Treasury and the IRS also announced that further guidance would be provided for same-sex couples as to the procedures for employers seeking to file refund claims for payroll taxes paid on previously taxed health insurance and fringe benefits, on cafeteria plans, and on how qualified retirement plans and other tax-favored arrangements should treat same-sex spouses. *Id.*

111. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 201.

112. *Id.* at 202-04.

113. *Id.* at 202 (“The particular case at hand concerns the estate tax, but DOMA is more than simply a determination of what should or should not be allowed as an estate tax refund. Among the over 1,000 statutes and numerous Federal regulations that DOMA controls are laws pertaining to . . . taxes.” (second alteration in original)(quoting *Windsor*, 132 S. Ct. at 2694) (internal quotation marks omitted)).

sex couples “would raise serious constitutional questions” that would likely lead to future litigation.¹¹⁴ In *Windsor*, the Court stated that the creation of two marriage regimes within the same State “diminish[ed] the stability and predictability of basic personal relations.”¹¹⁵ The IRS foresaw the same “stability and predictability” argument being used against it if the Tax Code were read to exclude same-sex couples.¹¹⁶ Additionally, the text of the Tax Code and the legislative history of the Code permitted a gender-neutral reading of the gender-related terms within the Code.¹¹⁷ Furthermore, the Ruling noted that a “gender-neutral reading of the Code fosters fairness . . . [and] administrative efficiency.”¹¹⁸ Finally, the Ruling declined to administer a state-of-domicile standard for recognizing same-sex marriage and instead determined that a marriage would be recognized if it was validly entered into in a state that recognizes same-sex marriage, regardless of where the couple is currently domiciled.¹¹⁹

However, the Revenue Ruling answered the third question in the negative.¹²⁰ Those in registered domestic partnerships, civil unions, or other similar formal relationships would not have their relationships recognized for federal tax purposes.¹²¹ Thus, the federal tax filing statuses of married filing jointly and married filing separately are now open to married same-sex couples, but still limited to only those couples

114. *Id.* The Ruling noted that it is “[a] well-established principle of statutory interpretation . . . that ‘where an otherwise acceptable construction of a statute would raise constitutional problems,’ a court should ‘construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.’” *Id.* (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

115. *Id.* (quoting *Windsor*, 132 S. Ct. at 2694).

116. *Id.*

117. *See id.*

118. *Id.* at 203 (noting that a gender-neutral reading of the gender-specific terms would relieve the IRS from needing to collect and maintain the gender of tax payers).

119. *Id.* at 203–04. Under the residency rule, a same-sex couple that was legally married in a state that recognized same-sex marriage and then subsequently move to a state that did not recognize same-sex marriage must file their federal income tax returns separately. *Id.* This decision was based on Revenue Ruling 58-66, which recognizes, for federal tax purposes, couples that entered into legally recognized common-law marriages, even if they later move to a state that does not recognize common-law marriage. *Id.* at 203. The state-of-domicile rule would have presented additional administrative concerns. *Id.*

120. *Id.* at 204.

121. *Id.* This is true regardless of whether those in the relationship are of the same or of the opposite sex. *Id.*

who have entered into a legally recognized marriage, defined as a marriage that was recognized by the state in which it was celebrated.¹²²

Since the IRS issued Revenue Ruling 2013-17, married same-sex couples are now entitled to the same tax benefits as their heterosexual counterparts, and this has had significant tax implications for them.¹²³ According to Joseph Henchman, vice president of legal and state projects at the Tax Foundation, “The tax code generally rewards married couples who file jointly.”¹²⁴ These benefits include the “pooling of income, greater deductions and assigning dependents to both partners rather than one.”¹²⁵ Married couples can also exclude the cost of employer-provided health insurance for their partners, which was previously reported as taxable income.¹²⁶ The Ruling also provides benefits related to the ability to claim personal and dependency exemptions, take the standard deduction, claim employee benefits, contribute to an IRA, and claim earned income tax credits and child tax credits.¹²⁷

Married couples who have a disparity in incomes may also receive the benefit of “marriage bonus,” as splitting the couple’s income equally places the couple in a lower tax bracket than the higher income earner would have been had he or she filed separately.¹²⁸ For example, if two individuals are married and one makes \$183,250 and the other makes \$40,000, the two will receive a marriage bonus of \$1,595¹²⁹ According to Bob Meighan, vice president of Turbo Tax, “As a general rule, . . . if one

122. *See id.*

123. See Jere Downs, *Gay, Married and Filing Taxes Jointly*, COURIER-J. (Jan. 17, 2014, 7:01 PM), <http://www.courier-journal.com/story/money/2014/01/17/gay-married-and-filing-taxes-jointly/4583363/>, archived at <http://perma.cc/36NQ-WDTP>.

124. *Id.*

125. Darla Mercado, *State Tax Labyrinth Awaits Same-Sex Couples*, INVESTMENT NEWS (Jan. 16, 2014, 12:38 PM), <http://www.investmentnews.com/article/20140116/FREE/140119921#>, archived at <http://perma.cc/N8G6-BWZC>.

126. *Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law*, INTERNAL REVENUE SERV. (last updated Feb. 6, 2015), <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples>, available at <http://perma.cc/7L7P-GRXW>.

127. *Id.*

128. *Tax Topics: Marriage Penalty*, TAX POL’Y CTR., <http://www.taxpolicycenter.org/taxtopics/Marriage-Penalties.cfm> (last visited, June 9, 2015), archived at <http://perma.cc/E2AY-ZZ7R>.

129. Calculations are based on 2014 tax brackets and are taken from *Marriage Bonus and Penalty Tax Calculator*, TAX POL’Y CTR., <http://taxpolicycenter.org/taxfacts/marriagepenaltycalculator.cfm> (last visited, June 9, 2015), archived at <http://perma.cc/Z6FJ-BTC4>.

[spouse] is in the low-income range and the other is the high range, they'll probably see some benefit."¹³⁰

However, filing income taxes jointly is not as beneficial for some couples as it is for others; indeed, some same-sex couples may be subject to the "marriage tax" if they choose to file their income taxes jointly.¹³¹ A marriage tax, or marriage penalty, occurs when two people earn close to equal amounts, and the combination of their incomes pushes them into a higher tax bracket.¹³² For example, two individuals who each earn \$183,250 would individually be taxed at a 28% marginal tax rate.¹³³ Their combined income is \$366,500 and their combined tax is \$83,288.¹³⁴ However, should that same couple choose to file jointly they will see a net increase in their taxes, despite the fact that their combine total income has remained the same.¹³⁵ Filing jointly, this couple will be taxed at a 33% marginal tax rate.¹³⁶ While their combine income remains \$366,500 their combine tax increases to \$91,454.¹³⁷ Thus, some same-sex couples who make relatively close to the same amount of income may be subject to a marriage tax if they choose to file their income taxes jointly.

However, for some, the *Windsor* decision, coupled with Revenue Ruling 2013-17, simply meant that, for some same-sex couples, their marriage was finally recognized by the federal government.¹³⁸ Chris Hartman, executive director of the Fairness Campaign, noted that, "[f]or the first time, many folks' tax filing will be one of the more emotional things that they do this year."¹³⁹ In fact, many couples have disregarded any potential negative tax implications and have solely

130. Weisbaum, *supra* note 74.

131. See *Tax Topics: Marriage Penalty*, *supra* note 128.

132. *Id.*

133. Calculations are based on 2014 tax brackets and are taken from *Marriage Bonus and Penalty Tax Calculator*, *supra* note 129; see *Tax Brackets*, BANKRATE (last visited June 9, 2010), <http://www.bankrate.com/finance/taxes/tax-brackets.aspx>, archived at <http://perma.cc/JB3X-K3VS>.

134. Calculations are taken from *Marriage Bonus and Penalty Tax Calculator*, *supra* note 129.

135. *Id.*

136. *Tax Brackets*, *supra* note 133.

137. Calculations taken from *Marriage Bonus and Penalty Tax Calculator*, *supra* note 129.

138. See Downs, *supra* note 123.

139. *Id.*

focused on celebrating the long-awaited federal recognition of their relationship.¹⁴⁰

After the IRS issued Revenue Ruling 2013-17, individual states had to determine whether they would adopt the Ruling or not. The Wisconsin Department of Revenue's decision is discussed below.

C. Wisconsin State Income Taxes Post-Windsor

Following the *Windsor* decision, the Wisconsin Department of Revenue chose not to voluntarily adopt Revenue Ruling 2013-17.¹⁴¹ Interestingly, Wisconsin tax law states that "married person" or "spouse" is defined according to the same definition provided by the IRS, unless context requires otherwise.¹⁴² However, the Department of Revenue's decision to not adopt Revenue Ruling 2013-17 was based on article XIII, section 13 of the Wisconsin Constitution (hereinafter the Marriage Amendment), which stated that legal recognition of same-sex marriages is prohibited.¹⁴³ Specifically, the Amendment provided that "[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in this state."¹⁴⁴ Additionally, "A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state."¹⁴⁵ Although not challenged on equality grounds, the Marriage Amendment was held to be constitutional by the Wisconsin Supreme Court in *McConkey v. Van Hollen*.¹⁴⁶ According to a spokeswoman for the Wisconsin Department of Revenue, the Amendment was believed to be controlling with regard to state income taxes, and the Department was barred from recognizing same-sex marriages.¹⁴⁷

140. For example, Gregory Hullender and Eric Wong are married and living in Seattle, and they will likely pay more on their income taxes filing jointly; however, they don't mind. Weisbaum, *supra* note 74. According to Hullender, "There is something exciting about this; it makes the process complete. . . . We will file one return this time and can stop attempting to track who owns what assets." *Id.*

141. See *Tax Guidance for Individuals in a Same-Sex Marriage*, *supra* note 75.

142. WIS. STAT. § 71.01(8) (2013–2014).

143. WIS. CONST. art. XIII, § 13.

144. *Id.*

145. *Id.*

146. 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855 (holding that the Marriage Amendment did not violate the separate amendment rule).

147. Patrick Marley, *Same-Sex Couples to File Separately*, MILWAUKEE J. SENTINEL, Sept. 9, 2013, at 7A.

Consequently, despite a Wisconsin statute allowing a husband and wife to file income taxes jointly, same-sex couples who had been legally married in another state and later moved to Wisconsin *could not* file their Wisconsin income taxes under the status of married filing jointly or married filing separately.¹⁴⁸ Additionally, a couple who had entered into a legal domestic partnership in Wisconsin also *could not* file their income tax returns under a married status.¹⁴⁹ Rather, each member in a same-sex household was required to file a separate tax return using the status of either single or head of household.¹⁵⁰

Under this system, same-sex couples who filed joint federal tax returns were required to complete a new Wisconsin form, a Schedule S: Allocation of Income to be Reported by Same-Sex Couples Filing a Joint Federal Return.¹⁵¹ Guidance issued by the Wisconsin Department of Revenue stated that Schedule S forms must have been filed on paper, not electronically filed, and that no amended returns were permitted to change the filing status for past tax returns.¹⁵²

The effect of the Wisconsin Department of Revenue's ruling was that legally married same-sex couples were prohibited from receiving the state tax benefits awarded to married couples in Wisconsin, which included a marriage tax credit of up to \$480.¹⁵³ Same-sex couples eligible for the Wisconsin earned income credit, which is a tax benefit for working families in Wisconsin who have filed a joint tax return and have at least one child, were also not allowed to file for the credit jointly.¹⁵⁴ Rather, a federal earned income credit was determined based on the federal income individually, and the Wisconsin earned income credit was determined off of the individual federal credit.¹⁵⁵ Additional

148. See WIS. STAT. § 71.03(2)(d) (2013–2014).

149. See *Appling v. Walker*, 2014 WI 96, ¶ 50, 358 Wis. 2d 132, 853 N.W.2d 888; Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204; see also *Tax Guidance for Individuals in a Same-Sex Marriage*, *supra* note 75.

150. *Tax Guidance for Individuals in a Same-Sex Marriage*, *supra* note 75.

151. *Id.* According to the Department of Revenue, “Schedule S shows the amount of income as reported on the federal return that is allocable to each individual, and determines the federal adjusted gross income to be used for Wisconsin tax purposes.” *Id.* Wisconsin marital property law does not apply. *Id.*

152. *Id.* A complete copy of both an individual's federal return and the Schedule S form must be submitted. *Id.*

153. See Marley, *supra* note 147.

154. WIS. DEP'T OF REVENUE, INSTRUCTIONS FOR SCHEDULE S (2013).

155. *Id.* Wisconsin earned income tax credits are based on the federal earned income tax credit and may be up to 34% of the federal credit. *Id.*

concern arose due to the mere fact that filing two sets of income taxes could be confusing for same-sex couples.¹⁵⁶

D. Was the Wisconsin Department of Revenue's Decision Constitutional?

If the Wisconsin Department of Revenue's decision to exclude out-of-state same-sex marriages from filing Wisconsin state income taxes under a married status had been challenged under the Wisconsin Constitution, the ruling would have likely survived the challenge. First, Wisconsin's Marriage Amendment provided constitutional support for the Department's decision.¹⁵⁷ And second, Wisconsin's Uniformity Clause does not apply to income taxes.¹⁵⁸

1. Wisconsin's Marriage Amendment

The Wisconsin Marriage Amendment would have likely given the Department of Revenue's decision enough constitutional support to survive a challenge under the Wisconsin Constitution.¹⁵⁹ In 2003, Wisconsin Assembly Joint Resolution 66, the initial proposition for the Marriage Amendment, was created.¹⁶⁰ In 2004, the Wisconsin assembly voted 68–27 in support of the Resolution, and the senate approved the Resolution by a margin of 20–13.¹⁶¹ In 2006, the Resolution was put to popular referendum; it was approved by 59% of Wisconsin voters and signed into law by then Democratic Governor Jim Doyle,¹⁶² thereby

156. See Josh Barro, *Tax Confusion Awaits Same-Sex Married Couples In Many States*, BUS. INSIDER (Sept. 30, 2013, 11:21 AM), <http://www.businessinsider.com/tax-confusion-awaits-same-sex-married-couples-in-many-states-2013-9>, archived at <http://perma.cc/6TRU-TQA9>.

157. WIS. CONST. art. XIII, § 13.

158. WIS. CONST. art. VIII, § 1.

159. See WIS. CONST. art. XIII, § 13.

160. Assemb. J. Res. 66, 2003–2004 Leg. (Wis. 2003), available at <http://docs.legis.wisconsin.gov/2003/related/proposals/ajr66.pdf>, archived at <http://perma.cc/2B2B-6SWT>; Carl J. Rasmussen & Susan L. Collins, *Wisconsin Constitutional Amendment to Define Marriage: The Legal Context*, WIS. LAW., Mar. 2005, at 16.

161. See Rasmussen & Collins, *supra* note 160, at 16. The Resolution was backed by many conservative lobby efforts, including Family Research Forum, Family Research Institute of Wisconsin, Inc., and the Wisconsin Catholic Conference. *Assembly Joint Resolution 66*, GOV'T ACCOUNTABILITY BOARD: EYE ON LOBBYING, <https://lobbying.wi.gov/What/BillInformation/2003REG/Information/1448> (last visited June 9, 2015), archived at <https://perma.cc/TX3E-TYTD>. Additionally, Action Wisconsin, the American Civil Liberties Union of Wisconsin, Inc., City of Madison, and the United Council of UW Students, Inc. were among those lobbying against the Resolution. *Id.*

162. *America Votes 2006: Key Ballot Measures*, CNN, <http://www.cnn.com/ELECTION/2006/pages/results/ballot.measures/> (last visited June 9, 2015), archived at <http://perma.cc/AF2>

solidifying that “[o]nly a marriage between one man and one woman shall be valid or recognized as a marriage in [Wisconsin].”¹⁶³ Moreover, the resolution provided that “[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.”¹⁶⁴

At the time, the Marriage Amendment had seen little in the way of litigation; thus, the full scope and effect of the Amendment remained largely unknown.¹⁶⁵ However, a purely textual interpretation of the Amendment suggests that the Wisconsin Department of Revenue’s decision not to recognize out-of-state same-sex marriages was a constitutional decision; a strict adherence to the text would likely have prohibited any other conclusion.¹⁶⁶ Additionally, a historical review of some of the legislative materials from 2003–2006 would support the argument that the Marriage Amendment was intended to preclude the recognition of out-of-state same-sex marriages in Wisconsin: A Legislative Council staff memorandum stated that a reasonable interpretation of the second sentence of the Amendment was that, “[i]f another jurisdiction confers or purports to confer a legal status of marriage or a status substantially similar to that of marriage on unmarried individuals, that status is not valid under law in this state or recognized at law in this state.”¹⁶⁷

P-T7Z4. Governor Doyle later proposed a state budget that would allow for a domestic partnership registration in Wisconsin and argued that it did not violate the Marriage Amendment but was rather “just a way we can be a little more decent.” Stacy Forster, *Same-Sex Proposal Stirs Opposition; Doyle Plan Would Violate Amendment, Critics Say*, MILWAUKEE J. SENTINEL, Feb. 23, 2009, at 1A.

163. WIS. CONST. art. XIII, § 13.

164. *Id.*

165. See *McConkey v. Van Hollen*, 2010 WI 57, 326 Wis. 2d 1, 783 N.W.2d 855 (holding that the Marriage Amendment did not violate the state’s separate amendment rule).

Wisconsin courts turn to three sources to aid in determining the meaning of a constitutional provision: the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the Legislature as manifested in the first law passed following adoption of the provision.

Letter from Don Dyke, Chief of Legal Services, Wis. Legislative Council, to Mark Gundrum, Representative, Wisconsin State Assembly 4 (Feb. 24, 2006), available at http://www.news.wisconsin.edu/domesticPartnerBenefits/images/LegCouncil_0206.pdf, archived at <http://perma.cc/LYD5-JHBL> (citing *Thompson v. Craney*, 199 Wis. 2d 674, 680 546 N.W. 2d 123, 127 (1996)). But see *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Appling v. Walker*, 2014 WI 96, 358 Wis. 2d 132, 853 N.W.2d 888; *supra* notes 148–50 and accompanying text; *infra* Part IV.B.

166. See WIS. CONST. art. XIII, § 13.

167. Letter from Don Dyke, *supra* note 165, at 8.

Thus, as a state agency, absent any legislative exception to the contrary, the Wisconsin Department of Revenue appeared to be barred from recognizing out-of-state same-sex marriages for income tax purposes under Wisconsin's Marriage Amendment, and any constitutional challenges to the decision would likely be stifled upon review of the Marriage Amendment.

2. Wisconsin's Uniformity Clause

Wisconsin's Uniformity Clause had been discussed as a possible ground for challenging the Department of Revenue's decision; however, this challenge also likely would have failed.¹⁶⁸ The Uniformity Clause in the Wisconsin Constitution states that "[t]he rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods."¹⁶⁹ Early case law on the Uniformity Clause was muddled and confusing, and the Wisconsin Supreme Court struggled to define exactly what uniformity in tax law meant and which taxes were required to meet the requirements of uniformity.¹⁷⁰

However, in 1908, article VIII, section 1 was amended to include an additional sentence: "Taxes may also be imposed on incomes, privileges, and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided."¹⁷¹ In the cases following the 1908 amendment, the Wisconsin Supreme Court determined that the legislative intent behind the amendment was to clearly exclude income taxes from of the purview of the Uniformity Clause.¹⁷² The 1908 amendment to article VIII, section 1 "divide[d] the subjects upon which taxes may be levied into two classes, one property, the other incomes, privileges, and occupations."¹⁷³ The Uniformity Clause applied to taxes

168. See WIS. CONST. art. VIII, § 1.

169. *Id.*

170. Jack Stark, *The Uniformity Clause of the Wisconsin Constitution*, 76 MARQ. L. REV. 577, 581–85 (1993); see Knowlton v. Bd. of Supervisors of Rock Cnty., 9 Wis. 410 (1859). *But see id.* at 431–33 (summarizing *Milwaukee & Miss. R.R. Co. v. Bd. of Supervisors of Waukesha*, 9 Wis. 431 (1859)).

171. Assemb. J. Res. 12, 1905–1906 Leg., at 992 (Wis. 1905); S.J. Res. 18, 1906–1907 Leg., at 1284; Act of July 16, 1907, ch. 661, 1907 Wis. Sess. Laws 1253; see WIS. CONST. art. VIII, § 1.

172. State *ex rel.* Manitowoc Gas Co. v. Wisconsin Tax Com., 161 Wis. 111, 114, 152 N.W. 848, 849 (1915); *Income Tax Cases*, 148 Wis. 456, 134 N.W. 673 (1912).

173. *Manitowoc Gas Co.*, 161 Wis. at 114; see also *Income Tax Cases*, 148 Wis. at 507.

upon property, meanwhile “taxes upon incomes may be graduated and progressive,” and not subject to the requirement of uniformity.¹⁷⁴

Thus, there does not appear to be any case law to support the proposition that the Uniformity Clause compelled Wisconsin to recognize out-of-state same-sex marriages in income tax law. Additionally, it seems unlikely that the Wisconsin Supreme Court would break from its historically narrow interpretation of the Uniformity Clause and extend it to income taxes in this case. Therefore, the Wisconsin Department of Revenue’s ruling would have likely survived a challenge under the Wisconsin Constitution.

IV. RECENT DEVELOPMENTS IN INCOME TAX FILING FOR SAME-SEX COUPLES

At the time of this Comment, the issue of same-sex marriage appears to be consistently in flux as same-sex couples and advocacy groups are actively fighting same-sex marriage bans in courtrooms across the country.¹⁷⁵ Many of these cases did not stop at the district court or appellate court level, and a number of the federal courts of appeals have weighed in on the issue.¹⁷⁶ However, that may change depending on how the Court rules this summer.¹⁷⁷

Of important consequence are the decisions that have come out of both the Sixth and the Seventh Circuits.¹⁷⁸ The Sixth Circuit’s decision is of immense importance to the overall debate on same-sex marriage because it is the first, and currently the only, federal appeals court to issue a decision upholding state bans on same-sex marriage, thereby creating the all-important circuit split.¹⁷⁹ Furthermore, the Seventh Circuit’s decision is particularly important to the State of Wisconsin

174. *Manitowoc Gas Co.*, 161 Wis. at 114.

175. See, e.g., *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

176. See, e.g., *Latta*, 771 F.3d 456; *Baskin*, 766 F.3d 648; *Bostic*, 760 F.3d 352; *Bishop*, 760 F.3d 1070; *Kitchen*, 755 F.3d 1193.

177. See *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015) (mem.) (cert. granted); *Tanco v. Haslam*, 135 S. Ct. 1040 (2015) (mem.) (cert. granted); *DeBoer v. Snyder*, 135 S. Ct. 1040 (2015) (mem.) (cert. granted); *Bourke v. Beshear*, 135 S. Ct. 1041 (2015) (mem.) (cert. granted).

178. *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014); *Baskin*, 766 F.3d 648.

179. See *DeBoer*, 772 F.3d 388.

because the decision is now binding on the state.¹⁸⁰ Both of these decisions are discussed more fully below.

A. A Circuit Split

There is a new circuit split regarding the constitutionality of state bans on same-sex marriage, and it has resulted in the United States Supreme Court's grant of certiorari to decide whether the Fourteenth Amendment requires states to issue marriage licenses to same-sex couples.¹⁸¹ Opinions in the Fourth, Seventh, Ninth, and Tenth Circuits have upheld lower court rulings striking down state laws and amendments banning same-sex marriage.¹⁸² These circuits all broadly interpreted the Supreme Court's language in *Windsor* and applied it to state bans on same-sex marriage.¹⁸³ Moreover, the United States Supreme Court denied a petition for certiorari from these circuits, thereby legitimizing them as the controlling authority over their respective states.¹⁸⁴

However the Sixth Circuit, which oversees Kentucky, Michigan, Ohio, and Tennessee, recently upheld bans on same-sex marriage.¹⁸⁵ In overturning six lower court decisions that struck down state marriage laws, the Sixth Circuit focused its analysis primarily on tradition and on judicial restraint on issues of important social policy.¹⁸⁶ Rather, the court accepted the argument that, in the face of thousands of years of marriage being defined as between a man and a woman, it is acceptable for states to take a slow approach to determine the effects of same-sex marriage.¹⁸⁷

180. See *Baskin*, 766 F.3d 648 at 653–59, 665–72.

181. See *Obergefell*, 135 S. Ct. at 1039 (mem.) (cert. granted); *Tanco*, 135 S. Ct. at 1040 (mem.) (cert. granted); *DeBoer*, 135 S. Ct. at 1040 (mem.) (cert. granted); *Bourke*, 135 S. Ct., at 1041 (mem.) (cert. granted).

182. See, e.g., *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Baskin*, 766 F.3d 648; *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).

183. *Latta*, 771 F.3d 456; *Baskin*, 766 F.3d 648; *Bostic*, 760 F.3d 352; *Bishop*, 760 F.3d 1070; *Kitchen*, 755 F.3d 1193.

184. See *Walker v. Wolf*, 135 S. Ct. 316 (2014) (mem.) (cert. denied).

185. *DeBoer*, 772 F.3d 388.

186. See *id.*

187. *Id.* at 406.

The plaintiffs' claim is that the States have acted irrationally in standing by the traditional definition in the face of changing social mores. Yet one of the key insights of federalism is that it permits laboratories of experimentation—accent on

At the outset of the decision, the court also notes the 1972 Supreme Court decision, *Baker v. Nelson*,¹⁸⁸ where the Supreme Court denied cert to a Minnesota Supreme Court decision that upheld a state law limiting marriage to persons of the opposite sex; the Court's "one-line order stat[ed] that the appeal did not raise 'a substantial federal question.'"¹⁸⁹ Because the Supreme Court never expressly overruled *Baker* in its opinion in *Windsor*, the Sixth Circuit argued that it is bound to abide by the *Baker* decision.¹⁹⁰ Moreover, the court argued, the two decisions do not directly conflict with one another:

[T]he outcomes of the cases do not clash. *Windsor* invalidated a federal law that refused to respect state laws permitting gay marriage, while *Baker* upheld the right of the people of a State to define marriage as they see it. To respect one decision does not slight the other. Nor does *Windsor's* reasoning clash with *Baker*. *Windsor* hinges on the Defense of Marriage Act's unprecedented intrusion into the State's authority over domestic relations. Before the Act's passage in 1996, the federal government had traditionally relied on state definitions of marriage instead of purporting to define marriage itself. That premise does not work—it runs the other way—in a case involving a challenge in federal court to state laws defining marriage. The point of *Windsor* was to prevent the Federal Government from "divest[ing]" gay couples of "a dignity and status of immense import" that New York's extension of the definition of marriage gave them, an extension that "without doubt" any State could provide. *Windsor* made explicit that it does not answer today's question, telling us that the "opinion and its holding are confined to . . . lawful marriages" already protected by some of the states.¹⁹¹

the plural—allowing one State to innovate one way, another State another, and a third State to assess the trial and error over time. As a matter of state law, the possibility of gay marriage became real in 2003 with the Massachusetts Supreme Judicial Court's decision in *Goodridge*. Eleven years later, the clock has not run on assessing the benefits and burdens of expanding the definition of marriage.

Id.

188. 191 N.W.2d 185 (Minn. 1971), cert. denied 409 U.S. 810 (1972).

189. *DeBoer*, 772 F.3d at 400 (quoting *Baker*, 409 U.S. at 810).

190. *Id.* at 400–01.

191. *Id.* (second and third alterations in original) (citations omitted) (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2692, 2695, 2696 (2013)).

Furthermore, the Sixth Circuit found that its decision did not conflict with the Supreme Court's other same-sex marriage case, *Hollingsworth v. Perry*:¹⁹²

Bringing the matter to a close, the Court held minutes after releasing *Windsor* that procedural obstacles in *Hollingsworth v. Perry* prevented it from considering the validity of state marriage laws. Saying that the Court declined in *Hollingsworth* to overrule *Baker* openly but decided in *Windsor* to overrule it by stealth makes an unflattering and unfair estimate of the Justices' candor.¹⁹³

By upholding the States' decisions to pass laws barring same-sex couples the ability to marry, the Sixth Circuit believed it was merely abiding by Supreme Court precedent.¹⁹⁴ Rather than use the judiciary to impose social change, the court believed that laws regarding marriage are best left to the citizens of individual states.¹⁹⁵ In the aftermath of this decision, the parties have filed, and the Supreme Court has granted, petitions for certiorari in their respective cases.¹⁹⁶

As previously noted, the split between the Sixth Circuit and Fourth, Seventh, Ninth, and Tenth Circuits has caught the attention of the United States Supreme Court.¹⁹⁷ Dale Carpenter, professor of constitutional law at the University of Minnesota, has stated that “[i]t’s entirely possible that we could have oral arguments in coming months and a Supreme Court decision by next summer.”¹⁹⁸ Accordingly, the issue of same-sex marriage income tax treatment may soon be resolved.

192. *Id.* at 401; *see also* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

193. *DeBoer*, 772 F.3d at 401 (citations omitted).

194. *See id.*

195. *Id.* at 421 (“When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.”).

196. *DeBoer*, 772 F.3d 388, *cert. granted*, 135 S. Ct. 1040 (2015).

197. Eckholm, *supra* note 11; Lyle Denniston, *Sixth Circuit: Now, a Split on Same-Sex Marriage*, SCOTUSBLOG (Nov. 6, 2014, 4:50 PM), <http://www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/>, *archived at* <http://perma.cc/6V5Q-UUJ2>.

198. Eckholm, *supra* note 11.

However, Wisconsin is not bound by the Sixth Circuit's decision; rather, the State must abide by the Seventh Circuit's ruling on same-sex marriage, and that decision and its implications are discussed below.¹⁹⁹

B. The Seventh Circuit and Wisconsin Income Taxes

The Marriage Amendment²⁰⁰—the premise for the Wisconsin Department of Revenue's decision not to allow joint filing of income taxes for legally married same-sex couples living in Wisconsin—was recently struck down by the Seventh Circuit Court of Appeals in *Baskin v. Bogan*.²⁰¹ Following the lead of the Supreme Court in *Windsor*, the Seventh Circuit sidestepped the issue of fundamental rights and based its decision on equality grounds.²⁰² The opinion, written by Judge Richard A. Posner, emphasizes that the States' prohibitions²⁰³ on same-sex marriage could not even pass the extremely deferential rational basis test, stating that “[t]he discrimination against same-sex couples is irrational, and therefore unconstitutional even if the discrimination is not subjected to heightened scrutiny.”²⁰⁴

Upon review of the Wisconsin Marriage Amendment and the attorney general's arguments in support of the Amendment, the court methodically rejected all of the State's arguments.²⁰⁵ To begin, the court held that the State's argument that the Marriage Amendment was constitutional based on a long tradition of marriage being defined as between one man and one woman was not persuasive, stating that “[t]radition per se . . . cannot be a lawful ground for discrimination—

199. *Baskin v. Bogan*, 766 F.3d 648, 653–59, 665–72 (7th Cir. 2014).

200. WIS. CONST. art. XIII, § 13.

201. 766 F.3d 648.

202. *Id.* at 654–57.

203. The case was a consolidation of two cases, one from Indiana and one from Wisconsin. See *Baskin*, 766 F.3d at 653, 660, 665. The Wisconsin case, *Wolf v. Walker*, directly challenged Wisconsin's Marriage Amendment. *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014).

204. *Baskin*, 766 F.3d at 656. However, Judge Posner suggests that sexual orientation should be treated as a suspect class, noting that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world,” that homosexuals themselves are not politically popular, and that sexual orientation “is an immutable (and probably an innate, in the sense of in-born) characteristic rather than a choice.” *Id.* at 657–58, 671.

205. *Id.* at 655–60, 665–72.

regardless of the age of the tradition.”²⁰⁶ Additionally, the court found the state’s argument that it was necessary to “go slow” and “gather sufficient information” on the effects of same-sex marriage disingenuous given that, at oral arguments, the State “conceded that [it] had no knowledge of any study underway to determine the possible effects on heterosexual marriage in Wisconsin of allowing same-sex marriage.”²⁰⁷ Moreover, the State could not point to *any* tangible harm caused by allowing same-sex couples to marry.²⁰⁸ The court further disregarded the State’s argument that the issue should be settled through the democratic process by stating simply that “[m]inorities trampled on by the democratic process have recourse to the courts; the recourse is called constitutional law.”²⁰⁹

The State of Wisconsin filed a petition for writ of certiorari with the United States Supreme Court, but the petition was denied.²¹⁰ Thus, the Seventh Circuit’s decision is binding on the State of Wisconsin, and the prohibition on same-sex marriage in Wisconsin is no longer in place.²¹¹

In the wake of the Seventh Circuit’s opinion and the Supreme Court’s subsequent denial of the State’s petition for certiorari, the Wisconsin Department of Revenue now treats same-sex married couples as it does opposite-sex married couples.²¹² Currently, the Wisconsin Department of Revenue directs that “lawfully married same-sex couple[s] must file their Wisconsin individual income tax returns as married filing jointly, married filing separately or, if qualified, as head of household.”²¹³ Additionally, the Department will recognize, as lawfully married, all couples who received a marriage license between June 6 and June 13, 2014—the time period between the lower court’s initial

206. *Id.* at 666–67. The court further noted that “the limitation of marriage to persons of the same race was traditional in a number of states when the Supreme Court invalidated it.” *Id.* at 666 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

207. *Id.* at 668 (internal quotation marks omitted).

208. *Id.* at 669.

209. *Id.* at 671. In Wisconsin, homosexuals, transgendered, and bisexual individuals make up only 2.8% of the population and, therefore, clearly constituted a minority group. *Id.*

210. *Walker v. Wolf*, 135 S. Ct. 316 (2014) (mem.) (cert. denied).

211. See *Baskin*, 766 F.3d 648.

212. *Same-Sex Couples Common Questions*, WIS. DEP’T REVENUE, <http://www.revenue.wi.gov/faqs/ise/samesex.html#samesex2> (last updated Oct. 21, 2014), archived at <http://perma.cc/ABP6-75KK>.

213. *Id.*

decision striking down the Marriage Amendment and an injunction placed on the decision pending the Seventh Circuit's review.²¹⁴

V. WHY THE SEVENTH CIRCUIT'S DECISION IS GOOD FOR WISCONSIN

The Seventh Circuit's decision in *Baskin* has led to Wisconsin's recognition of same-sex marriage and allowed same-sex couples in Wisconsin to file joint income tax returns, both of which are positive moves for the state for both economic and social reasons. First, Wisconsin's neighboring states, Minnesota, Iowa, and Illinois, have all legalized same-sex marriage, and it is important for Wisconsin to keep pace with, and not to isolate itself from, its neighbors with regard to civil rights.²¹⁵ Second, because the state of Wisconsin has a history of protecting individuals on the basis of their sexual orientation, and in the interest of fairness and equality,²¹⁶ the State should continue to extend this protection to same-sex couples with regard to state income taxes.

A. Many of Wisconsin's Neighboring States Now Recognize Same-Sex Marriages

Wisconsin may have been slowly isolating itself from its neighbors by refusing to allow legally married same-sex couples to file state income taxes jointly. To date, neighboring states Minnesota, Iowa, and Illinois all recognize same-sex marriage and allow same-sex couples to file their state income taxes jointly.²¹⁷ While studies have shown that the legalization of same-sex marriage would benefit both the federal government and the governments of individual states by increasing revenue, denying the recognition of legally married same-sex couples may have potentially *hurt* Wisconsin's economy in the long-run.²¹⁸

214. *Id.* ("To the extent that any couple, regardless of sex, received a marriage license and followed the requirements of ch. 765, Wis. Stats., the department will treat those couples as married under Wisconsin law, even if they received their license between June 6 and 13, 2014.").

215. *Gay Marriage*, PROCON, <http://gaymarriage.procon.org/> (last visited June 9, 2015), archived at <http://perma.cc/UW4A-AQYB>.

216. See William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91, 93 (2007).

217. See *Gay Marriage*, *supra* note 215.

218. In 2004 the Congressional Budget Office predicted the legalization of same-sex marriage would lead to a small increase in federal tax revenue. CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (2004), available at <https://www.cbo.gov/sites/default/files/06-21-samesexmarriage.pdf>, archived at <https://perma.cc/3ZT8-X9ZF>. Another study estimated that the state of Washington would see an

Just as corporations tend to incorporate in areas where they receive optimal tax treatment, same-sex couples will also likely migrate to those states that offer *them* the optimal tax treatment—the ability to file their state income taxes jointly and thereby receive a lower tax rate.²¹⁹ Rather than move to Wisconsin, these same-sex couples and individuals might have instead chosen to migrate to Wisconsin’s neighboring states—Minnesota, Iowa or Illinois.²²⁰ An example of this was seen when Minneapolis Mayor R.T. Rybak began inviting Wisconsin residents to Minneapolis to be married after Minnesota legalized same-sex marriage.²²¹ Mayor Rybak further encouraged Wisconsin to “cut the . . . red tape that prevents people from having equal rights” because it would “help a whole lot of small businesses put money into the local economy.”²²²

Consequently, Wisconsin businesses may have ultimately suffered from same-sex couples and individuals refusing to remain in or move to the state because they would not receive beneficial tax treatment under Wisconsin’s old income tax laws. Thus, it will likely end up being economically beneficial for the state to allow same-sex couples the ability to file their tax returns jointly.

B. Wisconsin’s History Prior to the Marriage Amendment Supported the Protection of Individuals Based on Sexual Orientation, and Wisconsin Should Return to History of Protection.

At one time Wisconsin was considered to be a gay rights state.²²³ In fact, Wisconsin was the first state to prohibit discrimination on the basis

estimated \$88 million boost to the state economy, with an additional \$8 million in tax revenue over the course of three years. ANGELIKI KASTANIS, M.V. LEE BADGETT & JODY L. HERMAN, WILLIAMS INST., *THE ECONOMIC IMPACT OF EXTENDING MARRIAGE TO SAME-SEX COUPLES IN WASHINGTON* (2010), available at <https://escholarship.org/uc/item/7w4662m> d, archived at <https://perma.cc/U73A-Y67S>.

219. See Caron Beesley, *Which is the Best State to Incorporate Your Brick and Mortar or Online Business?*, U.S. SMALL BUS. ADMIN. (Apr. 17, 2013), <http://www.sba.gov/community/blogs/which-best-state-incorporate-your-brick-and-mortar-or-online-business>, archived at <http://perma.cc/TB44-E96D>.

220. See, e.g., Bill Glauber, *Minneapolis Courting Same-Sex Couples*, MILWAUKEE J. SENTINEL, Sept. 13, 2013, at 1B.

221. *Id.*

222. *Id.*

223. Turner, *supra* note 216, at 93. Years after the passage of Chapter 112, Wisconsinites would appear at national LGBT civil rights events with signs declaring Wisconsin to be “The Gay Rights State.” *Id.*

of sexual orientation.²²⁴ This prohibition extended to employment, housing, and public places of accommodation or amusement.²²⁵ Upon signing the anti-discrimination bill into law, Wisconsin Republican Governor Lee S. Dreyfus stated, “It is a fundamental tenet of the Republican Party that government ought not intrude in the private lives of individuals where no state purpose is served, and there is nothing more private or intimate than who you live with and who you love.”²²⁶

In 1997 the Wisconsin Supreme Court prohibited discrimination based on sexual orientation against jurors.²²⁷ Additionally, Wisconsin courts had previously adopted a policy of recognizing marriages following a “place of celebration” approach; thus, a marriage that was valid in the state it was entered into was valid in Wisconsin.²²⁸ Moreover, while Wisconsin statutory law defines marriage as “a legal relationship between 2 equal persons, a husband and wife, who owe to each other mutual responsibility and support,”²²⁹ and the Wisconsin Supreme Court had noted that state law does not recognize same-sex marriage,²³⁰ previous attempts at codifying marriage as expressly between one man and one woman in Wisconsin had failed.²³¹ In at least

224. *Id.*; see also *Wisconsin First State to Pass Gay Rights Law*, *ADVOCATE*, Apr. 1, 1982, at 9.

225. Turner, *supra* note 216, at 97–98.

226. Zach Ford, *Wisconsin Governor Defends Ban on Same-Sex Marriage as ‘Healthy Balance’ of LGBT Rights*, *THINKPROGRESS* (Nov. 25, 2013, 9:17 AM), <http://thinkprogress.org/lgbt/2013/11/25/2989201/scott-walker-healthy-balance-lgbt/>, archived at <http://perma.cc/F5YG-KZ5D>. Current Wisconsin Governor Scott Walker recently stated that the mix of anti-discrimination laws in Wisconsin with Wisconsin’s constitutional ban on same-sex marriage had led to a “healthy balance” in the state. *Id.*

227. Turner, *supra* note 216, at 98; see also WIS. STAT. § 756.001(3) (2013–2014).

228. *In re Campbell’s Estate*, 260 Wis. 625, 631, 51 N.W.2d 709, 712 (1952) (holding that a “marriage that is valid where celebrated is valid everywhere, except those contrary to the law of nature and those which . . . [are] declared invalid upon the ground of public policy”); see also, *Lanham v. Lanham*, 136 Wis. 360, 365, 117 N.W. 787, 788 (1908).

229. WIS. STAT. § 765.001(2). The statute also states that

[m]arriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always.

Id.

230. *Annette G. v. Terry M. (In re Interest of Angel Lace M.)*, 184 Wis. 2d, 492, 504 n.1, 516 N.W.2d 678, 680 n.1 (1994) (“Wisconsin does not recognize same-sex marriages. Hence, under the laws of Wisconsin [petitioners] are not married.” (citation omitted)).

231. Rasmussen & Collins, *supra* note 160 at 18.

one other state, anti-discrimination laws similar to these were interpreted as providing “strong affirmative policy” that the state legislature intended to provide for a right to same-sex marriage.²³²

However, the 2006 Marriage Amendment drastically changed the course of Wisconsin’s same-sex marriage discussion. The Marriage Amendment was passed amid a “great momentum of other states passing marriage amendments in the mid-2000s, particularly in the Midwest,” and that fact has led some to argue that it is not too surprising that Wisconsin felt pressure to follow suit.²³³ On top of the Marriage Amendment, Wisconsin also has a “marriage evasion” statute that took on new meaning after the passage of the Marriage Amendment because it then prohibited same-sex Wisconsin residents from going to a neighboring state to get married and then returning to the state.²³⁴

But the tide is once again turning in Wisconsin. A statewide poll released by Public Policy Polling in February of 2013 noted that 71% of Wisconsin residents support some form of legal recognition of same-sex relationships.²³⁵ Forty-four percent of the state was in favor of allowing full marriage equality, while 46% opposed it.²³⁶ However, just eight months later a Marquette University Law School Poll showed that support for same-sex marriages had jumped to 53%.²³⁷ These numbers

232. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003) (stating that “Massachusetts has a strong affirmative policy of preventing discrimination on the basis of sexual orientation”).

233. Zachary Willenbrink, Comment, *Conflicts of Law and Policy Relating to Same-Sex Marriage Recognition in Wisconsin*, 94 MARQ. L. REV. 721, 728 (2010); see Turner, *supra* note 216, at 131.

234. WIS. STAT. § 765.04(1) (2013–2014). The statute states:

If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state.

Id.

235. *Clinton Would Beat Walker, Ryan in Wisconsin in 2016*, PUB. POL’Y POLLING (Feb. 28 2013), http://www.publicpolicypolling.com/pdf/2011/PPP_Release_WI_022813.pdf, archived at <http://perma.cc/UM8W-QAL2>.

236. *Id.*

237. MARQUETTE LAW SCHOOL POLL, OCTOBER 21–24, 2013 at Q31 (2013), available at <https://law.marquette.edu/poll/wp-content/uploads/2013/10/MLSP18Toplines.pdf>, archived at <https://perma.cc/BV97-6CFF>.

have led some to believe that a vote on the Marriage Amendment would be much different now than it was in 2006.²³⁸

It is obvious, then, that the Wisconsin of 2015 is dramatically different than the Wisconsin of 2006 and is, in fact, much more similar to the Wisconsin of the 1980s and 1990s. Equality in income tax treatment, as well as overall validation of same-sex relationships, is not only a step in the right direction for Wisconsin but also a step back toward Wisconsin's past—not only a past that recognized marriages based on a “place of celebration” test, but a past that was also more tolerant, indeed even protective, of the private lives of its citizens.

VI. CONCLUSION

Thus, regardless of the outcome in the Supreme Court's upcoming decision, Wisconsin should continue to allow same-sex couples the opportunity to file their taxes jointly. By allowing legally married same-sex couples the opportunity to file their Wisconsin state income taxes jointly, same-sex couples may now receive a marriage bonus, as well as other income tax-related marriage benefits, and they will not be forced to deal with the confusion and hassle of filing their federal income tax returns differently than their Wisconsin state income tax returns. Additionally, allowing legally married same-sex couples the opportunity to file their Wisconsin state income taxes jointly would better align Wisconsin with the federal government, with its neighboring states, and with its past. The federal government and many of Wisconsin's neighbors have moved past the days of *Baehr* and DOMA and into a post-*Windsor* world, and it is sound economic and social policy for Wisconsin to join them.

SAMANTHA SCHMID

238. Craig Gilbert, *A Lot Has Changed Since Wisconsin Banned Same-Sex Marriage in 2006*, MILWAUKEE J. SENTINEL (Mar. 27, 2013), <http://www.jsonline.com/blogs/news/200290611.html>, archived at <http://perma.cc/V687-BBLU>. Mike Tate, the current state Democratic chair who ran the campaign in 2006 against the same-sex marriage ban, believes that the shift has occurred due to a younger generation, who has opposed same-sex marriage, reaching the age of majority. *Id.*

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