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ELECTING FAIRNESS: A CHECK-THE-BOX-STYLE REGIME FOR SAME-SEX COUPLES' TAX FILING STATUS

JENNIFER BIRD-POLLAN¹

I. INTRODUCTION

In the wake of the United States Supreme Court's decision regarding the Defense of Marriage Act ("DOMA") in *United States v. Windsor*,² tax lawyers and those interested in tax policy immediately wondered what consequences this change would have to the United States' federal tax laws.³ The Internal Revenue Service ("IRS") issued a Revenue

¹ Assistant Professor of Law, University of Kentucky College of Law. Thanks for helpful comments go to Professors Stefan Bird-Pollan, Jake Brooks, Patricia Cain, Steve Clowney, Andrew Haile, David Herzig, Jinyan Li, Omri Marian, Shu-Yi Oei, Leigh Osofsky, and Susannah Tahk, as well as participants in the 2014 Tulane Tax Roundtable. Thanks also to the staff of the *Elon Law Review* and participants in the *Elon Law Review* Symposium 2013: The Effects of *Windsor* and *Perry* on Constitutional Law, Family Law, Tax Law, and Society.

² *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675 (2013).

³ On Friday, June 28, 2013, Professor Patricia Cain published an op-ed entitled, *The Less Obvious Tax Consequences from the Fall of DOMA*, available at http://tax-prof.typepad.com/taxprof_blog/2013/06/cain.html. Professor David J. Herzig also took to TaxProfBlog to discuss the consequences of the DOMA decision in an op-ed entitled, "*DOMA Decisions*," available at <http://taxprof.typepad.com/files/tax-prof-blog-doma-op-ed.pdf>. Indeed, even Justice Scalia himself worried about the tax consequences of the decision, as he wrote in his dissenting opinion. *Windsor*, 133 S. Ct. at 2697 (Scalia, J., dissenting). Scalia hypothesizes two women who live in Alabama but travel to New York to get married, before returning home to Alabama. *Id.* at 2708. He then asks, "When the couple files their next federal tax return, may it be a joint one? Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)? (Does the answer depend on whether they were just visiting in Albany?) Are these questions to be answered as a matter of federal common law, or perhaps by borrowing a State's choice-of-

Ruling explaining the position it took regarding the case, which answered many questions for taxpayers whose lives were affected by the decision.⁴ Because the IRS announced that it would recognize same-sex marriages based on the state of celebration of the marriage rather than the state of residence of the taxpayer, the IRS has gone a long way towards ensuring fairness for same-sex taxpayers in the United States.⁵ However, because, as of this writing, only seventeen states in the United States (and the District of Columbia) recognize same-sex marriages, taxpayers in same-sex relationships who live in any of the remaining thirty-three states must travel to another state in order to celebrate a marriage that will be recognized for federal tax law purposes.⁶ For some taxpayers this requires traveling a great distance.⁷ For poor taxpayers, the costs associated with traveling for a wedding in another state may very well be prohibitive.⁸ This introduces a new kind

law rules? If so, *which* State's? And what about States where the status of an out-of-state same-sex marriage is an unsettled question under local law?" *Id.*

⁴ Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

⁵ "[T]he Service has determined to interpret the Code as incorporating a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile." *Id.* at 9.

⁶ States that currently recognize same-sex marriage are California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, and the District of Columbia. Masuma Ahuja et al., *The Changing Landscape on Same-Sex Marriage*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage> (last updated Mar. 23, 2014). Oregon currently recognizes same-sex marriages performed in other states but does not perform same-sex marriages within state boundaries. *Id.*; *Oregon Tax Information for Same-Sex Couples*, OR. DEP'T OF REV., <http://www.oregon.gov/dor/PERTAX/Pages/same-sex.aspx> (last visited Mar. 25, 2014). A federal judge in Virginia has held that state's same-sex marriage prohibition to be unconstitutional and a federal judge in Kentucky has held that the state must recognize out-of-state same-sex marriages. *Bostic v. Rainey*, No. 2:13cv395, 2014 WL 561978 (E.D. Va. Feb. 13, 2014); *Bourke v. Beshear*, No. 3:13-CV-750-H, 2014 WL 556729 (W.D. Ky. Feb. 12, 2014). Litigation is pending in both cases. Oral Argument Notification, *Bostic v. Schaefer*, No. 14-1167 (4th Cir. Mar. 20, 2014); Intervening Complaint and Petition for Declaratory and Injunctive Relief, *Bourke v. Beshear*, No. 3:13-CV-750-JGH, 2014 WL 834785 (W.D. Ky. Feb. 27, 2014).

⁷ Imagine a same-sex couple living in Miami, Florida. The closest state where that couple could get married is Maryland, approximately 950 miles away. Even more extreme is the example of a same-sex couple living in Anchorage, Alaska. That couple would have to travel to Washington State, a distance of 2300 miles.

⁸ Assuming the federal mileage rate is an accurate reflection of the cost of travel by car, the Miami couple hypothesized in note 7 would incur a travel cost of fifty-six cents per mile, for a total of \$532. In addition, this couple would incur at least some costs for lodging and food while traveling. The Anchorage couple would have mileage expenses

of unfairness into the tax system with regard to same-sex couples, since benefits available to middle- and upper-income taxpayers will be unavailable to their lower-income counterparts. In this essay, I propose that the Treasury Department enact regulations to allow taxpayers in same-sex relationships who live in states that do not recognize same-sex marriages to elect married status for federal income tax purposes. Such a regime has a precedent in the check-the-box elective regime with regard to pass-through entities in the corporate and partnership tax context.⁹ Allowing same-sex taxpayers to elect married filing jointly status on their federal tax returns, even if those taxpayers are unable to get married in their states of residence, will ensure that all taxpayers are entitled to the benefits that Congress intended to bestow on married couples and their families.

II. *UNITED STATES v. WINDSOR* AND REVENUE RULING 2013-17

In order to understand why the law leaves low-income taxpayers in same-sex relationships at an economic disadvantage in filing their federal income tax returns, this Part will begin by explaining the current state of the law with regard to same-sex marriage.

In 1996, in response to the possibility that the State of Hawaii might allow same-sex taxpayers to marry, the United States Congress and President Bill Clinton signed DOMA into law.¹⁰ DOMA created what had not previously existed: a federal definition of marriage as something that could only occur between one man and one woman.¹¹ During the seventeen years of DOMA's existence as federal law a number of states expanded their definitions of marriage to include same-

of \$1288, plus food and lodging. In both cases, flights for the couple would be significantly more expensive.

⁹ The check-the-box regulations were enacted by the Treasury Department in 1997 as Treas. Reg. § 301.7701-2 and -3.

¹⁰ DOMA was enacted as 110 Stat. 2419.

¹¹ Until the enactment of DOMA, there was no federal definition of marriage. Instead, federal laws that incorporated references to "marriage" or "spouse" made reference to the relevant state law. States had historically been seen as the appropriate source of law regarding domestic issues like this one. However, Section 3 of DOMA stated that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 570 U.S. ___, 133 S. Ct. 2675 (2013).

sex marriages in addition to opposite-sex marriages.¹² However, for federal purposes, including, importantly for the subject of this essay, for federal tax purposes, none of these same-sex marriages were recognized.¹³ As a result, same-sex couples who were married for state law purposes were still required to file on their federal tax law returns as single tax payers.¹⁴

Thea Spyer and Edith Windsor, the plaintiffs in *United States v. Windsor*, were married in Canada in 2007.¹⁵ They lived in New York

¹² The following states came to recognize same-sex marriages in the years before the *Windsor* decision: Massachusetts, 2004; Connecticut, 2008; California, 2008; Iowa, 2009; Vermont, 2009; New Hampshire, 2010; New York, 2011; Maine, 2012; Washington, 2012; Maryland, 2013. Ahuja et al., *supra* note 6.

¹³ Until the enactment of DOMA, the federal government made reference to state law in order to determine the consequences of federal laws that made reference to “spouse.” See 28 U.S.C. § 1738 (2012) (“Acts, records and judicial proceedings or copies thereof . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”). But DOMA explicitly denied married treatment under federal law to any same-sex couples, even if they were married for state law purposes. See 28 U.S.C. § 1738C (2012) (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . .”), *invalidated by Windsor*, 133 S. Ct. 2675.

¹⁴ As a technical matter, these taxpayers had to complete two federal tax returns. See, e.g., *TIR 04-17: Massachusetts Tax Issues Associated with Same-Sex Marriages*, MASS. DEP’T OF REV., <http://www.mass.gov/dor/businesses/help-and-resources/legal-library/tirs/tirs-by-years/2004-releases/tir-04-17-massachusetts-tax-issues-associated.html> (last visited Mar. 25, 2014). For example, because they were married for state law purposes, and because Massachusetts state tax law bases the state tax return on the federal tax return, a same-sex couple married in Massachusetts was required to complete a married filing jointly tax return in order to complete their Massachusetts state return. *Id.* However, because they were not treated as married for federal tax purposes, the taxpayers could not file that joint return with the federal government. *Id.* Instead, they had to complete unmarried individual federal tax returns and file those. *Id.* Of course, now that the federal government recognizes same-sex marriages that are often not recognized by the state of residency, many taxpayers will find themselves in the opposite situation, required to file their federal returns jointly while also completing a mock unmarried federal return in order to properly complete their state tax returns. See, e.g., Blake Ellis, *Same-Sex Couples Still Face Tax Nightmares*, CNN MONEY (Mar. 5, 2014), <http://money.cnn.com/2014/03/05/pf/taxes/same-sex-taxes> (A Kansas same-sex couple’s “accountant will need to fill out a total of five returns — two separate state returns, one joint federal return, and two separate federal returns that won’t actually get filed to the government but will be used to calculate individual state liabilities.”).

¹⁵ *Windsor*, 133 S. Ct. at 2689.

State, where their marriage was recognized for state law purposes.¹⁶ When Thea Spyer died, she left the entirety of her estate to her wife, Edith Windsor.¹⁷ The estate tax return filed by Spyer's estate did not claim the marital deduction, as the marriage was not recognized for federal tax purposes.¹⁸ After paying \$363,053 in federal estate taxes, Windsor, as executor of Spyer's estate, brought the refund claim that resulted in this suit.¹⁹

In his majority opinion in *Windsor*, Justice Anthony Kennedy struck down Section 3 of DOMA, which had defined marriage for federal law purposes.²⁰ With the striking down of the federal definition of marriage, federal law would again make reference to state law in determining whether or not individuals were married.²¹ While this might have seemed straightforward for same-sex couples living in states that recognized their marriages, commentators immediately raised concerns that same-sex couples who had been married in states that recognized their marriages, but who lived in non-recognizing states, would be left out of the changes brought about by the *Windsor* decision.²²

In response to these concerns, and in order to clarify its position, the IRS issued Revenue Ruling 2013-17 on September 30, 2013.²³ In the Revenue Ruling, the IRS explained that it would use the "state of celebration" rule in order to determine whether or not taxpayers were married for federal tax purposes.²⁴ In other words, if a same-sex couple lives and marries in a state where their marriage is recognized, and then move to a state where their marriage is not recognized, they will still be married for federal tax purposes.²⁵ Similarly, if a same-sex couple lives in a state that will not recognize their marriage, but travels to another state to get married, then, even though they continue to live in the non-recognizing state, their marriage will be recognized for federal tax purposes.²⁶

¹⁶ *Id.* at 2683 ("The State of New York deems their Ontario marriage to be a valid one.").

¹⁷ *Id.* at 2682.

¹⁸ *Id.* at 2683.

¹⁹ *Id.*

²⁰ *Id.* at 2696.

²¹ *Id.* at 2692.

²² See Cain, *supra* note 3; Herzig, *supra* note 3.

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

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

The 2003 introduction of same-sex marriage in Massachusetts was not the first incongruity between states' various definitions of marriage.²⁷ State laws have historically differed with regard to the age of consent, the level of consanguinity permitted between married people, and the recognition of common-law marriages.²⁸ As long as these differences have existed, the federal government has had to determine what definition of marriage it will recognize for federal purposes.²⁹ The IRS's position in Revenue Ruling 2013-17 is consistent with the historic position the IRS has taken with regard to the definition of marriage.³⁰ In Revenue Ruling 58-66, the IRS explained that common-law marriages recognized by a taxpayer's state of residence would also be recognized for federal tax purposes.³¹ Further, if a couple had attained common law marriage status in one state (the ironically named "state of celebration"), and then moved to another state where that marriage was not recognized at the state level, that couple would still be married for federal tax law purposes.³² Revenue Ruling 2013-17 was merely an extension of that theory, recognizing, for federal tax purposes, same-sex marriages performed in states that permitted them.³³

²⁷ Same-sex marriage began to be recognized in Massachusetts in 2004 as a result of the Massachusetts Supreme Judicial Court decision *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003).

²⁸ Compare ARK. CODE ANN. § 9-11-106(a) (West 2014) ("All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, and between uncles and nieces, and between aunts and nephews, and between first cousins are declared to be incestuous and absolutely void." (emphasis added)), with IND. CODE § 31-11-1-2 (2014) ("Two (2) individuals may not marry each other if the individuals are more closely related than second cousins. However two (2) individuals may marry each other if the individuals are: (1) first cousins; and (2) both at least sixty-five (65) years of age."). As of this writing, no state has a statute authorizing the recognition for state law purposes of common-law marriage. However, many states previously permitted the creation of common law marriages, and the current law recognizes those previously established marriages. See, e.g., 23 PA. CONS. STAT. §1103 (2014) ("No common-law marriage contracted after January 1, 2005, shall be valid. Nothing in this part shall be deemed or taken to render any common-law marriage otherwise lawful and contracted on or before January 1, 2005, invalid.")

²⁹ Section 7703 of the Tax Code only makes reference to the term "married," but does not clarify in the regulations which state law should apply to a taxpayer. See 26 U.S.C. § 7703 (2014).

³⁰ Patricia A. Cain, *Taxation of Same-Sex Couples After United States v. Windsor: Did the IRS Get it Right in Revenue Ruling 2013-17?*, 6 ELON L. REV. ____ (2014).

³¹ Rev. Rul. 58-66, 1958-1 C.B. 60.

³² *Id.*

³³ Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

III. LIFE AFTER REV. RUL. 2013-17

While the IRS's response to *Windsor* expands the rights of same-sex couples with regard to the federal income tax rules, there is still a significant number of U.S. taxpayers who are unable to take advantage of Revenue Ruling 2013-17.³⁴ As explained above, the IRS's position beginning with returns filed for the 2013 tax year is that same-sex couples whose marriages were celebrated in one of the seventeen states that recognize those marriages *must* file as married.³⁵ This is a relatively expansive position, as it permits same-sex couple taxpayers living in one of the thirty-three non-recognizing states to file as married, as long as they travel to a recognizing state to have a marriage ceremony. However, for lower-income taxpayers, the burden of traveling to a recognizing state in order to have a marriage ceremony might very well be financially insurmountable. The states that currently recognize same-sex marriages tend to be clustered along the coasts.³⁶ For taxpayers deep in the middle of the country, or in Alaska, Texas, or south Florida, traveling to a state where they could have a same-sex marriage ceremony would require hundreds, if not thousands, of dollars in gasoline, airline tickets, hotels, and other traveling costs.³⁷ This could very well prove prohibitive for many people. Therefore, a same-sex couple living in a non-recognizing state who cannot afford to travel to a recognizing state in order to celebrate their marriage will not be able to avail themselves of the federal government's expansive approach to filing status, as elaborated in Revenue Ruling 2013-17. Having never celebrated a recognized marriage, these taxpayers cannot file as married for federal tax purposes.³⁸

IV. MARRIAGE BONUS AND MARRIAGE PENALTY

The combination of graduated tax rates and larger tax brackets for married couples results in a strange phenomenon in the United States' tax system. Depending on an individual taxpayer's income level, marital status, and the income level of her spouse, that taxpayer may experience either a marriage bonus or a marriage penalty on her federal income taxes.³⁹ Consider the following example, using 2014

³⁴ *Id.*

³⁵ *Id.*

³⁶ Ahuja et al., *supra* note 6.

³⁷ For hypothetical calculations of these amounts, see *supra* note 8.

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

³⁹ In each of these scenarios I assume that the married taxpayers are filing with the status of married filing jointly. Although it is technically true that married taxpayers can

tax rates and brackets: Assume a married couple, A and B. In the first example, A and B each earn \$125,000. If they choose married filing jointly as their tax filing status,⁴⁰ their incomes will be combined on their joint return, and their marginal tax rate will be thirty-three percent. This will result in a tax liability of \$58,404.50.⁴¹ However, if A and B are unmarried and each file their tax returns as single, unmarried, then each will be in the twenty-eight percent tax bracket, resulting in a tax liability of \$28,175.75 each, for a total of \$56,351.50 in tax.⁴² That's a \$2,053 penalty for getting married. But not every couple experiences a marriage penalty. In fact, some taxpayers are the beneficiaries of a marriage bonus.⁴³ Assume a married couple, C and D. Assume further that C earns \$250,000, while D has no income. Just like A and B, if C and D file their tax returns jointly, their tax liability will be \$58,404.50.⁴⁴ However, if C and D are unmarried, then C must report the entire \$250,000 of income on her individual return, while D will have no income, and therefore no tax liability. C's individual tax liability on \$250,000 of income would be \$66,358.25.⁴⁵ That results in a tax savings of \$7,953.75 merely for getting married.

The foregoing examples demonstrate that it is not always financially advantageous, from a tax perspective, for individuals to get married. The examples I use above focus on higher-income taxpayers, however, at the lower-income levels marriage has additional affects on taxpayers. The Earned Income Tax Credit (the "EITC") is one of the

choose between filing jointly or filing as married filing separately, in almost every circumstance taxpayers get a worse tax result by filing as married filing separately. See Steven C. Thompson & Randall K. Serrett, *Tax Returns Offer Distinct Advantages—Generally*, 68 PRAC. TAX STRATEGIES 158, 158 (2002).

⁴⁰ Married couples may elect to use the status married filing separately, however taxpayers almost always get a better tax result filing jointly.

⁴¹ In order to simplify these calculations I have assumed that these taxpayers actually have taxable income of \$125,000. In reality, \$125,000 of income would result in significantly less taxable income, due to deductions and personal exemptions available to the taxpayers. Using the tax rates in place under 26 U.S.C. § 1 results in the following calculation for married taxpayers filing jointly: Tax liability = $\$50,765 + 33\%(250,000 - 226,850) = \$58,404.50$. 26 U.S.C.A. § 1 (West 2013).

⁴² Using the tax rates in place under 26 U.S.C. § 1 results in the following calculation for unmarried taxpayers $\$18,193.75 + 28\%(125,000 - 89,350) = \$28,175.75 \times 2$ (for two taxpayers) = \$56,351.50.

⁴³ See, e.g., Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 788-89 (1996).

⁴⁴ *Supra* note 41.

⁴⁵ Using the tax rates in place under 26 U.S.C. § 1 results in the following calculation of C's tax liability = $\$45,353.75 + 33\%(250,000 - 186,350) = \$66,358.25$.

largest redistributive schemes in the United States aimed at low-income working families.⁴⁶ While in certain circumstances two working taxpayers would reduce the amount of EITC they qualify for by getting married, in other circumstances getting married will increase the amount of EITC the family qualifies for, increase the amount of income the family can earn and still get the EITC, or both.⁴⁷ In addition, the income tax brackets, even at the lowest income levels, are larger for married couples who file jointly than for single taxpayers.⁴⁸ As a result, the same “marriage penalty” described above with the example of high-income taxpayers could apply to low-income taxpayers.⁴⁹ Also, medical costs or other deductible expenses incurred by one member of the couple are only deductible by the other member if the couple is married for federal tax purposes.⁵⁰ So if a couple is not married for federal tax purposes, and only one member of the couple earns income, then the other member’s expenses cannot be deducted by the income-earning taxpayer, even though the income-earner is likely paying the expenses.

I include the above examples in order to demonstrate that, in many cases, lower-income taxpayers receive better federal tax results by filing their federal returns as married filing jointly. However, under current law, for same-sex couples to file with this status, they must have a marriage ceremony celebrated in a state that recognizes their marriage.⁵¹ This will, in certain circumstances, be impossible for these taxpayers. Because Congress has written the tax laws in order to offer economic benefits to couples who are married for federal tax purposes, those laws should not prevent low-income same-sex couples

⁴⁶ For a discussion of the mechanics of the EITC, policies related to its enactment and continued existence, and proposals for the future, see Jennifer Bird-Pollan, *Who’s Afraid of Redistribution: An Analysis of the Earned Income Tax Credit*, 74 Mo. L. Rev. 251 (2009).

⁴⁷ In 2014 the income cap for taxpayers with three or more children receiving the EITC is \$46,997, unless the filing status is married filing jointly, in which case the cap rises to \$52,427. 26 U.S.C. § 1 (2012). Again, this increase in the income cap on EITC filing is a benefit only available to married taxpayers, and can be especially meaningful in a family where only one taxpayer works. If a same-sex couple live in a state where they cannot get married, cannot afford to travel to another state to get married, and if one person in the couple earns \$50,000, then that family will not be entitled to *any* EITC. Merely getting married, and changing nothing else about their economic or tax situation, would allow them to qualify for the EITC.

⁴⁸ 26 U.S.C. § 1 (2012).

⁴⁹ See *supra* note 40 and accompanying text.

⁵⁰ 26 U.S.C. § 35 (2012).

⁵¹ Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

from receiving those benefits because they do not have the financial means to travel to a state where they could get married.⁵² This would necessarily exclude a needy segment of the population that will not be able to avail themselves of these tax advantages without some other option.

V. CHECK-THE BOX IN BUSINESS ENTITY TAXATION

The world of same-sex marriages is not the first time that inconsistencies in state law have caused complications in federal tax law. U.S. federal income tax law taxes business entities based on their organizational structure.⁵³ Entities that are organized as corporations are taxed at the corporate level,⁵⁴ while entities that are taxed as partnerships are treated as pass-through entities and taxed at the partner level.⁵⁵ As with the federal treatment of marital status, the classification of an entity as a corporation for federal tax purposes is a determination that happens, for the most part, as a matter of state law.⁵⁶ However, federal tax law goes further than state incorporation law. Historically, tax law has looked to the characteristics of unincorporated entities in order to determine whether or not they should be treated as corporations for federal tax purposes.⁵⁷ In response to these federal rules, states began creating new entity categories that would give business owners corporate-like limited liability, but had sufficient partnership-like characteristics to qualify as pass-through entities for federal tax purposes.⁵⁸ For many years, courts heard cases about whether a particular entity was

⁵² There is certainly some debate regarding how intentional the benefits available to married couples are. For purposes of this essay it is enough to note that those benefits *are* actually available to married couples through the tax code.

⁵³ See generally Classification of Certain Business Entities, 26 C.F.R. § 301.7701-3 (2013).

⁵⁴ 26 U.S.C. § 11 (2012).

⁵⁵ 26 U.S.C. § 701 (2012).

⁵⁶ 26 U.S.C. § 7701 (2012).

⁵⁷ Heather A. Field, *Checking in on "Check-the-Box,"* 42 LOY. L.A. L. REV. 451, 458 (2009) ("Prior to the CTB regulations, the classification of a business entity as a corporation, on one hand, or a partnership or trust, on the other hand, depended on the extent to which the entity resembled a corporation.").

⁵⁸ "In 1977, in an effort to develop a vehicle that provided owners corporate-like protection from liability for the entity's debts while attempting to achieve pass-through tax treatment under the Kintner regulations, the Wyoming legislature enacted the country's first legislation authorizing LLCs. LLCs combined very desirable characteristics – limited liability for all members, partnership features such as dissolution at will and lack of free transferability, and members' ability to participate in control without risking loss of their limited liability.'" *Id.* at 460 (citing Larry E. Ribstein, *LLCs: Is the Future Here?*, BUS. L. TODAY, Nov./Dec. 2003, at 11).

more partnership-like or more corporate-like, and the IRS spent significant money and time examining such entities.⁵⁹ Ultimately, given the variety of options available to individuals forming business entities, the IRS determined that an entity's tax status was elective.⁶⁰ Finally, in 1997, the U.S. Treasury Department issued the so-called "check-the-box" regulations allowing most (but not all) entities to elect their tax-filing status.⁶¹

This federal change allowed taxpayers to form business entities under whatever state provision gave them the most favorable state law treatment, and then elect the federal tax treatment that gave them the best tax result. The check-the-box regulations reflect a decision by the Treasury Department to take a classification that had historically rested in the hands of the states, where the options available to taxpayers differed based on what state a taxpayer lived in, and turn the classification into a federal tax law election.

Perhaps now the next step in my argument seems clear – same-sex couples living in states that do not permit them to attain the status "married" are in the same situation as taxpayers who, before the enactment of the check-the-box rules, could not organize a business entity in the way they wanted and still get the tax treatment they preferred. The solution is the same as well – allow affected taxpayers living in non-recognizing states to elect the desired tax status.

VI. ELECTIVE MARITAL STATUS FOR SAME-SEX COUPLES

The Treasury Department should enact regulations allowing same-sex couples to elect to be taxed as married filing jointly if they live in a state that does not recognize their marriage. One of the first things to note is that this solution is likely to be only needed for the relatively short-term. Just as, over the years, more and more states enacted business entity laws authorizing the organization of Limited Lia-

⁵⁹ *Id.* at 461-62.

⁶⁰ While tax status was not truly elective before the enactment of the check-the-box rules, individuals looking to organize a new business entity could examine the variety of state law choices available to them and choose to organize their business in a state that would give them the tax status and business law protection that they were looking for.

⁶¹ T.D. 8697, *Treas. Dec. Int. Rev.* 1997-1 C.B. 215. Even under the new more permissive regulations, business entities that were incorporated under the law of any state or any foreign government were not entitled to elect pass-through treatment. *See* Field, *supra* note 57, at 465.

bility Companies,⁶² more and more states are recognizing same-sex marriages.⁶³ It is very likely only a matter of time before all fifty states will recognize same-sex marriages. However, it is not acceptable to wait for those states to act while same-sex couples who do not have access to marriage are denied the tax benefits that Congress intended to provide to married couples. Allowing same-sex couples to elect to be treated as married for federal tax purposes would allow same-sex couples to claim all of the tax benefits available to their opposite-sex counterparts.

A. *Mechanics of the Proposal*

Current tax law requires couples who are married for state law purposes to file their federal income tax returns as married (either jointly or separately).⁶⁴ With the federal definition of marriage in DOMA eliminated as a result of the *Windsor* decision, same-sex couples who celebrate a marriage in any state (or foreign country) that recognizes that marriage must file jointly as well.⁶⁵ Under my proposal, the Treasury Department would issue regulations permitting same-sex couples to elect married filing jointly status. Just like the check-the-box regulations for business entities, this scheme would require no statutory changes. Instead, taxpayers would file an election form with the IRS, and then would file their individual income tax returns using the filing status married filing jointly.⁶⁶ This would bring with it the joint and several liability obligation of joint filing, as well as all other joint filing rights and obligations.⁶⁷ Nothing else would change about the returns, although perhaps, going forward, the IRS would request that taxpayers include a copy of their election form with their return.⁶⁸

⁶² The first LLC statute was enacted in Wyoming in 1977 as Wyoming Statute Section 17-29-101. *See* WYO. STAT. ANN. § 17-29-101 (West 2014). Other states quickly followed suit. As of 1996, all fifty states had legislation permitting the organization of LLCs.

⁶³ *Supra* note 6 (discussing the current status of same-sex marriage in the fifty states).

⁶⁴ I.R.S. Notice 2013-72.

⁶⁵ *Id.*

⁶⁶ Currently, business entities wishing to elect a tax status other than their default status under the Treasury Regulations file Form 8832 with the IRS. Once filed, the election remains in place for all future tax years, unless the entity files to have the status revoked.

⁶⁷ For a detailed discussion of the consequences of joint filing status, see Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do with Federal Tax Filing?*, 11 NEV. L.J. 718 (2011).

⁶⁸ This requirement would move beyond the requirements in place for opposite-sex married couples who are, in fact, *never* required to prove their marriages to the IRS with their returns. On audit the IRS may request proof of marriage, but opposite taxpayers

B. Potential Objections

While this proposal would go a long way towards creating more fairness in the federal tax system, there are potential objections to the project as well. In the following section I consider these objections and provide my responses to each of them.

One of the first questions that would arise in this scenario is who would be eligible to elect this status. Could same-sex couples who lived in states that would recognize their marriage elect married filing jointly status, without actually getting married, in order to avoid the other burdens and responsibilities that come with state-recognized marriage? Could same-sex couples who are, in fact, married elect to file singly, if that gives them a better tax result? In response to questions like these, my proposed elective scheme would mirror the business entity check-the-box rules. Under the regulations, entities that are actually incorporated under state law may not elect pass-through tax status.⁶⁹ In addition, entities that are publicly traded, or that have more than 100 shareholders or partners, are not entitled to claim pass-through status.⁷⁰ Similarly, under this proposal couples who are *actually* married under any state law or under the law of a foreign country would not be entitled to change their status for federal tax purposes. In addition, if the taxpayers live in a state that recognizes same-sex marriage, then those taxpayers would not be eligible to make the election. Since the goal of the proposal is to increase access to the tax benefits of marriage to those who cannot marry within their home states, allowing unmarried same-sex couples who live in recognizing states to make the election does not advance this goal.⁷¹ Finally, because the proposal focuses on allowing lower-income taxpayers to get the benefits of same-sex marriage without incurring the expense of traveling to a state that performs same-sex marriages, the Treasury Regulations could impose an income cap on couples making the election. While this is not necessary to the proposal, it also does not violate the

who get married during a tax year file as married on that year's return without providing any proof that they actually got married during the year.

⁶⁹ 26 U.S.C. § 1 (2012).

⁷⁰ Treas. Reg. § 301.7704-1.

⁷¹ The regulation could also include a self-destruct function, so that when all fifty states recognize same-sex marriage, the provision will be eliminated.

intention of the proposal, and so inclusion of this provision would be consistent with the other elements of the proposal.⁷²

Another objection to this proposal might be that taxpayers could elect married filing jointly status merely for the tax benefits, without actually having a relationship that would count as marriage. Of course this is a possibility for savvy taxpayers, but the same tax-gaming option is available to opposite-sex couples or same-sex couples who live in states where they are able to get married.⁷³ Unlike in immigration law, tax law does not inquire into the legitimacy of a marriage before granting married filing jointly tax status.⁷⁴ Taxpayers can get married purely for the tax benefits and still receive those benefits.⁷⁵ And taxpayers who are able to get legally married might choose not to do it, if it would increase their tax burden.⁷⁶ The same would be true here, where taxpayers could analyze what filing status gives them the best result, and then determine whether or not to elect to be treated as married for tax purposes. While it is true that the election to be treated as married for federal tax purposes might entail less of a commitment than a legally recognized marriage, and therefore we might be more concerned that taxpayers would try to game the system, receiving tax benefits to which they wouldn't otherwise be entitled, this concern seems small compared to the benefits of enacting such a plan. Because taxpayers would be tied to the person they elect to be treated as married to, for federal tax purposes, this would not be a decision to be made lightly.⁷⁷

⁷² An income cap may just add a level of complexity that is unnecessary in this proposal. Because the regulation will likely remain in place only temporarily (until all states recognize same-sex marriage), keeping it simple seems important.

⁷³ I.R.S. Notice 2013-72.

⁷⁴ In the granting of green cards on the basis of marriage, the federal government inquires into the legitimacy of the marriage before granting the green card. 8 U.S.C. § 1151 (b)(2)(A)(i) (2012).

⁷⁵ Marriage is defined in the Tax Code in section 7703. See 26 U.S.C. § 7703 (2014). There is no reference to any characteristics of the marriage, other than the issuance of a state marriage license.

⁷⁶ Taxpayers who earn similar incomes usually suffer a tax penalty when they get married. Because their salaries are added together, their combined income will usually reach into a higher tax bracket than either of their individual incomes did before they were married. For a further discussion of this, see *supra* note 41 and accompanying text.

⁷⁷ When taxpayers sign their annual tax returns they affirm that all the information included in the return is true and accurate. In addition to this obligation, the obligation of joint and several liability might make taxpayers think twice before tying their tax lives to another person merely for a tax benefit.

A related concern might center on the argument that a tax-elected “marriage” does not come with any of the responsibilities and obligations that a “real” marriage requires. Of course this would be literally true – electing to be treated as married for federal tax purposes would not affect spousal obligations, support rights, or any other state family law issue implicated by marriage. However, this is not really an objection to the proposal, since the justification for joint filing is not tied to the burdens and benefits of marriage, but stems from a history of conflicting state property laws.⁷⁸ Offering tax benefits to same-sex couples who elect to be treated as married would not violate any inherent connection between the burdens of marriage and the benefits of this particular tax status. Such a connection does not exist.

The final concern when creating a new filing regime like this one, that indefinitely connects taxpayers in an important financial way, is to ask what approach to take if, as often occurs, the relationship ends, and the taxpayers no longer wish to file their federal tax returns jointly. Would the regime require taxpayers to continue to file jointly, even when their relationship had ended? No such obligation faces couples who are able to legally marry and file joint tax returns as a result.⁷⁹ Instead, once the marriage is dissolved, the obligation, indeed, the *right* to file jointly, dissolves as well.⁸⁰ Divorced taxpayers may not file jointly with their ex-spouses, so clearly the ability to end this relationship must be a part of this new elective status as well.⁸¹ In just the way that much of this proposal is based on the check-the-box regime, the business entity election provides guidance with regard to the end of the election as well. While the Treasury Department sought to create more taxpayer freedom by enacting the check-the-box regulations, there was also concern that with no restrictions on the ability of taxpayers to change their elections, the IRS would be overwhelmed with taxpayers constantly switching their status from pass-through entity to corporation or vice versa, depending on which status gave the better tax result in a particular tax year.⁸² In response to this concern,

⁷⁸ The original married filing jointly tax status in the United States was enacted by Congress in 1948 as a response to the Supreme Court case of *Poe v. Seaborn*, 282 U.S. 101 (1930). For a further discussion of the history of joint filing and for an argument regarding why joint filing should not be seen as a “reward” for taking on the responsibilities of marriage, see Shari Motro, *The New “I Do,”* 91 IOWA L. REV. 1509 (2005).

⁷⁹ 26 U.S.C. § 7703(a)(1) (2014).

⁸⁰ *See id.*

⁸¹ *See id.*

⁸² *See* Field, *supra* note 57, at 503.

the final check-the-box regulations contained a restriction allowing entities to change their election only once every sixty months.⁸³ A rule like this might work well for business entities, but does not seem to allow the kind of fluidity of relationships that might be necessary for human life. Instead, the original election made by a taxpayer should apply to all tax years going forward, after the year of the election. However, taxpayers should also be allowed to submit another election reversing the original election, and changing the taxpayers' statuses back to single. While there may be some abuse in electing in and out of this special tax status, the best rule would permit reversal of the election without question. However, if a taxpayer who once elected to be treated as married to her same-sex partner, has then dissolved that election, and then attempts to file another election, either with the same partner or with another person, the election should be scrutinized to determine the legitimacy of the election.⁸⁴ In the first instance, the scrutiny should not be severe, since generally taxpayers who divorce and get remarried (even many times) do not face scrutiny of their subsequent marriages by the IRS.⁸⁵ However, repeated elections and dissolution of the elections might raise suspicion of tax fraud, in which case either the election would be denied, or a fine would be imposed.

VII. CONCLUSION

The future of same-sex marriage in the United States seems clear. While same-sex marriages now occur in seventeen states, proposed legislation and litigation regarding same-sex marriage is under way in many other states.⁸⁶ It is only a matter of time before same-sex marriage will have the same status as opposite-sex marriage in all fifty states. In the meantime, the IRS has tried to increase same-sex couples' access to federal benefits by recognizing all same-sex mar-

⁸³ Treas. Reg. § 301.7701-3(c)(1)(iv). For a more detailed discussion of this limitation, see Field, *supra* note 57.

⁸⁴ A similar approach applies in the case of married couples. In many cases taxpayers suffer from a so-called "marriage penalty," and one couple discovered a clever solution to this problem. Each year, before December 31, the couple traveled to a Caribbean island (Haiti and the Dominican Republic) in order to get divorced, and then would get remarried in the new year once they had returned home to the U.S. By their calculations, their tax savings by filing as unmarried covered the cost of their island trips. The Fourth Circuit applied the sham transaction doctrine and held that the couple was married for tax purposes. *Boyter v. Commissioner*, 668 F.2d 1382 (4th Cir. 1981).

⁸⁵ *Id.*

⁸⁶ *Supra* note 6.

riages celebrated in a recognizing state, even if the taxpayers live in a state that does not recognize their marriage.⁸⁷ While this goes a long way towards creating an equal system, there are many taxpayers who will still not be able to access these benefits. For many people, the costs associated with a trip to another state, where a same-sex marriage could be celebrated, are prohibitive. Without another option, these taxpayers will be left out of the federal tax benefits of marriage until their resident states change the law. My proposal increases fairness by allowing taxpayers in same-sex relationships who live in states that do not allow them to get married to elect to be treated as married for federal tax purposes. This change goes some way towards improving the situation for same-sex couples while we wait for national equality.

⁸⁷ Rev. Rul. 2013-17, 2013-38 I.R.B. 201.