

## BIG (GAY) LOVE: HAS THE IRS LEGALIZED POLYGAMY?\*

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*If the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything.*

—*Sen. Rick Santorum*<sup>1</sup>

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1. Alan Cooperman, *Santorum Angers Gay Rights Groups*, WASH. POST, Apr. 22, 2003, at A4 (quoting then-U.S. Senator Rick Santorum).

## INTRODUCTION

Bigamy and polygamy are perennial participants in the parade of horrors organized by opponents of LGBT rights.<sup>2</sup> To halt this parade, LGBT rights supporters argue that same-sex marriage is different from—and will *not* lead to—plural marriage.<sup>3</sup> The purpose of this advocacy is to open the door to marriage just enough to allow same-sex couples to enter—and then to quickly close the door before any of the participants in the parade of horrors can slip in behind them. Notwithstanding their efforts, it seems that LGBT rights supporters inadvertently left the door open just a crack.

If some commentators are correct, the Internal Revenue Service (IRS) may have unwittingly recognized plural marriage in its initial guidance<sup>4</sup> implementing the U.S. Supreme Court's decision in *United States v. Windsor*,<sup>5</sup> which struck down section three of the federal Defense of Marriage Act (DOMA).<sup>6</sup> According to these commentators, the IRS will now recognize any same-sex marriage that complies with the legal formalities of a state that permits same-sex couples to marry, regardless of its validity in the couple's state of domicile. This interpretation put a foot in the door to marriage, swinging the door back open and creating the possibility of dual status marriages—that is, ones that are invalid under state law but

2. *E.g.*, Brief of Amicus Curiae Liberty Counsel in Support of Respondent Bipartisan Legal Advisory Group of the U.S. House of Representatives (Merits Brief) at 45, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 390994, at \*45; Brief Amicus Curiae of U.S. Conference of Catholic Bishops in Support of Respondent Bipartisan Legal Advisory Group, Addressing the Merits, and Supporting Reversal at 13–14, 20, *Windsor*, 133 S. Ct. 2675 (No. 12-307), 2013 WL 1780814, at \*13–14, 20.

3. *E.g.*, Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1958 n.8, 1979–86 (2010); Jeffery L. Bineham, *Marriage Equality Is Not a Slippery Slope*, MINNPOST (Oct. 29, 2012), <http://www.minnpost.com/community-voices/2012/10/marriage-equality-not-slippery-slope>; William Saletan, *Don't Do Unto Others: The Difference Between Gay Marriage and Polygamy*, SLATE (Mar. 23, 2006, 12:45 AM), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2006/03/dont\\_do\\_onto\\_others.html](http://www.slate.com/articles/health_and_science/human_nature/2006/03/dont_do_onto_others.html); *see also* *Would Gay Marriage Lead to Polygamy?*, NAT'L PUB. RADIO (May 31, 2012, 12:00 PM), <http://www.npr.org/2012/05/31/154064922/would-gay-marriage-lead-to-legal-polygamy>.

"Plural marriage," like "polygamy," is a "gender-neutral term for marriages with multiple spouses, regardless of the gender combination." Davis, *supra* note 3, at 1966. Because the term "plural marriage" covers marriages to multiple spouses without reference to a specific number, I use it here as embracing both bigamy and polygamy.

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

5. 133 S. Ct. 2675 (2013).

6. *Id.* at 2696.

recognized for federal tax purposes—and thus to the potential recognition of plural marriage under the federal tax laws.

This essay builds upon my earlier work analyzing the shortcomings of the IRS's implementation of the *Windsor* decision.<sup>7</sup> The Secretary of the Treasury promised that Revenue Ruling 2013-17 would provide “certainty and clear, coherent tax-filing guidance” for same-sex couples.<sup>8</sup> To the contrary, I have explained that the ruling “provides no more than the same veneer of clarity that DOMA did, as it leaves important questions unanswered, lays traps for the unwary, creates inequities, and entails unfortunate (and, hopefully, unintended) consequences.”<sup>9</sup> Given the impossibility of finding a fair and workable solution for addressing the tax treatment of same-sex couples until same-sex marriage is recognized in every state, I have argued that the time is ripe to reconsider proposals to abandon the treatment of the married couple as a taxable unit in favor of an individual tax return filing system that recognizes and values all personal relationships.<sup>10</sup> In this essay, I extend that analysis by explaining how ambiguity in Revenue Ruling 2013-17 opens the door to recognizing plural marriage for federal tax purposes—a result that is as problematic as it is (in all likelihood) unintended.

The remainder of this essay is divided into four parts. Part I summarizes the relevant section of Revenue Ruling 2013-17, explaining both my own interpretation of it and reaction to that interpretation (what I will refer to as the “alternative interpretation”). It is the alternative interpretation of the ruling that opens the door to recognizing plural marriage for federal tax purposes. Part II explains how a subset of marriages that would be recognized for federal tax purposes under the alternative interpretation would be void under state law (until such time as the relevant state-level defense of marriage act is repealed or ruled unconstitutional), creating the possibility that taxpayers might (either purposefully or inadvertently) enter into plural marriages that are all recognized for federal tax purposes even though they are all invalid

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7. Anthony C. Infanti, *The Moonscape of Tax Equality*, 108 NW. U. L. REV. COLLOQUY 110 (2013), <http://colloquy.law.northwestern.edu/main/2013/10/the-moonscape-of-tax-equality.html>.

8. Annie Lowrey, *IRS to Recognize Gay Couples, Regardless of State Measures*, PITTSBURGH POST-GAZETTE, Aug. 30, 2013, at A6 (quoting Treasury Secretary Jacob Lew) (internal quotation marks omitted).

9. Infanti, *supra* note 7, at 118.

10. *Id.* at 128–29.

under state law (and therefore avoid state criminal prohibitions against plural marriage). Part III dissects the flaws in the alternative interpretation. It explains why the alternative interpretation is unlikely to withstand scrutiny when challenged and how the inevitable challenges will only exacerbate the uncertainty that continues to surround the tax treatment of same-sex couples post-*Windsor*. The essay then closes with brief concluding remarks.

### I. REVENUE RULING 2013-17

From 1996 until 2013, section three of DOMA provided that, for purposes of federal law, “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.”<sup>11</sup> The practical effect of this provision was to treat same-sex couples as legal strangers under federal law, even if they were treated as married under state law. For example, for federal tax purposes, same-sex couples who were married under state law (or who had entered into legally equivalent civil unions or domestic partnerships) were prohibited from filing joint federal income tax returns,<sup>12</sup> from transferring property to each other free of tax,<sup>13</sup> and from excluding from gross income the value of fringe benefits provided to a spouse.<sup>14</sup>

On June 26, 2013, a sharply divided Supreme Court invalidated section three of DOMA.<sup>15</sup> The Court held that section three “is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.”<sup>16</sup> Following this decision, the federal government scrambled to issue guidance to

11. Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013).

12. I.R.C. § 6013 (2012).

13. *Id.* §§ 1041, 2056, 2523.

14. *E.g., id.* §§ 105(b), 106, 132(h)(1)–(2), 132(j)(4), 132(m)(1); Treas. Reg. § 1.106-1 (1960). An employee’s same-sex partner who also qualified as the employee’s dependent did qualify for an exclusion from gross income for certain—but not all—of these fringe benefits. *Compare* I.R.C. §§ 132(h)(1)–(2), 132(j)(4) (including only dependent children), *with* I.R.C. §§ 105(b), 106; Treas. Reg. § 1.106-1; Prop. Treas. Reg. § 1.106-1, 72 Fed. Reg. 46,421 (Aug. 20, 2007) (together covering any qualifying dependent).

15. *See generally* United States v. Windsor, 133 S. Ct. 2675 (invalidating section three of DOMA).

16. *Id.* at 2696.

married same-sex couples on the application of federal law to their relationships.<sup>17</sup> Departing from its past practice of issuing to same-sex couples only guidance with no precedential value,<sup>18</sup> the IRS issued its first piece of guidance in the form of a revenue ruling.<sup>19</sup> The IRS issued Revenue Ruling 2013-17 on August 29, 2013, with an effective date of September 16, 2013.<sup>20</sup>

Among other things, Revenue Ruling 2013-17 purports to address the tax issues that mobile same-sex couples face as they grapple with a confusing patchwork of state laws governing relationship recognition.<sup>21</sup> As of this writing, states can be divided into four distinct (and sometimes overlapping) categories with regard to the legal treatment of same-sex couples: (1) those that permit same-sex marriage (e.g., the District of Columbia, California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington), (2) those that recognize legally equivalent relationships (i.e., civil unions or domestic partnerships) (e.g., Nevada and the District of Columbia, which is also a jurisdiction that permits same-sex couples to marry), (3) those that recognize legal

17. *E.g.*, Memorandum from Chuck Hagel, Sec’y of Def. to Sec’ys of the Military Dep’ts Under Sec’y of Def. for Pers. & Readiness (Aug. 13, 2013), *available at* <http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf>; U.S. Office of Pers. Mgmt., Benefits Admin. Letter No. 13-203, Coverage of Same-Sex Spouses 1, 2 (July 17, 2013), *available at* <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf>.

18. Past guidance has generally taken the form of private letter rulings and chief counsel memoranda, both of which are prohibited by law from being cited as precedent. I.R.C. § 6110(k)(3); *see infra* note 19.

19. *See* Treas. Reg. § 601.601(d)(2)(v)(d) (as amended in 1987) (“Revenue Rulings . . . are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose.”); Anthony C. Infanti, *LGBT Taxpayers: A Collision of “Others,”* 13 GEO. J. GENDER & L. 1, 19 (2012) (describing the history of providing nonprecedential guidance).

20. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204; I.R.S. News Release IR-2013-72 (Aug. 29, 2013), <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes%3B-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples>. The IRS will permit taxpayers to apply the revenue ruling retroactively in some circumstances. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204.

21. *See* Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 202 (“There are more than two hundred Code provisions and Treasury regulations relating to the internal revenue laws that include the terms ‘spouse,’ ‘marriage’ (and derivatives thereof, such as ‘marries’ and ‘married’), ‘husband and wife,’ ‘husband,’ and ‘wife.’”).

relationships with more limited rights and obligations as compared to marriage (e.g., Colorado and Wisconsin), and (4) those that refuse to legally recognize same-sex marriages (e.g., Georgia, Louisiana, Texas, and West Virginia—notably, Nevada, Colorado, and Wisconsin also fall into this category even though they afford some alternative form of legal recognition to same-sex relationships).<sup>22</sup> As they live in, move among, and travel between these states, married same-sex couples can divide their relationships into four distinct (and sometimes overlapping) categories:

- *Evasive marriages.* A marriage is evasive when a couple travels out of state to marry in order to “evade” a marriage prohibition in their home state. For example, a West Virginia same-sex couple might go to Maryland to marry, returning home to West Virginia after the wedding. This is an evasive marriage because the couple’s reason for traveling to Maryland was to avoid West Virginia’s ban on same-sex marriages.<sup>23</sup>
- *Migratory marriages.* A marriage is migratory when a couple lives and marries in one state but later moves to another. For example, a same-sex couple might live and marry in Massachusetts, but years later move to Louisiana (i.e., they “migrated” from Massachusetts to Louisiana).<sup>24</sup>
- *Visitor marriages.* A marriage is a visitor marriage when the couple is married and lives in one state but travels through

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22. Human Rights Campaign, *Marriage Equality and Other Relationship Recognition Laws* (2014), [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-equality\\_10-2014.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-equality_10-2014.pdf); Human Rights Campaign, *Statewide Marriage Prohibitions* (2014), [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-prohibitions\\_6-10-2014.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-prohibitions_6-10-2014.pdf). In contrast to the Human Rights Campaign, I would not classify Colorado as a state that provides a full legal equivalent to marriage because Colorado prohibits same-sex couples who have entered only into civil unions from filing joint state income tax returns. *See* COLO. REV. STAT. § 14-15-117 (2014) (requiring couples in civil unions to use the same filing status for state purposes as they use for federal purposes); COLO. CODE REGS. § 201-2:39-22-104(1.7) (2014) (requiring state filing status to track federal filing status, effectively permitting same-sex couples married outside of Colorado but living there to file joint state income tax returns); *see also* Rev. Rul. 2013-17, § 4, 2013-38 I.R.B. 201, 204 (refusing to recognize civil unions for federal tax purposes).

23. ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* 100–02 (2006).

24. *Id.*

another state. For example, the migratory same-sex couple from Massachusetts described in the previous paragraph would be in a visitor marriage while driving through the states that lie in between Massachusetts and Louisiana on the way to their new home.<sup>25</sup>

- *Extraterritorial marriages.* A marriage is extraterritorial when the marital status of a couple married and living in one state is relevant under the law of another state even though they have not actually lived or traveled there. For example, returning to the example of the Massachusetts same-sex couple above, their marriage would be extraterritorial if they engaged in a transaction in Texas by mail or over the Internet and their marital status was somehow relevant to the transaction, but they never physically lived in or visited Texas.<sup>26</sup>

In an effort to dodge the complex and thorny issues created when mobility intersects with the patchwork of state relationship recognition laws, the IRS stated in Revenue Ruling 2013-17 that it “has determined to interpret the [Internal Revenue] Code [(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.”<sup>27</sup> This statement seems simple and clear on its face; however, based on the explanation and justification of this position, the IRS appears to have had in mind only one of the four different categories of marriages described above. The IRS seems to have considered only the plight of same-sex couples in migratory marriages—that is, the IRS was concerned only with couples who lived and married in a state that recognizes same-sex marriage and who later moved to a state that refuses to recognize same-sex marriages. The IRS did not explicitly consider or address the legal situation faced by same-sex couples in evasive, visitor, or extraterritorial marriages.<sup>28</sup>

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25. *Id.* at 101–02.

26. *Id.* at 102.

27. Rev. Rul. 2013-17, § 3, 2013-38 I.R.B. 201, 203.

28. Even for those in migratory marriages, the IRS only addressed the situation where marital status is made directly relevant by the Code (i.e., situations where the Code directly refers to a taxpayer being “married” or a “spouse”). *Id.* As I have explained elsewhere, the IRS did not address the choice-of-law questions that arise when marital

This inference finds support in the IRS's assertion that its interpretation in Revenue Ruling 2013-17 is "[c]onsistent with the longstanding position expressed in Revenue Ruling 58-66."<sup>29</sup> Revenue Ruling 58-66 conveyed the IRS's position regarding common-law marriages, which, like same-sex marriages, are recognized in some states but not others. In Revenue Ruling 58-66, the IRS stated that it would recognize common-law marriages entered into in states recognizing those relationships and would continue to recognize those marriages in the case of taxpayers who enter into a "common-law marriage in a state which recognizes such relationships *and who later move into a state in which a ceremony is required to initiate the marital relationship*."<sup>30</sup> As described above, this is the very definition of a migratory marriage. In keeping with this focus on migratory marriages, the IRS recapitulated its position in Revenue Ruling 2013-17 regarding same-sex marriage as fitting neatly within the framework of Revenue Ruling 58-66: "For over half a century, for Federal income tax purposes, the [IRS] has recognized marriages based on the laws of the state in which they were entered into, *without regard to subsequent changes in domicile*, to achieve uniformity, stability, and efficiency in the application and administration of the Code."<sup>31</sup> The paragraphs following this recapitulation "reinforce the impression that the IRS only had migratory marriages in mind when it drafted the revenue ruling, as these paragraphs focus exclusively on the advantages of a uniform approach when couples change their domicile by moving from state to state."<sup>32</sup>

Of particular relevance to this essay, Revenue Ruling 2013-17 leaves evasive marriages (i.e., where a same-sex couple marries outside of their home state to evade a same-sex marriage ban) entirely unaddressed. Other commentators disagree with this interpretation—notably, without engaging the text of the revenue ruling at all—and maintain that the IRS did intend to cover evasive marriages in Revenue Ruling 2013-17.<sup>33</sup> I encountered a similar

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status is indirectly relevant to determining tax consequences—for example, where tax consequences turn on the existence of a parent-child relationship. *Infanti*, *supra* note 7, at 120–22.

29. Rev. Rul. 2013-17, § 3, 2013-38 I.R.B. 201, 203.

30. Rev. Rul. 58-66, 1958-1 C.B. 60 (emphasis added).

31. Rev. Rul. 2013-17, § 3, 2013-38 I.R.B. 201, 203 (emphasis added).

32. *Infanti*, *supra* note 7, at 119.

33. *E.g.*, Patricia A. Cain, Professor, Santa Clara Univ. Sch. of Law, Remarks at the Meeting of the Pro Bono & Tax Clinics Committee of the Section of Taxation of the American Bar Association (Sept. 21, 2013); Will Baude, *Two New Essays on Post-Windsor*

reaction when presenting this idea to others at continuing legal education programs and when publishing op-ed pieces on the tax treatment of same-sex couples post-*Windsor*. Most are incredulous that the Obama administration would have left out *any* same-sex marriages, and, in any event, they doubt that the IRS would audit same-sex couples who have gone through a marriage ceremony and claim to be married for federal tax purposes. But what the IRS may have intended to say—and, interestingly, all of these reactions are based not on objective evidence of such an intention but on the individual’s projection of what the IRS intended—is not the same as what the IRS actually said. In addition, as I have explained elsewhere, those most likely to press the ambiguities in this guidance and to contest its validity are not IRS agents auditing same-sex couples but individual lesbian or gay taxpayers who are caught in tax traps that the IRS laid in Revenue Ruling 2013-17.<sup>34</sup>

Even assuming that the IRS did intend to cover evasive same-sex marriages in Revenue Ruling 2013-17, there is still an open choice-of-law question regarding whether, in the words of the ruling, each of these evasive marriages “was valid in the state where it was entered into,” because only same-sex marriages meeting this requirement will be recognized for federal tax purposes.<sup>35</sup> The answer to this question will depend on whether the validity of the marriage is determined under the law of the place of the marriage’s celebration (which does recognize same-sex marriage) or under the law of the couple’s domicile (which does not).<sup>36</sup> As I will show in Part II below, this

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*Choice-of-Law Questions*, VOLOKH CONSPIRACY (Oct. 18, 2013, 11:24 AM), <http://www.volokh.com/2013/10/18/two-new-essays-post-windsor-choice-law-questions/>.

34. Infanti, *supra* note 7, at 122–25.

35. Rev. Rul. 2013-17, § 3, 2013-38 I.R.B. 201, 203.

36. In one case, these two may actually be the same state. Same-sex marriages celebrated in Utah in the interval between a U.S. federal district court decision striking down the state’s prohibition against same-sex marriage and the U.S. Supreme Court’s issuance of a stay of that ruling pending appeal will be legally recognized for federal tax purposes but are not legally recognized in Utah. Charlie Savage & Jack Healy, *U.S. to Recognize 1,300 Marriages Disputed by Utah*, N.Y. TIMES, Jan. 10, 2014, [http://www.nytimes.com/2014/01/11/us/politics/same-sex-marriage-utah.html?\\_r=0](http://www.nytimes.com/2014/01/11/us/politics/same-sex-marriage-utah.html?_r=0). Utah does not consider these marriages void but refuses to legally recognize them for most purposes. See *Evans v. Utah*, No. 2:14CV55DAK, 2014 WL 2048343, at \*4 (D. Utah May 19, 2014). As described in the text below, this distinction can make a difference in the evasive marriage situation, but would not necessarily rule out the possibility of plural marriage—though criminal prohibitions against bigamy may be a hurdle. See *infra* note 79. Nevertheless, the State of Utah is currently embroiled in litigation in federal court over whether it may refuse legal recognition to these marriages. *Evans*, 2014 WL 2048343, at \*20 (preliminarily enjoining Utah from enforcing its state ban against these marriages);

answer raises the possibility that the IRS might have unwittingly recognized plural marriage under Revenue Ruling 2013-17.<sup>37</sup>

In considering whether evasive same-sex marriages are “valid” and thus recognized for federal tax purposes, the conventional choice-of-law rules found in the *Restatement (First) and (Second) of Conflict of Laws* might very well result in a court’s decision to ignore the law of the place of celebration and instead to defer to the law of the same-sex couple’s domicile—that is, to the law of the state that does *not* recognize same-sex marriage.<sup>38</sup> Applying these rules, if the evasive marriage “violates the strong public policy” of the couple’s state of domicile or is declared “void” by that state, then the marriage is invalid and should not be recognized for federal tax purposes under Revenue Ruling 2013-17.<sup>39</sup> Again, without engaging the text of the ruling or considering collateral consequences, other commentators have argued that Revenue Ruling 2013-17 completely disregards the law of the couple’s domicile and requires only that the marriage be permitted under the laws of the place of celebration (for the

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Herbert v. Evans, No. 14A65, 2014 WL 3557112, at \*20 (U.S. July 18, 2014) (granting a stay of this decision pending a final decision of the U.S. Court of Appeals for the Tenth Circuit on appeal).

37. See *infra* Part II.

38. See *infra* note 39; see also Infanti, *supra* note 7, at 119–20. The *Windsor* case itself involved the evasive marriage of a New York couple who went to Canada to be married and then returned to New York to live. *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013). Importantly, however, the Second Circuit predicted that New York would have recognized the couple’s Canadian marriage and that the couple would, therefore, have been married at the time of the taxpayer’s death (i.e., the relevant time for determining the availability of the estate tax marital deduction). *Id.* at 2683; *Windsor v. United States*, 699 F.3d 169, 177–78 (2d Cir. 2012).

39. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971); see *id.* cmt. a (“The rule of this Section is concerned with what law governs the validity of a marriage as such, namely with what law determines, without regard to any incident involving the marriage, whether a man and a woman are husband and wife. . . . [T]he validity of a marriage as such may be exclusively involved in an action for an annulment, in an action for a declaratory judgment that a marriage does or does not exist and in a criminal prosecution for bigamy.”); *id.* ch. 11, intro. note (“[W]hether two persons are validly married is determined, wherever they may be, by the law governing the marriage (see § 283).”); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (1934) (“A marriage which is against the law of the state of domicil[e] of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases: . . . marriage of a domiciliary which a statute at the domicil[e] makes void even though celebrated in another state.”); Mark Strasser, *Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It’s Due*, 28 RUTGERS L.J. 313, 335 (1997) (stating in reference to the rules in the *Restatement (First)* and *Restatement (Second) of Conflict of Laws* that if “the marriage is obnoxious to an important public policy of the domicile, then the marriage will not be valid anywhere”).

remainder of this essay, I will refer to this position as the “alternative interpretation” of Revenue Ruling 2013-17).<sup>40</sup> Under this alternative interpretation, *all* evasive same-sex marriages would be recognized for federal tax purposes, unless the state of celebration had enacted an “anti-evasion” statute that invalidated marriages entered into by couples attempting to evade prohibitions in their home state.<sup>41</sup> For instance, Massachusetts formerly had an anti-evasion statute that then-Governor Mitt Romney used to prevent some out-of-state same-sex couples from marrying in Massachusetts.<sup>42</sup> New Hampshire still has an anti-evasion statute on its books.<sup>43</sup> In the next section, I will explore how the alternative interpretation might open the door to recognizing bigamous and polygamous same-sex marriages under the federal tax laws.

## II. OPENING THE DOOR TO TAX POLYGAMY

The possibility that plural marriages might be recognized for federal tax purposes is created by the significant gap between what would be a novel federal standard for validating marriages and a separate, long-standing state standard for validating marriages. An example will help to illustrate how this gap between state and federal law might open the door to plural marriages, and it will also provide a vehicle for exploring the potential consequences of disconnecting state and federal law regarding the determination of marital status. For this purpose, I will use the example of a hypothetical same-sex couple from Pennsylvania—a state that only began to recognize same-sex marriages on May 20, 2014.<sup>44</sup> Prior to that date, Pennsylvania was bordered on three sides by states that permitted same-sex couples to

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40. *See supra* note 33.

41. *See supra* note 33.

42. MASS. GEN. LAWS ch. 207, §§ 11–13 (2008), *repealed by* Act of July 31, 2008, ch. 216, § 1, 2008 Mass. Acts 1014; *see* Cote-Whitacre v. Dep’t of Pub. Health, 844 N.E.2d 623, 651–52 (Mass. 2006) (upholding the application of sections 11–13 to nonresident same-sex couples prior to their repeal).

43. N.H. REV. STAT. ANN. § 457:44 (2007).

44. *See* Whitewood v. Wolf, 992 F. Supp. 2d 410, 431 (M.D. Pa. 2014) (holding the Pennsylvania defense of marriage act unconstitutional); Kate Giammarise & Gideon Bradshaw, *No Appeal of Gay Marriage Ruling*, PITTSBURGH POST-GAZETTE, May 22, 2014, <http://www.post-gazette.com/news/politics-state/2014/05/21/Corbett-won-t-appeal-ruling-to-allow-same-sex-marriage/stories/201405210178> (indicating that Governor Corbett of Pennsylvania decided not to appeal the ruling because of the slim chance of success on appeal).

marry<sup>45</sup> and was in close proximity to others, which made entering into evasive marriages relatively easy. Our hypothetical Pennsylvania couple will be assumed to have traveled to New York to marry in late 2011 and to have returned to Pennsylvania after the wedding to make their home there.<sup>46</sup>

This example will allow us to consider both: (1) how the gap between these federal and state standards for determining the validity of a marriage would have operated during the time that Pennsylvania refused to recognize same-sex marriages;<sup>47</sup> and (2) the potential implications following Pennsylvania's recognition of same-sex marriages for those who might have taken advantage of, or inadvertently fallen into, this gap. As discussed in Part II.D below, same-sex couples from Pennsylvania who entered into evasive marriages are not the only ones who might have taken advantage of, or fallen into, this gap. A similar gap continues to exist between the alternative interpretation of Revenue Ruling 2013-17 and the standards for determining the validity of evasive same-sex marriages under the laws of several other states.<sup>48</sup>

I will begin the discussion of this example by considering the legal treatment of the couple's evasive New York marriage prior to the time when Pennsylvania began to recognize same-sex marriages, analyzing its legal treatment first for federal tax purposes under the alternative interpretation of Revenue Ruling 2013-17 and then under state law. Following that discussion, I will consider the possibility that either or both members of this couple might have married additional—or alternative—same-sex partners and have had those marriages recognized for federal tax purposes, too. I will conclude the discussion of this example by considering the ramifications on such plural marriages of the recent federal court decision striking down the Pennsylvania defense of marriage act as unconstitutional.

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45. Prior to *Whitewood*, same-sex marriage was legally recognized in Delaware, Maryland, New Jersey, and New York. Human Rights Campaign, *Marriage Equality and Other Relationship Recognition Laws (2014)*, [http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-equality\\_10-2014.pdf](http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-equality_10-2014.pdf).

46. New York allowed same-sex couples to marry beginning on July 24, 2011. Marriage Equality Act, ch. 95, § 3, 2011 N.Y. Sess. Laws 749–50 (McKinney) (codified at N.Y. DOM. REL. LAW §§ 10-a, 10-b, 13 (McKinney 2011)).

47. And, given the IRS's position in Revenue Ruling 2013-17 that taxpayers can apply that ruling retroactively to open taxable years, this period would extend back several years before the U.S. Supreme Court's decision in *United States v. Windsor*. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204.

48. See *infra* notes 101–106 and accompanying text.

A. *Legal Treatment Before the Fall of the State Defense of Marriage Act*

1. Federal Tax Treatment

Under the alternative interpretation of Revenue Ruling 2013-17, the Pennsylvania couple's New York marriage would be recognized for federal tax purposes from its inception so long as it was lawful in New York. Assuming for purposes of this discussion that the marriage did meet New York's legal requirements, the same-sex couple would have been treated as married for federal tax purposes from 2011 onward.<sup>49</sup>

2. State Law Treatment

For purposes of determining the validity of an evasive marriage entered into by Pennsylvania residents, the Pennsylvania Supreme Court has adopted and applied section 283 of the *Restatement (Second) of Conflict of Laws*.<sup>50</sup> According to section 283(2) of the *Restatement*, "[a] marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid *unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.*"<sup>51</sup>

In *Estate of Lenherr*,<sup>52</sup> the Pennsylvania Supreme Court applied this rule in determining whether a decedent's estate was entitled to the marital exemption under the state inheritance tax. Leo and Sarah Lenherr had been married for nearly forty years when Leo passed away.<sup>53</sup> Leo and Sarah had each been married before, and their former spouses had divorced them on the grounds that they had committed adultery (with each other).<sup>54</sup> Following their divorces, the Pennsylvania couple married in West Virginia and returned to

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49. Under my interpretation of Revenue Ruling 2013-17, whether an evasive marriage such as this New York marriage is recognized for federal tax purposes would always depend on whether it is valid under the appropriate state's law, as determined under relevant choice-of-law rules. Thus, my interpretation of the ruling coincides with the general treatment of marriage validity under state law, as discussed in Part II.A.2 *infra*.

50. *In re Estate of Lenherr*, 314 A.2d 255, 258 (Pa. 1974).

51. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) (emphasis added).

52. *In re Estate of Lenherr*, 314 A.2d 255 (Pa. 1974).

53. *Id.* at 257.

54. *Id.* at 256-57.

Pennsylvania to live.<sup>55</sup> The question in the case was whether the couple would be treated as married under Pennsylvania law at Leo's death, allowing property that was jointly owned by the couple with a right of survivorship to pass free of inheritance tax to Sarah.<sup>56</sup>

It was conceded that the couple's marriage was valid under West Virginia law.<sup>57</sup> However, the couple had married in West Virginia to avoid a Pennsylvania statute that prohibited a husband or wife who was guilty of the crime of adultery from marrying " 'the person with whom the said crime was committed during the life of the former wife or husband.' " <sup>58</sup> A separate statute prohibited the issuance of a marriage license in Pennsylvania to an individual who was divorced on grounds of adultery and wished to marry the person with whom he or she had committed adultery.<sup>59</sup> Although Leo and Sarah had been divorced on grounds of adultery, neither had been convicted of the crime of adultery.<sup>60</sup> Nonetheless, the Pennsylvania Supreme Court concluded that the adjudication of adultery in the context of Leo's and Sarah's divorces was sufficient to trigger both statutes.<sup>61</sup> This set up a direct conflict between Pennsylvania and West Virginia law and required the court to decide which state's law would apply for purposes of determining the validity of the couple's marriage.<sup>62</sup>

The Pennsylvania Supreme Court noted that there is a strong policy in favor of uniformity in the recognition of marriages but, at the same time, observed that each state has the authority to create its own marriage laws and "those laws and procedures should not be circumvented by the sham of travelling to a nearby less stringent jurisdiction."<sup>63</sup> In applying section 283 of the *Restatement*, the court had "no trouble concluding that Pennsylvania has the most significant relationship to the spouses and the marriage."<sup>64</sup> The only real question for the court was whether the policy behind the

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55. *Id.* at 257.

56. *Id.* at 256.

57. *Id.* at 257.

58. *Id.* (quoting Act of June 17, 1971, P.L. 169, No. 16, § 1, amending Act of March 13, 1815, P.L. 150, § 9, 48 P.S. § 169 (Supp. 1973-74), *repealed by* 1972 Pa. Laws, Act No. 334, § 5).

59. *Id.*

60. *Id.* at 256-57.

61. *Id.* at 257.

62. *Id.*

63. *Id.* at 258.

64. *Id.*

Pennsylvania statutes that prohibited the couple's marriage was "so strong that it must be given *extraterritorial effect*."<sup>65</sup>

In considering this question, the court found "that the strength of the policy behind [the statute] depends to a significant degree upon the incident of marriage under consideration."<sup>66</sup> According to the court, an incidents-based analysis was appropriate because the legislature itself had provided that the statutory bar to remarriage by adulterers would not extend to all incidents of marriage.<sup>67</sup> The court determined that the policy behind the statutory bar was not to penalize the adulterers but to protect the sensibilities of their former spouses as well as the "moral sense of the community."<sup>68</sup> Though the court admitted that the policy behind the statute might be "quite strong with respect to cohabitation and many other incidents of marriage," it concluded that denying the marital exemption from inheritance tax would neither deter adulterous conduct nor spare the feelings of the former spouses.<sup>69</sup> Balancing the "illusory gain" from enforcing the statutory bar against the purpose of the inheritance tax exemption to recognize that property held with right of survivorship is the product of joint effort as well as the policy in favor of uniformity in the recognition of marriages, the Pennsylvania Supreme Court "decline[d] to apply Pennsylvania law to invalidate this marriage for this purpose."<sup>70</sup>

Applying this analysis to the hypothetical New York marriage entered into by our Pennsylvania same-sex couple, the Pennsylvania courts would likely determine that Pennsylvania had the most significant relationship to the couple at the time of the marriage—a conclusion that would not only be consistent with *Estate of Lenherr* but also with other precedent applying the rule in section 283 of the *Restatement*.<sup>71</sup> The *Restatement* also explains that the first step in the analysis under section 283(2) is to determine whether there is a state statute that "invalidate[s] in specified circumstances the out-of-state marriage of local domiciliaries. If the marriage comes within the

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65. *Id.* (emphasis added).

66. *Id.*

67. *Id.* The court observed that the statutory bar did not affect the legitimacy of children. *Id.*

68. *Id.* at 259 (quoting *In re Stull's Estate*, 39 A. 16, 18 (Pa. 1898)).

69. *Id.*

70. *Id.*

71. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 reporter's note to cmt. k & app. (1971 & Supp. 2013) (collecting relevant precedent).

provisions of such a statute, it is clear that it would be held invalid in the state of most significant relationship and the forum will hold it invalid likewise . . . .”<sup>72</sup> In contrast to the situation in *Estate of Lenherr*, where there was no statute that invalidated the marriage and where it was left to the court to ascertain the policy behind the statute and the relative strength of that policy,<sup>73</sup> the Pennsylvania General Assembly was more direct and categorical in both its invalidation of evasive same-sex marriages and its statement of the strength of the policy behind that invalidation. Before it was struck down as unconstitutional, the relevant portion of the Pennsylvania defense of marriage act read:

It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.<sup>74</sup>

Because the General Assembly declared this category of marriages “void” and clearly articulated a “strong and longstanding

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72. *Id.* Regarding the potential countervailing considerations that might exist, the *Restatement* explains:

The time of the bringing of the action which questions the validity of the marriage may have an important bearing upon whether a strong policy of the state of most significant relationship is involved. *If the action is brought at a time when both spouses are still domiciled in that state, the interest of that state in the spouses is apparent and its strong policy may be involved in the circumstances discussed above.* The situation may well be different, however, if the action involving the validity of the marriage is brought at a time when both of the spouses have moved from the state.

*Id.* (emphasis added). In the situation posited here, where the couple returns to and remains in Pennsylvania following the New York marriage, these countervailing considerations would not exist. *See id.*

73. *Estate of Lenherr*, 314 A.2d at 257, 258–59. Moreover, the *Lenherr* court’s incidents analysis is not relevant to the instant situation because the General Assembly did not carve out any incidents of marriage from the statutory prohibition against same-sex marriage. *See infra* text accompanying note 744. The question here does not relate to whether it was inoffensive to treat a couple as married for a discrete purpose under state law; rather, it is whether the couple was married for all purposes under state law. Possessing one or more incidents of marriage is not sufficient for a couple to be treated as married for federal tax purposes. *See* Rev. Rul. 2013-17, § 4, 2013-38 I.R.B. 201, 204. It would be difficult for the IRS to argue otherwise when it refuses to recognize domestic partnerships and civil unions for federal tax purposes—even if they possess *all* of the incidents of marriage. *Id.*

74. 23 PA. CONS. STAT. ANN. § 1704 (West 2013).

public policy” against same-sex marriage, it appears that an evasive marriage entered into by a Pennsylvania same-sex couple would have been held invalid prior to the fall of the state’s defense of marriage act in May 2014.<sup>75</sup>

Furthermore, a void marriage in Pennsylvania is a marriage that never existed at all—regardless of whether either party to the marriage ever sought an annulment.<sup>76</sup> Indeed, “[i]t has been held that, as a void marriage is a nullity, the innocent party is free to marry again without any prior decree of annulment.”<sup>77</sup> Therefore, our hypothetical Pennsylvania same-sex couple would have been left with a marriage that did not exist under state law but that would

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75. See *In re May’s Estate*, 114 N.E.2d 4, 6 (N.Y. 1953) (using the law of the place of celebration to determine the validity of an evasive marriage of New York residents because a New York law voiding incestuous marriages did not have specifically extraterritorial application—as the Pennsylvania defense of marriage act did—and, under the circumstances, the natural law exception did not apply); *Godfrey v. Spano*, 920 N.E.2d 328, 337–40 (N.Y. 2009) (Ciparick, J., concurring) (applying the rule announced in *May’s Estate* and asserting that evasive same-sex marriages would be recognized in New York because of the lack of a specific statute voiding out-of-state same-sex marriages and because the natural law exception does not apply); see also *Cote-Whitacre v. Dep’t of Pub. Health*, 844 N.E.2d 623, 645 (Mass. 2006) (Spina, J., concurring) (deferring to the “paramount interest” of the state of a couple’s domicile in upholding the constitutionality of a now-repealed reverse evasion statute); KOPPELMAN, *supra* note 23, at 88 (describing the *Restatement* approach and stating that “[t]he disfavored form of marriage could not validly be celebrated in the forum state, and domiciliaries of the forum could not enter into that sort of marriage anywhere”); Strasser, *supra* note 39, at 337 (“Arguably, when a legislature declares a marriage void rather than merely prohibited, the state demonstrates that there is a strong public policy against such marriages and that such marriages, even if validly contracted elsewhere, should not be recognized by the state” (footnotes omitted)); see also *supra* note 39.

76. See *Commonwealth ex rel. Knode v. Knode*, 27 A.2d 536, 538 (Pa. Super. Ct. 1942); *Kern v. Taney*, 11 Pa. D. & C.5th 558, 563, 576 (Pa. Ct. C.P. Berks County 2010) (holding that the court lacked subject matter jurisdiction to grant a divorce to a same-sex couple; in dicta, the court, without citing any authority or engaging in any legal analysis, speculated that an evasive marriage—though void in Pennsylvania—might be valid in a state that recognizes same-sex marriage, but the court later indicated that the same-sex couple was not left without a remedy because they should have been able to obtain an annulment from the Pennsylvania courts, see 23 PA. CONS. STAT. ANN. § 3304(b) (West 2013)); see also *Surnamer v. Ellstrom*, No. 1 CA-CV 11-0504, 2012 WL 2864412, at \*2 (Ariz. Ct. App. July 12, 2012) (finding that granting an annulment to a couple who had entered into an evasive same-sex marriage would be consistent with the marriage’s treatment as void under Arizona law, because the annulment would not require the recognition of the marriage but rather constitute an affirmation of its invalidity).

77. *Faivre v. Faivre*, 128 A.2d 139, 142 (Pa. Super. Ct. 1956); see also *Commonwealth ex rel. Keith v. Keith*, 279 A.2d 311, 312 (Pa. Super. Ct. 1971); *LaVigne v. Wise*, 43 Pa. D. & C.4th 225 (Pa. Ct. C.P. Monroe County 1999).

nevertheless have been recognized for federal tax purposes under the alternative interpretation of Revenue Ruling 2013-17.

*B. Possibility of Plural Marriage*

Given the invalidity of this evasive marriage and Pennsylvania's treatment of void marriages as nullities, it seems that nothing would have prevented this couple from entering into additional marriages. Two different scenarios come to mind in which the couple might have wished to enter into additional marriages:

- *Serial monogamy.* If the Pennsylvania couple ended their relationship following their New York marriage, they might have relied on the invalidity of their first marriage to enter into a later marriage (or marriages) with a new same-sex partner(s). The couple might have done this because they could not obtain a divorce from a Pennsylvania court, did not wish to establish residency in New York for at least one year to be able to divorce there, or did not want to incur the significant expense of hiring a lawyer to test the legal waters regarding the availability of an annulment in Pennsylvania.<sup>78</sup>
- *Purposeful plural marriage.* Or, if the couple were in an "open" relationship, they might have decided to take advantage of the alternative interpretation of Revenue Ruling 2013-17 by marrying other parties to the relationship, too. From a federal tax perspective, there are a variety of reasons why the couple might have done this. For instance, the couple might have wished to expand the marital unit to include additional parties to the relationship in order to be able to transfer property among all of themselves free of tax—or merely to avoid the uncertainties entailed with the sharing of finances outside of a legally recognized marriage.<sup>79</sup> Alternatively, if both members of the married same-sex couple had adequate health insurance from their employers (i.e., neither one needed to be added as a spouse to the other's insurance), they might have wished to marry other parties to

78. N.Y. DOM. REL. LAW § 230 (McKinney 2014); *see supra* note 76.

79. *See supra* note 13; *see also* Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 783–803 (2004) (describing the federal tax uncertainties surrounding the sharing of finances by unmarried individuals).

the relationship who had to pay for their own health insurance in order to add them to their employer-provided coverage on a tax-free basis.<sup>80</sup>

It would have been possible for the same-sex couple to enter into additional marriages because their New York marriage would have been invalid both within and without Pennsylvania at that time. In other words, it should have been as if the marriage never existed. Thus, either or both of the same-sex spouses in this couple would have been free to marry another person without the need for a judicial declaration of annulment.<sup>81</sup> For example, one spouse might have gone to Maryland to enter into an evasive same-sex marriage with a third Pennsylvania resident in early 2013,<sup>82</sup> and the other spouse might have gone to New Jersey to enter into an evasive same-sex marriage with a fourth Pennsylvania resident later in 2013.<sup>83</sup> Due to the invalidity of the New York marriage, neither of these subsequent same-sex marriages would have been bigamous at the time they were entered into.<sup>84</sup> Indeed, both the Maryland and New Jersey marriages would have been invalid for the same reasons that

80. See *supra* note 14.

81. Cf. Op. Att’y Gen. No. L-06 (N.D. 2013), available at 2013 WL 6593427 (opining that a party to a valid same-sex marriage may legally enter into a different-sex marriage in North Dakota without first dissolving the same-sex marriage and without risking criminal prosecution; however, no opinion was expressed regarding the treatment of the different-sex marriage under the laws of the state where the same-sex marriage was entered into).

82. Maryland began to permit same-sex couples to marry on January 1, 2013. See Jean Marbella, *This Is Another Step in Being Treated Equally*, BALT. SUN, Dec. 7, 2012, at 1A (indicating that “Gov. Martin O’Malley officially confirmed the passage of the same-sex marriage referendum” by the state’s voters).

83. New Jersey began to permit same-sex couples to marry on October 21, 2013. See *Garden State Equality v. Dow*, 82 A.3d 336, 369 (N.J. Super. Ct. Law Div. 2013) (mandating that New Jersey extend the right to marry to same-sex couples); Salvador Rizzo, *Christie Ends Legal Battle Against Gay Marriage*, STAR-LEDGER (Newark, N.J.), Oct. 22, 2013, at 1 (indicating that Governor Christie had decided not to appeal the decision in *Garden State Equality*).

84. See MD. CODE ANN., CRIM. LAW § 10-502(b) (LexisNexis 2012) (“While lawfully married to a living person, a person may not enter into a marriage ceremony with another.”); N.J. STAT. ANN. § 2C:24-1(a)(4) (West 2012) (stating that a married person is not guilty of bigamy when he “reasonably believes that he is legally eligible to remarry”); *Port v. Cowan*, 44 A.3d 970, 975–76 (Md. 2012) (applying a rule similar to section 283(2) of the *Restatement (Second) of Conflict of Laws* for purposes of determining the validity of a marriage); *Wright v. State*, 81 A.2d 602, 605 (Md. 1951) (“[I]t is a good defense to an indictment for bigamy that the first marriage was void, since bigamy can be committed only by the marriage of a person already married.”); *Wilkins v. Zelichowski*, 140 A.2d 65, 68 (N.J. 1958) (applying a rule similar to that of Pennsylvania with respect to evasive marriages).

the New York marriage was.<sup>85</sup> Accordingly, from a state law perspective, none of these couples would have been considered “married” at all, let alone married multiple times. Yet, under the alternative interpretation of Revenue Ruling 2013-17, all three of these marriages would have been recognized for federal tax purposes because all that would matter under that interpretation would be whether each marriage was permissible under the law of the place of celebration—regardless of its actual validity.<sup>86</sup>

At first blush, it might seem odd that the state of celebration in each of these cases would be ignoring the prior marriage on the ground that it was invalid but then would be allowing one of the parties to that marriage to enter into another, similar marriage that was likewise invalid. But it would only be odd if the state were actually making a legal determination regarding the validity of these marriages prior to issuing a license. In practice, little or no legal vetting usually takes place before issuing a marriage license—a reality that is leveraged here by having the marriages take place in three different states. For example, when I emailed the New Jersey Department of Health to determine whether any legal vetting takes place in that state, I received the following response: “The local Registrars do not check any records to verify previous marriages when they take an application. The applicants sign the application to verify that they have provided honest and accurate information. They are liable if they [sic] information is fraudulent.”<sup>87</sup> Questions about

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85. See *supra* note 844 and Part II.A.

86. It might also have been possible for each of the parties to the New York same-sex marriage to enter into a single different-sex marriage without running afoul of criminal prohibitions against bigamy or polygamy. See *supra* note 811.

87. E-mail from records@doh.state.nj.us, to Anthony C. Infanti, Senior Assoc. Dean for Academic Affairs & Professor of Law, Univ. of Pittsburgh Sch. of Law (Jan. 6, 2014, 08:34 AM EST) (on file with author); see E-mail from Guy R. Warner, N.Y. State Registrar, Dir., Vital Records, to Anthony C. Infanti, Senior Assoc. Dean for Academic Affairs & Professor of Law, Univ. of Pittsburgh Sch. of Law (Jan. 6, 2014, 09:18 AM EST) (“Marriage licenses are issued by local municipal clerks. They do not check records of marriages, deaths, etc. before issuing the license.”) (on file with author); see also *Bride Accused of Stealing Dead Woman’s ID*, NEWS JOURNAL (Wilmington, Del.), Dec. 6, 2007, at B3 (reporting that a individual used deceased relative’s identification to marry in Delaware, likely because the state reportedly performs no records check prior to issuing a marriage license); Susannah Cahalan & David Seifman, *I.D.-Thief Wedding Crushers: Forgery Nightmare Turns Brides into “Bigamists,”* N.Y. POST, Aug. 26, 2007, at 5 (describing how individuals were denied marriage licenses on the ground that they were already married in the state (in some cases multiple times), when the earlier marriages were fraudulently entered into by individuals who had stolen their identities); David Doege, *Woman Pleads Guilty to Identity Theft, Bigamy Using Aunt’s Name*, MILWAUKEE

the validity of a marriage are thus normally left to be sorted out sometime after the wedding day (hence many of the cases cited in this essay).

Thus, whether our hypothetical Pennsylvania same-sex couple entered into multiple marriages with the purpose of achieving legal recognition for an open relationship under the federal tax laws or merely to memorialize their serial monogamy, the alternative interpretation of Revenue Ruling 2013-17 would seem to treat the marriages the same. That is, all three of these marriages would be recognized for federal tax purposes and, in turn, our four Pennsylvania residents would be federally recognized bigamists or polygamists. Accordingly, the parties to these marriages would have been required to file plural joint federal income tax returns—a practically difficult task given that the joint return is designed to be filed only by those in dyadic marriages—or, if all of the parties were not agreeable to filing jointly (which is highly probable in the serial monogamy scenario), they would have been required to use the generally disadvantageous married filing separately status on their returns.<sup>88</sup>

### C. *Ramifications of Recognizing Same-Sex Marriage*

On May 20, 2014, a federal district court issued a decision striking down the Pennsylvania defense of marriage act on constitutional grounds—a decision with immediate effect that the Governor of Pennsylvania chose not to appeal.<sup>89</sup> Because at least one set of plaintiffs in the case had entered into an evasive marriage,<sup>90</sup> the court's ruling clearly addressed the legal treatment of same-sex marriages previously entered into outside of Pennsylvania and specifically conferred legal recognition on those relationships.<sup>91</sup> This legal development raises further interesting questions and issues regarding the interaction of state and federal law for couples who enter into multiple marriages, whether of the purposefully plural or

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JOURNAL SENTINEL, Dec. 3, 2002, at B5 (reporting that one woman married two different men within months using two different identities).

88. I.R.C. §§ 1(a), (d), 6013 (West 2012). For a description of the disadvantages of married filing separately status, see *Infanti*, *supra* note 7, at 122–23.

89. See *supra* note 44.

90. *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 416 (M.D. Pa. 2014).

91. *Id.* at 413 (“By virtue of this ruling, same-sex couples who seek to marry in Pennsylvania may do so, and already married same-sex couples will be recognized as such in the Commonwealth.”).

the serially monogamous variety. Again, the discussion of the legal treatment of these marriages will be discussed first for federal tax purposes under the alternative interpretation of Revenue Ruling 2013-17 and then under state law.

### 1. Federal Tax Treatment

Under the alternative interpretation of Revenue Ruling 2013-17, the court's decision should have been a nonevent for federal tax purposes. Under that interpretation, all that matters from a federal tax perspective is whether the state where a same-sex couple was married permitted same-sex marriages at the time.<sup>92</sup> Because all three of the states where the marriages posited in our example took place (i.e., New York, New Jersey, and Maryland) permitted same-sex couples to marry when the marriages were entered into,<sup>93</sup> all three of these same-sex marriages should have been, and should continue to be, "valid" and recognized for federal tax purposes under the alternative interpretation.

### 2. State Law Treatment

From a state law perspective, however, the retroactive application of the federal court decision could give rise to difficult legal issues. If all of these marriages were now retroactively afforded legal recognition, then Pennsylvania would now, too, see these individuals as having entered into multiple marriages. As a result, some or all of these four individuals might have committed the crime of bigamy.<sup>94</sup> There is, however, a defense to bigamy in Pennsylvania for those who enter into a subsequent marriage in good faith, which might protect the parties to these marriages from criminal prosecution.<sup>95</sup> Nevertheless, a deliberate attempt to enter into multiple marriages to take advantage of the gap that the alternative interpretation of Revenue Ruling 2013-17 creates between federal tax law and state family law (as occurred in the purposefully plural marriage scenario) might be seen as evidence of bad faith that would negate such a defense.

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92. *See supra* Part I.

93. *See supra* notes 46, 82, 83 and accompanying text.

94. 18 PA. CONS. STAT. ANN. § 4301 (West 2014). Whether the other parties to the second and third marriages are guilty of bigamy would depend on their knowledge of the hypothetical Pennsylvania same-sex couple's first (i.e., New York) marriage. *Id.* § 4301(b).

95. 23 PA. CONS. STAT. ANN. § 1702(e).

In terms of the legal validity of the multiple marriages posited in our example, the legal treatment under Pennsylvania law diverges significantly from the federal tax treatment under the alternative interpretation of Revenue Ruling 2013-17. In keeping with its criminalization of bigamy, Pennsylvania permits only one marriage to be legally recognized at a time.<sup>96</sup> Depending on the facts and circumstances, the Maryland and New Jersey marriages might be retroactively void as bigamous, leaving only the New York marriage valid.<sup>97</sup> Alternatively, under appropriate facts and circumstances, the Maryland and New Jersey marriages might be legally recognized over the New York marriage.<sup>98</sup> But recall that if the validity of a marriage under the law of the state of domicile is irrelevant under Revenue Ruling 2013-17, as proponents of the alternative interpretation hold, then the invalidation of any of these marriages under Pennsylvania law should not affect their recognition for federal tax purposes. Thus, parties to multiple marriages—whether those marriages are purposefully plural or merely serially monogamous—could (or should) continue to file plural joint federal income tax returns—or be relegated to the disadvantageous married filing separately status—following the federal court decision striking down the Pennsylvania defense of marriage act.<sup>99</sup>

If our hypothetical Pennsylvania same-sex couple were serially monogamous (rather than purposefully plural) in their marriages, then they might actually wish for the subsequent Maryland and New Jersey marriages to remain valid (rather than the initial New York marriage). A Pennsylvania statute could provide them with a partial remedy in this situation if the New York marriage is the only one that is otherwise to be legally recognized. That statute provides in pertinent part:

If a married person, during the lifetime of the other person with whom the marriage is in force, enters into a subsequent

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96. See *infra* note 100.

97. See *In re Estate of Watt*, 185 A.2d 781, 784–86 (Pa. 1962) (setting up a facts and circumstances test for determining which marriage will be legally recognized that stems from the need to resolve conflicting presumptions regarding (1) the continuance of the first marriage and (2) the innocence of the parties entering into the second marriage); *Huff v. Dir.*, U.S. Office of Pers. Mgmt., 40 F.3d 35, 39–42 (3d Cir. 1994) (applying *Estate of Watt*).

98. See, e.g., *Huff*, 40 F.3d at 42–43 (describing the possibility that the second marriage in that case might be recognized over the first and remanding the case to the district court to weigh the facts and circumstances).

99. See *supra* note 88 and accompanying text.

marriage . . . and the subsequent marriage was entered into by one or both of the parties in good faith in the full belief that the former spouse was dead or that the former marriage has been annulled or terminated by a divorce, or without knowledge of the former marriage, they shall, after the impediment to their marriage has been removed by the death of the other party to the former marriage or by annulment or divorce, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and immediately after the date of death or the date of the decree of annulment or divorce.<sup>100</sup>

This statute provides only a partial remedy because the subsequent Maryland and New Jersey marriages could not be retroactively validated from their inception; rather, they would be valid only from the date the New York marriage ended through divorce or annulment. It would seem that, even under the alternative interpretation of Revenue Ruling 2013-17, the formal divorce or annulment of the first marriage should end its recognition for federal tax purposes—coincidentally, as of the same time the marriage would cease to be legally recognized under state law. However, as mentioned above, under the alternative interpretation, the Maryland and New Jersey marriages would have been recognized for federal tax purposes from the date of their celebration—and not just from the time the New York marriage ended through divorce or annulment—creating yet further discontinuity between the federal tax and state law treatment of the same marriages.

#### *D. Not Just a Pennsylvania Problem*

This opportunity for purposeful legal arbitrage—or, alternatively, to inadvertently fall into a trap of legal complexity—is not unique to Pennsylvania. Pennsylvania is not the only state that has prohibited same-sex marriage, that has adopted rules similar to those in the *Restatement of Conflict of Laws* for determining the validity of marriages, and whose laws would allow same-sex couples to avoid criminal bigamy or polygamy charges because their relationships are legally invalid. Other states in an ostensibly similar

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100. 23 PA. CONS. STAT. ANN. § 1702(a) (West 2014).

legal position include Arkansas,<sup>101</sup> Georgia,<sup>102</sup> Indiana,<sup>103</sup> Kentucky,<sup>104</sup>

101. See ARK. CONST. amend. 83, § 1 (“Marriage consists only of the union of one man and one woman.”); ARK. CODE ANN. § 5-26-201(b) (2014) (providing that a reasonable belief that one is eligible to marry is an affirmative defense to a charge of bigamy); *id.* § 9-11-107 (refusing to treat as valid migratory same-sex marriages); *id.* § 9-11-109 (“A marriage between persons of the same sex is void.”); *State v. Graves*, 307 S.W.2d 545, 550 (Ark. 1957) (“In the circumstances, it can hardly be said that the public policy of this State against under-age marriages is so strong that such a marriage, valid in the state where it was contracted, is void in this State.”); *Etheridge v. Shaddock*, 706 S.W.2d 395, 396 (Ark. 1986) (reaffirming *Graves* and stating, “We have no doubt that the Arkansas policy against incest is so strong that we would not recognize the validity of a marriage, even if performed in another state, between very close blood relatives, such as a father and daughter or a brother and sister.”). *But see* Max Brantley, *Arkansas Supreme Court Stays Ruling Overturning Same-Sex Marriage Ban*, ARK. TIMES ARK. BLOG (May 16, 2014, 4:31 PM), <http://www.arktimes.com/ArkansasBlog/archives/2014/05/16/arkansas-supreme-court-stays-ruling-overturning-same-sex-marriage-ban> (reporting that one week after a decision by a state trial court judge striking down the state’s defense of marriage act on constitutional grounds, the Arkansas Supreme Court issued a stay of that decision pending appeal).

102. See GA. CONST. art. I, § 4, para. 1(a) (Westlaw 2014) (“Marriages between persons of the same sex are prohibited in this state.”); GA. CODE ANN. § 16-6-20(b) (2013) (providing that a reasonable belief that an individual is eligible to remarry is a defense to bigamy); *id.* § 19-3-3.1(b) (“Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state.”); *id.* § 19-3-43 (“Parties residing in this state may not evade any of the laws of this state as to marriage by going into another state for the solemnization of the marriage ceremony.”); *King v. State*, 40 Ga. 244, 247 (1869) (“If the first marriage were, for any cause, void, or if the defendant has been divorced *a vinculo matrimonii*, the second marriage is not bigamy.”); *Bituminous Cas. Corp. v. Wacht*, 66 S.E.2d 757, 757–59 (Ga. Ct. App. 1951) (finding no intent to evade marriage laws where a woman moved to another state, met a man there, married there, and remained there for several years before returning to Georgia).

103. See IND. CODE ANN. § 31-11-1-1(b) (West 2013) (“A marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized.”); *id.* § 31-11-8-6 (rendering evasive marriages void); *id.* § 35-46-1-2(b) (providing that a reasonable belief that an individual is eligible to remarry is a defense to bigamy); *Pry v. Pry*, 75 N.E.2d 909, 913 (Ind. 1947) (stating that “‘a void marriage is good for no legal purpose’ ” and indicating that there is no need to bring an action to declare a marriage void (quoting *Wiley v. Wiley*, 123 N.E. 252, 254 (1919))). *But see* *Baskin v. Bogan*, No. 1:14-cv-00355-RLY-TAB, 2014 WL 2884868, at \*16 (S.D. Ind. June 25, 2014), *aff’d*, 2014 WL 4359059 (7th Cir. Sept. 4, 2014) (striking down Indiana’s same-sex marriage ban as a violation of the Due Process and Equal Protection Clauses of the U.S. Constitution); Rick Callahan, *Gay Marriage Ruling Put on Hold*, WIS. ST. J., Sept. 16, 2014, at A5 (indicating that the Seventh Circuit Court of Appeals had issued a stay of its ruling pending appeal to the U.S. Supreme Court).

104. See KY. REV. STAT. ANN. § 402.020 (West 2014) (deeming same-sex marriages “prohibited and void”); *id.* § 402.040 (adopting a place of celebration rule for determining the validity of foreign marriages unless they are against public policy in Kentucky and specifying that same-sex marriages are against public policy); *id.* § 402.045 (declaring foreign same-sex marriages void in Kentucky); *id.* § 530.010(2) (providing that a reasonable belief that one is eligible to marry is a defense to a charge of bigamy); *id.* cmt.

North Dakota,<sup>105</sup> and Virginia.<sup>106</sup> Thus, if the alternative interpretation of Revenue Ruling 2013-17 proves correct, then there are several other states whose laws appear to allow individuals to enter into plural marriages for federal tax purposes, whether purposefully or inadvertently.

### III. A FLAWED INTERPRETATION

Adopting the alternative interpretation of Revenue Ruling 2013-17 might thus result in a profound reworking of the federal tax

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(indicating in appended commentary from the Kentucky Crime Commission/LRC, which is intended as an aid in construing the statute, *id.* § 500.100, that this reasonable belief defense aims to cover, among others, the situation where “the prior marriage was void”). *But see* Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky. 2014) (finding in a memorandum opinion that Kentucky’s constitutional amendment and statutes prohibiting same-sex marriage violate the Equal Protection Clause of the U.S. Constitution as applied to same-sex couples who entered into apparently evasive marriages in jurisdictions outside of Kentucky; unfortunately, the court’s reasoning was conceptually muddled by its assumption, without explanation or analysis, that these evasive marriages are in fact valid—like the IRS in Revenue Ruling 2013-17, the court did not seem to appreciate the different categories of marriages that exist or the choice-of-law issues raised by evasive marriages and the impact of those issues on the constitutional analysis in the opinion); Love v. Beshear, 989 F. Supp. 2d 536 (W.D. Ky. 2014) (striking down the state same-sex marriage ban as it applies to couples wishing to marry in Kentucky, but issuing a stay of that decision); John Cheves, *Federal Judge Grants Indefinite Delay of His Same-Sex Marriage Ruling in Kentucky*, KENTUCKY.COM (Mar. 19, 2014), <http://www.kentucky.com/2014/03/19/3149077/federal-judge-grants-indefinite.html> (granting stay of the decision in *Bourke*).

105. *See* N.D. CENT. CODE § 12.1-20-13(1) (2012) (criminalizing a marriage to “another person, while married to another person”); *id.* § 14-03-08 (determining validity of an evasive marriage by reference to North Dakota law); Johnson v. Johnson, 104 N.W.2d 8, 13 (N.D. 1960) (same); *see also supra* note 811.

106. *See* VA. CONST. art. 1, § 15-A (“That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.”); VA. CODE ANN. §§ 18.2-363, -364 (2014) (providing an exception to the crime of bigamy for a person “whose former marriage was void”); *id.* § 20-45.2 (“Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.”); Farah v. Farah, 429 S.E.2d 626, 629 (Va. Ct. App. 1993) (“A marriage that is valid under the law of the state or country where it is celebrated is valid in Virginia, unless it is repugnant to public policy.”); Kleinfeld v. Varuki, 372 S.E.2d 407, 409 (Va. Ct. App. 1988) (“A void marriage, unlike a voidable marriage, does not require an action of annulment to render it void. Without obtaining an annulment, a party to a void marriage is free to marry again.”). *But see* Bostic v. Rainey, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014), *aff’d sub nom.* Bostic v. Schaefer, 2014 WL 3702493 (4th Cir. July 28, 2014) (striking down on summary judgment Virginia’s same-sex marriage ban under the Due Process and Equal Protection Clauses of the U.S. Constitution). The Supreme Court has issued a stay of this decision. McQuigg v. Bostic, No. 14A196, 2014 WL 4096232 (U.S. Aug. 20, 2014).

treatment of intimate relationships. To be clear, I express no opinion here regarding whether plural marriage ought to be recognized for federal tax purposes. Rather, I am merely observing that adopting an interpretation that would lead to the recognition of plural marriage would represent a sea change in the tax treatment of intimate relationships. In this Part, I articulate the reasons why such a sea change in the tax treatment of intimate relationships is unlikely to withstand scrutiny and why it would do no more than add to the uncertainty that continues to surround the tax treatment of same-sex couples post-*Windsor*.

A. *Contradictory Positions*

The alternative interpretation would cause the IRS to espouse contradictory positions—in the same ruling—that both reify and undermine the importance of marriage in its conventional, dyadic form. Although Revenue Ruling 2013-17 is not without its internal contradictions,<sup>107</sup> these two positions stand in such stark contrast that they call into question the alternative interpretation’s plausibility.

Reifying the importance of “marriage,” Revenue Ruling 2013-17 takes a rigidly formalistic approach in determining which conjugal relationships qualify as “marriages” for federal tax purposes. In that ruling, the IRS—without any explanation or justification—announced that it would *not* treat same-sex or different-sex couples in civil unions or domestic partnerships as “married” for federal tax purposes.<sup>108</sup> This position came as a surprise because, just two years earlier, the IRS indicated its willingness to look past labels and to treat different-sex couples in civil unions and domestic partnerships as “married” for federal tax purposes so long as their legal relationships were equivalent to marriage under state law.<sup>109</sup> The IRS’s newly rigid attachment to the label “marriage” effectively closes the door to

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107. *Infanti*, *supra* note 7, at 124.

108. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204; *see Infanti*, *supra* note 7, at 123–25 (explaining the reversal of position).

109. Letter from Pamela Wilson Fuller, Senior Technician Reviewer, Internal Revenue Serv., to Robert Shair, Senior Tax Advisor, H&R Block (Aug. 30, 2011), *available at* 2011 TNT 215-62 (LEXIS) (“[I]f Illinois treats the parties to an Illinois civil union who are of opposite sex as husband and wife, they are considered ‘husband and wife’ for purposes of Section 6013 of the Internal Revenue Code, and are not precluded from filing jointly, unless prohibited by other exceptions under the Code.”).

recognizing alternative forms of relationships for federal tax purposes.<sup>110</sup>

Yet, embracing the alternative interpretation would undermine the importance of “marriage” in its conventional sense by opening the door to plural marriage. This would represent a radical departure from extant social norms concerning marriage, as expressed in state criminal prohibitions against bigamy.<sup>111</sup> Furthermore, in contrast to its position regarding civil unions and domestic partnerships, the IRS takes no explicit position on evasive (and, correlatively, plural) marriages in the ruling; rather, that position has only been inferred by commentators.<sup>112</sup> It is doubtful that a sea change in the legal treatment of intimate relationships would come about by implication, especially given the IRS’s professed goal of providing certainty, clarity, and cohesive guidance to same-sex couples.<sup>113</sup> Moreover, it would be quite odd for the same ruling, on the one hand, to purposefully close the door to recognizing alternatives to conventional, dyadic marriage that already exist under state law and, on the other, to implicitly embrace an alternative to dyadic marriage that does not yet exist under state law (and that would not be correlatively recognized under state law following the fall of the individual state bans on same-sex marriage).<sup>114</sup>

#### B. *Too Far, Too Fast*

Compounding the oddity of this juxtaposition of contradictory positions is the tax system’s complete lack of preparedness to deal with plural marriage. As mentioned above, I express no opinion here regarding the propriety of legally recognizing plural marriage. My purpose is far more modest—that is, to observe that the IRS could not legally recognize plural marriage without making changes to the tax system to accommodate the differences between dyadic and plural marriage. No such changes accompanied the issuance of Revenue Ruling 2013-17.<sup>115</sup> This calls into question whether the IRS had the alternative interpretation in mind when drafting the ruling or, if it did,

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110. *Infanti*, *supra* note 7, at 127.

111. *See, e.g., supra* notes 84–1066.

112. *See, e.g., supra* notes 321–322.

113. *See supra* note 8 and accompanying text.

114. *See, e.g., supra* Part II.C.

115. Hence, the reference above to the practical difficulty of filing plural joint tax returns. *See supra* text accompanying note 888.

whether it actually considered or understood the consequences of that position.

Through the Code, Congress imposes a *federal* income tax that applies at the *national* level; however, it is important to remember that the Code “taxes transactions whose legal effects are usually prescribed by *state* rather than federal law.”<sup>116</sup> As a result, state family law underpins the federal tax treatment of intimate relationships.<sup>117</sup> But this underpinning falls short when it comes to plural marriage. Because plural marriage remains criminalized, commentators have not focused their energies on creating or refining a legal regime for its regulation.<sup>118</sup> To fill this gap, Adrienne Davis has considered what a regime for recognition and regulation of plural marriage might look like.<sup>119</sup> According to Professor Davis, family law is not equipped to deal with plural marriage and the ways in which it differs from dyadic marriage.<sup>120</sup> Instead, Professor Davis suggests that commercial partnership law could serve as a useful starting point for developing a regulatory framework for plural marriage.<sup>121</sup> Regardless, because family law is currently unequipped to deal with plural marriage, the Code lacks an underlying legal framework to which it can attach tax consequences.

Tax law is in no better position than family law to deal with plural marriage. As Samuel Brunson has observed, “tax law . . . has no mechanism for dealing with polygamous taxpayers.”<sup>122</sup> The qualitative and quantitative differences between dyadic and plural marriage render our extant joint filing system, which treats the dyadic married couple as a taxable unit, ill-suited to the task of appropriately taxing plural marriages.<sup>123</sup> Indeed, citing the difficulties of taxing

116. BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 4.1.1 (2014) (emphasis added), available at 1997 WL 439503 \*1.

117. *Id.* (“Without the body of state law prescribing the rights and liabilities arising from taxpayers’ daily activities, the federal tax collector would be a fish out of water. . . . [T]he Code’s reliance on state law is so pervasive that it rarely rises to the conscious level.”).

118. Davis, *supra* note 3, at 1957–60.

119. *Id.* at 1958.

120. *Id.* at 1959. On the qualitative differences between dyadic and plural marriage, Professor Davis explains that “[p]olygamy’s defining feature—marital multiplicity—generates specific costs and vulnerabilities, as well as opportunities for exploitative and opportunistic behavior. . . . (Of course, for some, multiplicity also generates upsides . . . .)” *Id.* at 1958; *see id.* at 1989–95 (providing further detail).

121. *Id.* at 2002–32.

122. Samuel D. Brunson, *Taxing Polygamy*, 91 WASH. U. L. REV. 113, 116 (2013).

123. *Id.* at 145–61, 167–68.

plural marriage, Professor Brunson has added his voice to those calling for a switch to an individual filing system.<sup>124</sup>

Of course, Revenue Ruling 2013-17 cannot address the lack of an underlying family law framework for dealing with plural marriage. Nor, for that matter, does it address the lack of a tax law framework for dealing with plural marriage. Had it done so, the IRS would have gone well beyond interpreting the Code. Adopting the alternative interpretation would therefore move the tax laws too far, too fast—entering into uncharted territory that Congress and the states need to map before the IRS can address the tax treatment of plural marriage.

### C. *Validity of the Alternative Interpretation*

The previous two sections make it clear that the alternative interpretation of Revenue Ruling 2013-17 is both implausible and inadvisable because it opens the door to plural marriage. In response to these arguments, proponents of that interpretation might argue that the IRS never intended to legally recognize plural marriages, as evidenced by the lack of any mention of plural marriage in the ruling. But the same could be said of evasive marriages—the ruling makes no mention of this category of marriages either.<sup>125</sup> Nonetheless, proponents of the alternative interpretation assert that the IRS must have intended to cover evasive marriages in its guidance.<sup>126</sup> Such a conflicted interpretation of the ruling—reading coverage of one unmentioned type of marriage into the ruling while reading another unmentioned type of marriage out of the ruling—would be wholly untethered from the text. Far beyond mere interpretation, this would amount to a rewriting of the ruling—one that undermines the promise that the ruling would provide same-sex couples with certainty, clarity, and coherent guidance regarding their tax treatment.<sup>127</sup>

As a fallback, proponents of the alternative interpretation might argue that the IRS had only dyadic marriage in mind when it drafted Revenue Ruling 2013-17. This argument is no better because it only draws attention to questions regarding the validity of the alternative interpretation. As described above, the alternative interpretation's treatment of evasive marriages creates what is, in essence, a federal law of marriage that stands apart from state law by overriding

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124. *Id.* at 149, 161–68.

125. *See supra* Part I.

126. *See supra* note 33 and accompanying text.

127. *See* Lowrey, *supra* note 8.

applicable state laws regarding the validity of marriages. To argue that couples who enter into these marriages may only have a single, dyadic marriage recognized for federal tax purposes—when these couples might, in fact, enter into a series of dyadic same-sex marriages because each of the dyadic marriages is void under state law—would merely impose a federal restriction on a category of federal tax marriages.

If the IRS were to embrace the alternative interpretation, taxpayers would very likely challenge it. These challenges could come from same-sex couples wishing to enter into plural tax marriages (if the IRS refuses them recognition), serially monogamous same-sex couples who wish to be freed from adverse consequences of the alternative interpretation, or, as I have explained elsewhere, from same-sex couples in evasive marriages that have broken down and who now find themselves trapped indefinitely in the highly disadvantageous married filing separately tax status because they are unable to sever their marital relationship under state or federal law.<sup>128</sup> As discussed below, when challenged, the alternative interpretation is unlikely to withstand scrutiny because of a combination of its implausibility, its inadvisability, and its creation of a federal tax law of marriage. Both litigation challenging the alternative interpretation and any ruling striking down that interpretation would serve only to darken the cloud of tax uncertainty hanging over same-sex couples post-*Windsor*.<sup>129</sup>

### 1. Deference to Revenue Rulings

According to the Treasury Regulations, “[a] Revenue Ruling is an official interpretation by the [IRS] that has been published in the Internal Revenue Bulletin. Revenue Rulings . . . are published for the information and guidance of taxpayers, [IRS] officials, and others concerned.”<sup>130</sup> The purpose of publishing revenue rulings is “to promote correct and uniform application of the tax laws by [IRS] employees and to assist taxpayers in attaining maximum voluntary compliance by informing [IRS] personnel and the public of National Office interpretations.”<sup>131</sup> Although it is intended that taxpayers will

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128. *Infanti*, *supra* note 7, at 122–23.

129. *E.g.*, *id.* at 120–22.

130. Treas. Reg. § 601.601(d)(2)(i)(a) (as amended in 1987); *see* Rev. Proc. 89-14, 1989-1 C.B. 814.

131. Treas. Reg. § 601.601(d)(2)(iii) (as amended in 1987).

rely upon revenue rulings in determining their tax liability, revenue rulings “do not have the force and effect of Treasury Department Regulations.”<sup>132</sup>

It is unclear precisely what level of deference, if any, should be afforded to revenue rulings. Conventional wisdom holds that the high level of deference afforded to agency action under *Chevron, USA, Inc. v. Natural Resources Defense Counsel, Inc.*<sup>133</sup> is inappropriate for revenue rulings and that the lower level of deference afforded under *Skidmore v. Swift & Co.*<sup>134</sup> is more appropriate.<sup>135</sup> In contrast, Kristin Hickman has argued that revenue rulings are eligible for *Chevron* deference because they can trigger the imposition of penalties and, therefore, have the force of law.<sup>136</sup> However, Professor Hickman has further argued that courts should nonetheless invalidate revenue rulings because the IRS issues them without satisfying the notice-and-comment requirements of the Administrative Procedure Act.<sup>137</sup>

Accepting Professor Hickman’s analysis, Revenue Ruling 2013-17 should be invalidated in its entirety because the IRS failed to comply with the Administrative Procedure Act when issuing the ruling. As discussed below, even following the conventional wisdom and applying *Skidmore* deference, the alternative interpretation should still be afforded no deference and should be rejected. Whichever approach is taken, the result will be to compound the uncertainty surrounding the tax treatment of same-sex couples post-*Windsor*.

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132. *Id.* § 601.601(d)(2)(v)(d)–(e).

133. 467 U.S. 837 (1984).

134. 323 U.S. 134 (1944).

135. *Chevron*, 467 U.S. at 842–43 (holding that when a statute is silent or ambiguous on the question to be addressed, the court will not impose its own construction of the statute if the agency has adopted a reasonable interpretation of the statute); *Skidmore*, 323 U.S. at 140 (holding that administrative “rulings, interpretations and opinions . . . while not controlling upon the courts by reason of their authority, constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”); Leandra Lederman, *The Fight over “Fighting Regs” and Judicial Deference in Tax Litigation*, 92 B.U. L. REV. 643, 664–68 (2012).

136. Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 502–09, 526–29 (2013).

137. Brief of Professor Kristin E. Hickman as Amicus Curiae in Support of Neither Party at 30–34, *United States v. Quality Stores, Inc.*, 134 S. Ct. 1395 (2014) (No. 12-1408), 2013 WL 6114794. Professor Hickman has argued that the exceptions to the notice-and-comment requirement are generally inapplicable to revenue rulings. *Id.* at 28–30.

## 2. *Skidmore* Analysis

Under *Skidmore*, agency interpretations that are not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.<sup>138</sup>

More recently, the Supreme Court, citing *Skidmore*, stated that “[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”<sup>139</sup> Professor Hickman, writing with Matthew Krueger, has helpfully suggested that these factors should be balanced with the overarching goals of *Skidmore* in mind; namely, “*Skidmore*’s factors should . . . be understood as ferreting out two things: first, the extent to which agencies have deliberately employed their superior expertise and resources in evaluating the statutory ambiguity at hand; and second, the potential for arbitrariness in agency action.”<sup>140</sup>

Bearing this in mind, the alternative interpretation of Revenue Ruling 2013-17 should be afforded no deference under *Skidmore* because it smacks more of arbitrariness than of a reasoned application of agency expertise. It cannot be argued that the alternative interpretation demonstrates thoroughness of consideration or a high degree of care on the part of the IRS. As discussed above, it is unclear whether the IRS intended to cover evasive marriages in the ruling or even whether the IRS understood that this category of marriages exists at all.<sup>141</sup> How can the IRS be said to have engaged in a reasoned application of its expertise with regard to a position that was not clearly articulated and, to date, has only been inferred by commentators and others interpreting ambiguous

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138. *Skidmore*, 323 U.S. at 140.

139. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (footnotes omitted).

140. Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1294 (2007).

141. *See supra* notes 22–43 and accompanying text.

language in the ruling? This is an especially difficult task when, in stark contrast, the IRS clearly articulated its position regarding migratory marriages, took care in explaining that position, and provided a reasoned justification of its choice of a place of celebration rule on administrability grounds.<sup>142</sup>

The alternative interpretation also lacks any claim to consistency with earlier IRS pronouncements. The IRS cites its earlier position in Revenue Ruling 58-66 as evidence of a consistent position regarding the determination of a marriage's validity for federal tax purposes; however, as explained above, Revenue Ruling 58-66 did *not* address the treatment of evasive marriages.<sup>143</sup> Rather, it does no more than lend support to the argument that the IRS has taken a consistent approach in dealing with the separate question of how to determine the validity of migratory marriages.<sup>144</sup>

Finally, the alternative interpretation lacks the power of persuasion. As discussed above, the alternative interpretation essentially creates a federal tax law of marriage—a law that would embrace the recognition of plural marriage for federal tax purposes.<sup>145</sup> Aside from an anomalous Second Circuit decision concerning the validity of an *ex parte* divorce (which the IRS has declined to follow),<sup>146</sup> the IRS and the courts have consistently taken the view that, for federal tax purposes, questions of marital status are determined under state law.<sup>147</sup> Indeed, in specifically rejecting the

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142. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 203-04.

143. See *supra* notes 29-32 and accompanying text.

144. Even that support may be tenuous, as one appellate court found that the IRS had taken a position contrary to the one announced in Revenue Ruling 58-66 in the context of determining the validity of an *ex parte* divorce. *Estate of Borax v. Comm'r*, 349 F.2d 666, 675 (2d Cir. 1965); Rev. Rul. 67-442, 1967-2 C.B. 65, 65 (declining to follow *Estate of Borax*).

145. See *supra* Part II.

146. *Estate of Borax*, 349 F.2d 666; Rev. Rul. 67-442, 1967-2 C.B. 65, 65 (declining to follow *Estate of Borax*).

147. *Boyter v. Comm'r*, 668 F.2d 1382, 1385 (4th Cir. 1981) (“We agree with the government’s argument that under the Internal Revenue Code a federal court is bound by state law rather than federal law when attempting to construe marital status.”); *Estate of Steffke*, 538 F.2d 730, 734 (7th Cir. 1976) (“No one argues that Congress intended to create a body of federal marital law wholly independent from state law. The real issue which this court must decide in the present case is not whether to apply state or federal law; it rather must decide which jurisdiction’s law should be recognized where a judgment of one jurisdiction is adjudged to be without validity in the controlling taxation jurisdiction although concededly the first judgment would have been recognized and sustained in other jurisdictions.”); *Von Tersch v. Comm'r*, 47 T.C. 415, 419 (1967) (“For the purpose of establishing eligibility to file a joint Federal income tax return, the marital status of the

Second Circuit's position, the Ninth Circuit emphasized some of the problems associated with adopting a federal tax law of marriage:

To provide a federal tax law of marriage would create greater confusion in divorce courts than now exists. Some individuals would be validly married for all purposes except federal taxes, and others validly married for federal tax purposes only. Marriage is peculiarly a creature of state law and we reaffirm . . . that state law governs.<sup>148</sup>

As the discussion in Part II above amply demonstrates, the Ninth Circuit was, if anything, understating the potential problems and confusion created by a federal tax law of marriage. Under the alternative interpretation, marriages could be recognized for federal tax purposes when actually void under state law. Because of the invalidity of these marriages under state law, additional marriages could then be entered into for federal tax purposes, whether purposefully or inadvertently. When the relevant state ban on same-sex marriage eventually falls, all of these marriages might then be recognized under state law as well, but either the additional marriages or the first marriage would likely be invalidated under state law to avoid a bigamous result—even though there might not be a corresponding termination of the marriage for federal tax purposes (or, if there is, the periods during which the various marriages would be legally recognized under state law might not match the periods during which those same marriages would be legally recognized for federal tax purposes). Furthermore, those taking advantage of this novel federal tax law of marriage might actually risk criminal prosecution for bigamy under state law following the fall of the state ban on same-sex marriage.

Moreover, the Ninth Circuit's observation that "[m]arriage is peculiarly a creature of state law"<sup>149</sup> highlights an additional problem with the alternative interpretation—namely, the federalism concerns that it raises. The alternative interpretation would create a federal tax

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two individuals is to be determined under the laws of the State of their residence."); Rev. Rul. 76-255, 1976-2 CB. 40, 40-41 (finding that, where a state court annulled a marriage and held that no valid marriage ever existed, the couple must file as single individuals for the year of the annulment and file amended returns for prior years); see BITTKER & LOKKEN, *supra* note 1166, ¶ 111.3.6 ("There being no federal law of marriage and divorce (except in the District of Columbia), the marital status of taxpayers is usually governed by local law.").

148. Lee v. Comm'r, 550 F.2d 1201, 1202 (9th Cir. 1977) (per curiam).

149. *Id.*

law of marriage that is both independent of and, by recognizing plural marriage, moves far beyond state marriage laws. The majority in *United States v. Windsor* was suspicious of DOMA's uniform federal definition of marriage because it flatly denied recognition to marriages that were valid under state law.<sup>150</sup> Of course, the alternative interpretation is not motivated by anti-gay animus in the way that DOMA was.<sup>151</sup> But, in the case of evasive marriages, the alternative interpretation would directly interfere with a state's ability to determine the circumstances under which its own residents may marry, just as DOMA did.<sup>152</sup> Courts may eventually declare individual (and hopefully, all) state bans on same-sex marriage unconstitutional; however, it is beyond the IRS's authority to circumvent the legal process for reaching these decisions by creating a federal tax law of marriage that overrides and overleaps state law.

Unfortunately, a concomitant of these federalism concerns is tangible harm to same-sex couples. As I have explained elsewhere, same-sex couples would be adversely affected by the alternative interpretation if they find themselves trapped in a federal tax marriage with no way out after the relationship breaks down or when they are forced to deal with the complexities (and increased risk of audit) stemming from inconsistent federal and state tax treatment of their relationships while those relationships remain intact.<sup>153</sup> The alternative interpretation would also exacerbate class-based inequities within states that refuse to recognize same-sex marriage, as only those with the means to "evade" same-sex marriage bans would have access to marriage for federal tax purposes.<sup>154</sup> Furthermore, as mentioned above, if plural marriage were recognized for federal tax purposes, the alternative interpretation could expose the parties to marriages intended to take advantage of plural marriage to criminal sanctions under state law when the relevant state bans on same-sex marriage are repealed or declared unconstitutional and legal recognition is applied retroactively.

For all of these reasons, courts would owe no deference to the alternative interpretation of Revenue Ruling 2013-17. Indeed, given its lack of persuasive power, courts entertaining challenges to the

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150. *United States v. Windsor*, 133 S. Ct. 2675, 2689-93 (2013).

151. *Id.* at 2693-95.

152. *Id.* at 2693-94.

153. *Infanti*, *supra* note 7, at 122-23, 125-26.

154. *Id.* at 120.

alternative interpretation would likely reject it. While legal challenges to the alternative interpretation were pending, the level of uncertainty surrounding the tax treatment of same-sex couples would naturally rise. Following the invalidation of the alternative interpretation, that uncertainty level would remain high because same-sex couples in evasive marriages would return to the status quo pre-*Windsor*, when the courts and the IRS provided same-sex couples essentially no guidance on the tax treatment of their relationships.<sup>155</sup>

As I have explained elsewhere, deferring to state choice-of-law rules on questions of marital status is no panacea either, because that would have its own set of negative impacts on same-sex couples.<sup>156</sup> The point of my work in this area is not to advocate one or another set of rules that privilege certain marriages over others for federal tax purposes. Instead, the point of my work is to demonstrate the complexities and problems entailed by the choice in the tax laws to privilege one form of relationship (i.e., marriage) over all others. The problems entailed by this choice have long been known to tax academics.<sup>157</sup> The evolving legal landscape for recognizing same-sex relationships simply provides an opportunity to make these problems salient to a wider audience. Hopefully, we can seize this opportunity to move away from a discussion of how best to bring same-sex couples into the privileged fold of marriage and toward a conversation about how to achieve a tax system that respects *all* relationships equally.<sup>158</sup>

#### CONCLUSION

Revenue Ruling 2013-17 has failed to deliver on the promise to same-sex couples of “certainty and clear, coherent tax-filing guidance.”<sup>159</sup> The ruling does not address—nor does it seem to fully appreciate—the complexities created by the intersection of mobility with the patchwork of state relationship recognition laws. Resulting ambiguity in the ruling has created the space for commentators to offer an interpretation of this ruling that would immediately expand the number of same-sex couples who could be treated as married for

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155. *Id.* at 116–17.

156. Anthony C. Infanti, *LGBT Families, Tax Nothings*, 17 J. GENDER RACE & JUST. 35, 64–68 (2014).

157. See, e.g., Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 614–18.

158. Infanti, *supra* note 7, at 128–29.

159. Lowrey, *supra* note 8 (internal quotation marks omitted).

federal tax purposes far beyond those married and residing in (or who formerly resided in) states that permit same-sex couples to marry.

In addition to having potential negative effects on same-sex couples, this interpretation would open the door to legally recognizing plural marriage for federal tax purposes. From all appearances, it seems that this door was inadvertently left ajar rather than purposefully held open. The failure of the alternative interpretation to demonstrate any power to persuade is testament to the accidental nature of this radical expansion of marriage's privileged circle. However salutary it might be to expand the legal recognition of same-sex relationships and to break the hold that conventional marriage has had on the federal tax laws, the alternative interpretation of Revenue Ruling 2013-17 is not the appropriate means of accomplishing these ends.