

Hegemonic Marriage: The Collision of “Transformative” Same-Sex Marriage with Reactionary Tax Law

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Abstract

Before there was a culture war in the United States over same-sex marriage, there was a battle between opponents and proponents of same-sex marriage within the LGBTQ+ community. Some opposed same-sex marriage because of the long patriarchal history of marriage and the more consequential need to bridge the economic and privilege gap between the married and the unmarried. Others, in contrast, saw marriage as a civil rights issue and lauded the transformative potential of same-sex marriage, contending that it could upset the patriarchal nature of marriage and help to refashion marriage into something new and better.

This Article looks back at that debate—and explores the complex relationship between legal and social change—through the prism of the federal tax definition of *marriage* before and after the landmark decisions in *United States v. Windsor* and *Obergefell v. Hodges*. Through an examination of the Internal Revenue Service’s shifting positions regarding the recognition of civil unions and domestic partnerships, this Article explores how and why the promised transformative potential of same-sex marriage has failed to be realized in this influential area of law.

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I. Introduction

Before there was a culture war in the United States over same-sex marriage, there was a debate between opponents and proponents of same-sex marriage within the LGBTQ+ community. Some within the community opposed pursuing the right to marry because of the long patriarchal history of marriage and the more consequential need to bridge the economic and privilege gap between the married and the unmarried. Others, however, saw marriage as a civil rights issue because of the central importance of marriage in American society. They sensed a profound wrong in denying marriage to same-sex couples who carried on lives no different from their heterosexual counterparts. Marriage proponents also lauded same-sex marriage’s transformative potential, contending that it would contribute to refashioning marriage into something new, better, and less patriarchal. Opponents, of course, feared the hegemony of heterosexual marriage and argued that same-sex marriage could not and would not transform American society.

This Article looks back at this debate through the lens of the federal tax definition of *marriage* before and after the U.S. Supreme Court’s decisions in *United States v. Windsor*¹ and *Obergefell v. Hodges*,² which legalized same-sex marriage in the federal and state realms, respectively. Following the advent of marriage equality, the question is whether the promised transformative potential of same-sex marriage is being realized. In the realm of federal tax law—the situs of perhaps the most intimate and sustained connection that citizens have with government—the answer thus far is a resounding no.

¹ 570 U.S. 744 (2013).

² 576 U.S. 644 (2015).

After earlier opening the door to legally recognizing a broader array of relationships, the Internal Revenue Service (Service) reversed course in the wake of *Windsor* and refused recognition to any relationship not denominated *marriage*.³ At first, it seemed that the Service was prodding states that had adopted civil union or domestic partnership regimes to recognize same-sex marriage—and this did happen in the two years that separated the *Windsor* and *Obergefell* decisions. But after *Obergefell*, when every state was required to permit same-sex couples to marry, the Service even more firmly closed the door to recognizing alternative relationship statuses, revealing its original move as reactionary and aimed at stymieing the transformative potential of same-sex marriage in this influential area of the law. This Article approaches the collision between faith in the ability to disrupt and overturn hierarchies and the reality of powerful and entrenched societal institutions such as heterosexual marriage as a case study of the complex relationship between legal and social change and of how, in keeping with Antonio Gramsci's notion of hegemony, the dominant group in society manages agitation for change by subordinated groups while maintaining its own privilege intact.

II. The Debate

Before and after the Hawaii Supreme Court's decision in *Baehr v. Lewin*,⁴ which first opened the door to extending the right to marry to same-sex couples in the United States, there was a lively debate within the LGBTQ+ community about whether marriage was a goal worth pursuing. In 1989, Thomas Stoddard and Paula Ettlbrick (both then of the Lambda Legal Defense and Education Fund) engaged in a well-known exchange on this topic, with Stoddard making arguments in favor of marriage and Ettlbrick arguing against marriage.⁵ This exchange, which is briefly recounted below, illustrates the arguments made on each side of the larger debate over whether to pursue marriage.

A. *Argument for Marriage*

Stoddard's argument in favor of marriage was three-pronged. On a practical level, Stoddard accepted the privileging of marriage in American society

³ These relationships go by many different names (*e.g.*, civil unions, domestic partnerships, reciprocal beneficiaries, and designated beneficiaries) and entail differing sets of rights and obligations. For convenience, I refer to these relationship statuses collectively as either "marriage alternatives" or "civil unions and domestic partnerships."

⁴ 852 P.2d 44 (Haw. 1993). Hawaii was expected to be the first state to recognize same-sex marriage after the landmark 1993 decision in *Baehr v. Lewin*; however, an amendment was later added to the Hawaii Constitution that placed the power to define *marriage* in the hands of the state legislature and effectively validated the challenged marriage law before a final decision could be reached in the case. *Baehr v. Miike*, No. 20371, 1999 WL 35643448 (Haw. Dec. 9, 1999).

⁵ See LESBIANS, GAY MEN, AND THE LAW 397–406 (William B. Rubenstein ed., 1993).

as a given and asserted that same-sex couples should have access to the “substantial economic and practical advantages” of marriage because reproducing those advantages outside of marriage was difficult and expensive—and inherently incomplete.⁶ On a political level, Stoddard argued that marriage should be placed at the top of every LGBTQ+ rights organization’s agenda “[b]ecause marriage is . . . the political issue that most fully tests the dedication of people who are *not* gay to full equality for gay people, and also the issue most likely to lead ultimately to a world free from discrimination against lesbians and gay men.”⁷ Finally, on a philosophical level, Stoddard favored the “*right to marry*” but did not advocate that, once achieved, all lesbians and gay men ought to exercise that right.⁸ Stoddard acknowledged that “marriage may be unattractive and even oppressive as it is currently structured and practiced.”⁹ But he argued that

enlarging the concept to embrace same-sex couples would necessarily transform it into something new. . . . Extending the right to marry to gay people—that is, abolishing the traditional gender requirements of marriage—can be one of the means, perhaps the principal one, through which the institution divests itself of the sexist trappings of the past.¹⁰

B. *Argument Against Marriage*

In contrast, Ettelbrick took a highly critical view of marriage: “Steeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis, the institution of marriage long has been the focus of radical feminist revulsion. Marriage defines certain relationships as more valid than all others.”¹¹ She saw marriage as antithetical to the “primary goals of the lesbian and gay movement.”¹² On the one hand, Ettelbrick contended that “marriage will not liberate us as lesbians and gay men. In fact, it will constrain us, make us more invisible, force our assimilation into the mainstream, and undermine the goals of gay liberation.”¹³ On the other hand, she asserted that “attaining the right to marry will not transform our society from one that makes narrow, but dramatic, distinctions between those

⁶ Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, in LESBIANS, GAY MEN, AND THE LAW, *supra* note 5, at 398, 399–400.

⁷ *Id.* at 400.

⁸ *Id.* at 401.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in LESBIANS, GAY MEN, AND THE LAW, *supra* note 5, at 401, 402.

¹² *Id.* at 402.

¹³ *Id.*

who are married and those who are not married to one that respects and encourages choice of relationships and family diversity.”¹⁴

Ettelbrick also bristled at the constraints of legal discourse, which would require lesbians and gay men to accentuate how similar they are to heterosexuals in order to obtain marriage.¹⁵ She saw this rhetorical erasure of difference as the Achilles’ heel of any attempt at transforming marriage:

By looking to our sameness and de-emphasizing our differences, we don’t even place ourselves in a position of power that would allow us to transform marriage from an institution that emphasizes property and state regulation of relationships to an institution which recognizes one of many types of valid and respected relationships. Until the constitution is interpreted to respect and encourage differences, pursuing the legalization of same-sex marriage would be leading our movement into a trap; we would be demanding access to the very institution which, in its current form, would undermine *our* movement to recognize many different kinds of relationships.¹⁶

Ettelbrick further feared that an unbending focus on “rights” would come at the expense of “justice” because obtaining the right to marry for a few “would do nothing to correct the power imbalances between those who are married . . . and those who are not.”¹⁷

C. *A Hindsight View*

Fast-forward a quarter century and it is easy to see how this debate was resolved. Opposition to pursuing marriage grew more muted within the LGBTQ+ community while opposition from without grew more vocal and governments of all levels took steps to prevent marriage from being extended to same-sex couples.¹⁸ Marriage eventually became the primary focus of the LGBTQ+ movement, and public opinion began to shift, with those in favor of same-sex marriage outnumbering those against by the early 2010s.¹⁹ Following that shift in public opinion, the U.S. Supreme Court issued two decisions just two years apart that extended marriage to same-sex couples on constitutional grounds. The first, *United States v. Windsor*,²⁰ required the federal government to legally recognize same-sex couples who were validly married under state law. The second, *Obergefell v. Hodges*, required all states

¹⁴ *Id.*

¹⁵ *Id.* at 403.

¹⁶ *Id.*

¹⁷ *Id.* at 402.

¹⁸ ANTHONY C. INFANTI, *EVERYDAY LAW FOR GAYS AND LESBIANS (AND THOSE WHO CARE ABOUT THEM)* 154–57 (2007).

¹⁹ ANDREW R. FLORES, WILLIAMS INST., *NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES* 19–21 (2014).

²⁰ 570 U.S. 744 (2013).

to permit same-sex couples to marry.²¹ Though the legal battle for same-sex marriage was won, opponents continue to resist these judicial decisions.²²

In light of Stoddard's and Ettelbrick's (not to mention others') sharply dissonant views regarding the transformative potential of same-sex marriage, these early years following the advent of marriage equality provide an opportunity to consider what, if any, transformative effect same-sex marriage has begun to have on American society. I explore this question by examining the Service's reaction to the *Windsor* and *Obergefell* cases. This tax lens is enlightening both because we all pay taxes or do things that trigger or impact our taxes every day and because tax benefits were at the heart of the legal arguments for marriage equality (indeed, *Windsor* itself involved a federal estate tax controversy).²³ As this Article demonstrates, the Service's response to the legalization of same-sex marriage suggests that Ettelbrick's concerns that the campaign for marriage equality would ultimately run counter to the LGBTQ+ movement's goals of encouraging the affirmation of difference and the validation of choice among family structures were well founded.

III. Pre-*Windsor* Tax Landscape

Historically, federal tax law deferred to state law when determining who is married.²⁴ For more than 80 years, this meant that same-sex relationships were not recognized for federal tax purposes because no state permitted same-sex couples to marry. Following the Hawaii Supreme Court's decision in *Baehr v. Lewin*,²⁵ however, Congress feared that this deference to state law might soon force the federal government to legally recognize same-sex relationships.²⁶ In response, Congress enacted the Defense of Marriage Act (DOMA), which defined *marriage* for purposes of federal law as a union of "one man and one woman."²⁷

As states extended legal recognition to same-sex couples, DOMA denied them access to the tax certainty that accompanies marriage, relegating them instead to a wilderness of tax uncertainty. For instance, as I have explored in detail elsewhere, married different-sex couples who pooled their income were (and still are) protected from adverse tax consequences by federal income and gift tax exemptions for transfers of property between spouses.²⁸ DOMA de-

²¹ 576 U.S. 644 (2015).

²² See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

²³ Anthony C. Infanti, *Victims of Our Own Success: The Perils of Obergefell and Windsor*, 76 OHIO ST. L.J. FURTHERMORE 79, 82–83 (2015).

²⁴ *Boyer v. Commissioner*, 668 F.2d 1382, 1385 (4th Cir. 1981).

²⁵ See *supra* note 4 and accompanying text.

²⁶ H.R. REP. NO. 104-664, at 10 (1996).

²⁷ Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (1996).

²⁸ See generally Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004).

nied same-sex couples access to these tax exemptions, but did nothing to instruct same-sex couples regarding how their intertwined financial lives would be treated for tax purposes in the absence of those exemptions. Same-sex couples had no idea which among many potential characterizations of the financial transfers between them the Service might choose on an intrusive audit. Would the Service attempt to characterize one partner's greater contributions to the pool as payments for services, gifts, or support payments—or something else entirely? The different potential characterizations entailed different tax consequences, some of which could result in punitively taxing the same dollars multiple times.

While same-sex couples grappled with the uncertainty surrounding the tax treatment of their relationships, the Service provided helpful guidance to different-sex couples in states that permitted them to enter into marriage alternatives. With no statutory barrier to treating these different-sex couples as *married* for federal tax purposes, H&R Block sent an inquiry in 2011 to the Service asking whether a different-sex couple who had entered into an Illinois civil union could file a joint federal income tax return.²⁹ In keeping with basic tax principles that look to substance rather than form in determining tax consequences,³⁰ the Service responded that the couple could file a joint return because civil unions and marriages are legally equivalent under Illinois law.³¹ Word of this position circulated among the tax bar, and the Illinois Department of Revenue apparently relied upon it when advising different-sex civil union couples that they could file joint income tax returns at both the federal and state levels.³² Thus, before *Windsor*, there were cracks in marriage's monopoly on relationship recognition for federal tax purposes that could only have been expected to grow once same-sex relationships were legally recognized at the federal level.

IV. Post-*Windsor* Surprise

Shortly following the Supreme Court's *Windsor* decision, the Service issued Revenue Ruling 2013-17 to clarify which same-sex relationships would be recognized for federal tax purposes because, at that time, the majority of states still denied same-sex couples the right to marry.³³ Revenue Ruling

²⁹ Amy S. Elliott, *IRS Memo Indicates Civil Unions Are Marriages for Tax Purposes*, 133 TAX NOTES (TA) 794 (Nov. 14, 2011); Letter from Pamela Wilson Fuller, Senior Technician Reviewer, Branch 2, Internal Revenue Service, to Robert Shair, Senior Tax Advisor, H&R Block (Aug. 30, 2011), available at 2011 TNT 215-62 (Tax Analysts) [<https://perma.cc/CXH8-PFAQ>].

³⁰ See *Estate of H.H. Weinert v. Commissioner*, 294 F.2d 750, 755 (5th Cir. 1961).

³¹ Letter from Pamela Wilson Fuller, *supra* note 29.

³² *Same-Sex Civil Unions*, ILL. REVENUE (2012), <http://www.revenue.state.il.us/individuals/same-sex-civil-unions.htm> [<https://web.archive.org/web/20120221025408/http://www.revenue.state.il.us/Individuals/Same-Sex-Civil-Unions.htm>]; see Elliott, *supra* note 29.

³³ 2013-2 C.B. 201.

2013-17 broadly recognized any same-sex marriage that was valid where celebrated, even if the couple resided in a state that refused to recognize same-sex marriages.³⁴ At the same time, the Service explained that it would embrace a broad, purposive reading of the gendered terms *husband* and *wife* in the Internal Revenue Code (Code) so that those terms would include married same-sex couples.³⁵ Then, at the end of that long ruling, the Service summarily stated—without any supporting legal reasoning—that it would deny legal recognition to any relationship that was “not denominated as a marriage” under state law.³⁶

At first, some thought that the Service’s position regarding marriage alternatives was simply political posturing. Because *Windsor* had no effect on state law (the decision merely required the federal government to revert to its historic deference to state law on questions of marital status), it was thought that denying legal recognition to civil unions and domestic partnerships might be a strategic move to pressure states that had created alternative relationship statuses to extend the right to marry to same-sex couples. Indeed, in less than a month, the Service’s position was cited in a New Jersey court decision holding that the state’s civil union law unconstitutionally denied equal treatment to same-sex couples.³⁷ In that decision, the court ordered the State of New Jersey to extend the right to marry to same-sex couples.³⁸

Yet, any political impetus for denying legal recognition to marriage alternatives as a means of encouraging states to extend the right to marry to same-sex couples disappeared once the Supreme Court decided *Obergefell v. Hodges*, which mandated that all states extend the right to marry to same-sex couples.³⁹ But any hope that the Service’s position was merely an act of political opportunism was quickly extinguished. Within a few months of *Obergefell*, the Treasury Department (Treasury) and the Service proposed regulations that reaffirmed the Service’s position in Revenue Ruling 2013-17.⁴⁰

Those regulations proposed to recognize “[a] marriage of two individuals . . . for federal tax purposes if the marriage would be recognized by any state, possession, or territory of the United States.”⁴¹ The regulations went on to provide that “[t]he terms *spouse*, *husband*, and *wife* do not include individuals who have entered into a registered domestic partnership, civil union, or other similar relationship not denominated as a marriage under the law of

³⁴ *Id.* at 203–04.

³⁵ *Id.* at 202–03.

³⁶ *Id.* at 204.

³⁷ *Garden State Equal. v. Dow*, 82 A.3d 336, 361–68 (N.J. Super. Ct. 2013).

³⁸ *Id.* at 366.

³⁹ 576 U.S. 644 (2015).

⁴⁰ Notice of Proposed Rulemaking, Definition of Terms Relating to Marital Status, 80 Fed. Reg. 64,378 (Oct. 23, 2015) (to be codified at 26 C.F.R. pt. 1, 20, 25, 26, 31, 301).

⁴¹ Prop. Reg. § 301.7701-18(b), 80 Fed. Reg. at 64,380.

a state, possession, or territory of the United States.”⁴² Treasury and the Service provided three reasons for denying legal recognition to marriage alternatives: (1) states that created marriage alternatives “have intentionally chosen not to denominate those relationships as marriages,” (2) recognizing these relationships might upset the expectations of couples who entered into them to reap greater federal benefits (under Social Security, for example) than they would if they were “married,” and (3) “no provision of the Code indicates that Congress intended to recognize as marriages civil unions, registered domestic partnerships, or similar relationships.”⁴³

V. Reaction to the Proposed Regulations

Treasury and the Service received only a handful of responses to the proposed regulations—a total of a dozen individuals and organizations submitted comments. One of those comments consisted of a single sentence of religious protest: “Marriage is between one man and one woman ordained by God not the government.”⁴⁴ Another likewise went beyond the scope of the regulations by urging Treasury and the Service to take a position regarding the application of *Obergefell*’s constitutional analysis to the laws of states that recognize common-law marriage.⁴⁵ Of the comments that addressed matters within the Service’s purview, the discussion below focuses on those regarding the proposed rules relating to marriage alternatives.

A. *Comments of General Support*

Some comments voiced general support for the proposed regulations. A trio of labor organizations applauded Treasury and the Service for issuing guidance in the form of regulations rather than relying on the more informal (and less visible) types of guidance that it had historically used to address tax issues relevant to the LGBTQ+ community.⁴⁶ The Family Equality Council similarly applauded Treasury and the Service, but suggested that the Service

⁴² *Id.*

⁴³ Definition of Terms Relating to Marital Status, 80 Fed. Reg. at 64,379.

⁴⁴ Donald Smith Jr., Comment on Proposed Regulations Containing Definition of Terms Relating to Marital Status (Dec. 8, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0013>.

⁴⁵ John J. Masselli, Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status (Dec. 5, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0005>.

⁴⁶ AFL-CIO, Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status (Dec. 7, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0015>; AFSCME, Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status (Dec. 7, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0010>; Am. Fed’n of Tchrs, Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status (Dec. 7, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0017>.

should amend its forms to use the gender-neutral term *spouse* rather than the terms *husband* and *wife*.⁴⁷

B. *Neutral and Supportive Comments*

Several commenters directly addressed the decision by Treasury and the Service not to recognize marriage alternatives. One commenter voiced neither support nor opposition to that decision.⁴⁸ Instead, he merely suggested the addition of a section to the proposed regulations addressing questions faced by registered domestic partners in community property states that stem from the tension between (1) the Service's preexisting position recognizing the application of state property law to domestic partners and (2) the intersection of the proposed regulations with Code provisions that speak to the treatment of married couples under community property regimes.⁴⁹

Two commenters wrote in support of the decision by Treasury and the Service not to recognize marriage alternatives. Mark Wojcik, a professor at John Marshall Law School, framed his support as respecting the choice made by couples to remain in a civil union or domestic partnership even after the advent of same-sex marriage.⁵⁰ Wojcik's comments made no mention, however, of the plight of couples who cannot convert their civil union or domestic partnership into a marriage (*e.g.*, due to the death or incapacity of one of the partners or breakdown of the relationship) or of intact couples whose choice of relationship status is circumscribed by continuing fears of discrimination—subjects that were directly addressed by some of those who wrote in opposition to the proposed regulations' treatment of marriage alternatives, as discussed below.⁵¹

Stephanie Hunter McMahon, a professor at the University of Cincinnati College of Law, opened her supportive comments with a focus on section 6013(a), which authorizes joint filing of income tax returns.⁵² McMahon observed that this provision only permits "[a] husband and wife" to file a joint

⁴⁷ Family Equality Council, Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status (Dec. 7, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0004>.

⁴⁸ Robert Denham, Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status (Dec. 3, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0016>.

⁴⁹ *Id.*

⁵⁰ Mark E. Wojcik, Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status (Dec. 7, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0014>.

⁵¹ *See infra* Part V.C.

⁵² Stephanie Hunter McMahon, Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status (Nov. 16, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0008>. References to a "section" are to a section of the Code, unless otherwise indicated.

return.⁵³ Based on the text of section 6013, McMahon argued that the Service has no authority to “overwrite the statute” and extend legal recognition to marriage alternatives because marriage alternatives are not specifically mentioned in the statute.⁵⁴ Taken to its logical conclusion, however, that argument would also seem to preclude the Service from recognizing same-sex marriages through the proposed regulations—after all, permitting married same-sex couples to file jointly would just as clearly overwrite the statute by undoing section 6013(a)’s explicit limitation of joint filing not just to married couples but specifically to different-sex married couples (*i.e.*, “a husband and wife”).⁵⁵ Under McMahon’s argument, it would seem that Congress alone has the power to amend the law to comply with the spirit of the Supreme Court’s marriage equality decisions—as she says, “Extension of joint filing beyond the statute is a decision for Congress and not the Treasury Department.”⁵⁶ Compounding the logical problems with her argument, McMahon paradoxically suggested that, before *Obergefell*, the Service *would* have been justified in recognizing marriage alternatives to afford equitable treatment to same-sex couples, even though, according to her reading of the statute, this action would be *ultra vires* and invalid.⁵⁷

McMahon further justified her support for the proposed regulations on policy grounds. She asserted that recognizing marriage alternatives would cause a drain on government resources because the Service would need to evaluate the rights and obligations of each marriage alternative to determine whether it is sufficiently equivalent to marriage.⁵⁸ Undercutting her own point, however, McMahon made a passing reference to how the Service had previously dealt with and resolved similar issues created by the proliferation of different forms of business entities.⁵⁹ McMahon also pointed to the potential for abuse by states colluding with their citizens to create marriage alternatives to achieve tax advantages.⁶⁰ But in making this argument, McMahon ignored both that marriage itself has given rise to the pervasive need to police taxpayer abuse and that refusing recognition to marriage alternatives only creates new and further possibilities for abuse.

⁵³ *Id.* at 1; I.R.C. § 6013(a).

⁵⁴ McMahon, *supra* note 52, at 1.

⁵⁵ I.R.C. § 6013(a).

⁵⁶ McMahon, *supra* note 52, at 1.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 2.

C. *Comments in Opposition*

Three commenters strongly opposed the decision by Treasury and the Service to refuse recognition to marriage alternatives. The Human Rights Campaign urged Treasury and the Service to recognize civil unions and domestic partnerships both because other agencies (*e.g.*, the Social Security Administration) already recognized these relationships and because “marriage remains out of reach for many same-sex couples due to fear of discrimination.”⁶¹ Donald Read, a long-time tax practitioner and then-member of the IRS Advisory Council, also urged Treasury and the Service to recognize marriage alternatives.⁶² Read rejected the rationales offered by Treasury and the Service for refusing such recognition as “contrived and unpersuasive.”⁶³ The ABA Section of Taxation (Tax Section) similarly described the decision by Treasury and the Service to deny legal recognition to marriage alternatives as “seriously flawed.”⁶⁴

With respect to the first justification proffered by Treasury and the Service (*i.e.*, deference to state law), Read argued that “[t]he proposed regulations do not show the deference to state domestic relations law that the Preamble asserts. The proposed regulations do violence to the principles of *Windsor* and *Obergefell*. And they violate longstanding ‘cornerstone’ tax principle that substance should prevail over form.”⁶⁵ Like Read, the Tax Section observed that Treasury and the Service were not actually deferring to the states as they purported to be doing:

The state legislatures were in most cases limited in their ability to recognize same-sex relationships either as a political matter or by a state constitutional provision that banned them from enacting legislation extending “marriage” to same-sex couples. It is also important to bear in mind that when they first appeared on the scene, civil unions and domestic partnerships were heralded

⁶¹ Hum. Rts. Campaign, Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status 2 (Dec. 7, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0009>.

⁶² Donald H. Read, Supplemental Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status (Jan. 29, 2016), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0020>.

⁶³ Donald H. Read, Supplemental Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status 2 (Dec. 7, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0012>.

⁶⁴ Section of Tax’n, Am. Bar Ass’n, Comment Letter on Proposed Regulations Containing Definition of Terms Relating to Marital Status 6 (Dec. 3, 2015), *available at* <https://www.regulations.gov/document?D=IRS-2015-0032-0007>. In the interest of full disclosure, I served as the principal author of these comments on behalf of the Tax Section, working together with other members of the Section’s Teaching Taxation Committee and a practitioner from its Estate & Gift Tax Committee.

⁶⁵ Read, *supra* note 62, at 1–2.

as granting full equality to same-sex couples, but within a short time came to be seen as doing nothing more than relegating same-sex couples to a second-class, separate-but-equal status. With this history in mind, it becomes clear that to deny legal recognition to these relationships based on the label applied to them—especially, but not exclusively, in open years when these relationships were the only legal status available to same-sex couples—would make the Service a party to the very sort of discrimination that the U.S. Supreme Court declared unconstitutional in *Obergefell* and *Windsor* and that the Service is attempting to remedy through the Proposed Regulations.⁶⁶

The Tax Section argued that, “[t]o truly defer to the states, the Service should ignore the labels applied to these alternative relationships and be guided instead by their legal equivalence to marriage under state law in determining their federal tax treatment.”⁶⁷

With respect to the second justification proffered by Treasury and the Service (*i.e.*, frustrated expectations of couples in marriage alternatives), Read explained that this justification was nothing more than a red herring. Before the Supreme Court’s same-sex marriage decisions, the only couples who had a choice between marriage and a civil union or domestic partnership were *different-sex* couples—the same-sex couples for whom these alternatives were originally designed had *little or no* choice among relationship statuses.⁶⁸ The Tax Section further noted that, even after the Supreme Court decisions, some same-sex couples remained trapped in alternative relationships and unable to marry because of the death or incapacity of one of the partners—and the same is, of course, true for those whose relationships broke down before marriage became available but who did not split until afterward.⁶⁹ These couples never had a real “choice” among relationship statuses that Treasury and the Service would be honoring—their only choice was between a marriage alternative or no legal recognition at all. Compounding the disregard for couples still suffering the legacy of unconstitutional discrimination, the Tax Section pointed out that the actual expectation of *all* couples in civil unions and domestic partnerships prior to 2013 was—based on the Service’s own informal guidance—that these relationships *would* be recognized for federal tax purposes.⁷⁰ If anything, it was the Service’s post-*Windsor* change in position that frustrated taxpayer expectations.⁷¹

Furthermore, both Read and the Tax Section opposed the idea that interpretation of the tax laws should be dictated by couples’ expectations regarding the tax and nontax benefits that they might achieve through abusive behavior

⁶⁶ Section of Tax’n, *supra* note 64, at 6–7.

⁶⁷ *Id.* at 7.

⁶⁸ Read, *supra* note 62, at 2–3.

⁶⁹ Section of Tax’n, *supra* note 64, at 9.

⁷⁰ *Id.* at 8–9; see *supra* text accompanying notes 29–32.

⁷¹ Section of Tax’n, *supra* note 64, at 9.

that takes advantage of gaps in the law. The Tax Section noted that the tax law doctrine of substance over form was designed precisely to combat such behavior and also noted that setting tax policy in order to influence Social Security or other federal benefits is outside the purview of Treasury and the Service.⁷² And, as Read remarked, “it is not clear that their device works—Social Security bases spousal status for benefits on whether one person would take from the other under intestacy laws, which, in California, registered domestic partners clearly do.”⁷³

With respect to the final justification proffered by Treasury and the Service (*i.e.*, that Congress had not enacted a provision recognizing marriage alternatives), both Read and the Tax Section underscored how untenable this argument was, with the Tax Section explaining:

[U]ntil the *Windsor* decision, Congress refused to treat even married same-sex couples as spouses for federal tax purposes. It is implausible to expect that Congress would have enacted a provision indicating that if the federal Defense of Marriage Act were ever struck down, only married spouses and not registered domestic partners or parties to a civil union could be treated as married. Moreover, the lack of a specific provision in the Code addressing the exact situation faced by a taxpayer has never been a barrier to the application of the principle of substance over form; indeed, the inability of Congress to timely address every situation faced by taxpayers is the *raison d'être* of that principle.⁷⁴

The Tax Section concluded its comments by noting that the proposed rule regarding the recognition of marriage was inconsistent with the proposed regulations' position regarding marriage alternatives. The proposed regulations would recognize a marriage so long as *any* state, possession, or territory would recognize the relationship as a marriage.⁷⁵ As the Tax Section observed, some states already recognized as a marriage not only civil unions and domestic partnerships but any relationship that has “substantially” the same rights and obligations as a marriage.⁷⁶ Thus, despite purporting to deny recognition to marriage alternatives, the proposed rule for determining marital status actually would require the Service to recognize marriage alternatives because at least one state already classified them as marriages under its laws.

VI. The Final Regulations

In its discussion of the comments regarding the treatment of marriage alternatives, the preamble to the final regulations first summarized the Treasury

⁷² *Id.* at 10.

⁷³ Read, *supra* note 62, at 3.

⁷⁴ Section of Tax'n, *supra* note 64, at 11.

⁷⁵ Prop. Reg. § 301.7701-18(b), 80 Fed. Reg. at 64,380.

⁷⁶ Section of Tax'n, *supra* note 64, at 11–12.

and Service's position and then stated: "Several commenters submitted comments addressing this section of the proposed regulations. Many agreed with [refusing recognition to marriage alternatives], but three did not."⁷⁷ This description of the support for Treasury and the Service's position is misleading. With only a dozen commenters in total on a regulation project that touches an untold number of lives, it stretches credulity to use the word *many* to characterize the number who expressed agreement with Treasury and the Service. Moreover, of the dozen comments received, only half addressed marriage alternatives—these are the "several commenters" inexactlly referenced by Treasury and the Service. Of that group, half were either neutral or supportive and half strongly opposed the rule; yet, Treasury and the Service's ambiguous phrasing makes it seem as if opponents were a tiny minority of those who addressed the refusal to recognize marriage alternatives. It only becomes apparent in the ensuing discussion of specific comments that Treasury and the Service included among the "many" who supported its position not only those who simply expressed general support for the proposed regulations but also those who made comments outside the scope of the regulations altogether.⁷⁸ By exaggerating support for their decision to deny recognition to marriage alternatives, Treasury and the Service made clear from the start how little interest they had in hearing criticism of their position or in altering the rule in the proposed regulations.

When addressing the specific comments on their position regarding marriage alternatives, Treasury and the Service did not identify or explain any of the flaws or logical inconsistencies in the arguments made by those supporting their position; those arguments were embraced unquestioningly.⁷⁹ In contrast, the critiques leveled at the position of Treasury and the Service regarding marriage alternatives received a skeptical reception. Treasury and the Service alternatively minimized, disregarded, or turned these critiques on their head, standing steadfast with their original position that maintained the illusion of deference to the states and the existence of "choice" among relationship statuses.⁸⁰ The attitude of Treasury and the Service toward these critiques is summed up in a single sentence from the preamble to the final regulations: "Treasury and the IRS disagree with the commenters and continue to believe that the regulation should not treat registered domestic partnerships, civil unions, and other similar relationships—entered into in states that continue to distinguish these relationships from marriages—as marriage for federal tax purposes."⁸¹ Treasury and the Service had quite obviously decided

⁷⁷ T.D. 9785, 81 Fed. Reg. 60,609, 60,612 (Sept. 2, 2016).

⁷⁸ *Id.* at 60,615.

⁷⁹ *Id.* at 60,612. See *supra* Part V.B for discussion of some of the flaws in the supportive comments.

⁸⁰ T.D. 9785, 81 Fed. Reg. at 60,612–15.

⁸¹ *Id.* at 60,614.

on their position and were not going to be persuaded by arguments to the contrary.

The only critique that Treasury and the Service did accept was the one pointing out a conflict in the proposed regulations. They acknowledged that the proposed rule affording recognition to a relationship that *any* state, possession, or territory would recognize as a marriage would undermine their position regarding marriage alternatives because several states already treated marriage alternatives as marriages under their own laws.⁸² Yet, despite professing their deference to the judgment of the states, Treasury and the Service stubbornly refused to respect the judgment of those states—a group including both states that had created marriage alternatives (*i.e.*, Connecticut and New Hampshire) and those that had not (*i.e.*, Massachusetts)—that relationships that entail similar rights and obligations should be treated similarly under the law.⁸³ Turning their back on core tax policy principles and forfeiting their usual role of combating abuse, Treasury and the Service revised the final regulations to tighten the privileging of marriage by specifying that the determination of whether a relationship is a marriage or a marriage alternative would be made under the law of the state where the relationship was celebrated.⁸⁴

VII. Gramscian Hegemony

Critical legal scholars have recognized that Antonio Gramsci's "work on hegemony provides a useful starting point for [those] who understand that domination is often subtle, invisible, and consensual."⁸⁵ This work on hegemony serves as a powerful lens for examining the implementation of the *Windsor* and *Obergefell* decisions by Treasury and the Service, illustrating the complex relationship between legal and social change and how the dominant group in society protects and preserves its privilege in response to demands for change from subordinated groups.

This Part first provides a brief description of the Gramscian notion of hegemony. Then, having laid the necessary groundwork, the Article examines the implementation by Treasury and the Service of the *Windsor* and *Obergefell* decisions through the lens of Gramscian hegemony.⁸⁶

⁸² *Id.* at 60,610–11.

⁸³ Section of Tax'n, *supra* note 64, at 11.

⁸⁴ Reg. § 301.7701-18(c).

⁸⁵ Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYUL REV. 515, 519; *see, e.g.*, Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 12 GERMAN L.J. 247 (2011); Aníbal Rosario-Lebrón, *For Better and for Better: The Case for Abolishing Civil Marriage*, 5 WASH. U. JURIS. REV. 189 (2013).

⁸⁶ This description is adapted from Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1243–49 (2008) [hereinafter Infanti, *Tax Equity*], which applies the Gramscian concept of hegemony more broadly in a tax context than just the particular manifestation described here. For another example of a broader application of Gramscian hegemony, *see* ANTHONY C. INFANTI,

A. “*Domination*” and “*Leadership*” (or “*Hegemony*”)

In his influential *Prison Notebooks*, Gramsci posited that a social group maintains its supremacy through a combination of force and consent.⁸⁷ As he put it:

[T]he supremacy of a social group manifests itself in two ways, as “domination” and as “intellectual and moral leadership”. A social group dominates antagonistic groups, which it tends to “liquidate”, or to subjugate perhaps even by armed force; it leads kindred and allied groups. A social group can, and indeed must, already exercise “leadership” before winning governmental power (this indeed is one of the principal conditions for the winning of such power); it subsequently becomes dominant when it exercises power, but even if it holds it firmly in its grasp, it must continue to “lead” as well.⁸⁸

“Domination” is associated with “[t]he apparatus of state coercive power which ‘legally’ enforces discipline on those groups who do not ‘consent’ either actively or passively.”⁸⁹ This force may be applied by the military or by the courts, and the threat of future force hangs over those who currently consent to their own subordination but who later change their minds.⁹⁰ Yet, domination alone is insufficient to maintain lasting control over subordinated groups. The dominant group must also exercise “leadership,” which Gramsci often labeled *hegemony*.⁹¹ The “leadership” (or “hegemony”) that Gramsci speaks of is a leadership of ideas. Gramsci observed that, through a dominant group’s exercise of ideological leadership, it could actually secure the consent of other groups to their own subordination. Despite feeling uncoerced, this consent is shaped and influenced by past history, including past exercises of “leadership,” which subordinated groups have internalized to the point where it has simply come to feel normal and natural.⁹² To secure subordinated groups’ consent, the dominant group offers a conception of life or worldview that serves its own interests, but that, at the same time, taps into this internalized past history in a way that makes that worldview appealing to both intellectuals and the masses.⁹³

OUR SELFISH TAX LAWS: TOWARD TAX REFORM THAT MIRRORS OUR BETTER SELVES 137–59 (2018) [hereinafter INFANTI, SELFISH TAX LAWS].

⁸⁷ SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI 12 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971) [hereinafter PRISON NOTEBOOKS].

⁸⁸ *Id.* at 57–58.

⁸⁹ *Id.* at 12.

⁹⁰ *Id.* at 12; see Litowitz, *supra* note 85, at 519.

⁹¹ Quintin Hoare & Geoffrey Nowell Smith, *Preface* to PRISON NOTEBOOKS, *supra* note 87, at ix, xiii–xiv.

⁹² PRISON NOTEBOOKS, *supra* note 87, at 196–200.

⁹³ *Id.* at 328–29, 341, 421–22.

Of course, the dominant group must make some sacrifices to subordinated groups in fashioning this worldview in order to align their interests and make the subordinated groups' consent feasible; however, those sacrifices occur only at the margins and never jeopardize the dominant group's control.⁹⁴ With some effort, the dominant group's worldview (as tempered to appeal to subordinated groups) can eventually transform the "popular 'mentality'" and come to be "concretely—i.e. historically and socially—universal."⁹⁵ Once a worldview achieves such mass acceptance, it comes to seem natural or normal, and it becomes "implicitly manifest in art, in law, in economic activity and in all manifestations of individual and collective life."⁹⁶

[This] type of control . . . is more insidious and complicated to achieve. It involves subduing and co-opting dissenting voices through subtle dissemination of the dominant group's perspective as universal and natural, to the point where the dominant beliefs and practices become an intractable component of common sense. In a hegemonic regime, an unjust social arrangement is internalized and endlessly reinforced in schools, churches, institutions, scholarly exchanges, museums, and popular culture.⁹⁷

Gramsci envisioned law as playing a dual role that corresponds to the notions of "domination" and "hegemony."⁹⁸ Obviously, the law furthers "domination" through its repressive function of punishing those who fail to conform to the norms promulgated by the dominant group.⁹⁹ At the same time, however, the law furthers ideological hegemony by serving an assimilationist/educational function:

This problem contains in a nutshell the entire "juridical problem", i.e. the problem of assimilating the entire grouping to its most advanced fraction; it is a problem of education of the masses, of their "adaptation" in accordance with the requirements of the goal to be achieved. This is precisely the function of law in the State and in society; through "law" the State renders the ruling group "homogeneous", and tends to create a social conformism which is useful to the ruling group's line of development.¹⁰⁰

In this regard, Gramsci saw law's influence as extending beyond the area of positive law and into general notions of morality and customs, allowing the

⁹⁴ *Id.* at 161.

⁹⁵ *Id.* at 348.

⁹⁶ *Id.* at 328.

⁹⁷ Litowitz, *supra* note 85, at 519.

⁹⁸ *Id.* at 530.

⁹⁹ PRISON NOTEBOOKS, *supra* note 87, at 247.

¹⁰⁰ *Id.* at 195.

“leadership” of the dominant group to be brought to bear even in areas where people feel that their actions are spontaneous and free.¹⁰¹

B. *Channeling Privilege*

In the United States, marriage and the “traditional” family are core components of the worldview offered by the dominant group—its articulation of the “normal” and “natural” that has come to be manifested in all aspects of American life. As Marjorie Kornhauser has observed, “the one-breadwinner, married-couple family holds special political and historical meaning in the United States.”¹⁰² Naturally, this worldview surfaces in federal tax laws that are riddled with considerations of marital and familial status,¹⁰³ going so far as to reward so-called traditional families with marriage “bonuses” that allow breadwinning husbands to pay less tax than they would have, had they not married their stay-at-home spouses:¹⁰⁴

[T]he tax laws endorse a specific family type as the ideal against which all others should be measured and to which all should aspire, and they exert a powerful influence to close the door on alternative relationship statuses that might provide couples with a choice among different levels of legal recognition. The taxable unit is—and especially during the battles over same-sex marriage, was—a highly visible embodiment of “an ‘ideology of marriage and family’ that exalts marriage and nuclear family above all other personal relationships, and that is so deeply ingrained in [American] society that it goes unrecognized and unchallenged.”¹⁰⁵

Treasury and the Service’s implementation of *Windsor* and *Obergefell* reflects and reifies this privileging of the “traditional” family. Notably, Treasury and the Service did not implement *Windsor* and *Obergefell* under a conservative administration otherwise hostile to LGBTQ+ rights. Yet, even under the Obama administration, which eventually came around to full-throated public support of same-sex marriage and LGBTQ+ rights,¹⁰⁶ the implementation of

¹⁰¹ *Id.* at 195–96.

¹⁰² Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*, 11 THEORETICAL INQUIRIES L. 631, 634 (2010).

¹⁰³ Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 132 (1998).

¹⁰⁴ BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES & GIFTS ¶ 111.5.5 Westlaw (database updated 2020).

¹⁰⁵ INFANTI, SELFISH TAX LAWS, *supra* note 86, at 88 (quoting Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 672 (2010)).

¹⁰⁶ See Letter from Eric H. Holder, Jr., U.S. Attorney General, to John A. Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011), <https://www.justice.gov/opa/pr/letter-attorney-general-congress-litigation-involving-defense-marriage-act> [<https://perma.cc/Z3WN-B9LC>]; U.S. Departments of Education and Justice, “Dear Colleague Letter on Transgender Students”

the *Windsor* and *Obergefell* decisions was tinged with the reactionary hues of coercive homonormativity.

The application of the Supreme Court's marriage equality decisions to the federal tax laws demonstrates how the dominant group in society contends with agitation for social change from subordinated groups and how an accepted heteronormative "worldview" can influence the interpretation and application of law. While the dominant group may make sacrifices to quiet subordinated groups and bring them into the fold, those sacrifices will be limited in nature—or, as Gramsci put it, "such sacrifices . . . cannot touch the essential."¹⁰⁷ Thus, in Revenue Ruling 2013-17, the Service chose (1) to adopt a generous place-of-celebration rule for recognizing same-sex marriages that treated same-sex couples as married for federal tax purposes even if they lived in one of the many states that refused to recognize their marriages; and (2) to embrace a broad, gender-neutral reading of the terms *husband* and *wife* that includes both different-sex *and* same-sex couples. Juxtaposed against these strongly homonormative positions, the Service took what, in retrospect, appear to be clear and consistent steps to cabin the LGBTQ+ movement's legal victories in ways that both perpetuate past harms caused by tax discrimination based on sexual orientation and stymie progress toward a society that eliminates the privileges historically accorded to heterosexuality and marriage.

C. *Heterosexual Privilege*

When deciding to deny legal recognition to marriage alternatives, the Service turned a blind eye to the history of legal discrimination against same-sex couples. Ignorance of how its position reverberated against this historical background might have been a plausible excuse for that initial guidance as well as the later proposed regulations issued by Treasury and the Service denying recognition to marriage alternatives; however, the plausibility of that excuse evaporated once comments on the proposed regulations directly addressed their impact on LGBTQ+ taxpayers and placed the regulations in the context of long-standing discrimination against same-sex couples. But faced with these comments, Treasury and the Service exhibited an unwavering adherence to their initial position through unquestioning acceptance of the comments submitted by those who favored their perspective and exaggeration of the level of support among commenters for denying legal recognition to marriage alternatives.

While essentially ignoring the discrimination experienced by same-sex couples, Treasury and the Service chose to privilege and showcase the experience of different-sex couples and to embrace a strongly heteronormative view of the social context when explaining their decision to deny legal recognition

(May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf> [<https://perma.cc/6852-Z6RL>].

¹⁰⁷ PRISON NOTEBOOKS, *supra* note 87, at 161.

to marriage alternatives. Before *Windsor*, some different-sex couples took advantage of marriage alternatives—which had primarily been created to keep same-sex couples in second-class, “separate-but-equal” relationships—to arbitrage and benefit from the perceived legal gaps between marriage, on the one hand, and civil unions and domestic partnerships, on the other. When federal legal recognition was extended to married same-sex couples in *Windsor*, Treasury and the Service suddenly became preoccupied with different-sex couples’ ability to reap the real or imagined benefits of being in a relationship that was not denominated *marriage*. Treasury and the Service ignored the Service’s earlier guidance on the treatment of marriage alternatives—which had been disseminated among the tax bar and echoed by the Illinois Department of Revenue—so that they could fashion a claim of frustrated expectations out of whole cloth in order to ensure that the benefits that different-sex couples hoped to reap when they entered into marriage alternatives would remain undisturbed. Further entrenching heterosexual privilege, Treasury and the Service cast the following aside as irrelevant: (1) the fact that same-sex couples did not have the same ability to choose among legally recognized relationships as different-sex couples did prior to *Windsor* (and because of the continued legality of discrimination based on sexual orientation in many states, still do not); (2) the fact that some same-sex couples who entered into civil unions and domestic partnerships could not marry even after *Windsor* and *Obergefell* (e.g., due to incapacity, death, or breakdown of the relationship); and (3) the idea that the Service should adhere to its historic role of protecting against taxpayer abuse of the law.

The Service has underscored its privileging of the needs of different-sex couples over those of same-sex couples through its general failure to provide guidance to same-sex couples regarding the application of *Windsor* and *Obergefell* to years before those decisions were issued.¹⁰⁸ For example, rather than shatter the illusion of taxpayer “choice” among legal relationships, the Service has provided no transitional relief to same-sex couples who found themselves trapped in marriage alternatives when the Supreme Court decided *Windsor* and *Obergefell* and who thus never had enjoyed a “choice” among relationship statuses. The Service has likewise failed to address a problem quickly identified following *Windsor* concerning the tax expectations of married same-sex couples whose divorces and alimony arrangements predated

¹⁰⁸ The Service has provided a variety of guidance regarding the retroactive application of the Supreme Court’s same-sex marriage decisions to employers with LGBTQ+ employees. See Notice 2015-86, 2015-2 C.B. 887; Notice 2014-37, 2014-1 C.B. 1100; Notice 2014-19, 2014-1 C.B. 979; Notice 2014-1, 2014-1 C.B. 270; Notice 2013-61, 2013-2 C.B. 432. The Service has been far less forthcoming with guidance for issues directly affecting LGBTQ+ taxpayers. See Notice 2017-15, 2017-6 I.R.B. 783; Rev. Proc. 2014-18, 2014-1 C.B. 513.

(and, importantly, could not have contemplated or anticipated) that decision.¹⁰⁹ The Service has neither provided guidance nor transitional relief to same-sex couples in these situations, despite their legitimate claims of frustrated expectations.

Windsor and *Obergefell* have thus brought recognition to a slice of same-sex relationships for federal tax purposes, but without any acknowledgment of, let alone any serious attempt to redress, the effects of discrimination suffered by the LGBTQ+ community. Indeed, while ostensibly implementing judicial decisions extending legal recognition to *same-sex* relationships, Treasury and the Service placed front and center the needs and perspective of a segment of *different-sex* couples—couples who suffered no discrimination but who attempted to engage in abusive behavior by leveraging their heterosexual privilege to arbitrage legal gaps between marriage and its alternatives. It is little wonder, then, that efforts by Treasury and the Service to recognize same-sex relationships have had the effect of preserving and protecting heterosexual privilege. Their actions bring to mind Gramsci's observation that "[s]ubaltern groups are always subject to the activity of ruling groups, even when they rebel and rise up In reality, even when they appear triumphant, the subaltern groups are merely anxious to defend themselves"¹¹⁰

D. Marital Privilege

Following the *Obergefell* decision, Melissa Murray expressed concern that the U.S. Supreme Court had only further entrenched the importance of marriage with that decision, at the cost of "render[ing] nonmarital families less valuable and less worthy."¹¹¹ Murray's concerns have clearly been borne out in the implementation by Treasury and the Service of the *Windsor* and *Obergefell* decisions. Treasury and the Service have dashed any hope that the Court's same-sex marriage decisions might open the door to recognizing a broader array of conjugal and nonconjugal relationships for federal tax purposes.

In reality, the decision by Treasury and the Service goes a step further by punishing many couples who enter into marriage alternatives. In states that recognize marriage alternatives and that have an income tax that piggybacks on the federal income tax (*e.g.*, California and Hawaii), couples in civil unions and domestic partnerships find that Treasury and the Service have multiplied their tax return filing obligations. Couples in these states need to fill out extra forms just to convert their separate federal returns into joint state

¹⁰⁹ Lydia Beyoud, *Tax Complications May Surface in Same-Sex Divorces, Practitioners Say*, DAILY TAX REP. (BNA), Sept. 18, 2013, at GG-1.

¹¹⁰ PRISON NOTEBOOKS, *supra* note 87, at 55.

¹¹¹ Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1256–57 (2016).

returns.¹¹² These couples also find themselves at greater risk of being audited by state tax authorities because the information reported to the federal and state governments differs due to the mismatch between their state and federal filing statuses.¹¹³ In other states (*e.g.*, Colorado and Illinois), couples in civil unions and domestic partnerships have lost the benefit of joint filing because the state compels them to file separate returns using their federal filing status.¹¹⁴

Even among those who do marry, Treasury and the Service have privileged a certain type of marriage: “traditional” marriage. Comments on the proposed regulations suggested that Treasury and the Service should “specifically reference ‘same-sex marriage’ so that the definitions apply regardless of gender and to avoid any potential issues of interpretation.”¹¹⁵ Treasury and the Service rejected this suggestion and instead embraced the gendered/heterosexual terms *husband* and *wife*. The final regulations provide that, “[f]or federal tax purposes, the terms *spouse*, *husband*, and *wife* mean an individual lawfully married to another individual. The term *husband and wife* means two individuals lawfully married to each other.”¹¹⁶ Incomprehensibly, Treasury and the Service justified their rejection of the commenter’s suggestion on the ground that “[a]mending the regulations to specifically address a marriage of two individuals of the same sex would undermine the goal of these regulations to eliminate distinctions in federal tax law based on gender.”¹¹⁷ In effect, Treasury and the Service created definitions of *marriage*, *husband*, and *wife* that, rather than recognizing LGBTQ+ taxpayers and their relationships as required by *Windsor* and *Obergefell*, subsumed the homosexual into the heterosexual.

This legal erasure of homosexuality dovetails with the privileging of heterosexuality discussed earlier and sends the message that taxpayers remain presumptively heterosexual even in the wake of *Windsor*. After all, the statutory and regulatory provisions that contain the gendered terms *husband* and *wife* outnumber the provision that defines these terms by more than 270 to 1.¹¹⁸

¹¹² Haw. Dep’t of Tax’n, 2019 N-11 Hawaii Resident Income Tax Instructions, at 12 (2019); Cal. Franchise Tax Bd., Pub. No. 737, Tax Information for Registered Domestic Partners, at 3 (2019).

¹¹³ See Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29 (2012).

¹¹⁴ COLO. REV. STAT. ANN. § 14-15-117 (Westlaw through 2020 Reg. Sess.); 35 ILL. COMP. STAT. 5/502(c) (Westlaw through P.A. 101-651); Ill. Dep’t of Revenue, 2019 Form IL-1040 Instructions, at 5–6 (2019).

¹¹⁵ T.D. 9785, 81 Fed. Reg. at 60,610; see Wojcik, *supra* note 50.

¹¹⁶ Reg. § 301.7701-18(a).

¹¹⁷ T.D. 9785, 81 Fed. Reg. at 60,610.

¹¹⁸ Anthony C. Infanti, *The House of Windsor: Accentuating the Heteronormativity in the Tax Incentives for Procreation*, 89 WASH. L. REV. 1185, 1210–12 (2014) (searches updated September 2019).

Moreover, this erasure reinforces the demand that members of the LGBTQ+ community conform their behavior to heterosexual norms in order for their relationships to be recognized—a demand that inheres in the refusal to recognize marriage alternatives.

Though this privileging of marriage and heterosexuality is quite purposeful and coercive, there is no indication or evidence that either Treasury and the Service under the Obama administration or those who submitted comments in agreement with their position were animated by malice toward the LGBTQ+ community. To the contrary, domination and subordination are complex and insidious forces, and they often operate in ways that are “subtle, invisible, and consensual.”¹¹⁹ The privileging of marriage and heterosexuality has surrounded all of us for so long that, in many ways, it just seems normal and natural—an unarticulated part of the way in which we see the world. Treasury and the Service formulated their post-*Windsor/Obergefell* positions (and commenters agreed with those positions) influenced by this worldview and, even more importantly, against the background of an Internal Revenue Code that contains a taxable unit structured on and around marriage and that rewards with marriage “bonuses” those who conform to a 1950s, *The Adventures of Ozzie and Harriet* vision of the American family. Our tax laws remain tightly moored to an idealized past and, having endorsed a specific family type as the ideal, the extant structure of the tax system could only have exerted a powerful influence on Treasury, the Service, and others intimately connected with the tax system to deny recognition to alternative relationship statuses in a coercive move to reaffirm the importance and privilege of heterosexual marriage.

VIII. Conclusion

Looking back at Stoddard’s and Ettelbrick’s exchange in the early years following the advent of marriage equality, it seems that Ettelbrick was both prescient and justifiably skeptical of the transformative potential of same-sex marriage—at least insofar as the federal tax domain is concerned. Far from witnessing the tumbling (or even slow crumbling) of hierarchies and the embrace of more expansive and inclusive approaches to legal recognition of the family in this area of the law, we have witnessed the quiet workings of domination/subordination through the reinforcement of hierarchies and reification of privilege, forcible legal assimilation/erasure, and new steps toward exclusion of the traditionally subordinated. It may simply be that Stoddard and others expected too much work to be done by marriage equality alone and that Ettelbrick was more realistic about the limited work that marriage equality could and would accomplish for the LGBTQ+ movement.

This case study has demonstrated the power of entrenched societal institutions such as marriage to stymie or cabin efforts to effect social change

¹¹⁹ Litowitz, *supra* note 85, at 519.

through legal change, especially when those efforts threaten established and entrenched privilege. If the goals of the early LGBTQ+ movement to affirm difference and validate choice among family structures are to be achieved, it will not be through the simple embrace of “traditional” marriage but through the continued hard work of chipping away at its hegemony and by offering a more inclusive and appealing view of how our society might approach difference at the individual and family levels.¹²⁰ This work should include, among other things, advocacy not only from tax academics but also from the practicing tax bar and the public for:

- LGBTQ+ interest groups and activists to pay attention to the impact of the tax system on the LGBTQ+ community. Though not as “exciting” as some other areas of the law, tax law has a wider, more sustained, and more direct impact on members of the LGBTQ+ community than most (if not all) other areas of law.¹²¹
- Resistance to coerced tax homonormativity through a move to an individual tax filing regime, which could open the way to accommodating a variety of conjugal and nonconjugal relationships for tax purposes and produce a tax system that better reflects the diversity of family relationships in American society.¹²²
- Ferreting out and eliminating the vestiges of heteronormativity that mark our tax system.¹²³
- Taking active steps to redress the decades of discrimination perpetrated against the LGBTQ+ community through our tax system;¹²⁴ for example, by (1) removing the overtly heterosexual bias in the text of both the Code and Service publications, which continue to refer to *husbands and wives*—often in explicitly heterosexual contexts—years after the *Windsor* decision; (2) reversing the Treasury and Service’s position denying legal recognition to marriage alternatives; and (3) waiving the statute of limitations on refunds for claims arising out of the retroactive application of the *Windsor* and *Obergefell* cases to the

¹²⁰ See Infanti, *Tax Equity*, *supra* note 86, at 1246–47.

¹²¹ For recent examples of nongovernmental organizations focusing attention on the intersection of tax law with gender inequality, see Anthony C. Infanti & Bridget J. Crawford, *A Taxing Feminism*, in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES (Deborah L. Brake et al. eds., forthcoming).

¹²² See Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605.

¹²³ See, e.g., Infanti, *supra* note 118.

¹²⁴ Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 TAX LAW. 407 (2008).

federal tax laws, including their application not only to same-sex couples who were married before *Windsor* but also to those who entered into civil unions, domestic partnerships, and other marriage alternatives.¹²⁵

¹²⁵ See PRIDE Act of 2019, H.R. 3299, 116th Cong. (2019) (unfortunately, failing to generally address the Treasury and Service's position with regard to marriage alternatives or even to specifically do so in its provision extending the statute of limitations to redress past tax discrimination).