NOTES

ARE WE MARRIED? STATE TAX FILING PROBLEMS AFTER *WINDSOR*

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In the wake of United States v. Windsor*, the IRS determined that a validly married same-sex couple is married for federal tax purposes regardless of their state of residence. A same-sex spouse residing in a state that does not recognize same-sex marriage is required to file federal taxes as married under federal law but is prohibited from filing as married in-state, thereby creating incompatibility—a filing status mismatch—between her federal and state income taxes. In order to resolve this, states should not require a same-sex spouse to prepare a pro forma "unmarried" federal return for state filing purposes, as this is inefficient to administer and enforce, and creates an inequitable compliance burden on the taxpayer. Nor should states delink their base from federal income or remove from their state tax codes all references to federal tax law, as this reduces tax efficiency. Instead, states should place traditional concerns of tax efficiency and equality above narrower same-sex marriage policy objectives when crafting their tax systems. Tax efficiency and equity require that states at least permit resident same-sex married taxpayers to allocate income and deduction figures already computed for their federal returns when preparing their state returns.*

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Introduction

In *United States v. Windsor*,[1] the Supreme Court invalidated Section 3 of the Defense of Marriage Act (DOMA)[2] on equal protection grounds.[3] The federal government now must treat married same-sex couples no differently from any other married couple. The Internal Revenue Service (IRS) has interpreted this dictate to require all same-sex spouses to file federal taxes using a married filing status.[4] At the same time, the *Windsor* Court was silent on the validity of Section 2 of DOMA, which grants states the right not to recognize same-sex marriages performed in another state.[5] The combination of these two developments left open the possibility that many same-sex spouses would be required to file federal taxes using a married status and simultaneously be required to file state taxes using an unmarried status. As Justice Scalia articulated in his *Windsor* dissent, the federal government would have to decide, in determining whether a couple was married, to look either to the state of the taxpayer's residence, or

[1] 133 S. Ct. 2675 (2013).

[2] *See* Defense of Marriage Act, 1 U.S.C. § 7 (2012) (defining "marriage" as "only a legal union between one man and one woman as husband and wife" (internal quotation marks omitted)), *invalidated by Windsor*, 133 S. Ct. 2675.

[3] *Windsor*, 133 S. Ct. at 2696.

[4] *See* Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (recognizing same-sex couples for federal tax purposes).

[5] *See Windsor*, 133 S. Ct. at 2682–83 ("Section 2, which has not been challenged here, allows States to refuse to recognize same-sex marriages performed under the laws of other States.").

to the state where marriage was initially established (the "state of celebration").[6]

Taking its cue from a 1958 revenue ruling concerning common-law marriage,[7] the IRS announced in Revenue Ruling 2013-17 that same-sex marital status would be determined at the federal level based on the state of celebration. From a federal tax procedural and policy standpoint, Revenue Ruling 2013-17 creates an exact parallel between the treatment of common-law marriage and same-sex marriage.[8] However, parallel treatment does not hold at the state level. Every state, regardless of whether it allows common-law marriage to be contracted in-state or not, generally recognizes common-law marriages contracted out of state;[9] but due to Section 2 of DOMA and the politically contentious nature of the same-sex marriage debate, each state that did not legally perform same-sex marriage also did not recognize same-sex marriages performed out of state (such a state is called a "nonrecognition state").[10] Post-*Windsor*, the disparate state

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[6] *Id.* at 2708 (Scalia, J., dissenting) ("DOMA avoids difficult choice-of-law issues that will now arise absent a uniform federal definition of marriage. . . . Which State's law controls, for federal-law purposes: their State of celebration (which recognizes the marriage) or their State of domicile (which does not)?").

[7] *See* Rev. Rul. 58-66, 1958-1 C.B. 60 ("The marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws.").

[8] In both situations, a person married in one state but residing in a state that does not recognize the marriage will now be treated as married for all federal income tax purposes, including filing and exemptions. *See* Rev. Rul. 2013-17, 2013-38 I.R.B. at 203 ("[T]he Service has determined to interpret the Code as incorporating a general rule, for Federal tax purposes, that recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile.").

[9] Unlike divorce, which is pursuant to a judicial decree, out-of-state marriage has never definitively been subject to full faith and credit principles. *See* Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 433–42 (2005) (discussing the history of differences in state marriage definitions). Nevertheless, by the mid-1970s most states recognized out-of-state common-law marriages. *Id.* at 468–69. Today it appears that all states generally recognize common-law marriage out-of-state, though there may be some exceptions to recognition, for example for reasons of public policy. *Cf.* Nat'l Conference of State Legislatures, *Common-Law Marriage*, NCSL.ORG, http://www.ncsl.org/research/human-services/marriage-issues-family-law.aspx (last visited Jan. 29, 2015) (claiming all states recognize common-law marriages, though specifically under full faith and credit principles). Only eight states currently allow the formation of common-law marriages. *Id.*

[10] Today all nonrecognition states have explicitly prohibited recognition of same-sex marriage, wherever performed, either by statute, constitutional amendment, or both. *See, e.g.*, GA. CONST. art. I, § 4, para. I(b) ("No union between persons of the same sex shall be recognized by this state as entitled to the benefits of marriage."); MICH. CONST. art. I, § 25 ("To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."); ALASKA STAT. § 25.05.013 (2012) ("A marriage entered into by persons of the same sex . . . that is recognized by another state or foreign jurisdiction is void in this state . . . ."). New Mexico

and federal filing status treatment that results from the state-of-celebration rule has created a tax administration problem in nonrecognition states with a state income tax.[11]

Due to the substantial efficiency benefits that states and their resident taxpayers realize when the state tax system conforms to the federal system, virtually all states with a state income tax require resident taxpayers to use information from their federal return while preparing their state return.[12] Absent modification, information from a married couple's joint federal return cannot be used to prepare separate nonmarried state returns. For example, a same-sex couple married in California is required to file a federal return using a married status, but if the couple resides in Nebraska—a nonrecognition state—for the same tax year, each spouse is required to file her state returns individually.[13] Because Nebraska uses federal adjusted gross income (AGI) as a starting point for calculating state income tax liability, if Nebraska were to require each same-sex spouse to separately use the joint federal AGI figure, the total combined state tax liability for the couple would be calculated starting with a base figure approximately twice what would be appropriate.

An obvious solution to the filing status mismatch is for nonrecognition states to allow resident same-sex couples to file joint taxes, regardless of their marital status under state law.[14] However, in an effort to retain autonomy from the federal same-sex marriage policy created in *Windsor*, most nonrecognition states continue to require same-sex married residents to file using an unmarried status, and furthermore do not allow joint filing of any kind for same-sex married

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was the last nonrecognition state to have an ambiguous recognition policy. *See* Zelie Pollon, *New Mexico Supreme Court Rules to Allow Same-Sex Marriage*, REUTERS, Dec. 19, 2013, *available at* http://www.reuters.com/article/2013/12/20/us-usa-gaymarriage-newmexico-idUSBRE9BI11E20131220 ("New Mexico faced a situation unique in the United States because its law was ambiguous on same-sex marriage . . . ."). In late 2013, the New Mexico Supreme Court held state bans on same-sex marriage unconstitutional. Griego v. Oliver, 316 P.3d 865, 889 (N.M. 2013).

[11] Of the forty-four states with an individual income tax, twelve do not allow same-sex married couples to file joint taxes (as of December 2014). *Infra* note 63 and accompanying text. All but two of the twelve directly import figures from the federal tax return; without specific guidance, taxpayers in these states would not be able to prepare their state taxes as instructed pre-*Windsor*. For a state-by-state listing, see *infra* Appendix.

[12] The efficiency benefits of conformity are discussed below in Part I.A.

[13] *Frequently Asked Questions for Individuals in a Same-Sex Marriage*, NEB. DEP'T REVENUE, http://www.revenue.nebraska.gov/question/same-sex_FAQ.html (last visited Jan. 29, 2015) [hereinafter *Nebraska FAQ*] ("[Use] the single or, if qualified, head of household filing status.").

[14] Colorado and Missouri explicitly employed this solution for the 2013 tax year. *Infra* note 70 and accompanying text. Montana functionally did so as well. *Infra* note 74.

taxpayers.[15] Nor has any nonrecognition state chosen to remove all references to a taxpayer's federal income figures from her state returns. Instead, nonrecognition states have almost universally chosen one of two methods to resolve the problem created by the federal/state filing status mismatch: A few utilize a special form on which the spouses allocate joint federal income figures between the taxpayers (the "allocative method"),[16] but the vast majority require each spouse independently to prepare a pro forma federal return, the figures from which she then uses in preparation of her separate state return (the "pro forma method").[17] Despite its prevalence, however, the pro forma method violates standard normative tenets of tax policy—efficiency and equity.[18]

Much of the current discussion of the impact of *Windsor* focuses on two constitutional issues: specifically, whether the Supreme Court will require states to recognize same-sex marriages performed outside the state under full faith and credit principles, and whether it will require states to perform same-sex marriages under either equal protection or due process principles.[19] This Note instead addresses the implications of *Windsor* from a tax policy perspective. It argues that, regardless of the ultimate constitutional destiny of DOMA's Section 2, nonrecognition states should adopt the approach to the problem that allows their tax systems to retain as much efficiency and equity as possible. In making this argument, this Note draws on material from academic literature on the topic of formal federal/state conformity[20]—

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15 *See infra* Appendix for a list of how each nonrecognition state dealt with state tax filing for the 2013 tax year. This Note was written in early 2014. Modification of individual state approaches to the filing mismatch problem in 2014 and 2015 are not covered here.

16 For a description and examples of the allocative method, see *infra* Part III.A.

17 The figures from the actual joint federal return are completely disregarded for state purposes. For a description and examples of the pro forma method, see *infra* Part II.A–B.

18 The goal of efficiency is to minimize the economic waste caused by imposition of a tax system. The goal of equity is to distribute to each taxpayer her fair burden of the tax system. *See, e.g.*, Boris I. Bittker, *Equity, Efficiency, and Income Tax Theory: Do Misallocations Drive Out Inequities?*, 16 SAN DIEGO L. REV. 735, 735–36 (1979) (explaining the meaning of the terms as applied to tax policy theory).

19 *See* United States v. Windsor, 133 S. Ct. 2675, 2697 (2013) (Roberts, J., dissenting) ("We may in the future have to resolve challenges to state marriage definitions affecting same-sex couples."). For a succinct examination of various possible constitutional challenges to Section 2 of DOMA, see Mark Strasser, Windsor, *Federalism, and the Future of Marriage Litigation*, 37 HARV. J.L. & GENDER ONLINE 1 (2013), *available at* http://harvardjlg.com/wp-content/uploads/2013/11/Strasser_Windsor_Federalism_and_the_Future_of_Marriage_Litigation.pdf.

20 Peter Miller's enthusiastic portrayal of successful conforming state tax systems in the 1950s helped facilitate the extensive conformity observed today. Peter Miller, *Proposal for a Federally-Based New York Personal Income Tax*, 13 TAX L. REV. 183 (1958). Ruth Mason has recently undertaken a thorough investigation of tax base conformity, explaining its crucial role in the federal tax system, reviewing its costs and benefits, and giving

the extent to which a state tax code borrows from, or incorporates by reference, portions of federal tax law. The advent of state recognition of same-sex relationships has piqued renewed exploration of the mostly dormant topic of conformity, due to the complications that result when a taxpayer files federal and state taxes, one jointly with her same-sex spouse, the other individually.[21] This Note adds to the discussion by evaluating the states' various responses to post-*Windsor* tax filing complications, ultimately concluding that most nonrecognition states have not chosen a response consistent with the mandates of sound tax policy.

This Note argues that nonrecognition states should not require same-sex married couples to prepare pro forma individual federal returns, as most of those states currently do. The argument proceeds in three parts. Part I presents the problem: Federal/state tax conformity combined with federal recognition of same-sex marriage creates a filing status mismatch in nonrecognition states. Part I also explains why states have developed tax systems that conform to the federal system and examines the efficiency benefits and autonomy costs of conformity. Part II explains the solution to the filing status mismatch preferred by nonrecognition states: the pro forma method. Though states have employed this solution to resolve similar problems in the past, the result has been an increase in administrative and enforcement inefficiency, as well as unacceptable compliance inequity post-*Windsor*. Part III discusses the path forward for nonrecognition states. It advocates—from a tax policy rather than a constitutional

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recommendations for how states and the federal government can mitigate some if its negative consequences. Ruth Mason, *Delegating Up: State Conformity with the Federal Tax Base*, 62 DUKE L.J. 1267 (2013). Heather M. Field has likewise conducted a broad and illuminating investigation of federal/state conformity, and her work has provided valuable insight into issues states should consider when presented with the possibility of filing status nonconformity. Heather M. Field, *Binding Choices: Tax Elections & Federal/State Conformity*, 32 VA. TAX REV. 527 (2013). As conformity is intrinsically linked to tax filing in the same-sex marriage context, recent scholarship has investigated its specific effects on same-sex spouses and the states in which they reside. Carlton Smith and Edward Stein have prepared a particularly informative description of these effects in various recognition states pre-*Windsor*. 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). I owe a debt of gratitude to each of these authors as well as many other academics and practitioners who no doubt have spent countless hours preparing the excellent material on which I have based my research and argumentation. My intent is to further these efforts by presenting, from a tax policy perspective, an in-depth and critical account of how nonrecognition states have been responding to the fast-changing same-sex recognition landscape.

[21] *See* Mason, *supra* note 20, at 1270 & n.1 (noting that tax scholarship regarding federal/state tax system interaction has since the late 1970s primarily been concerned with fiscal federalism); Smith & Stein, *supra* note 20, at 31 (investigating the inequities resulting from state nonconformity with federal same-sex marital status).

perspective—for the allocative method as an equitable and efficient alternative.

I
The Problem

Revenue Ruling 2013-17 requires same-sex married taxpayers to file federally using one of the two "married" filing statuses: "married filing jointly" or "married filing separately."[22] Thus a same-sex married taxpayer filing joint federal taxes and residing in a nonrecognition state presents a new problem for the state of residence: how to resolve a mismatch in filing status between a same-sex married taxpayer's state and federal taxes. The problem results because all state income tax systems conform—at least to some extent—to the federal income tax system.[23]

Part I.A of this Note provides a background of federal/state tax conformity and explains how states seek to reap the benefits of conforming to the federal system without ceding too much autonomy to federal decisionmakers, particularly over revenue streams. Part I.B focuses the discussion on the filing status mismatch problem. It describes how similar problems exist outside the definition-of-marriage context as well as for states recognizing same-sex marriage post-*Windsor*. Part I.C explains why states as a practical matter cannot retain nonrecognition autonomy by jettisoning all references to federal tax law.

A. Federal/State Tax System Conformity

In our federal system, most taxpayers pay two levels of income tax: one to the state of residence and another to the United States.[24] One benefit of this system is that states can maintain fiscal and policy

[22] *See* Internal Revenue Serv., Dep't of the Treasury, 1040 Instructions 5, 12–13 (2013) [hereinafter Federal 1040 Instructions] (requiring same-sex married taxpayers to file as married, regardless of their state of residence); *see also* Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (adopting the state-of-celebration rule).

[23] For a comprehensive breakdown of state tax systems, including their extent of federal conformity, see generally Rick Olin & Sandy Swain, Wis. Legislative Fiscal Bureau, Individual Income Tax Provisions in the States (2013), *available at* http://legis.wisconsin.gov/lfb/publications/Informational-Papers/Documents/2013/4_Individual%20Income%20Tax%20Provisions%20in%20the%20States.pdf.

[24] The Sixteenth Amendment was adopted in 1913 to allow the federal government to levy an income tax. U.S. Const. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."). Wisconsin became the first state to levy a modern progressive income tax in 1911 after amending its own constitution in 1908. *See* 1 Nat'l Indus. Conference Bd., State Income Taxes: Historical Development 26 (1930) ("Taxes may also be imposed on incomes, privileges

autonomy from the federal government. One cost is a decrease in efficiency; the same income is subject to two distinct and complex tax systems, each associated with administrative costs and taxpayer burdens. States reduce this costly redundancy by conforming, to varying degrees, their income tax systems to the federal system.

Conformity allows states to conserve legislative resources and to take advantage of federal tax administrative procedures and enforcement measures;[25] it enhances simplicity for all taxpayers, preserving their resources and encouraging compliance;[26] and it promotes economic "harmonization" among the states, meaning that the similar treatment of similarly situated taxpayers across state lines facilitates

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and occupations . . . ." (quoting WIS. CONST. art. VIII, § 1) (internal quotation marks omitted)).

25 *See* HARLEY T. DUNCAN, FED'N OF TAX ADM'RS, RELATIONSHIPS BETWEEN FEDERAL AND STATE INCOME TAXES 6 (2005) (outlining benefits of conformity in a report to the President's Advisory Panel on Federal Tax Reform). To the extent its tax code conforms, a state need not make difficult independent decisions about the definitions of income and deductions, but can rely on the I.R.C. and its associated treasury regulations, administrative guidance, and extensive case law. *See* Field, *supra* note 20, at 538–40 (reviewing the benefits of conformity). In addition, conformity enables the state to take advantage of federal audit procedures by utilizing existing federal third-party reporting systems, directly comparing information on filed state and federal returns (a discrepancy often indicates that an audit should be undertaken), obtaining information about federal deficiencies compiled during federal audits, and cooperatively performing audits with the federal government. *See* Mason, *supra* note 20, at 1280–81 (summarizing audit-related conformity benefits). Even with no discrepancy, a deficiency that stems from an understatement of federal income is likely to be repeated at the state level. If the IRS can recover money from the taxpayer, the state will likely be able to as well. *See* Smith & Stein, *supra* note 20, at 33 (describing how states "piggyback" off of federal audit results); *see also* Harley Duncan & LeAnn Luna, *Lending a Helping Hand: Two Governments Can Work Together*, 60 NAT'L TAX J. 663, 668–69 (2007) (explaining how in many cases where states conform, the procedure can be automated).

26 To the extent state definitions conform to the federal code, the taxpayer need not keep separate accounts and books and need not make distinct state determinations of complicated tax laws, rules, and definitions. *See* DUNCAN, *supra* note 25, at 6 (describing the advantages to the individual taxpayer of federal/state conformity). These advantages all help to reduce the hours and dollars wasted on (as well as the number of taxpayer errors made during the process of) tax preparation. Preparation simplicity has the added efficiency benefit of promoting overall taxpayer compliance, thereby increasing state revenue. *Id.* Thus, conformity increases efficiency by directly reducing taxpayer compliance burden, one component of "excess burden"—the total economic burden of the system less all actual tax liability incurred by its taxpayers. *See* John L. Guyton et al., *Estimating the Compliance Cost of the U.S. Individual Income Tax*, 56 NAT'L TAX J. 673, 675 (2003) ("Taxpayer [c]ompliance [b]urden . . . includes the time and money spent by taxpayers to comply with the federal tax system. In addition to completing and submitting tax forms, this category can include record keeping, tax planning, gathering tax materials, using IRS services, and working with a tax professional."). It also reduces a second, less easy to quantify component of excess burden: taxpayer psychological costs, "which include the dissatisfaction, frustration, and anxiety of taxpayers caused by their interaction with the tax system." *Id.*

interstate cooperation.[27] However, conformity does reduce state autonomy. It leaves states more vulnerable to revenue fluctuation and shortfalls, and it imports federal fiscal and social policy into the state.[28] Thus each state must balance efficiency with autonomy when designing its tax system.[29]

Though it is an oversimplification, the same-sex marital status filing problem is generally considered to be the consequence of the interaction between two types of conformity: base conformity and filing status conformity.[30] States conform to federal tax law through incorporating by reference portions of the Internal Revenue Code

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[27] Mason, *supra* note 20, at 1347 ("[B]ase conformity also facilitates interstate commerce, reduces tax arbitrage, promotes interstate spillovers, and discourages discriminatory state taxation."); *see, e.g.*, DEP'T OF ADMIN. & FIN. SERVS., ME. REVENUE SERVS., MAINE STATE TAX EXPENDITURE REPORT 2014–2015 § 1.048 (2013) ("Maine generally conforms to federal income exclusion and deduction provisions used to calculate federal adjusted gross income. Conformity reduces filing errors, eases tax administration and increases tax compliance. Conformity also helps keep Maine taxes more competitive with other states.").

[28] Though there are other costs associated with conformity, the primary cost is the impairment of state autonomy: The more closely a state conforms its tax system to the federal system, the less able it is to maintain its desired flow of revenue and determine its own economic and social policy. For example, today no state calculates its tax liability as a percentage of federal liability. The last three states to use this method, North Dakota, Rhode Island, and Vermont, switched their tax base to taxable income in response to the Bush tax cuts in 2001. *See* DUNCAN, *supra* note 25, at 2 n.4 ("The prospect of annual reductions in federal liability that were beyond their control . . . caused each of the states [to] change their tax to one based on taxable income or AGI. This allowed them to establish their own rate structure and stabilize their revenue stream."). Similarly, when new federal tax legislation is automatically incorporated by the state, the state cedes legislative authority to the federal government; when a state relies on federal audit procedures to help determine state deficiencies, it cedes enforcement authority. For a summary of these and other costs of federal/state tax conformity, see Mason, *supra* note 20, at 1288–1309.

[29] *See* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, FEDERAL-STATE COORDINATION OF PERSONAL INCOME TAXES 126 (1965) [hereinafter 1965 FEDERAL-STATE COORDINATION] ("No State that embarks today upon a general discussion of the income tax . . . can avoid the question of conformity between State definitions and the Internal Revenue Code. . . . [A] decision on the extent-of-conformity issue . . . should be faced explicitly . . . .").

[30] *See, e.g.*, JOSEPH HENCHMAN & CHRIS STEPHENS, TAX FOUNDATION, STATES PROVIDE INCOME TAX FILING GUIDANCE TO SAME-SEX COUPLES 4 (2014) (erroneously describing states using an independent tax base as not referencing the federal tax code at all). This is an oversimplification because states with an independent tax base still utilize portions of the federal tax code. *See, e.g.*, ARK. DEP'T OF REVENUE, ARKANSAS 2013 INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS 13–15 (2013) (requiring taxpayers to transfer figures from their Federal Schedules C, D, E, and F, and to attach the forms to their Arkansas state return); MISS. DEP'T OF REVENUE, RESIDENT, NON-RESIDENT AND PART-YEAR RESIDENT INCOME TAX INSTRUCTIONS 10, 14–15 (2013) (same). Even states with little apparent conformity still extensively incorporate by reference portions of the federal tax system. For a description of how this works in practice, see *infra* notes 55–59 and accompanying text (describing Pennsylvania's state income tax system).

(I.R.C.) or by requiring taxpayers preparing state returns to use information from their federal returns.[31] Most state income tax systems conform to the federal system by requiring the transfer of a figure from their federal return (either taxable income or AGI)[32] to use as a starting point—or "base"—of their state return.[33] Likewise, before the advent of same-sex marriage, state tax systems generally required a taxpayer to use the same filing status on the state return that she used on her federal return.[34]

31 *See* Miller, *supra* note 20, at 207–09 (describing ways states can formally conform to the federal system). When states formally conform to the I.R.C., they either refer to the code as it exists currently and prospectively ("rolling" or "dynamic" conformity), or as it existed on a specified date in the past ("fixed date" or "static" conformity). The term "dynamic conformity" has been used to refer to a state's practice of incorporating by reference a portion of a federal code since at least 1998. *See* Howard M. Friedman, *The Impact of NSMIA on State Regulation of Broker-Dealers and Investment Advisers*, 53 BUS. LAW. 511, 524–25 (1998) (discussing the state constitutional implications of automatic conformity with SEC regulations). Professor Mason has applied the terms "dynamic" and "static" conformity to state tax system's automatic or non-automatic incorporation of the I.R.C. *See* Mason, *supra* note 20, at 1331–33 (noting that some states have altered their constitutions to specifically allow their state codes to dynamically incorporate the I.R.C.).

32 AGI is the combined gross of a multitude of types of income and deductions, such as wages, business income, and moving expenses, among many others. Taxable income is AGI less deductions and personal exemptions. *See* FEDERAL 1040 INSTRUCTIONS, *supra* note 22, at 30 (listing deductions relevant to the calculation of adjusted gross income). The components of federal AGI comprise lines 7 to 36 of the federal Form 1040. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, FORM 1040 at 1 (2013) [hereinafter FEDERAL FORM 1040]. Some of these components, such as business income, individually refer to other federal forms and schedules, each containing many more components. *See id.* at 1–2 (referring taxpayers to other forms and schedules for a number of income components, taxes, credits, and payments).

33 As a rough cut, each state must balance efficiency and autonomy by first deciding on whether to conform its base to federal tax law, and if so to which figure to conform. A 1965 federal report delineates multiple possibilities, each of which has been used by at least one state in the last fifty years: (1) no base conformity (this category includes states which incorporate specific income and deduction provisions by reference to the I.R.C.), (2) adjusted gross income, (3) net income, (4) taxable income, and (5) tax liability. 1965 FEDERAL-STATE COORDINATION, *supra* note 29, at 126–28. The four bases correspond to line items from a federal individual tax return: AGI is the sum of all non-excluded income less "above-the-line" deductions (line 37 of the 2014 Form 1040), net income is AGI less deductions (1040 line 41), taxable income is AGI less deductions and the personal exemption (1040 line 43), and tax liability is taxable income with the appropriate tax rate bracket (and certain tax credits) applied (1040 line 61). FEDERAL FORM 1040, *supra* note 32, at 1–2.

34 *See, e.g.*, N.Y. STATE DEP'T OF TAXATION & FIN., INSTRUCTIONS FOR FORM IT-201, at 12 (2013) [hereinafter NEW YORK TAX FORM INSTRUCTIONS] ("In nearly all cases you must use the same filing status that you used on your federal return."); N.C. DEP'T OF REVENUE, INDIVIDUAL INCOME TAX INSTRUCTIONS FOR FORM D-400, at 7 (2013) [hereinafter NORTH CAROLINA TAX FORM INSTRUCTIONS] (generally requiring taxpayers to use the same filing status they used on their federal returns). In addition to base and filing status conformity, states formally conform to individual portions of federal tax law on a form-by-form or section-by-section basis, for example federal business income (Schedule C) or the earned income credit (EIC). So even a nonrecognition state that does not

AGI and taxable income are composite figures that incorporate multiple categories of income and deductions, so a state that conforms its base to either figure takes advantage of all efficiency benefits associated with each of the figure's many components.[35] Today most states consider these benefits to outweigh the costs to autonomy for two reasons: (1) States that use federal AGI as a base have had little trouble maintaining income tax revenue autonomy,[36] and (2) states are generally able to express sufficient autonomous policy—whether to incentivize desired behavior or to distribute tax liability more equitably—through state-specific adjustments to the imported tax base.[37]

B. *The Filing Status Mismatch*

Maintaining autonomy from federal same-sex recognition policy creates a special type of procedural problem. Nonrecognition states cannot simply use adjustments to convert federal AGI into two separate individual state tax bases, because the federal tax system uses filing status to determine the "taxpaying unit"—the societal component whose income is subject to taxation. Thus, indication of filing status in fact precedes all other steps taken by the taxpaying unit to determine tax liability and informs all figures on the federal return, including any figure to be used as the state tax base itself.[38] Put

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conform its base to the federal system will have a filing status mismatch, though the mismatch will affect fewer aspects of state tax liability.

[35] *See* Miller, *supra* note 20, at 207–09 (extolling the virtues of conformity while advocating for New York to adopt a conforming tax base in 1958).

[36] Most of the difficulty states have had maintaining revenue autonomy has been a result of conforming to a percentage of federal tax liability, so today most states conform to federal AGI. *See* DUNCAN, *supra* note 25, at 2 n.4 (noting that several states shifted from using a percentage of federal tax liability to conforming to federal taxable income or AGI in order to "establish their own rate structure and stabilize their revenue stream"). As a result, to trigger a sudden severe shortfall in state tax revenue, Congress would have to make dramatic base-narrowing changes to composite AGI before states had a chance to react and adjust their own tax systems. But, although base narrowing is common, the process generally occurs gradually as more and more incentives are added to the tax code. On the other hand, Congress has enacted base-broadening changes abruptly. For a review of the effects of the expansion to the federal tax base that resulted from the adoption of the Internal Revenue Code of 1986, see generally ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, THE TAX REFORM ACT OF 1986—ITS EFFECT ON BOTH FEDERAL AND STATE PERSONAL INCOME TAX LIABILITIES (1998).

[37] *See, e.g.*, ECON. & STATISTICAL RESEARCH BUREAU, CAL. FRANCHISE TAX BD., CALIFORNIA INCOME TAX EXPENDITURES: COMPENDIUM OF INDIVIDUAL PROVISIONS 3–6 (2005) [hereinafter CALIFORNIA INCOME TAX EXPENDITURES] (discussing the policy motivations of California's nonconforming tax provisions, such as the state exclusion for social security benefits, and explaining how the state makes adjustments to decouple from specific provisions).

[38] The very first five line items on the federal tax return refer to filing status. FEDERAL FORM 1040, *supra* note 32, at 1; *see also* Field, *supra* note 20, at 580–81 ("[T]he filing status

another way, for federal tax purposes, a taxpayer filing jointly reports no individual income, no individual deductions, no individual credits, and ultimately no individual tax liability. A same-sex married couple filing joint federal taxes will only report a single number for each of the multitude of federal AGI components. Absent a method by which each of these numbers is allocated to the two taxpayers individually, no figure from the joint federal return can be directly imported for use on the individual state returns.

The advent of same-sex unions marked the first time in decades that states were confronted with a substantial filing status mismatch problem. The requirement to file using a joint status at one level and a single status at the other generally only arises when either the federal government *or* the taxpayer's current state of residence (but not both) does not recognize her legal state union.[39] Related matters of contention outside of the same-sex context did not present the same procedural problems. First, with some notable exceptions, states generally took a pro-recognition stance for out-of-state marriages, even those that could not legally be performed in the state.[40] Second, the issues about which states were most concerned, such as interracial marriage and common-law marriage, had largely been resolved by the Supreme Court or otherwise ceased to be divisive by the mid-1960s, the era of federal/state base conformity.[41]

Although nonrecognition states, post-*Windsor*, for the most part now face the filing status mismatch problem for the first time, recognition states—those that, pre-*Windsor*, allowed same-sex couples to file jointly in-state as registered domestic partners (RDPs), as members of civil unions, or as married spouses—had already dealt with a similar

decision occurs at the very beginning of the tax preparation process and may affect so many income and deduction calculations throughout the tax preparation process . . . .").

39 Technically a mismatch can also arise if the state of residence does not recognize a federally recognized divorce. This possibility effectively became moot before it might have become a tax filing problem. *See* Williams v. North Carolina, 317 U.S. 287, 303–04 (1942) (holding that, under the Full Faith and Credit Clause, a state must recognize a divorce validly performed in another state).

40 *See* Grossman, *supra* note 9, at 460–77 (explaining how states generally recognized out-of-state marriages that conflicted with their own definitions).

41 *See id.* at 472 ("The virtual uniformity of state marriage laws in the modern era has meant that relatively few cases were litigated in the 1970s–1990s."). Prior to same-sex marriage, the last major area of state disagreement involved interracial marriage. The Supreme Court invalidated nonrecognition of interracial marriage at the time most states were beginning to conform to a federal tax base. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding unconstitutional state laws prohibiting interracial marriage). The timing of these events is the major reason why in the U.S. context tax policy considerations have not been as deeply entangled with civil rights until now.

problem.[42] So in one sense, *Windsor* does not create a new problem; it merely relocates an old one from recognition to nonrecognition states. However, it is important not to overlook the changed context in which the post-*Windsor* filing status mismatch occurs. The vast majority of same-sex couples greatly values the personal and social affirmation that accompanies the ability to file using a married status.[43] Nonrecognition states are also in the uncomfortable position of denying benefits rather than providing them and must justify any extra burdens they place on an unwilling class of taxpayers. Likewise, the extensive political efforts to recognize same-sex marriage were not directed at recognition states, but at the nonrecognition states and the federal government. Today, these efforts are directed at nonrecognition states only and have the powerful support of the *Windsor* ruling to fuel them.[44]

Although there are few filing status mismatch problems outside the same-sex marriage context, states commonly have dealt with two related filing status nonconformity problems. The first is jurisdictional: Because states do not have jurisdiction over nonresidents' out-of-state income,[45] most allow or require a resident married to a nonresident to file a separate tax return in-state, regardless of whether the couple has filed joint federal taxes.[46] The second results from the approach some

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[42] In 2000, Vermont became the first state to allow same-sex couples to form civil unions, thus allowing them largely the same rights as married couples. Carey Goldberg, *Vermont Gives Final Approval to Same-Sex Unions*, N.Y. Times, Apr. 26, 2000, at A14. Vermont permitted the couples to file joint state income taxes by employing the pro forma method. Vt. Dep't of Taxes, 2001 Income Tax Return 2 (2001) ("[Y]our Federal tax liability must be recomputed as if the Federal return were also filed Married Filing Jointly. Complete a second Federal return for use by the VT Department of Taxes only, claiming only exemptions and deductions allowable for Married Filing Jointly under the Internal Revenue Code.").

[43] *See* Kathleen E. Hull, *The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-Sex Marriage*, 28 Law & Soc. Inquiry 629, 635 (2003) (finding, in an empirical study, a consensus among same-sex couples about the desirability of legally recognized same-sex marriage).

[44] *See, e.g.*, Michael Muskal, *Gay Marriage Dynamic in U.S. Shifted Dramatically in 2014*, L.A. Times (Dec. 28, 2014, 7:00 AM), http://www.latimes.com/nation/la-na-year-ahead-gay-marriage-20141228-story.html (detailing the changes in same-sex marriage laws as well as court cases currently pending in the wake of *Windsor*).

[45] *See, e.g.*, Shaffer v. Carter, 252 U.S. 37, 57 (1920) ("As to nonresidents, the jurisdiction extends only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources.").

[46] *See, e.g.*, New York Tax Form Instructions, *supra* note 34, at 5 (allowing a separate state return for a taxpayer married to a nonresident); North Carolina Tax Form Instructions, *supra* note 34, at 7 (same). Married couples have been able to file joint federal taxes electively since 1918. Revenue Act of 1918, Pub. L. No. 65-254, § 223, 40 Stat. 1057, 1074 (codified as amended at I.R.C. § 6013 (2012)) ("[A] husband and wife . . . each shall make [a separate] return unless the income of each is included in a single joint

states have taken to avoid the "marriage penalty": permitting or requiring couples filing joint federal taxes to file separately in-state.[47]

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return."). However, joint liability was calculated by applying the same rate structure to the combined income as would have been applied to each spouse's individual income, so it almost invariably created higher liability and few made the election. *See* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1400 & n.20 (1975) (explaining the early joint filing system). In addition, married taxpayers filing separately were often able to assign income from the high earner to the low earner, thereby reducing their total liability by shifting some of the combined income into a lower tax bracket. Thus, this jurisdictional problem has really only existed since 1948—the year Congress enacted the "income-splitting joint return" statute under which the vast majority of married taxpayers filed joint federal taxes, and the year after the first state adopted a conforming tax base. *See id.* at 1401–02 (referring to 1948 congressional authorization of income-splitting returns). The statute had essentially the same effect as taxing each member of the couple on exactly one-half the combined income. *See id.* at 1412–13 (explaining that the 1948 legislation resulted in married couples paying twice "what a single person would pay on one half of their consolidated taxable income"). The new income-splitting process eliminated the advantage previously enjoyed by taxpayers in community property states. *See id.* at 1404–14 (describing the developments that led to the Act, including the Supreme Court's ruling in Poe v. Seaborn, 282 U.S. 101 (1930), that required the federal government to recognize income splitting in community property states). Though joint filing under the 1948 income-splitting statute was technically optional, the advantage of enjoying reduced tax brackets along with other tax benefits of marriage was so favorable that filing joint federal taxes was clearly preferable. *See* Stanley S. Surrey, *Federal Taxation of the Family—the Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1105–09, 1115 (1948) ("Husband and wife are not compelled to file a joint return but may elect to do so. Or, to state it differently, if they desire to file separate returns and pay a larger tax, they are free to make the excess contribution to the Government."). Despite married and single taxpayers now having completely distinct tax brackets, filing jointly is still generally favorable. In tax year 2012, ninety-five percent of married taxpayers filed joint federal taxes. *See Table 1.2 All Returns: Adjusted Gross Income, Exemptions, Deductions, and Tax Items, by Size of Adjusted Gross Income and by Marital Status, Tax Year 2012*, INTERNAL REVENUE SERV., http://www.irs.gov/file_source/pub/irs-soi/12in12ms.xls (last visited Oct. 20, 2014) (listing the number of filers of each status). Thus the state jurisdictional issue remains significant.

47 After Congress enacted the income-splitting statute of 1948, virtually all married couples filing joint taxes enjoyed a reduced tax rate. *See* Surrey, *supra* note 46, at 1109 & n.47 (predicting that the benefits the Act created for joint returns meant that almost all married couples would file them). Deeming the relative advantage income splitting provided to married couples too great, in 1969 Congress closed the "gap" by reducing the rate structure for unmarried taxpayers only. Tax Reform Act of 1969, Pub. L. No. 91-172, § 803, 83 Stat. 487, 678–82 (codified as amended at I.R.C. § 1(a) (2012)); *see* Bittker, *supra* note 46, at 1426–29 (commenting on the magnitude of this gap and observing that the 1969 Act closed much of it). But if these lower rates applied to married taxpayers filing separately, it would advantage married taxpayers in community-property states and create opportunities for spouses to reduce taxes by giving each other income-producing property and then filing separately. Bittker, *supra* note 46, at 1429. Therefore, for married taxpayers filing separately, Congress retained the less favorable rate structure that formerly applied to single taxpayers, creating a "marriage penalty" for spouses who each report relatively equal income. *See id.* at 1429–33 (describing the negative impact of the marriage penalty). Since its inception, the marriage penalty has been contentious; today most states seek to avoid it at the state level. They do so either by (1) having a flat tax, (2) setting the joint filing brackets at exactly twice the "married filing separately" rate, or (3) allowing joint federal filers to file separately in-state. *See* OLIN & SWAIN, *supra* note 23, at 13–56

Like the jurisdictional issue, this is an exception to the general rule that states require married taxpayers to file using the same status they provided on their federal returns. Because states have often resolved the jurisdiction and marriage penalty problems by using the pro forma and allocative methods respectively, these two issues are discussed in more detail in Parts II and III, which focus on these two methods.

C. Contrasting Approaches for Nominally Nonconforming States: Alabama and Pennsylvania

In theory, the simplest way for nonrecognition states to retain autonomy from federal recognition policy would be to remove from their tax systems all references to the federal system. No state has yet done so, and none is likely to do so, because the efficiency benefits of conformity are too substantial to sacrifice.[48] The almost universal reliance on federal AGI as a state tax base underscores conformity's

(detailing states' tax systems). The primary motivation for allowing separate filing is to avoid the marriage penalty without providing a separate rate structure for married taxpayers. *See* Field, *supra* note 20, at 547–49 (discussing sovereignty motivations for filing status nonconformity and the indeterminate simplicity costs and benefits).

[48] *See* Duncan, *supra* note 25, at 8 (claiming that the efficiency benefits of conformity are so great that the states could not operate independently of the federal system). While the last state to discard its independent base for a conforming base did so twenty-five years ago, *see* Tax Fairness Act of 1989, § 105-134.5(a), 1989 N.C. Sess. Laws ch. 728 (codified as amended at N.C. Gen. Stat. § 105-153.4 (2014) ("'North Carolina taxable income' means taxable income as calculated under [federal tax law] . . . .")), no state that has successfully adopted a conforming base has ever done the reverse—discarded it for an independent base. Otto G. Stolz & George A. Purdy, *Federal Collection of State Individual Income Taxes*, 1977 Duke L.J. 59, 116 & n.289 (citing a 1967 Virginia tax study that found that, as of 1967, "no state that has once conformed its income tax base to the federal [system] appears subsequently to have abandoned it." (internal quotation marks omitted)). *Compare* 2 Advisory Comm'n on Intergovernmental Relations, Significant Features of Fiscal Federalism 1976–77 Edition 209 tbl.110 (1977) (listing thirty-two base-conforming states), *with* 1 Advisory Comm'n on Intergovernmental Relations, Significant Features of Fiscal Federalism: Budget Proposal and Tax Systems 1995, at 51–52 tbl.16 (1995) (listing the same thirty-two, plus Arizona, California, North Carolina, and South Carolina), *and infra* Appendix (listing the same thirty-six states as the 1995 report). North Carolina illustrates the modern balancing of autonomy and efficiency: In 1989, citing simplicity, the state conformed its independent tax base to federal taxable income. Tax Fairness Act of 1989, *supra* (claiming in its header to be "An Act to Enhance the Simplicity and Fairness of the State Income Tax System"). In 2012, North Carolina moved from a base of federal taxable income to federal AGI because its state deductions no longer conformed to federal law. *See* Tax Simplification and Reduction Act of 2013, N.C. Sess. Laws 2013-316, at 2 (codified at N.C. Gen. Stat. § 105-153.3(12) (2014)) (redefining "North Carolina taxable income" as federal AGI with state adjustments); *see also* Keith A. Wood, *2011 North Carolina Tax Changes*, Tax Assessments (N.C. Bar Ass'n, N.C.), Jan. 26, 2012, *available at* http://web.archive.org/web/20130421120221/http://tax.ncbar.org/newsletters/taxjanuary2012/2011changes (relating that the stated purpose of the change was to simplify the tax returns complicated by nonconforming deductions).

value to the states and how reluctant they are to discard it for the sake of autonomy from federal recognition policy.[49]

Furthermore, most state systems employing a nominally independent tax base incorporate by reference many AGI-component sections of the I.R.C., so they are less autonomous and more efficient than they appear at first glance.[50] For example, Alabama specifically incorporates by reference to the current federal tax law a vast array of income inclusions, income exclusions, and above-the-line deduction components of federal AGI.[51] Taxpayers need not keep separate records for each of these overlapping state and federal components, and for audit purposes the state can often make direct comparisons between AGI components listed on the state and federal forms.[52] To aid with this comparison, Alabama requires taxpayers to include on their state returns their federal AGI and to indicate the source and amounts of income they reported on the federal Form 1040 but did

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49 *See, e.g.*, JEFF MARTIN, REVENUE & TRANSP. INTERIM COMM., BACKGROUND REPORT ON MONTANA'S INDIVIDUAL INCOME TAX FOR THE SENATE JOINT RESOLUTION NO. 37 STUDY 6 (2009), *available at* http://leg.mt.gov/content/Committees/Interim/2009_2010/Revenue_and_Transportation/Staff_Reports/BACKGROUND_09SEPT.pdf (noting that "[c]onforming to federal income tax law generally makes the state's individual income law easier to comply with and to administer," but also that "the choice of the federal tax base may cede more or less control to the federal government in the formulation of state tax policy").

50 These states also generally begin with an all-inclusive definition of income that parallels much of I.R.C. § 61 in substance. *See, e.g.*, Ala. Code § 40-18-14(1) (LexisNexis 2014) (defining gross income of individuals very inclusively); MISS. CODE ANN. § 27-7-15(1) (West 2014) (same).

51 Alabama defines gross income to explicitly incorporate, by reference to I.R.C. section number, at least three income inclusion and eleven income exclusion components of AGI. *See* ALA. CODE § 40-18-14 (incorporating by reference inclusions for alimony (I.R.C. § 71), property received as compensation for services (I.R.C. § 83), and income derived from gifts (I.R.C. § 102); and exclusions for income from life insurance policies (I.R.C. §§ 72, 101), gift property value (I.R.C. § 102), compensation and health plans (I.R.C. §§ 104, 105), ministerial rental (I.R.C. § 107), sale of a personal residence (I.R.C. § 121), retirement plans (I.R.C. § 403(b)), and employee cafeteria plans, fringe benefits, and dependent care (I.R.C. §§ 125, 129, 132)). Similarly, Alabama defines deductions to explicitly incorporate by reference certain above-the-line deduction components of AGI. *See id.* § 40-18-15 (incorporating by reference deductions for business expenses (I.R.C. § 162), alimony payments (I.R.C. § 215), and retirement plans (I.R.C. § 219), among others). Arkansas also incorporates a laundry list of AGI-component sections, but each component has its own statically conforming date. *See* ARK. CODE ANN. § 26-51-404 (2014) (defining gross income).

52 The Alabama individual return Form 40 and the federal Form 1040 have multiple common fields, including business income, IRA distributions and deductions, and moving expenses. *See* ALA. DEP'T OF REVENUE, 2013 FORM 40: ALABAMA INDIVIDUAL INCOME TAX RETURN (2013), *available at* http://revenue.alabama.gov/incometax/2013_forms/13f40blk.pdf (specifically referencing figures from the taxpayer's federal forms and schedules, and requiring the taxpayer to attach the relevant forms and schedules to her state tax return).

not report to the state.[53] With this degree of overlap, Alabama has not retained a tax base substantially distinct from federal AGI. Thus, nonrecognition states cannot look to Alabama as a model of a state that has no filing status mismatch problem.[54]

Pennsylvania—the state whose comprehensive income tax employs the least federal conformity—serves as the best example of the impracticality of removing all references to the federal system. Pennsylvania's personal income tax system is one of the simplest; it taxes only specified classes of income at a flat rate of approximately three percent on every resident, and allows few deductions and no exemptions.[55] Nevertheless, the Pennsylvania tax code contains at least 300 explicit references to the I.R.C.[56] and, on top of that, repeats verbatim large portions without explicit reference.[57] Many of these references have the effect of importing specific aspects of federal recognition policy—for example, exclusions for same-sex spousal health savings accounts and qualified tuition programs.[58] For Pennsylvania to remove all state tax dependence on every aspect of the federal system differentiating between married and nonmarried persons would be a

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53 *Id.*

54 Alabama has specifically provided needed guidance to same-sex married taxpayers to use the allocative method to resolve the mismatch. *See infra* note 133 (discussing the method by which taxpayers are instructed to allocate income). Arkansas and Mississippi are similar to Alabama in that they define income inclusively and conform to various forms and schedules. *See* sources cited *supra* note 30 (same). Probably because these states do not give a state tax credit for taxes paid to the federal government, they have not yet given any guidance to same-sex married residents as to how to resolve the filing status mismatch.

55 *See* 61 PA. CODE § 103.1(a) (2014) ("There shall be imposed an annual tax . . . on the privilege of residents receiving specified classes of income . . . ."); §§ 103.11–103.19 (listing only nine classes of income, including compensation, business profits, rents and royalties, dividends, and interest); OLIN & SWAIN, *supra* note 23, at 48 (listing Pennsylvania's 2012 flat rate as 3.07% and only a few above-the-line deductions).

56 *See* Tax Reform Code of 1971, §§ 301–361, 1971 Pa. Laws 2–494 (containing over 300 usages of the terms "Internal Revenue Code," "26 U.S.C.," or "federal income tax"). Though many of these references occur in the corporate tax portions of the act, they are affected by federal recognition policy because Pennsylvania conforms to federal shareholder attribution rules. *See* 72 PA. CONS. STAT. ANN. § 7401(10) (West 2000 & Supp. 2014) (defining "[a]ffiliated entity" by reference to I.R.C. § 318, which attributes ownership interest between spouses).

57 *Compare, e.g.*, 72 PA. CONS. STAT. ANN. § 7303(a)(3)(iv) (referring to nonrecognition for income derived from tax-free reorganizations), *with* I.R.C. §§ 354, 368 (2012) (same).

58 *See* 72 PA. CONS. STAT. ANN. § 7303(a)(8)(a.7) (allowing deductions for contributions to qualified tuition programs, and excluding from income "[a]ny amount distributed from a qualified tuition program that is excludable from tax under section 529(c)(3)(B) of the [I.R.C.]"). *Compare* 72 PA. CONS. STAT. ANN. § 7303(a)(6) (including amounts paid out of health savings account only to the extent "includable in the gross income of an account beneficiary for Federal income tax purposes"), *with* I.R.C. § 223 (discussing tax treatment of health savings account distributions).

daunting task.[59] For a state employing greater conformity to do the same would be almost impossible, and it would lead to an even greater reduction in efficiency.

II
The Pro Forma Method: An Inelegant Solution

In an effort to retain autonomy from federal recognition policy,[60] most nonrecognition states have resolved the filing status mismatch by requiring each same-sex taxpayer filing joint federal taxes to also prepare a federal return as if she were unmarried, a solution referred to in this Note as the pro forma method. This Part evaluates the pro forma method in terms of the two basic objectives of any tax system: efficiency and equity. Part II.A is an overview of state responses to *Windsor*. Part II.B examines state use of pro forma filing to resolve filing status mismatch and jurisdictional limits to state taxation. Part II.C discusses inefficiencies of the pro forma method for tax preparation and state enforcement, as well as its implications for state autonomy.

A. *State Responses to* Windsor

Though states have become ever more hospitable to governmental recognition of same-sex relationships in the years since DOMA was enacted,[61] the impact of *Windsor* should not be minimized. For the 2012 tax year, only eleven of the forty-four states with an income tax allowed same-sex couples to file joint state taxes as

59 Additionally, Pennsylvania conforms to other portions of federal tax law in ways that would not be easy to untangle. For example, whether a Pennsylvania S corporation is taxable as a separate entity can depend on whether two of its shareholders are considered married to each other under federal tax law. *See* 72 Pa. Cons. Stat. Ann. § 7301(n.1), (s.2) (defining a Pennsylvania S corporation by reference to the I.R.C.); *id.* § 7307 (allowing the S corporation to be a pass-through entity if its shareholders so elect).

60 *See, e.g.*, La. Dep't of Revenue, Revenue Information Bulletin No. 13-024 (2013) [hereinafter Louisiana Pro Forma Bulletin], *available at* http://revenue.louisiana.gov/LawsPolicies/RIB%2013-024.pdf ("[A]ny recognition of a same-sex filing status in Louisiana as promulgated in IRS Revenue Ruling 2013-17 would be a clear violation of Louisiana's Constitution."); S.C. Dep't of Revenue, SC Revenue Ruling #14-1, at 2 (2014), *available at* http://www.sctax.org/policy/rr14-1-doc ("[A] marriage between persons of the same sex is *void ab initio* . . . and against the public policy of this State." (quoting S.C. Code Ann. § 20-1-15 (2014)).

61 Between 1996, the year DOMA was enacted, and the beginning of 2013, the year DOMA Section 3 was held unconstitutional, nine states (plus the District of Columbia) had recognized same-sex marriage, and nine others had sanctioned same-sex unions without recognizing same-sex marriage. Patrick Garvin, *A Timeline of Same-Sex Marriage in the US,* Bos. Globe (Oct. 17, 2014), http://www.bostonglobe.com/2014/01/25/same-sex-marriage-over-time/mbVFMQPyxZCpM2eSQMUsZK/story.html.

married.[62] For the 2014 tax year, the number is likely to be at least thirty-one.[63] The potential filing status mismatch created by the result in *Windsor* ensured that the vast majority of states would tax same-sex married couples in 2013 under a new state regime—for example, by allowing same-sex couples to file jointly or by adopting the pro forma or allocative method.

Of the forty-four states with an individual income tax, thirty-seven are base-conforming—they use either federal AGI or taxable income figures as a starting point for determining state liability.[64] Five more states determine a tax base independently, but nonetheless rely on other federal filings (such as Schedules C and D) for aspects of state liability.[65] A major implication of conformity is implicit importation of federal policy. For example, in a base-conforming nonrecognition state, the federal exemption for employer-paid health insurance premiums for same-sex spouses will be transferred to the state tax return.[66] Thus, the nonrecognition state also effectively exempts the premiums, reducing the taxpayer's state income and state tax liability and implicitly adopting federal recognition policy as its own.

Thirty-two states began 2013 as conforming, nonrecognition states,[67] meaning that they would have to find some way to handle the potential filing status mismatch. During the year, many of these made policy decisions largely unrelated to tax policy that nonetheless addressed the problem: Eight states began recognizing same-sex marriages no matter where performed,[68] and a ninth recognized same-sex

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62 *See infra* Appendix for a listing of states' approaches to same-sex marriage filing for the 2013 tax year.

63 *See* Carol V. Calhoun, *State Taxes and Married Same-Sex Couples*, EMP. BENEFITS & LEGAL RES. SITE (Jan 27, 2015), http://benefitsattorney.com/charts/state-taxes-and-married-same-sex-couples/ (listing states that allow same-sex marriages as of December 2014).

64 *See infra* Appendix for a summary of how states conform to the federal system. The amount and type of deductions and credits allowed for determining tax liability vary greatly by state, especially for categories such as social security income and capital gains. *See* OLIN & SWAIN, *supra* note 23, at 1–7 (summarizing state systems).

65 *Infra* Appendix; *see also* OLIN & SWAIN, *supra* note 23, at 13, 15, 26, 35, 40, 48 (outlining tax systems for states that use a tax base of state (adjusted) gross income). For a discussion of some aspects of these state tax systems, see *supra* Part I.C.

66 *See* Treas. Reg. § 1.106-1 (1960) (excluding from gross income employer contributions to health plans for spousal coverage).

67 *See infra* Appendix for a listing of states' approaches to same-sex marriage filing for the 2013 tax year.

68 *Id.* Utah's status as a recognition state faces a pending court challenge. *See* UTAH STATE TAX COMM'N, TAX NOTICE: INDIVIDUAL INCOME TAX RETURNS FOR SAME SEX COUPLES FOR TAX YEAR 2013 (2014), *available at* http://tax.utah.gov/notice/2014-01-15.pdf (explaining that Utah's current policy applies to 2013 only). Prior to a successful district court challenge to its same-sex marriage ban, Utah was planning to employ the pro forma method. *See* Press Release, Utah State Tax Comm'n, Same-Sex Couples May Not File Joint

marriages performed out of state.[69] The remaining twenty-three were tasked with resolving incompatible state and federal income tax filings through a specific tax policy decision. Of these, two chose the most efficient and least autonomous solution—allowing same-sex married taxpayers to file joint state returns, without recognizing the marriage for other legal purposes;[70] five chose a compromise solution—the allocative method, whereby same-sex spouses exactly apportion conforming income figures to each spouse;[71] thirteen chose the less efficient and equitable, but arguably more autonomous, solution—the pro forma method;[72] and none chose the least efficient but most

State Income Tax Returns (Oct. 9, 2013), *available at* http://tax.utah.gov/commission/releases/2013-10-09.pdf.

69 Following an Oregon state Department of Justice opinion from October 2013, Oregon became the first state to recognize out-of-state same-sex marriages while not legally performing them in-state. *See* Tony Merevick, *Oregon to Recognize Marriages of Same-Sex Couples Wed in Other States*, BuzzFeed (Oct. 17, 2013), http://www.buzzfeed.com/tonymerevick/oregon-to-recognize-marriages-of-same-sex-couples-wed-in-oth (embedding a memo from the Oregon DOJ to state agencies stating that they can recognize same-sex marriages performed out-of-state). Recognition extended to tax filing. In 2014, Oregon began performing same-sex marriages in-state. *See Oregon Tax Information for Same-Sex Married Couples*, Or. Department Revenue, http://www.oregon.gov/dor/PERTAX/Pages/same-sex.aspx (last visited Oct. 21, 2014) ("The Oregon Department of Revenue recognizes same-sex couples legally married in Oregon and other jurisdictions as married for Oregon tax purposes . . . .").

70 These states are Missouri and Colorado. *See* Exec. Order No. 13-14, 38 Mo. Reg. 2085 (Nov. 14, 2013), *available at* https://governor.mo.gov/news/executive-orders/executive-order-13-14 (justifying the decision to require joint filing on the text of the Missouri tax statute); *Income Tax Filing Status for Same-Sex Couples*, Colo. Department Revenue (Nov. 29, 2013), http://web.archive.org/web/20140420074911/http://www.colorado.gov/cs/Satellite/Revenue/REVX/1251648321168 (justifying the decision to conform to federal filing status on the basis of administrative efficiency).

71 These states are Alabama, Arizona, Kansas, Louisiana, and North Dakota. *See* Ala. Dep't of Revenue, Tax Guidance: Alabama Income Tax Filing Status For Same-Sex Couples (2013) [hereinafter Alabama Allocation Instructions], *available at* http://revenue.alabama.gov/incometax/Tax-Guidance.pdf; Ariz. Dep't of Revenue, 2013 Arizona Individual Income Tax Filing Requirements for Same-Sex Couples (2013); Kan. Dep't of Revenue, 2013 Kansas Allocation of Income Worksheet (2013) [hereinafter Kansas Allocation Instructions], *available at* http://www.ksrevenue.org/pdf/iiallocation13.pdf (including a bulletin briefly announcing and describing the method); La. Dep't of Revenue, 2013 Louisiana Resident Individual Income Tax Return Instructions 21 (2013) [hereinafter Louisiana Allocation Instructions], *available at* http://revenue.louisiana.gov/TaxForms/IT540i(2013)F.pdf (containing the only instructions for same-sex married taxpayers in the standard resident form); N.D. Dep't of Revenue, 2013 North Dakota Schedule ND-1S (2013) [hereinafter North Dakota Allocation Instructions], *available at* http://www.nd.gov/tax/indincome/forms/2013/schedulend-1s.pdf (instructing individuals to complete the form to determine their share of the amount reported on the joint federal return). For a description of the allocative method, see *infra* Part III.B.

72 These states are Georgia, Idaho, Indiana, Kentucky, Michigan, Nebraska, North Carolina, Ohio, Oklahoma, South Carolina, Virginia, West Virginia, and Wisconsin. *See* Ga. Dep't of Revenue, Informational Bulletin IT-2013-10-25, at 3 (2013) (on file

autonomous solution—complete removal of all references to federal tax law from the state tax code. Finally, three states did not opt for any solution and issued no directive.[73] At least one of these three deemed the cost of implementing a solution to outweigh any potential financial benefit.[74]

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with *New York University Law Review*) (providing guidance for taxpayers in same-sex marriages); *Info for Same-Sex Marriage Filers*, IDAHO ST. TAX COMMISSION (Oct. 4, 2013), http://tax.idaho.gov/n-feed.cfm?idd=424 (same); *Same-Sex Marriage Tax Filing Guidance*, IND. DEPARTMENT REVENUE, http://web.archive.org/web/20140628014641/http://www.in.gov/dor/4895.htm (last visited Jan. 29, 2015) (same); *Same-Sex Married Couples Filing Guidance,* KY. TAX ALERT (Ky. Dep't of Revenue, Frankfort, Ky.), Nov. 2013 [hereinafter *Kentucky Pro Forma Info*], at 1, *available at* http://revenue.ky.gov/NR/rdonlyres/9BA15C3D-34CC-45FE-BFB6-0D346D93BAC5/0/KYTaxAlertNov2013.pdf (same); MICH. DEP'T OF TREASURY, NOTICE TO TAXPAYERS: SAME-SEX COUPLES FILING JOINT FEDERAL INCOME TAX RETURNS MUST FILE MICHIGAN INCOME TAX RETURNS AS SINGLE FILERS (2013), *available at* https://www.michigan.gov/documents/taxes/DOMAnotice_434103_7.pdf (same); *Nebraska FAQ*, *supra* note 13 (same); N.C. DEP'T OF REVENUE, DIRECTIVE PD-13-1 (2013), *available at* http://www.dornc.com/practitioner/individual/directives/pd-13-1.pdf (same); OHIO DEP'T OF TAXATION, Individual Income Tax Information Release IT 2013-01: Filing Guidelines for Taxpayers Filing a Joint Federal Income Tax Return With Someone of the Same Gender 1–2 (2013) [hereinafter OHIO PRO FORMA BULLETIN], *available at* http://www.tax.ohio.gov/Portals/0/ohio_individual/individual/information_releases/DOMAInformationRelease.pdf (same); *Notice: Oklahoma Income Tax Filing Status for Same Sex Couples*, OKLA. TAX COMMISSION (Sept. 27, 2013) [hereinafter *Oklahoma Pro Forma Bulletin*], http://www.tax.ok.gov/upmin092713.html (same); S.C. DEP'T OF REVENUE, *supra* note 60, at 3 (same); VA. DEP'T OF TAXATION, TAX BULLETIN 13-13, at 1–2 (2013), *available at* http://www.tax.virginia.gov/Documents/TB_13-13_DOMA.pdf (same); W. VA. DEP'T OF REVENUE, 2013 PERSONAL INCOME TAX FORMS & INSTRUCTIONS 16 (2013), *available at* http://www.state.wv.us/taxrev/forms/2013/it140.forms-and-instructions.pdf (same); *Tax Guidance for Individuals in a Same-Sex Marriage*, WIS. DEPARTMENT REVENUE, http://web.archive.org/web/20131023210220/http://revenue.wi.gov/taxpro/news/130906.html (last visited Jan. 29, 2015) [hereinafter *Wisconsin Pro Forma Bulletin*] (same).

[73] These states are Arkansas, Mississippi, and Montana. Arkansas and Mississippi are not base-conforming states, but do require the use of schedule information from the federal return. *See* OLIN & SWAIN, *supra* note 23, at 15, 35 (noting overlap between the states' filing systems and the federal system). For the 2013 tax year, they did not explain how same-sex couples should import information from conforming federal schedules. *See, e.g.*, *Individual Income Tax FAQs*, MISS. DEPARMENT REVENUE, http://www.dor.ms.gov/info/faqs/IndividualIncomeFAQs.html#samesex (last visited Oct. 21, 2014) (instructing same-sex taxpayers to file as unmarried, but giving no instruction as to how to resolve the filing status mismatch).

[74] Montana specifically noted that the cost of determining the sex of taxpayers alone would dwarf any financial benefit received by the state. Memorandum from Mike Kadas, Dir., Mont. Dep't of Revenue, to Revenue and Transp. Interim Comm. (Oct. 1, 2013), *available at* http://revenue.mt.gov/Portals/9/committees/Revenue_Transportation/2013-2014/october/Discussion_of_Same_Sex_Marriage.pdf.

B. The Pro Forma Method as a Solution to the Filing Status Mismatch

Nonrecognition states choosing the pro forma method apparently view it as a simple and efficient way to retain state autonomy from federal recognition policy. That is, from the states' perspective, the taxpayer simply recomputes a federal income figure for importing into the state tax return using an unmarried filing status, exactly as if DOMA Section 3 were still in effect.[75] Thus, in theory, the pro forma solution is simple; it eliminates the filing status mismatch by completely disregarding the actual federal joint return for purposes of state taxes. The procedure is as follows: Each of the same-sex spouses compiles a pro forma federal tax return using an unmarried filing status. Each then transfers the relevant figure(s) from the pro forma return to a state return with the same (unmarried) filing status.[76] In the end, the affected taxpayers will have exactly the same state tax liability they would have had prior to *Windsor*.[77]

The reality of the pro forma method is more complicated. First, the pro forma method does nothing to eliminate the requirement that a taxpayer prepare an *actual* federal return, which instead must now be prepared in addition to the pro forma federal return required by the state. Second, though it eliminates the filing status mismatch, the pro forma method creates a new mismatch—the figures that otherwise would be identical on the taxpayer's state and federal returns no longer agree. On a joint return, married taxpayers do not simply add together figures that would have appeared anyway on their individual federal tax returns had they filed separately as unmarried. Many types of income, such as income derived from property or business activi-

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[75] *See, e.g.*, *Oklahoma Pro Forma Bulletin*, *supra* note 72 ("Taxpayers impacted by this rule must provide the same federal income tax information on the Oklahoma state return that would have been provided prior to the issuance of the IRS Ruling 2013-17."); *Info for Same-Sex Marriage Filers*, *supra* note 72 ("Recompute your federal income tax return as if you had used either the single (or head of household, if qualified) filing status . . . .").

[76] *See, e.g.*, *Same-Sex Marriage Tax Filing Guidance*, *supra* note 72 (instructing Indiana taxpayers to complete a sample federal return with a nonmarried status to use as a basis for determining state tax liability).

[77] Whether by oversight or design, West Virginia's use of the pro forma method was slightly different. West Virginia's only guidance appeared on instructions for its tax return, and contained two key differences from the systems of other pro forma states: (1) Only spouses preparing joint federal returns must use the pro forma method; and (2) the spouses must prepare a pro forma federal return as if they had "separately" filed federal returns, which in the language of state tax booklets generally means "married filing separately." *See* W. VA. DEP'T OF REVENUE, *supra* note 72, at 16. Taken at face value, these instructions would have allowed same-sex spouses to import some of the federal marriage benefits, just not those associated with filing jointly.

ties, need not be earned individually.[78] Similarly, joint treatment extends to many deductions and credits as well.[79] A married couple preparing joint federal taxes at no point needs to designate the relative income earned by (or deductions allowed to) each spouse. More importantly, when an amount reported individually by one spouse differs—for federal (married) purposes—from the amount that would have been reported had she been unmarried, there can be severe efficiency and equity consequences.

Despite the efficiency and equity problems inherent in the pro forma method, some states have adopted it even outside of the same-sex marriage context. For example, to resolve the jurisdictional filing status problem discussed in Part I.B,[80] some states ostensibly require the resident spouse to use the pro forma method,[81] while others either allow a form of allocation[82] or give little explicit guidance on whether or how to use figures from the federal return.[83] Though these states suggest using the pro forma method as a convenient way to calculate conforming federal figures,[84] in reality it appears that few states actu-

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78 *Cf., e.g.*, Lawrence Zelenak, *Marriage and the Income Tax*, 67 SO. CAL. L. REV. 339, 381–84 (1995) (discussing artificial shifting of earned income between spouses).

79 *Cf. id.* at 381–82, 391, 394, 396–99 (discussing difficulties of allocating deductions, exemptions, and credits between married spouses filing separately).

80 *See supra* note 46 and accompanying text (describing the jurisdictional filing status problem that arises for a taxpayer married to a resident of a different state).

81 *See, e.g.*, *Filing Status*, VA. DEPARTMENT TAXATION, http://www.tax.virginia.gov/site.cfm?alias=FilingStatus (last visited Jan. 29, 2015) ("Compute your federal adjusted gross income as though you had filed separately on your federal return . . . .").

82 *See, e.g.*, WIS. DEP'T OF REVENUE, FEDERAL AND WISCONSIN INCOME TAX REPORTING UNDER THE MARITAL PROPERTY ACT 3, 7 (2014), *available at* http://revenue.wi.gov/pubs/pb113.pdf (explaining how to allocate income between spouses under Wisconsin's complex community property rules).

83 *See, e.g.*, CAL. FRANCHISE TAX BD., 2013 PERSONAL INCOME TAX BOOKLET 7 (2013), *available at* https://www.ftb.ca.gov/forms/2013/13_540bk.pdf (allowing a resident filing joint federal taxes with a nonresident to file a separate resident California return, but giving no instructions about how to compute a separate federal AGI); GA. DEP'T OF REVENUE, 2013 INDIVIDUAL INCOME TAX 500 AND 500EZ FORMS AND GENERAL INSTRUCTIONS 11 (2013), *available at* https://etax.dor.ga.gov/inctax/2013_forms/TSD_Form_IT511_Instructions_2013.pdf (allowing residents married to nonresidents to file separately, but giving no instructions on how to compute AGI).

84 A North Carolina Department of Revenue spokesman justified the requirement that same-sex couples prepare pro forma returns by noting that it was an "existing methodology" created to solve the state jurisdictional problem. Mark Binker, *North Carolina Same-Sex Couples Could End up Doing Taxes Twice*, WRAL.COM (Oct. 24, 2013), http://www.wral.com/north-carolina-same-sex-couples-could-end-up-doing-their-taxes-twice/13029463/ (quoting the spokesman). Tax preparation software programs also instruct taxpayers to use the pro forma method. *See, e.g.*, *How Do I Prepare a Joint Federal Return and Separate State Returns?*, TURBOTAX, https://ttlc.intuit.com/questions/1901214-how-do-i-prepare-a-joint-federal-return-and-separate-state-returns (last visited Oct. 21, 2014) (instructing married taxpayers who reside in different states to prepare pro forma federal returns using the status "married filing separately").

ally *require* taxpayers to calculate their state tax base exactly as if they had filed separate federal taxes.[85] Perhaps this is not surprising, as the pro forma method—done properly—has consequences states likely find undesirable in this context. For example, a married resident required to prepare a pro forma separate federal return may not be able to exclude from income most of her social security benefits.[86] As a result, her pro forma federal AGI imported into the state could end up much higher than her allocable share of actual federal AGI.

Regardless, the pro forma method is even less well-suited for resolving same-sex marriage filing status mismatches. First, unlike in the juridisdictional problem above, normally both same-sex married taxpayers will reside in-state, which means the state will have ready access to both returns and can insist that each be filed with a copy of the federal return as well as a copy of the other spouse's individual return. The pro forma method does not allow for direct comparison between the two returns, and so cannot take advantage of the resulting possibility of more efficient enforcement. Second, the jurisdictional problem creates only a mismatch between the two married filing statuses—joint and separate—not a *marital* status mismatch itself. Between the two married filing statuses there are some tax liability distinctions, but between the married and unmarried statuses there are many more distinctions, some with far more extensive repercussions.[87]

C. Efficiency, Equity, and Autonomy of the Pro Forma Method

In its most traditional form, the tax policy principle of "horizontal equity" holds that taxpayers "who have the same income should pay the same amount *in taxes*." However, even those who espouse this liability-centric form often restate the principle more generally. For example, "a tax system . . . should assign the same tax *burden* to people with the same income" or should guarantee "equal *treatment*

[85] *See, e.g.*, NORTH CAROLINA TAX FORM INSTRUCTIONS, *supra* note 34, at 4 (allowing taxpayers to prepare a schedule showing separate income, deductions, and exemptions in lieu of preparing a separate federal return); VA. DEP'T OF TAXATION, 2013 VIRGINIA FORM 760: RESIDENT INDIVIDUAL INCOME TAX BOOKLET 8 (2013), *available at* http://www.tax.virginia.gov/taxforms/Individual/Income%20Tax/2013/760Instr.pdf (giving no instruction how to compute separate federal AGI, but allowing some deductions to be allocated by "share" of joint federal AGI).

[86] Married filers filing separately but who have lived together at any point in the year can only exclude fifteen percent of their social security benefits. I.R.C. § 86(a), (c)(1)(C) (2012).

[87] For a brief examination of just a few of the many differences, see *infra* notes 100–09 and accompanying text. For an explanation of how far reaching the repercussions can be, see *infra* notes 164–68 and accompanying text.

of equals."[88] From an economic standpoint, to the extent that tax burdens aside from the liability itself can be assigned a monetary value, there is absolutely no reason to exclude them when considering the principle of horizontal equity. The individual economic burden faced by each of two taxpayers with identical liabilities but differing compliance costs will not be the same.

Total compliance cost—the systemic nonliability cost associated with taxpayer compliance—has been a topic of study for tax analysts concerned about the overall inefficiency of the increasingly complex U.S. tax system.[89] For example, one study estimates that individual taxpayers alone spend 3.5 billion hours per year of their *own* time on tax compliance matters, and another estimates that for every dollar taxpayers pay in income taxes, they spend at least ten cents more on compliance.[90] Further, analysis of compliance burden is not limited to the cost to the system as a whole; advocates and analysts both have recently considered these costs as they apply across specific groups of taxpayers.[91] The differences in this burden across taxpayers with identical incomes can and should be included in a thorough inquiry of tax system equity. The additional compliance burdens associated with the pro forma method have a disproportionate impact on same-sex taxpayers, who face both greater tax preparation and audit risk burdens.[92]

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88 *See id*. (emphasis added) (using all three variations of the definition interchangeably).

89 *See, e.g.*, U.S. Gov't Accountability Office, GAO-05-878, Summary of Estimates of the Costs of the Federal Tax System 12–13 (2005) (summarizing studies finding the total deadweight compliance cost to be in the range of $67 billion to $104 billion).

90 John Slemrod & Jon Bakija, Taxing Ourselves: A Citizen's Guide to the Debate over Taxes 4, 161 (4th ed. 2008). Some estimates are as high as fourteen percent of aggregate income tax receipts. 1 Taxpayer Advocate Serv., National Taxpayer Advocate: 2008 Annual Report to Congress 3–4 (2008).

91 *See, e.g.*, Allen H. Lerman & Peter S. Lee, Evaluating the Ability of the Individual Taxpayer Burden Model to Measure Components of Taxpayer Burden: The Alternative Minimum Tax as a Case Study 139, 140 (2003), *available at* http://www.irs.gov/pub/irs-soi/04lerman.pdf ("The results for the sample taxpayers . . . can be categorized in various ways, such as by adjusted gross income, tax form used, filing status, or other desired characteristics."); Guyton et al., *supra* note 26, at 681–85 (explaining the versatility of the Individual Taxpayer Burden Model and comparing compliance burdens across taxpayers with varying characteristics); *see also* Quantria Strategies, Measuring and Modeling the Federal Income Tax Compliance Burden of Small Businesses 22–29 (2011), *available at* http://www.sba.gov/sites/default/files/files/rs382tot.pdf (modeling the relative compliance burdens across types of small businesses).

92 One pre-*Windsor* advertisement colorfully describes the "unfair administrative and tax compliance burdens on same sex married couples" associated with pro forma requirements as a "tax compliance nightmare." *New York State Marriage Equality Act Tax Ramifications*, Medows CPA, PLLC, http://www.medowscpa.com/services/New-York-State-Marriage-Equality-Act-Tax-Ramifications.aspx (last visited Oct. 20, 2014).

Pre-*Windsor*, recognition states generally resolved their filing status problem using the pro forma method: Same-sex couples were required to determine the federal figures necessary for their state returns as if they had filed federal taxes jointly—the exact converse of the current situation in nonrecognition states.[93] The same inefficiencies and inequities created by this system now affect the nonrecognition states and their taxpayers today.

1. *The Pro Forma Method Is Inefficient*

Not only were same-sex married taxpayers prior to *Windsor* required to prepare two sets of federal returns, they also faced significant added complexities and costs in preparing their actual separate federal returns.[94] The filing status mismatch created uncertainties: for example, how to divide income from jointly owned property; whether a parent-child relationship existed if it were created under state law; which spouse would be eligible for deductions or credits, such as the home-mortgage interest deduction or the earned income tax credit or child credit; and to what extent the gift and estate taxes would apply between spouses, including, among others, the issue of whether the creation of community property upon marriage would constitute a taxable gift.[95] Complicating matters, the states provided insufficient guidance on whether federal tax benefits that same-sex married taxpayers would have been eligible for had they been allowed to file

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[93] *See, e.g.*, *Maine Income Tax Issues Related to Same-Sex Marriages*, ME. TAX ALERT (Me. Revenue Servs. for Tax Prof'ls, Augusta, Me.) Jan. 2013, at 1, 1, *available at* http://www.maine.gov/revenue/publications/alerts/2013/TAJan13_Vol23_Iss3.pdf (stating that Maine taxpayers must prepare pro forma federal returns to determine federal AGI, exemptions, deductions, and credits); *see also supra* note 42 and accompanying text (discussing Vermont becoming the first state to use the pro-forma method for same-sex taxpayers in civil unions).

[94] *See* United States v. Windsor, 133 S. Ct. 2675, 2694 (2013) (noting that, under DOMA, same-sex taxpayers were forced "to follow a complicated procedure to file their state and federal taxes jointly"); Kelley Greene, *Headaches for Same-Sex Couples*, WALL ST. J., July 9, 2011, at B8 ("Since they still have to file their federal income-tax returns as individuals, many same-sex couples wind up filling out tax forms no fewer than four times—each filing separately with the federal government, then a 'dummy' joint federal return, and finally a married-filing-jointly state return based on the pretend federal one . . . .").

[95] For some issues such as the creation of community property upon marriage, the same-sex filing status mismatch created unique problems. *See, e.g.*, 1 TAXPAYER ADVOCATE SERV., NAT'L TAXPAYER ADVOCATE: 2010 ANNUAL REPORT TO CONGRESS 211–18 (2010) (raising some of these issues in: "Most Serious Problems #15: State Domestic Partnership Laws Present Unanswered Federal Tax Questions"). Many serious questions remained unresolved at the time that *Windsor* was decided. *See* 1 TAXPAYER ADVOCATE SERV., NAT'L TAXPAYER ADVOCATE: 2012 ANNUAL REPORT TO CONGRESS 449–55 (2012) ("Status Update: Federal Tax Questions Continue to Trouble Domestic Partners and Same-Sex Spouses.").

jointly would nevertheless be available to them at the state level.[96] This lack of certainty at both the state and federal levels exposed taxpayers to potential liability and exposed the states and the IRS to potential loss of revenue.[97]

The pro forma method further complicated the state and federal audit processes for joint state tax returns filed by same-sex couples. As part of their audit procedures, state revenue departments and the IRS rely on the assumption that figures imported from the federal return match those on the state return. Discrepancies caused multiple enforcement problems in recognition states: Existing federal third-party reporting procedures had to be duplicated with different state figures,[98] cooperative federal/state audits were less efficient and effective, and states had more difficulty making deficiency determinations through automatic utilization of deficiency reports generated by the federal government.[99]

2. *The Pro Forma Method Is Inequitable*

Even where no uncertainties existed, same-sex married taxpayers still faced inequitable compliance burdens. Multiple I.R.C. sections require distinct inputs or distinct calculations and thus distinct record-keeping for taxpayers who are married and those who are not. A New

[96] *See* Smith & Stein, *supra* note 20, at 48–81 (providing a detailed summary of each recognition state's pre-*Windsor* guidance). The most notable exception was California. *Id.* at 51; *see also* FRANCHISE TAX BD., STATE OF CAL., FTB PUBLICATION 776: TAX INFORMATION FOR SAME-SEX MARRIED COUPLES (2011), *available at* https://www.ftb.ca.gov/archive/forms/2010/10_776.pdf (providing same-sex taxpayers with relatively detailed information about how to prepare and file taxes).

[97] Taxpayers uncertain of their liability must decide how much risk to take when filing taxes. While some taxpayers may take a risk-averse approach and over-report liability, others take an aggressive or even evasive tack by underreporting. *See* Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 TAX L. REV. 489, 489–91 (2011) (arguing that the government risks loss of revenue through tax law uncertainty). Without sufficient guidance, many taxpayers may not even realize they are taking an aggressive or in some cases clearly erroneous approach.

[98] *See, e.g.*, EMP. BENEFITS PROGRAM, CITY OF N.Y. OFFICE OF LABOR RELATIONS, N.Y. STATE MARRIAGE EQUALITY Act (2011), *available at* http://www.nyc.gov/html/olr/downloads/pdf/healthb/marriage_equality_act.pdf (describing differences between reporting of wage income for federal and state purposes that would affect employees of New York City).

[99] *See* TAX SECTION, N.Y. STATE BAR ASS'N, REPORT ON NEW YORK STATE TAX ISSUES RELATING TO SAME-SEX UNIONS 27 (2005) [hereinafter NY STATE BAR REPORT], *available at* http://old.nysba.org/Content/ContentFolders20/TaxLawSection/TaxReports/1090Report.pdf ("The difficulty with the 'mock return' approach is that the data . . . on same-sex couples' state income tax returns would not necessarily correlate to the information reported to the IRS on the couples' single returns. . . . [It] would provide no road map to enable ready comparison of federal and state reporting."); Smith & Stein, *supra* note 20, at 35–36 & nn.21–23 (explaining how states can determine deficiency assessments from federal information shared under I.R.C. § 6103).

York State Bar Association report lists some of the many relevant ways in which tax treatment differs:[100] interspousal transfers and alimony,[101] sale of a principal residence,[102] employer-paid spousal health benefit exclusion,[103] earned income tax credit,[104] netting of certain deductions,[105] phase-outs for deductions,[106] qualification for S corporation status,[107] qualification for grantor trust status,[108] and various related-party attribution rules,[109] among many others. Married same-

100 *See* NY STATE BAR REPORT, *supra* note 99 (describing in detail many of the complications related to same-sex filing that stem from different tax treatment of married and unmarried individuals). The bar report barely scratches the surface. Professor Seto notes at least 250 I.R.C. sections that apply particularly to parties with certain close relationships, including the marital relationship. *See* Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1531 & n.2 (2008).

101 Alimony and separate maintenance payments are excluded—from income to the recipient and from deductions to the payer—for spouses (or former spouses) who file a joint return. I.R.C. §§ 71(e), 215(b) (2012). Other transfers of property between spouses are generally completely excluded from income under the unlimited marital gift deduction. I.R.C. §§ 1041(a), 2523(a). The potential additional recordkeeping and reporting required by the nonexclusion of marital gifts has been described as a "Sisyphean compliance burden" that is "demeaning and oppressive." Anthony C. Infanti, *The Internal Revenue Code as a Sodomy Statute*, *in* CRITICAL TAX THEORY: AN INTRODUCTION 192, 197 (Anthony C. Infanti & Bridget J. Crawford eds., 2009).

102 Joint filers can exclude up to twice the amount of income from the sale of a principal residence, regardless of which spouse actually owned the residence. I.R.C. § 121(b)(2)(A).

103 Married taxpayers can exclude amounts paid by their employer for coverage of their spouses. I.R.C. § 106(a); Treas. Reg. § 1.106-1 (1960).

104 Each of the federal filing statuses requires a distinct calculation for determining the EIC. *See* DEP'T OF THE TREASURY, PUBLICATION 596: EARNED INCOME CREDIT (EIC) (2013), *available at* http://www.irs.gov/pub/irs-pdf/p596.pdf (explaining distinct rules and providing distinct rate tables for each taxpayer status, as well as describing multiple scenarios for claiming a qualifying child).

105 Certain deductions are only allowed to the extent the taxpayer has income of the same type. For joint filers, income attributable to one spouse can be offset by deductions attributable to the other. *See, e.g.*, I.R.C. § 465(a) (deductions limited to amounts "at risk"); *id.* § 469(d) (passive activities); *id.* § 1222 (capital gains).

106 Above a threshold, itemized deductions phase out with increasing AGI. Thus, 1) a joint return will have a distinct AGI from each spouse's separate return, and 2) the threshold for joint filers differs from the threshold for individuals. I.R.C. § 68(a)–(b) (overall limit on itemized deductions). Other specific deductions contain their own phase-outs. *See, e.g.*, I.R.C. § 213(a) (itemized medical expenses); *id.* § 221(b)(2) (student loan interest).

107 A "husband and wife" count as one person for determining S corporation status. I.R.C. § 1361(c)(1)(A). This matters because an S corporation can have a maximum of one hundred shareholders. I.R.C. § 1361(b)(1)(A).

108 Qualification for a grantor trust requires that certain powers or interests be retained by the grantor or the grantor's spouse. I.R.C. § 672(c), (e).

109 Deductions are generally disallowed for transactions between related persons, including spouses. I.R.C. § 267(a), (b)(1). In addition, stock ownership is attributed from one spouse to the other for many different corporate transactions. *E.g.*, I.R.C. §§ 267(c)(4), 318(a)(1)(A)(i). These attribution rules can affect tax calculations not only for the taxpayer and her spouse, but also for the corporation that issued the stock and its other shareholders as well.

sex taxpayers preparing pro forma returns were ostensibly required to duplicate their compliance efforts for each of these factors, usually without the benefit of federal or state guidance on how exactly to accomplish this task.[110] The combined magnitude of these differences prevented even sophisticated tax software programs from correctly handling complicated same-sex tax returns.[111] To make matters worse, same-sex couples filing jointly often could not take advantage of state electronic filing programs due to the resulting discrepancies between federally reported figures and the pro forma figures prepared for their state returns.[112] The state could not resolve these discrepancies merely by adding figures from both spouses' federal tax returns for comparison—the distinct treatment for married and unmarried taxpayers ensured that very often the correct federal sums would not equal the joint totals required by the state.[113] Finally, taxpayers faced both increased audit risk and more expense in complying with distinct state and federal audit inquiries.[114]

These very same inefficiencies and inequities now affect same-sex married taxpayers residing in nonrecognition states.[115] Likewise, the nonrecognition states themselves now encounter the very same

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[110] *See supra* note 96 and accompanying text (explaining how states provided insufficient guidance to same-sex taxpayers).

[111] *See* Tara Siegel Bernard, *Is Tax Software Sophisticated Enough for Same-Sex Couples?*, N.Y. TIMES, Mar. 3, 2012, at B4 (listing instances where tax preparation software could not handle the complexity of pro forma returns and recommending that same-sex filers see an accountant instead).

[112] *See* Smith & Stein, *supra* note 20, at 77 (citing a 2011 Illinois bulletin instructing same-sex couples in civil unions on how to file).

[113] As an example, if one same-sex spouse enrolled herself and her spouse in her employee health benefit plan, the combined actual federal AGI of the married taxpayers (prepared as two separate unmarried federal returns) would not reflect the spousal health benefit exclusion, while the pro forma federal AGI (prepared as one married federal return) would reflect the exclusion.

[114] *See* Smith & Stein, *supra* note 20, at 34 (explaining how nonconformity affected same-sex taxpayers disproportionately); *see also* NY STATE BAR REPORT, *supra* note 99, at 28 (expressing concern that the extra procedures necessarily involved might be seen as "targeting" same-sex couples for audits).

[115] *See* Blake Ellis, *Same-Sex Couples Still Face Tax Nightmares*, CNN MONEY (Mar. 5, 2014, 11:50 AM), http://money.cnn.com/2014/03/05/pf/taxes/same-sex-taxes/index.html?hptHP_t3 (explaining that same-sex married couples in nonrecognition states now face the burden that couples in recognition states previously faced); *see also Frequently Asked Questions for Individuals in a Same-Sex Marriage*, NEB. DEPARTMENT REVENUE, http://www.revenue.nebraska.gov/question/same-sex_FAQ.html (last visited Oct. 20, 2014) (instructing same-sex married residents to include, in their pro forma returns, the imputed value of their employer-paid spousal health benefit, a distinct earned income tax credit calculation, and a separate pro forma child and dependent care federal form, among other differences); *Same Sex Couples*, WISC. DEPARTMENT REVENUE, http://www.revenue.wi.gov/faqs/ise/samesex.html (last visited Jan. 29, 2015) [hereinafter *Wisconsin Pro Forma FAQs*] (requiring same-sex couples filing joint federal taxes to make distinct state determinations for spousal health savings accounts, health flexible spending accounts, IRA

administrative and enforcement inefficiencies that recognition states previously did.[116] Though same-sex couples certainly suffered the inequitable compliance burden of the pro forma method in recognition states prior to *Windsor*, they also enjoyed the symbolic benefit of filing as married and in many cases faced a lower tax liability.[117] Nonrecognition states impose the same burdens without the offsetting benefits.

3. *How the Pro Forma Method Does and Does Not Maintain Autonomy*

The pro forma method clearly allows states to maintain one form of autonomy from federal recognition policy: It prevents same-sex married taxpayers from filing joint state taxes. However, in other important ways the pro forma method provides little autonomy. It does not preserve state revenue, nor does it meaningfully redistribute tax liability.

A major reason base-conforming nonrecognition states have nonetheless chosen the pro forma method is to ensure that a same-sex spouse includes in her state tax return income she would have needed to include had she been unmarried. For example, federal wage income excludes employer-paid spousal health benefits, and unmarried taxpayers must include as income the imputed value of any similar benefit paid by the employer for a nonspouse.[118] In contrast to the use of the pro forma method to resolve state jurisdictional limits, these nonrecognition states very clearly state that the pro forma method is required,[119] and that taxpayers must take special steps to ensure they

excess contributions, and IRA early withdrawal penalties, among other components of AGI).

116 Some advocates recommend pro forma as a viable solution because the extra administrative and enforcement costs to the state would be relatively minor. *See, e.g.*, HENCHMAN & STEPHENS, *supra* note 30, at 10, 12 (recommending states consider the pro forma method as one option to resolve the filing status mismatch problem). This overlooks both the additional administrative burden nonrecognition states would face in providing same-sex taxpayers with effective guidance and the compliance inequities faced by those taxpayers.

117 The liability benefits and disadvantages of filing jointly are described in more detail below in notes 121–26 and accompanying text.

118 *See Wisconsin Pro Forma FAQs*, *supra* note 115 (requiring a taxpayer to include the value of the employer's contributions to a health plan for the portion that covers the same-sex spouse); *see also* Treas. Reg. § 1.106-1 (1960) (excluding from gross income employer contributions for a health plan's spousal coverage).

119 *Compare, e.g.*, NORTH CAROLINA TAX FORM INSTRUCTIONS, *supra* note 34, at 4 (allowing a resident married to a nonresident to prepare a schedule to compute her separate AGI, and not requiring the schedule to be submitted with the state tax return), *with id.* (requiring same-sex taxpayers to prepare and submit a pro forma federal return); W. VA. DEP'T OF REVENUE, *supra* note 72, at 16 (allowing a resident/nonresident couple

do not avail themselves of tax benefits reserved for married couples.[120]

While married joint filing can be beneficial economically to taxpayers, this is not always the case.[121] Though the pro forma method has the effect of denying some benefits, it also provides the opportunity for reduced liability through other advantages. These advantages include the ability to take extra deductions and receive extra credits,[122] as well as the ability to engage in tax planning unavailable to married couples.[123] Furthermore, in nonrecognition states allowing joint filing, the total effect on state revenue of allowing same-sex couples some of the tax benefits that married couples enjoy is minimal—certainly less than the cost of effective administration and enforcement of the pro forma method.[124] That these states' primary concern is neither equity nor efficiency, nor loss of revenue, but rather the expression of staunch opposition to same-sex marriage, is strik-

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who have filed a joint federal return to file a joint state return), *with id.* (requiring all same-sex taxpayers to file separate state returns).

120 *See, e.g.*, VA. DEP'T OF TAXATION, *supra* note 72, at 2 (noting some of the above-the-line deductions—components of imported federal AGI—that might be unavailable to same-sex taxpayers, including the health savings account deduction, the self-employed health insurance deduction, the individual retirement account deduction, the deduction for interest on educational loans, and the deduction for tuition and fees).

121 *See generally* James Alm et al., *Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage*, 53 NAT'L TAX J. 201 (2000) (modeling the interaction between marriage benefits and the marriage penalty).

122 For example, low-income taxpayers filing as single in states that conform to federal EIC can take advantage of an amount of credit unavailable to a married couple filing jointly. *See, e.g.*, VA. DEP'T OF TAXATION, *supra* note 72, at 4–5 (instructing taxpayers to import a pro forma federal EIC). High-income taxpayers have other advantages, such as the ability to separate itemized deductions and avoid the marriage penalty. *See* Lydia Beyoud & Heidi Przybyla, *Tax Bills May Rise for Gay Couples*, BOS. GLOBE (Aug. 20, 2013), http://www.bostonglobe.com/business/2013/08/19/married-same-sex-couples-with-kids-may-see-irs-tabs-rising/8L12JWjTeXScT1H3u4rj2J/story.html (explaining the effects of deduction limits and the marriage penalty for joint filers).

123 For an in-depth account of the various ways same-sex couples can take advantage of a tax system that treats them as unaffiliated (and therefore not subject to the same related-party rules designed to prevent abusive tax planning), see Seto, *supra* note 100. As a simple example, a same-sex couple considered unmarried under state law can claim both the standard and itemized deductions by "loading below-the-line deductions into the separate return of one of the two spouses, so that the other can then claim the standard deduction." *Id.* at 1579; *see also* N.C. DEP'T OF REVENUE, FREQUENTLY ASKED QUESTIONS FOR SAME-SEX MARRIAGE (2014), [hereinafter NORTH CAROLINA PRO FORMA FAQS] (on file with *New York University Law Review*) (explaining that each spouse takes her own deductions, and that unlike other married couples, one spouse can itemize even if the other does not).

124 *See, e.g.*, Kadas, *supra* note 74 (noting that the cost of determining the genders of joint filers alone would outweigh any potential revenue gains to the state); *Income Tax Filing Status for Same-Sex Couples*, *supra* note 70 (implying that the significant administrative difficulties involved in departing from the federal tax filing status would be outweighed by any benefit to the state).

ingly evident—none allows same-sex married taxpayers using a federal status of "married filing separately" to use the same status in-state.[125]

The use of the pro forma method pre-*Windsor* in recognition states does not provide a direct parallel. Recognition states have employed the pro forma method because simply combining the spouses' federal income figures before importation into the state would effectively deny the same-sex couple all the tax benefits of marriage while simultaneously denying any state tax benefits associated with separate filing.[126] At the same time, the onus of resolving the difficult administrative questions raised in preparing returns with mismatched filing statuses once fell partially on the federal government; now it falls solely on the nonrecognition states.[127] Today, nonrecognition states contend that the pro forma method (1) permits the state to retain autonomy from federal recognition of same-sex marriage,[128]

[125] *See* sources cited *supra* note 72 (specifically denying to same-sex spouses the ability to file using the status "married filing separately"). In virtually all cases, allowing same-sex spouses filing separate federal taxes to use the same status in-state would be more efficient for both the taxpayers and the state (because there would be no filing status mismatch problem) and would increase state revenue (because generally the combined tax burden for a couple filing as "married filing separately" will be higher than it would have been if both were able to file as unmarried). *See* Internal Revenue Serv., Dep't of the Treasury, Publication 17: IRS Tax Map 2014, at 22–23 (2014), *available at* http://www.irs.gov/pub/irs-pdf/p17.pdf (explaining some of the disadvantages of filing as "married filing separately"); *see also supra* note 124 and accompanying text (explaining the advantages same-sex married taxpayers can access by not being required to file using a married status at the state level).

[126] Married taxpayers get beneficial treatment in several areas, including IRA contributions, employer-paid benefits, inheritance of the spouse's estate, and gifts between spouses. Some states allow married taxpayers to avoid the marriage penalty either through favorable tax rates or separate filing. *See supra* note 47 and accompanying text (introducing and discussing the marriage penalty). Interestingly, since 2010 but before *Windsor*, same-sex married couples living in community property states received the double bonus of having their income divided equally under federal law while being required to file separately—they received income averaging without suffering the marriage penalty, a fortuitous situation unavailable to any other taxpayers. *See* Laura Saunders, *Same-Sex Couples and the Marriage Penalty*, Wall St. J., Feb. 19, 2011, at B9 (noting the unintended tax benefits for same-sex couples in three states).

[127] Reliance on federal precedent as it existed pre-*Windsor* is at best a partial solution. Not all issues had been resolved, and undoubtedly more will arise over time as state and federal tax laws evolve. *See* NY State Bar Report, *supra* note 99, at 20–21 (describing the guidance that the state must produce as clearly "voluminous," but "necessary[,] given the breadth of the affected areas, the complexity of the tax laws, and the variety of different types of adjustments that must be made"); *see also supra* note 95 (discussing unresolved issues).

[128] *See, e.g.*, *Kentucky Pro Forma Info*, *supra* note 72, at 1 (attempting to use the pro forma method to prevent the change in federal tax treatment from affecting taxes in-state); *Oklahoma Pro Forma Bulletin*, *supra* note 72 (attempting to use the pro forma method to maintain state tax treatment as it existed prior to federal recognition).

and (2) is sufficiently equitable and efficient for taxpayers and the state.[129] Both of these beliefs are misguided. The federal and state tax systems are so intertwined that complete state autonomy from federal recognition policy has not been—and functionally cannot be—achieved so long as the state continues to administer a comprehensive income tax.

III
The Way Forward

This Part argues that nonrecognition states should employ an efficient filing method that distributes the tax burden equitably: the allocative method. Part III.A advocates for the allocative method through the example of Louisiana. Ironically, although the state was initially the most vociferous and adamant about autonomy, it has quietly discarded the pro forma method. Part III.B details the allocative method of resolving the filing status mismatch. Part III.C reviews its use outside of the same-sex marriage context. It explores the efficiency and autonomy implications of states' choice to allocate, rather than recompute, liability. Finally, Part III.D explains how nonrecognition states can use the allocative method to maintain the efficiency of base conformity without an unacceptable loss of equity or autonomy.

A. Switching from the Pro Forma Method to the Allocative Method

Just two weeks after Revenue Ruling 2013-17 was released, Louisiana became one of the first states to make a public response. So as to leave no doubt as to its stance on same-sex marriage, the Louisiana Department of Revenue used such strongly-worded phrases as "[b]y its very definition, a same-sex marriage is in direct contravention of," "any recognition . . . would be a clear violation of," and "[the] Secretary of Revenue is bound to support and uphold" the Louisiana Constitution, while instructing same-sex spouses that they must use the pro forma method.[130] That Louisiana—whether by acci-

[129] *See* Henchman & Stephens, *supra* note 30, at 10–12 (claiming that the impact to the state could be minimal, and that compliance inequities for taxpayers may be counterbalanced by the benefit of filing joint federal taxes).

[130] Louisiana Pro Forma Bulletin, *supra* note 60. As a result, the pro forma method is often referred to as the "Louisiana approach." *See, e.g.*, Henchman & Stephens, *supra* note 30, at 1, 10 (identifying states that require same-sex taxpayers to complete pro forma tax returns as having embraced the "Louisiana approach"). Ironically, the allocative method has likewise been deemed the "Wisconsin approach," *see id.* (noting that the five states that require same-sex married taxpayers to allocate their incomes separately use the "Wisconsin approach"), but it is clear that Wisconsin switched to the pro forma method for the 2013 tax year. *See infra* notes 146–54 and accompanying text (discussing Wisconsin's treatment of same-sex married taxpayers).

dent or design—has since adopted the allocative method suggests that its true commitment is to the expression of disapproval of same-sex marriages rather than the misguided belief that the pro forma method maintains equity or autonomy. Likewise, pro forma states' selective willingness to forego their stance against implicit recognition of these marriages underscores the states' fundamental motivation: to express disapproval of same-sex relationships and the federal recognition policy.[131] The allocative method fulfills this function as well as any other solution. More importantly, from a tax policy perspective, it does not come with as high a cost to efficiency and equity. Rather than follow the lead of Wisconsin and Ohio, which have chosen to discard the advantages of conformity in a quixotic quest for pure equivalence, states should look to Louisiana, apparently the only state to date to have done the reverse.[132]

B. The Allocative Method as a Solution to the Filing Status Mismatch

In theory, the allocative method, like the pro forma method, is simple; it eliminates the filing status mismatch by allocating an exact portion of actual conforming federal figures to each spouse for importing into her state return. The procedure in an AGI conforming state is as follows.[133] On a separate state allocation form,[134] the spouses in column "A" list the AGI-component figures from their joint federal return. In parallel columns, "B" and "C," they list the portion of each figure allocated to each spouse. The sum of each AGI

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131 For a discussion of how states implicitly recognize same-sex marriages despite using the pro forma method, see *infra* Part III.D.3.

132 Louisiana's reversal may be a mere oversight, thus more apparent than real. The language of the Louisiana Bulletin announcing adoption of the pro forma method seems to be directly contradicted by the later guidance in the tax instructions, yet Louisiana has apparently given no indication that the reversal was intentional. *Compare* LOUISIANA PRO FORMA BULLETIN, *supra* note 60 ("The taxpayer must provide the same federal income tax information on the Louisiana State Return that would have been provided prior to the issuance of . . . Revenue Ruling 2013-17."), *with* LOUISIANA ALLOCATION INSTRUCTIONS, *supra* note 71, at 3 ("[T]ake the income on the federal joint tax return and allocate it between the taxpayers for use on their . . . [individual] state tax return."). However, whether the reversal was intentional is almost irrelevant. A state concerned with maintaining complete autonomy from recognition policy would presumably not have issued tax form instructions completely at odds with its former guidance.

133 Alabama is not a base-conforming state; its procedure is different. To calculate separate federal tax liability (used in determining a federal taxes paid deduction), the state requires allocation of the joint federal liability by the ratio of each spouses' separate federal AGI to the combined federal AGI. ALABAMA ALLOCATION INSTRUCTIONS, *supra* note 71.

134 Louisiana does not actually provide a form but merely tells each spouse to "take the income on the federal joint tax return and allocate it between the taxpayers for use on their [individual] state tax return." LOUISIANA ALLOCATION INSTRUCTIONS, *supra* note 71, at 3.

component in columns "B" and "C" must equal the corresponding figure in column "A." In the end, the sum of the spouses' allocated AGIs will precisely match the AGI figure on the joint federal return.[135] Married couples filing separate federal taxes avoid the process entirely by simply using their federal figures on their state forms.

Though the pro forma and allocative methods seem similar, and, for taxpayers with very simple tax returns, the results under each could be identical, they utilize completely distinct procedures. Under the allocative method, a taxpayer will begin the state tax preparation process using figures from her actual federal return.[136] Under the pro forma method, the actual federal return is ignored.[137] The distinction goes beyond mere formalism—in preparing a joint return, married taxpayers do not simply add together final figures that would have appeared on their individual federal tax returns had they filed separately as unmarried.

The allocative method is a general approach to distributing joint tax figures between two parties, rather than a specific strategy for each figure. Because a major impetus for this method was to enhance enforcement by direct comparison of a married couple's separate state returns and their joint federal return,[138] states give various instructions regarding how to allocate AGI components to each taxpayer,[139]

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[135] North Dakota, a state that conforms to federal taxable income (which contains income, deductions, and exemptions as components), contains simple instructions on how to allocate federal figures. NORTH DAKOTA ALLOCATION INSTRUCTIONS, *supra* note 71. Critically, the figures must match exactly those reported on the joint federal return. *See id.* ("The amounts in Columns B and C must add up to the amount in Column A."). Though less explicit, the Arizona and Kansas instructions imply that the sum of the allocations must match federal figures. *See* ARIZ. DEP'T OF REVENUE, *supra* note 71 ("Each taxpayer will determine his or her separate *share of the federal adjusted gross income reported on their joint federal income tax return*." (emphasis added)); KANSAS ALLOCATION INSTRUCTIONS, *supra* note 71, at 1 ("Same-sex individuals who file a joint federal income tax return must complete a worksheet . . . to show the amount of income *as reported on the joint federal return* that is allocable to each individual . . . ." (emphasis added)).

[136] *See* NORTH DAKOTA ALLOCATION INSTRUCTIONS, *supra* note 71 ("In Column A, enter the amounts from the joint federal income tax return . . . . In Columns B and C, enter the portion of the amount in Column A belonging to each taxpayer.").

[137] *See, e.g.*, VA. DEP'T OF TAXATION, *supra* note 72, at 2 ("Same-sex couples who file federal returns jointly or as married taxpayers filing separately must recalculate their [federal AGI] for Virginia purposes as if their federal income tax returns were prepared using a filing status of either 'single' or 'head of household.'").

[138] *See* JARET COLES, INDIVIDUAL INCOME TAX IN THE UNITED STATES AND MONTANA: A ROADMAP FOR FUTURE COMMITTEE DECISIONS ON HOUSE JOINT RESOLUTION 13, at 30–35 (2011) (report to the Montana Revenue and Transport Committee) (explaining the history of and rationales for combined filing in Montana, including more efficient audits and reviews).

[139] *See, e.g.*, MONT. DEP'T OF REVENUE, 2013 MONTANA FORM 2: INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS 5 (providing general instructions for taxpayers on how to allocate various types of income and itemized deductions); IOWA DEP'T OF REVENUE, 2013

but all clarify that the combined amounts must equal the amount reported on the joint federal return. In addition, the states make little distinction between combined filing and filing separately (whether for jurisdictional or other reasons); in either case resident taxpayers are explicitly instructed to use the allocative method.

C. "Combined" Filing: A Template for the Allocative Method

Several states use the allocative method outside the same-sex marriage context. This method is employed to resolve the mismatch that results from states avoiding the importation of the federal marriage penalty while simultaneously maintaining the benefits of conformity.[140] These states allow, or require, couples who file joint federal taxes to file separately on the same state return, often called a "combined" return.[141] All base-conforming states utilizing combined filing employ the allocative method.[142] Though combined filing involves no *marital* status mismatch, it illustrates how the allocative method is a relatively efficient and equitable solution to filing status nonconformity.

As will be explained below, the end result of the allocative method is both efficient and equitable; the states retain matching figures, and the taxpayers need not prepare pro forma federal returns using the "married filing separately" status. The one major caveat is that, despite having filed separately in-state, the spouses have been able to import their joint AGI, and thus any benefit associated with joint filing contained within each of the AGI components is also preserved. As a result, the state has surrendered some autonomy by implicitly recognizing the federal joint filing status.

Thus, for nonrecognition states choosing the allocative method, the mismatch seemingly created a mere procedural inconvenience, easily resolved by mechanical allocation such as that used in combined filing. Allocative states have chosen to retain the distinct efficiency and equity advantages that accompany base conformity but have chosen to forego some autonomy. On the other hand, nonrecognition states seemingly view the loss of autonomy associated with the alloca-

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IOWA INCOME TAX INFORMATION 2–10 (2013) [hereinafter IOWA TAX FORM INSTRUCTIONS] (providing detailed instructions for married filing separately taxpayers on how to allocate their federal income figures and itemized deductions, in some cases assigning all to one spouse, in other cases dividing equally or pro rata by relevant assets or AGI).

140 *See* OLIN & SWAIN, *supra* note 23, at 1–2 (explaining the purpose of combined filing).

141 *See id.* (listing the states that permit the "combined" approach).

142 *See, e.g.*, *supra* note 139 (instructing married Montana and Iowa taxpayers on how to use the allocative method while preparing their combined but separate state tax returns).

tive method as implicit state recognition of federal same-sex marriage policy.[143] While avoiding this very loss of autonomy may be the driving force behind states' choice of the pro forma method, a comparison of the two methods shows how insubstantial the autonomy difference is in practice.

D. Preserving Efficiency, Equity, and Autonomy Through Allocation

With the profound efficiency gains states realize through tax system conformity, one might question whether tax policy is really the appropriate venue for expressing state displeasure with federal social policies that have little impact on state revenue. In fact, for the 2013 tax year, three states explicitly decided that any attempt to prevent the importation of federal recognition of same-sex marriage through the tax system was not worth the effort.[144] Nonetheless, at least for now, many nonrecognition states remain determined to prevent same-sex couples from filing joint state taxes. These states can and should adopt the allocative method to maintain an efficient and equitable tax system while expressing their autonomous social policy preferences.

1. The Allocative Method Retains Efficiency

The allocative method and the pro forma method are often viewed as rough equivalents, both providing autonomy while retaining efficiency and equity.[145] Certainly neither method entails the efficiency price tag that would accompany a retreat to complete nonconformity with the federal system, if such a retreat is even possible. However, in approach the two methods are quite dissimilar, as one starts with the joint federal return while the other completely ignores it.

Recent guidance provided by Wisconsin and Ohio—two states that initially opted for the allocative method but since switched to the pro forma method for the 2013 tax year[146]—demonstrates how the pro

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[143] *See infra* notes 161–62 and accompanying text (describing nonrecognition states' responses to Revenue Ruling 2013-17).

[144] The states are Colorado, Missouri, and Montana. *Supra* notes 70, 74.

[145] *See, e.g.*, Henchman & Stephens, *supra* note 30, at 2, 10 (advocating for either option).

[146] In the days after Revenue Ruling 2013-17 was released, Wisconsin became one of the very first states to announce its solution to the filing status mismatch. *See Wisconsin Pro Forma Bulletin*, *supra* note 72 ("Same-sex individuals who file a joint federal income tax return must complete a new Wisconsin form . . . . Schedule S shows the amount of income as reported on the federal return that is allocable to each individual, and determines the federal adjusted gross income to be used for Wisconsin tax purposes."). Within two months, Wisconsin had converted to the pro forma method. *See Wisconsin Pro Forma*

forma method's inferiority manifests in practice. The federal Form 1040 lists twenty-eight distinct AGI components.[147] These same components appear on the allocation form for each state that used the allocative method, plus Wisconsin and Ohio.[148] Virtually every one of these components contains some differential treatment for married and unmarried taxpayers. For example, Ohio has provided guidance for employers that they must report wages for same-sex married taxpayers differently for federal and state purposes.[149] These expensive duplicate third-party reporting procedures are unneeded in a state using the allocative method.[150] Wisconsin warned taxpayers—ironically on a form originally designed for allocation—to report multiple components of AGI that "may change" when filing using the required unmarried status, including IRA deductions, employer-paid health insurance, health savings accounts, contributions to health flexible spending accounts, student loan interest deductions, passive activity losses, and capital losses.[151] In an understatement, it further noted that the list is "not all inclusive."[152]

FAQs, *supra* note 115 (informing taxpayers of various marital benefits that cannot be excluded from AGI). Subsequent to each change, Ohio followed Wisconsin's lead. *Compare* OHIO PRO FORMA BULLETIN, *supra* note 72, at 2 (instructing same-sex taxpayers to "allocate the federal adjusted gross income . . . reported on their joint federal income tax return"), *with* OHIO DEP'T OF TAXATION, Individual Income Tax Information Release IT 2013-01: Filing Guidelines for Taxpayers Filing a Joint or "Married Filing Separately" Federal Income Tax Return with Someone of the Same Gender 2 (rev. ed. 2013), *available at* http://www.tax.ohio.gov/Portals/0/ohio_individual/individual/information_releases/DOMA%20PIT%20Information%20Release%2012-19-13.pdf (instructing taxpayers to "re-determine their federal adjusted gross income . . . as if they had filed using [a nonmarried status]").

147 FEDERAL FORM 1040, *supra* note 32, at 1.

148 *See, e.g.*, KANSAS ALLOCATION INSTRUCTIONS, *supra* note 71 (containing the allocation income worksheet).

149 OHIO DEP'T OF TAXATION, EMPLOYER WITHHOLDING INFORMATION RELEASE EW 2013-01: GUIDELINES FOR EMPLOYERS PROVIDING BENEFITS TO EMPLOYEES MARRIED IN A JURISDICTION THAT RECOGNIZES SAME-GENDER MARRIAGE (2013).

150 *See, e.g.*, CALIFORNIA INCOME TAX EXPENDITURES, *supra* note 37, at 4–5 (explaining that the cost of ending conformity with similar federal exclusions would be "particularly high" due to the need for new third-party reporting systems and education for taxpayers).

151 WISC. DEP'T OF REVENUE, 2013 INSTRUCTIONS FOR SCHEDULE S (2013) [hereinafter WISCONSIN PRO FORMA INSTRUCTIONS]. Because both Ohio and Wisconsin used a state form originally designed for the allocative method, unlike other pro forma states they each required same-sex married taxpayers filing joint federal taxes to complete the allocation form together using their pro forma amounts for AGI components in what is essentially a dual pro forma federal return. *Id.*; OHIO DEP'T OF TAXATION, SCHEDULE IT S (2013) [hereinafter OHIO PRO FORMA INSTRUCTIONS]. This could be viewed as targeting same-sex taxpayers for special enforcement procedures. In a maneuver of questionable legality, Ohio extended this same dual pro forma treatment to same-sex married taxpayers who have filed *separate* federal taxes. *Id.*

152 WISCONSIN PRO FORMA INSTRUCTIONS, *supra* note 151.

Unlike the allocative method, wherein the only instruction taxpayers require is how to divide certain types of joint AGI components, and under which the taxpayers only need to keep segregated original records for these components,[153] under the pro forma method each difference between treatment of married and unmarried taxpayers creates entirely distinct inputs, calculations, and recordkeeping for the taxpayers.[154] Each difference also makes state enforcement difficult, as the figures cannot be directly compared with the federal joint return.[155] Nor can states indefinitely rely on vague advice that taxpayers prepare pro forma federal returns as if *Windsor* had never occurred; as time passes, federal nonrecognition tax treatment of same-sex married taxpayers will become increasingly obsolete—the advice and policies of the IRS that existed pre-*Windsor* will reflect an increasingly outdated federal tax system.

2. *The Allocative Method Retains Equity*

Nonrecognition states employ the pro forma method to deny same-sex spouses benefits that unmarried taxpayers cannot receive, some of which same-sex spouses enjoy in states employing the allocative method. Thus, superficially, the pro forma method may appear to better preserve equity amongst taxpayers who are unmarried under state law, as same-sex spouses and those unmarried under the laws of any state face the same tax liability. However, because the pro forma method creates a disproportionate compliance burden that falls solely

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153 For same-sex married taxpayers filing separate federal taxes, these requirements create no additional burden at all. In contrast, like all other states using the pro forma method, Wisconsin and Ohio required taxpayers filing separate federal returns to prepare pro forma returns using a nonmarried status. *See id.* (requiring a same-sex spouse who filed separate federal taxes to use the pro forma method if the income reported would be different); Ohio Pro Forma Instructions, *supra* note 151 (same).

154 For example, in addition to being an AGI-conforming state, Wisconsin used the calculated excess federal IRA contribution penalties to determine a conforming state penalty. Same-sex married taxpayers who have no actual federal penalty may nonetheless have been subject to a state penalty based on pro forma federal income figures. *Wisconsin Pro Forma FAQs*, *supra* note 115. A taxpayer in this situation would have been required to keep track of and report his state penalty indefinitely. Though the taxpayer could have avoided the penalty in future years by withdrawing the excess contribution, Wisconsin helpfully noted that doing so "may result in a federal early distribution penalty." *Id.*

155 Each difference also raises the enforcement stakes. Couples using the allocative method can at best hope to allocate AGI components inappropriately from one or the other taxpayer in their favor—the combined amounts must match what is reported on the federal form. Aggressive or insufficiently informed taxpayers using the pro forma method might seek to reduce total combined AGI, especially if state guidance is minimal. *See supra* note 97 (discussing the consequences of tax law opacity on taxpayer compliance).

on same-sex spouses, the question becomes which inequity is greater.[156]

Two factors suggest the allocative method is at least as, if not more, equitable than the pro forma method. First, in many cases same-sex spouses forced to file as unmarried in-state have opportunities for tax advantages that counteract the cost of denied marital benefits.[157] Though these opportunities are technically also available to any two unmarried people, married spouses tend to have greater financial interdependence than do unmarried couples, and so they can more easily take advantage of them. The pro forma method, which dissociates the spouses' tax returns to a greater degree than the allocative method, provides more of these tax-planning opportunities.

More importantly, the extra tax preparation and recordkeeping costs, audit risk and audit compliance costs, and psychological costs of being singled out for special state treatment under the pro forma method apply to every same-sex spouse, even those for whom tax liability is unaffected. A Joint Committee on Taxation report lists sixteen factors that increase complexity and thus compliance costs for taxpayers.[158] These factors, which include "lack of consistency in definitions," "the extent to which a provision makes it difficult for taxpayers to estimate and understand their tax liabilities," and "the existence of appropriate administrative guidance," are virtually all implicated by the pro forma method.[159] Considering the high costs of tax compliance in general, there is little reason to think the pro forma method is more equitable.

3. *The Allocative Method Retains Autonomy*

States cannot claim that the inefficient pro forma method is justified by the need to protect vulnerable state coffers.[160] Nor can they

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156 For an argument that horizontal equity should take into account compliance burdens as well as tax liability, see *supra* notes 88–92 and accompanying text.

157 *See* NY STATE BAR REPORT, *supra* note 99, at 17–18 (noting that it is "impossible to generalize" whether a same-sex married couple would owe more tax liability if the state were to recognize the marriage, because the additional marital benefits available would be counterbalanced by an inability to engage in the same level of tax planning). *See generally* Seto, *supra* note 100 (documenting the many ways same-sex spouses can engage in tax planning essentially unavailable to single people without the same type of close relationship normally implied by marriage).

158 JOINT COMM. ON TAXATION, STUDY OF THE OVERALL STATE OF THE FEDERAL TAX SYSTEM AND RECOMMENDATIONS FOR SIMPLIFICATION 7–8 (2001).

159 Other factors include the extent of mathematical calculations, error rates, recordkeeping mandates, and comprehensibility. *See id.* (listing the sixteen factors).

160 No state has claimed such a justification. *See supra* note 72 (listing the states that have chosen to use the pro forma method). The overall impact on state revenue alone, not taking into account the efficiency costs of administering, complying with, and enforcing a

claim that the pro forma method is necessary to prevent *explicit* state recognition of same-sex marriage.[161] The only other remaining autonomy claim—that the pro forma method effectively prevents the *implicit* state recognition of same-sex marriage that accompanies the allocative method—is flawed. The strong opposition to recognition in many states leaves little doubt that they oppose any recognition of same-sex marriage that might be implied by the utilization of information from a federal tax return filed with a married status. For example, in its official announcement in response to the state of celebration ruling, the South Carolina Department of Revenue quoted the stern language of both the state constitution ("This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union, however denominated") and state statutes ("[A] marriage between persons of the same sex is *void ab initio* . . . and against the public policy of the state").[162] However, strong statements cannot replace reality; state and federal tax systems are so intertwined that "pure equivalence," the treatment of same-sex spouses identically to unmarried individuals, would be virtually impossible to achieve, even by removing all references to federal tax law.[163]

Some pro forma nonrecognition states do seem aware that complete autonomy from implicit recognition is impossible. For example, all states credit resident taxpayers for taxes paid to another state to

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tax system using the pro forma method, might even be negative. *See supra* notes 121–24 and accompanying text (discussing certain types of tax planning and other opportunities unavailable to married couples). In other instances where states have undertaken costly efforts to reduce conformity with the federal system, significant amounts of revenue were at stake. *See, e.g.*, DUNCAN, *supra* note 25, at 4–5 (discussing how states decoupled from the federal bonus depreciation allowances enacted in 2002 and 2003 due to revenue concerns); ILL. DEP'T OF REVENUE, INFORMATIONAL BULLETIN: ILLINOIS DECOUPLES FROM FEDERAL LAW (2002) (informing taxpayers of the extra procedural requirements involved in decoupling from federal bonus depreciation, including the necessary filing of a new state form).

[161] The six states that used the allocative method for the 2013 tax year all explicitly disavowed same-sex marriage. *See, e.g.*, KANSAS ALLOCATION INSTRUCTIONS, *supra* note 71, at 1 ("Kansas only recognizes marriages between one woman and one man." (referring to KAN. CONST. art. XV, § 16)).

[162] S.C. DEP'T OF REVENUE, *supra* note 60, at 2 (quoting S.C. CONST. art. XVII, § 15; S.C. CODE ANN. § 20-1-15 (2014)). That a motivation for the pro forma method is preventing implicit recognition can also be seen in Wisconsin's abandonment of the allocative method and subsequent pro forma compliance guidance. *See supra* notes 146–52 and accompanying text (examining Wisconsin's attempt to obtain equivalent tax treatment).

[163] *Cf.* NY STATE BAR REPORT, *supra* note 99, at 1–3 (explaining the concept of "pure equivalence" in the opposite direction, that is, treating couples in same-sex unions identically to opposite-sex married couples, and arguing that, pre-*Windsor*, this equivalence would be extremely difficult to achieve in New York).

avoid double taxation of the same income. For the 2013 tax year, at least one pro forma state used the allocative method to determine the portion of the out-of-state joint liability each resident same-sex spouse was allowed to claim as a credit.[164] At the same time, nonrecognition states have made no effort to deal with much more serious and far-reaching implications of complete autonomy from federal same-sex tax policy. As an illustration of the practical impossibility of pure equivalence, consider that a married couple counts as only one shareholder for determining S corporation status.[165] Potentially, a corporation with both same-sex spouses as shareholders could be classified as an S corporation under federal law but a C corporation under the pro forma method. Undistributed corporate income earned each year would be taxable to the shareholders under federal law but to the corporation under the laws of the nonrecognition state.[166] Not only would the same-sex spouses be affected, but so would every other shareholder and the corporation itself, for all succeeding tax years.[167] The sheer magnitude of this and similar complications means that nonrecognition states, even those with limited apparent conformity to the federal system such as Pennsylvania, will conveniently ignore

164 *See Wisconsin Pro Forma FAQs*, *supra* note 115, at 4 (precisely allocating the actual out-of-state tax liability to the spouses). If the other state is a recognition state that determined a same-sex taxpayer's liability under a married status, giving credit for the actual taxes paid means importing the other state's recognition policy. However, determining how much the taxpayers would have been liable for had they been unmarried would require the taxpayers to prepare additional pro forma state returns for the other state. North Carolina resolved this dilemma by retaining neither autonomy nor any semblance of equity: It allowed a credit only for the *lesser* of the pro forma out-of-state taxes paid or the actual out-of-state taxes paid. *See* North Carolina Pro Forma FAQs, *supra* note 123 (requiring taxpayers to prepare pro forma out-of-state returns and have them available on request).

165 I.R.C. § 1361(c) (2012).

166 Almost all states treat S corporations as pass-through entities. For a brief summary of S corporation treatment under various state laws, see Renee Lewis, *A State-by-State Analysis of S Corporation Tax Treatment*, *in* S Corporation ESOPs (David Ackerman et al. eds., 3d ed. 2008), *available at* http://www.morganlewis.com/pubs/Lewis_SCorporationStatebyStateAnalysis_dec08.pdf.

167 Corporate shareholder attribution rules create similar intractable problems. For many corporate tax purposes, a shareholder is deemed to own shares of a corporation directly or indirectly owned by her spouse. *E.g.*, I.R.C. §§ 267(c)(4), 318(a)(1)(A)(i), 544(a)(2), 1563(e)(5) (2012). For example, a corporate distribution could be treated as a dividend for federal tax purposes (where shares are attributed to a same-sex spouse) and a redemption for state tax purposes (where they are not). *See* I.R.C. § 302(c) (using the attribution rules of § 318 to determine constructive ownership, a critical factor for determining the character of a distribution under § 302(g)). The differential treatment would affect not only the distributee same-sex taxpayer, but all the other corporate shareholders and the corporation itself, for the current year and all succeeding years.

them.[168] In the end, they will implicitly import federal recognition policy, effectively just as they would under the allocative method.

Conclusion

Federally recognized same-sex marriage reprises a fundamental and enduring challenge to states' tax conformity with the federal government and reopens a key challenge: how to balance state revenue and policy autonomy with efficiency and equity, two of the pillars of sound tax policy. An analysis of the spectrum of state responses to *Windsor* provides an indication of how feasible it may be to retain state autonomy from federal tax policy. Whatever state's rights arguments may apply to the issue of same-sex marriage more generally, the current extent of federal/state tax code conformity renders genuine state autonomy illusory. States should not sacrifice sound tax policy by adopting cosmetically autonomous solutions such as the pro forma method.

The federal and state court cases decided in 2014 have had the effect of dramatically reducing the number of nonrecognition states, and the pending Supreme Court cases quite possibly will reduce the number even further. Any state that nevertheless insists on expressing autonomy from the new post-*Windsor* policy can realistically only resolve the filing status mismatch through allocation or pro forma returns. The limited time-frame between the release of 2013-17 and the end of 2013 forced states to make an immediate decision for the 2013 tax year. Though most chose—for 2013—to resolve the filing status mismatch with the pro forma method, at least three states reversed course by the end of that year, an indication that the method is unwieldy and ineffective for preserving state autonomy. A fully considered balancing of autonomy with efficiency and equity concerns favors the allocative method over the flawed pro forma method.

168 For an examination of the intractability of state conformity, see *supra* notes 50–59.

APPENDIX

State	IRC "as of" date[169]	Minimum conformity (e.g. states conforming to AGI also can conform to Schedule A)[170]	Status as of 1/1/2013 (pre-*Windsor*)[171]	Status as of 1/1/2014[172]	Incompatibility resolution in 2013[173]
Alabama	current	Schedule C, F (3903) [& deduction for fed tax paid]	no recognition	no recognition	allocation
Alaska	no state income tax	—	no recognition	no recognition	—
Arizona	1/1/12	adjusted gross income	no recognition	no recognition	allocation
Arkansas	various	Schedule C, D, E, F and other forms	no recognition	no recognition	no effort to deal with it
California	1/1/09	adjusted gross income	out-of-state recognition	performed in state	—
Colorado	current	taxable income	no recognition	can file as married	can file as married
Connecticut	current	adjusted gross income	performed in state	performed in state	—
Delaware	current	adjusted gross income	no recognition	performed in state	performed in state
Florida	no state income tax	—	no recognition	no recognition	—
Georgia	1/3/13	adjusted gross income	no recognition	no recognition	pro forma
Hawaii	1/2/13	adjusted gross income	no recognition	performed in state	performed in state
Idaho	1/1/13	taxable income	no recognition	no recognition	pro forma
Illinois	current	adjusted gross income	no recognition	performed in state	performed in state

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169 *See* FEDERATION OF TAX ADMINISTRATORS, STATE PERSONAL INCOME TAXES: FEDERAL STARTING POINTS (2015), *available at* http://www.taxadmin.org/fta/rate/stg_pts.pdf.

170 *See id.*; ALA. DEP'T OF REVENUE, 2013 FORM 40: ALABAMA RESIDENT INDIVIDUAL TAX RETURN (2013); ARK. DEP'T OF REVENUE, ARKANSAS 2013 INDIVIDUAL TAX FORMS AND INSTRUCTIONS (2013); MISS. DEP'T OF REVENUE, 2013 MISSISSIPPI RESIDENT AND NON-RESIDENT/PART-YEAR RESIDENT INCOME TAX FORMS AND INSTRUCTIONS (2013).

171 *See* Patrick Garvin, *The History of Same-Sex Marriage in the US, 1970 to Now*, BOS. GLOBE, May 20, 2014, www.bostonglobe.com/2014/01/25/same-sex-marriage-over-time/mbVFMQPyxZCpM2eSQMUsZK/story.html#.

172 *See id.*

173 *See Resources on States Conformity on DOMA Filing Issues for Same-Sex Couples,* AICPA.ORG, http://www.aicpa.org/interestareas/tax/resources/specializedguidance/pages/non-recognition-states-issued-filing-guidance-for-same-sex-couples.aspx (last visited Feb. 13, 2015); *supra* notes 62–65 (citing resources for nonrecognition states' 2013 resolutions).

Indiana	1/1/13	adjusted gross income	no recognition	no recognition	pro forma
Iowa	1/1/13	adjusted gross income	performed in state	performed in state	—
Kansas	current	adjusted gross income	no recognition	no recognition	allocation
Kentucky	12/31/06	adjusted gross income	no recognition	no recognition	pro forma
Louisiana	current	adjusted gross income	no recognition	no recognition	pro forma
Maine	1/2/13	adjusted gross income	performed in state	performed in state	—
Maryland	current	adjusted gross income	performed in state	performed in state	—
Massachusetts	1/1/05	adjusted gross income	performed in state	performed in state	—
Michigan	current	adjusted gross income	no recognition	no recognition	pro forma
Minnesota	1/3/13	taxable income	no recognition	performed in state	performed in state
Mississippi		Schedule C, D, E, F, and other forms	no recognition	no recognition	no effort to deal with it
Missouri	current	adjusted gross income	no recognition	can file as married	can file as married
Montana	current	adjusted gross income	no recognition	no recognition	no effort to deal with it
Nebraska	current	adjusted gross income	no recognition	no recognition	pro forma
Nevada	no state income tax	—	no recognition	no recognition	—
New Hampshire	on interest & dividends only	—	performed in state	performed in state	—
New Jersey		various IRC sections	no recognition	performed in state	performed in state
New Mexico	current	adjusted gross income	probably no recognition	performed in state	performed in state
New York	current	adjusted gross income	performed in state	performed in state	—
North Carolina	1/2/13	adjusted gross income	no recognition	no recognition	pro forma
North Dakota	current	taxable income	no recognition	no recognition	allocation
Ohio	3/22/13	adjusted gross income	no recognition	no recognition	pro forma (formerly allocation)
Oklahoma	current	adjusted gross income	no recognition	no recognition	pro forma

Oregon	1/3/13	taxable income	no recognition	out-of-state recognition	out-of-state recognition
Pennsylvania		various IRC sections	no recognition	no recognition	no effort to deal with it
Rhode Island	current	adjusted gross income	no recognition	performed in state	performed in state
South Carolina	1/2/13	taxable income	no recognition	no recognition	pro forma
South Dakota	no state income tax	—	no recognition	no recognition	—
Tennessee	tax on interest & dividends only	—	no recognition	no recognition	no effort to deal with it
Texas	no state income tax	—	no recognition	performed in state (lawsuit)	—
Utah	current	adjusted gross income	no recognition	performed in state (lawsuit)	performed in state (lawsuit)
Vermont	1/1/12	taxable income	performed in state	performed in state	—
Virginia	1/2/13	adjusted gross income	no recognition	no recognition	pro forma
Washington	no state income tax	—	performed in state	performed in state	—
West Virginia	1/2/13	adjusted gross income	no recognition	no recognition	pro forma
Wisconsin	12/31/10	adjusted gross income	no recognition	no recognition	pro forma (formerly allocation)
Wyoming	no state income tax	—	no recognition	no recognition	—
District of Columbia	current	adjusted gross income	performed in state	performed in state	—