THE HOUSE OF *WINDSOR*: ACCENTUATING THE HETERONORMATIVITY IN THE TAX INCENTIVES FOR PROCREATION

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I. INTRODUCTION

The heteronormativity[1] of federal tax law and policy was no secret before *United States v. Windsor*.[2] In that landmark decision, the U.S. Supreme Court struck down the portion of the federal Defense of Marriage Act (DOMA) that refused recognition to same-sex marriages for purposes of federal law—including the tax laws at issue in the case—as a violation of "basic due process and equal protection principles applicable to the Federal Government."[3] Following the *Windsor* decision, the Internal Revenue Service (IRS) acted quickly to issue guidance to same-sex couples indicating how the agency would apply the decision to the federal tax laws. The IRS's guidance recognized a broader range of marriages than some had expected, and it attempted to place this broad swath of married same-sex couples on ostensibly equal tax footing with married different-sex couples.[4] Given this quick action and the IRS's broad and enthusiastic interpretation of the

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[1] *See generally* Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998).

[2] 133 S. Ct. 2675 (2013).

[3] *Id.* at 2693.

[4] In Revenue Ruling 2013-17, 2013-38 I.R.B. 201, the IRS adopted a "place of celebration" rule for purposes of determining the marital status of same-sex couples rather than the less generous "place of residence" or "place of domicile" rule that would have denied recognition to the marriages of same-sex couples in the majority of states. *See* MARGOT L. CRANDALL-HOLLICK ET AL., CONG. RESEARCH SERV., R43157, THE POTENTIAL FEDERAL TAX IMPLICATIONS OF UNITED STATES V. WINDSOR (STRIKING SECTION 3 OF THE DEFENSE OF MARRIAGE ACT (DOMA)): SELECTED ISSUES 1 (2013) ("As a result of the SCOTUS decision, it appears that these statutory provisions will be applied in the same manner to married same-sex couples as they are to married opposite-sex couples—at least for those married same-sex couples residing in states that recognize their marriages. It is currently unclear whether the provisions will also apply to married same-sex couples who are residing in a state where the marriage is not recognized." (footnotes omitted)); Amy S. Elliott, *Practitioners Debate Expected IRS Guidance on Marital Status*, 140 TAX NOTES 529 (2013) (recounting how "[p]ractitioners speaking on two separate webcasts … debated whether the IRS will adopt a state of celebration test or a state of residence test in its expected guidance on determining marital status in the wake of the Supreme Court's decision in *United States v. Windsor*"); Annie Lowrey, *Gay Marriages in All States Get Recognition from the I.R.S.*, N.Y. TIMES, Aug. 30, 2013, at A12 (describing the IRS's guidance as "the broadest federal rule change to come out of the landmark Supreme Court decision in June that struck down the 1996

Windsor decision in favor of same-sex couples,[5] it might be tempting to postulate that we have now entered a post-heteronormative tax world.[6]

Despite the IRS's good intentions, we are still far from a tax system in which heteronormativity is an artifact of history. As I have explained elsewhere, far from making things clear and simple for same-sex couples by placing them on equal legal footing with different-sex couples, the IRS's post-*Windsor* guidance actually "provides no more than the same veneer of clarity that DOMA did, as it leaves important questions unanswered, lays traps for the unwary, creates inequities, and entails unfortunate (and, hopefully, unintended) consequences."[7] In this essay, I continue to plumb the gap between the promise of *Windsor* and the reality that heteronormativity has been one of the core building blocks of our federal tax system. Eradicating embedded heteronormativity will take far more than a single court decision or revenue ruling; it will take years of work uncovering the subtle ways in which heteronormativity pervades our federal tax laws and of identifying means of eliminating that heteronormativity. To further this work and in keeping with the theme of this symposium issue, "Compensated Surrogacy After *Windsor*," I will here explore the unremitting heteronormativity of the federal tax incentives for procreation as they apply to compensated surrogacy, which is the only practical option for gay couples wishing to procreate.

The remainder of this essay is divided into four parts. To set the stage for understanding the gap between rhetoric and reality, Part II summarizes the series of legal decisions, beginning with *Windsor*, that extol the equality of same-sex and different-sex couples, affirm the importance of marriage not only to same-sex couples but also to their children, and validate same-sex couples as fit parents. Part III continues the stage setting by explaining how the IRS has acted in keeping with this rhetoric by implementing the *Windsor* decision in a way that aims for a sexual-

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Defense of Marriage Act, and a sign of how quickly the government is moving to treat gay couples in the same way that it does straight couples").

[5] Alexei Koseff, *IRS to Recognize All Legally Married Same-Sex Couples*, SUN-SENTINEL (Fort Lauderdale, FL), Aug. 30, 2013, at 8A ("The new approach 'provides access to benefits, responsibilities and protections under federal tax law that all Americans deserve,' Treasury Secretary Jacob Lew said in a statement. 'This ruling also assures legally married same-sex couples that they can move freely throughout the country knowing that their federal filing status will not change.' "); Annie Lowrey, *IRS to Recognize Gay Couples, Regardless of State Measures*, PITTSBURGH POST-GAZETTE, Aug. 30, 2013, at A6 (quoting Treasury Secretary Jacob Lew as stating that Revenue Ruling 2013-17 provides "certainty and clear, coherent tax-filing guidance" for same-sex couples).

[6] Indeed, following the *Windsor* decision, colleagues have asked me at conferences whether I will be moving on to other areas of scholarly inquiry now that same-sex marriage is recognized for federal tax purposes.

[7] Anthony C. Infanti, *The Moonscape of Tax Equality*, 108 NW. U. L. REV. COLLOQUY 118 (2013), http://colloquy.law.northwestern.edu/main/2013/10/the-moonscape-of-tax-equality.html [hereinafter Infanti, *Moonscape*]; *see also* Anthony C. Infanti, *Big (Gay) Love: Has the IRS Legalized Polygamy?*, ___ N.C. L. REV. ADDENDUM ___ (forthcoming 2014) [hereinafter Infanti, *Big (Gay) Love*] (exploring how some commentators have taken the IRS's generosity of spirit a step further and have interpreted ambiguity in Revenue Ruling 2013-17 in a way that may open the door to recognizing plural marriage for federal tax purposes).

orientation-neutral tax system (at least insofar as the definition of "marriage" is concerned). In contrast, Part IV recapitulates the longstanding heteronormativity of the tax incentives for procreation and explains the anticipated—and unremittingly heteronormative—operation of these tax incentives on compensated surrogacy post-*Windsor*. Because these tax incentives will, if anything, be more heteronormative after *Windsor* than they were before, Part V concludes by suggesting that this accentuated heteronormativity may open the previously closed door to constitutional scrutiny of the application of these incentives to procreation by married same-sex couples (and, by extension, other nontraditional families). The IRS and/or the courts could easily ensure that this door remains closed by abandoning past interpretations of § 213 in favor of a broader, more inclusive interpretation that is in keeping with the promise of the *Windsor* decision and the IRS's actions post-*Windsor*.

II. *WINDSOR* AND ITS PROGENY

In June 2013, the U.S. Supreme Court issued its decision in *United States v. Windsor*[8] striking down as unconstitutional section three of DOMA. Prior to that decision, DOMA prohibited the recognition of same-sex marriages for purposes of federal law.[9] In *Windsor*, a majority of the Court found that "[t]he avowed purpose and practical effect of [DOMA] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[10] DOMA "discourage[d] enactment of state same-sex marriage laws and … restrict[ed] the freedom and choice of couples married under those laws … ."[11] Thus, the Court concluded:

> DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, *including their own children*, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.[12]

Following the *Windsor* decision—both in time and, as the passage above suggests, often in reasoning—federal courts around the country have struck down one state same-sex marriage ban after another on constitutional grounds. A key component of all of these decisions has been the effect of prohibitions against same-sex marriage on the family and, particularly, on the children of

[8] 133 S. Ct. 2675 (2013).
[9] 1 U.S.C.A. § 7 (West 2005), *overruled by Windsor*, 133 S. Ct. 2675.
[10] *Windsor*, 133 S. Ct. at 2693.
[11] *Id.*
[12] *Id.* at 2695–96 (emphasis added).

same-sex couples.[13] This Part summarizes how families—gay and straight—have factored into this series of judicial decisions that would legalize same-sex marriage.

As of this writing, federal district court judges and one federal court of appeals have struck down same-sex marriage bans in fourteen different states since the Supreme Court decided *Windsor*.[14] The affected states include Colorado, Idaho, Indiana, Kentucky, Michigan, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Utah, Virginia, and Wisconsin. How family has factored into each of these decisions is described below on a state-by-state basis in (largely) chronological order. Before undertaking that summary, it is worth noting that when addressing the effects of state same-sex marriage bans on same-sex couples with children (or those who wish to have children), these courts often cite passages from the *Windsor* decision—even though that case arose in the context of the federal government's denial of the estate tax marital deduction to a surviving same-sex spouse in a couple with no children. Yet, providing fodder for the ensuing decisions regarding state same-sex marriage bans, the *Windsor* Court several times observed the importance of marriage not only to same-sex couples but also to their children.[15] Most strikingly, the Court stated of DOMA:

> The differentiation demeans the couple, whose moral and sexual choices the Constitution protects and whose relationship the State has sought to dignify. *And it*

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[13] In 2012, 11.4% of male same-sex couples had children in their household and 24.3% of female same-sex couples had children in their household. *American Community Survey Data on Same Sex Couples: Characteristics of Same-Sex Couple Households, 2012*, at tbl.1, U.S. CENSUS BUREAU, http://www.census.gov/hhes/samesex/data/acs.html (last visited May 30, 2014); *see* Anthony C. Infanti, *Taxing Civil Rights Gains*, 16 MICH. J. GENDER & L. 319, 343–47 (2010) (urging a shift in the focus of legal arguments away from same-sex couples and onto lesbian and gay families and explaining some of the opposition to such a move).

[14] In addition, state court judges have struck down four states' same-sex marriage bans since the *Windsor* decision. An Arkansas Circuit Court judge struck down that state's same-sex marriage ban on what appears to be a combination of federal and state constitutional grounds. Wright v. Arkansas, No. 60CV-13-2662 (Ark. Cir. Ct. 2d Div. May 9, 2014). A New Jersey Superior Court judge and the New Mexico Supreme Court struck down their states' same-sex marriage bans on state constitutional grounds. Garden State Equality v. Dow, 434 N.J. Super. 163 (2013); Griego v. Oliver, 316 P.3d 865 (N.M. 2013). A Colorado District Court judge struck down that state's same-sex marriage ban on federal constitutional grounds, largely quoting from and echoing the federal court decisions described in the text below. Brinkman v. Long, No. 13-CV-32572 (Colo. Dist. Ct. Adams Cnty. July 9, 2014), *available at* http://www.courts.state.co.us/userfiles/file/Court_Probation/17th_Judicial_District/Adams/brinkman%20sj%20order%20july%209%20final%2007%2014.pdf.

[15] *See Windsor*, 133 S. Ct. at 2689 ("Slowly at first and then in rapid course, the laws of New York came to acknowledge the urgency of this issue for same-sex couples *who wanted to affirm their commitment to one another before their children*, their family, their friends, and their community." (emphasis added)); *id.* at 2695 ("DOMA also brings financial harm to children of same-sex couples. … And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security."); *id.* at 2696 ("DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, *including their own children*, that their marriage is less worthy than the marriages of others." (emphasis added)).

> *humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives*.[16]

As we will see, all of the recent federal court decisions have picked up and reaffirmed this theme in both similar and different ways.

A. UTAH

In a challenge to the Utah same-sex marriage ban, the opponents of same-sex marriage argued that same-sex couples are not qualified to marry—and, therefore, do not have a fundamental right to marry—because they cannot "naturally reproduce with each other."[17] In rejecting this argument, the court noted an interesting exchange occasioned by the natural extension of this argument to postmenopausal women and infertile men:

> At oral argument, the State attempted to distinguish post-menopausal women from gay men and lesbians by arguing that older women were more likely to find themselves in the position of caring for a grandchild or other relative. But the State fails to recognize that many same-sex couples are also in the position of raising a child, perhaps through adoption or surrogacy. The court sees no support for the State's suggestion that same-sex couples are interested only in a "consent-based" approach to marriage, in which marriage focuses on the strong emotional attachment and sexual attraction of the two partners involved. Like opposite-sex couples, same-sex couples may decide to marry partly or primarily for the benefits and support that marriage can provide to the children the couple is raising or plans to raise. Same-sex couples are just as capable of providing support for future generations as opposite-sex couples, grandparents, or other caregivers.[18]

When the court reached its equal protection analysis, the focus once again returned to procreation and child rearing: "[T]he State argues that its extension of marriage benefits to opposite-sex couples promotes certain governmental interests such as responsible procreation and optimal child-rearing that would not be furthered if marriage benefits were extended to same-sex couples."[19] Applying rational-basis review, not only did the court find a lack of any rational relationship between the state's goals and its ban on same-sex marriage, but it also found the ban to be at odds with the state's purported aim of benefiting children because the ban did nothing more than ensure that the many children being raised by same-sex couples would actually be harmed both psychologically and financially.[20] Interestingly, the court also noted the harm to the children of *both* different-sex *and* same-sex couples who are lesbian or gay "and who will grow up with the knowledge that the State does not believe they are as capable of creating a family as

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[16] *Id.* at 2694 (emphasis added) (citation omitted).
[17] Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1201 (D. Utah 2013), *aff'd*, ___ F.3d ___ (10th Cir. 2014).
[18] *Id.* at 1201–02 (citation omitted).
[19] *Id.* at 1210.
[20] *Id.* at 1211–12.

their heterosexual friends."[21]

A divided panel of the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's decision.[22] It, too, rejected the argument that same-sex couples do not share the fundamental right to marry because they cannot naturally procreate,[23] observing that raising children (rather than creating children) has been "a key factor in the inviolability of marital and familial choices."[24] Because Utah's same-sex marriage ban implicated the fundamental right to marry, the Tenth Circuit majority opinion applied strict scrutiny in determining whether the ban passed constitutional muster.[25]

On appeal, the opponents of same-sex marriage offered the following four justifications in support of the ban:

> They contend it furthers the state's interests in: (1) "fostering a child-centric marriage culture that encourages parents to subordinate their own interests to the needs of their children"; (2) "children being raised by their biological mothers and fathers—or at least by a married mother and father—in a stable home"; (3) "ensuring adequate reproduction"; and (4) "accommodating religious freedom and reducing the potential for civic strife."[26]

The Tenth Circuit majority assumed that all three of the procreation/child-rearing justifications were compelling.[27] Nevertheless, the court found "a mismatch" between prohibiting same-sex couples from marrying and furthering these presumably compelling interests, which "is precisely the type of imprecision prohibited by heightened scrutiny."[28] The Tenth Circuit majority "agree[d] with the numerous cases decided since *Windsor* that it is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples."[29] The court further found that "a prohibition on same-sex marriage is not narrowly tailored toward the goal of encouraging gendered parenting styles. The state does not restrict the right to marry or its recognition of marriage based on compliance with any set of parenting roles, or even parenting quality."[30] The court additionally found that the arguments in support of the ban were undercut by the "palpable harm" that the ban causes to the children of same-sex couples, heavily drawing from the Supreme Court's condemnation of this harm in *Windsor* in reaching this conclusion.[31]

The Tenth Circuit dissent rejected the application of heightened scrutiny to the Utah same-

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[21] *Id.* at 1213.
[22] Kitchen v. Herbert, No. 13-4178 (10th Cir. June 25, 2014), *available at* https://www.ca10.uscourts.gov/opinions/13/13-4178.pdf.
[23] *Id.* at 27–35.
[24] *Id.* at 33.
[25] *Id.* at 42.
[26] *Id.* at 43.
[27] *Id.*
[28] *Id.* at 44.
[29] *Id.* at 51.
[30] *Id.* at 54.
[31] *Id.* at 57–58.

sex marriage ban.[32] In its opinion, the dissent focused on the rationales for the ban offered in the district court, which also largely focused on procreation and child rearing and included "(1) encouraging responsible procreation given the unique ability of opposite-gender couples to conceive, (2) effective parenting to benefit the offspring, and (3) proceeding with caution insofar as altering and expanding the definition of marriage."[33] The dissent concluded that these justifications were sufficient for the ban to survive the highly deferential rational-basis review.[34]

The dissent asserted that "[i]t is biologically undeniable that opposite-gender marriage has a procreative potential that same-gender marriage lacks. The inherent differences between the biological sexes are permissible legislative considerations, and indeed distinguish gender from those classifications that warrant strict scrutiny."[35] The dissent further observed that procreation is a legitimate consideration in regulating marriage, even if other concerns are sometimes also taken into account.[36] Moreover, the dissent stated:

> [T]he State has an important interest in ensuring the wellbeing of resulting offspring, be they planned or unplanned. To that end, the State can offer marriage and its benefits to encourage unmarried parents to marry and married parents to remain so. Thus, the State could seek to limit the marriage benefit to opposite- gender couples completely apart from history and tradition. Far more opposite-gender couples will produce and care for children than same-gender couples and perpetuation of the species depends upon procreation. Consistent with the greatest good for the greatest number, the State could rationally and sincerely believe that children are best raised by two parents of opposite gender (including their biological parents) and that the present arrangement provides the best incentive for that outcome. Accordingly, the State could seek to preserve the clarity of what marriage represents and not extend it.[37]

Against this background, the dissent concluded that "the State's position is (at the very least) arguable. It most certainly is not arbitrary, irrational, or based upon legislative facts that no electorate or legislature could conceivably believe."[38]

B. OHIO

In an "as-applied" challenge to the Ohio same-sex marriage ban that concerned only the inclusion of information relating to same-sex marriages on death certificates, one of the justifications that the court considered was "that children are best off when raised by a mother and father."[39] The court rejected this justification, along with all others, as lacking any rational connection with a ban on same-sex marriage.[40] Indeed, the court pointed out that "[t]he only effect

[32] *Id.* at 14 (Kelly, J., dissenting).
[33] *Id.* at 13; *see id.* at 14 n.2.
[34] *Id.* at 15–16.
[35] *Id.* at 16.
[36] *Id.*
[37] *Id.* at 16–17.
[38] *Id.* at 20.
[39] Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 994 (S.D. Ohio 2013).
[40] *Id.* at 995.

the [same-sex marriage] bans have on children's well-being is harming the children of same-sex couples who are denied the protection and stability of having parents who are legally married."[41]

A few months later, the same judge considered a facial challenge to the Ohio same-sex marriage ban in a case that concerned the completion of birth certificates for three lesbian couples procreating through artificial insemination and a gay couple adopting a child born in Ohio.[42] Relying upon its earlier determination that "Ohio enacted the marriage recognition bans with discriminatory animus and without a single legitimate justification,"[43] the federal district court found that the Ohio same-sex marriage ban is "facially unconstitutional and unenforceable in all circumstances."[44] Of particular importance here, the federal district court found that the Ohio same-sex marriage ban violates the fundamental rights of parents to care for and control their children.[45] The court also focused its equal protection analysis on the birth certificate situation before it and on the particular harms that the same-sex marriage ban visits upon the children of same-sex couples:

> Defendants' discriminatory conduct most directly affects the children of same-sex couples, subjecting these children to harms spared the children of opposite-sex married parents. Ohio refuses to give legal recognition to both parents of these children, based on the State's disapproval of their same-sex relationships. Defendants withhold accurate birth certificates from these children, burdening the children because their parents are not the opposite-sex married couples who receive the State's special stamp of approval. The Supreme Court has long held that disparate treatment of children based on disapproval of their parents' status or conduct violates the Equal Protection Clause.[46]

Moreover, in reaffirming its earlier equal protection analysis, the court reiterated that it had already "analyzed and roundly rejected any claimed government justifications based on a preference for procreation or childrearing by heterosexual couples."[47] Indeed, the court found that "child welfare concerns weigh exclusively in favor of recognizing the marital rights of same-sex couples."[48]

C. OKLAHOMA

In a challenge to the same-sex marriage ban in the Oklahoma state constitution, the opponents of same-sex marriage offered the following justifications:

> (1) encouraging responsible procreation and child-rearing; (2) steering naturally procreative relationships into stable unions; (3) promoting "the ideal that children be raised by both a mother and a father in a stable family unit;" and (4) avoiding a redefinition of marriage that would "necessarily change the institution and could

[41] *Id.* at 995–96.
[42] Henry v. Himes, No. 1:14-CV-129, 2014 WL 1418395 (S.D. Ohio Apr. 14, 2014).
[43] *Id.* at *6.
[44] *Id.* at *7.
[45] *Id.* at *9, *13.
[46] *Id.* at *15 (emphasis omitted).
[47] *Id.* at *16.
[48] *Id.*

have serious unintended consequences."[49]

As elucidated, all four of these justifications directly related to procreation and the rearing of children.[50] After examining each of these justifications in turn, the court concluded that their link with prohibiting same-sex couples from marrying was so attenuated as to cause the marriage ban to fail rational-basis review.[51] Importantly, in the course of its examination, the court pointed out that the first two justifications, which it considered together:

> "make[] no sense" because a same-sex couple's inability to "naturally procreate" is not a biological distinction of critical importance, in relation to the articulated goal of avoiding children being born out of wedlock. The reality is that same-sex couples, while not able to "naturally procreate," can and do have children by other means. As of the 2010 United States Census, there were 1,280 same-sex "households" in Oklahoma who reported as having "their own children under 18 years of age residing in their household." If a same-sex couple is capable of having a child with or without a marriage relationship, and the articulated state goal is to reduce children born outside of a marital relationship, the challenged exclusion hinders rather than promotes that goal.[52]

About six months later, the same panel of the U.S. Court of Appeals for the Tenth Circuit that affirmed the federal district court decision striking down Utah's same-sex marriage ban likewise upheld this federal district court decision striking down the same-sex marriage ban in Oklahoma's state constitution.[53] The majority and dissenting opinions largely relied upon the earlier decision in the Utah case, describe above.[54] The opponents of same-sex marriage did, however, raise one different argument, namely that "children have an interest in being raised by their biological parents."[55] The majority of the court found that the same-sex marriage ban fails to be narrowly tailored to the interest too, in light of both "numerous laws that result in children being raised by individuals other than their biological parents" and the ability of infertile different-sex couples to marry.[56]

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[49] Bishop v. United States *ex rel.* Holder, 962 F. Supp. 2d 1252, 1290 (N.D. Okla. 2014), *aff'd*, ___ F.3d ___ (10th Cir. 2014) (quoting Defendant Sally Howe Smith's Cross-Motion for Summary Judgment at 38).

[50] *Id.* at 1290–95.

[51] *Id.* at 1295–96. It is worth noting that the court only addressed the portion of the ban that affected the ability of same-sex couples to marry in Oklahoma. Due to a lack of standing, the court did not reach the question of whether the portion of the ban that prohibited the recognition of out-of-state same-sex marriages would pass constitutional muster. *Id.* at 1272–73.

[52] *Id.* at 1292 (citation omitted).

[53] Bishop v. Smith, No. 14-5003 (10th Cir. July 18, 2014), *available at* https://www.ca10.uscourts.gov/opinions/14/14-5003.pdf. The Tenth Circuit likewise did not consider the constitutionality of the portion of the ban that applied to same-sex couples married out-of-state. *Id.* at 18–46.

[54] *Id.* at 14; *id.* at 8 (Kelly, J., dissenting); *see supra* notes 22–38 and accompanying text.

[55] *Bishop*, No. 14-5003, at 16 (majority opinion).

[56] *Id.* at 16–17.

D. KENTUCKY

In a challenge to the application of the Kentucky same-sex marriage ban to couples married out of state, the proffered justifications for the ban included tradition and, as suggested by *amicus curiae*, "responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the optimal childrearing environment, and proceeding with caution when considering changes in how the state defines marriage."[57] The court noted that the State of Kentucky, "not surprisingly, declined to offer [the latter] justifications, as each has failed rational basis review in every court to consider them post-*Windsor*, and most courts pre-*Windsor*."[58] The court further noted, "Kentucky allows gay and lesbian individuals to adopt children. And no one has offered evidence that same-sex couples would be any less capable of raising children or any less faithful in their marriage vows."[59]

A few months later, the same federal district court considered a related challenge to the application of the Kentucky same-sex marriage ban to couples wishing to marry in Kentucky. In striking down the ban, the court declined to find that the case implicated the fundamental right to marry, believing that this "would be a dramatic step that the Supreme Court has not yet indicated a willingness to take."[60] Instead, the court found the Kentucky's same-sex marriage ban unconstitutional on equal protection grounds, concluding that it could not survive rational basis review let alone the heightened scrutiny that should apply in light of the court's decision that homosexuals are a quasi-suspect class.[61]

The only justification proffered in support of the ban was "encouraging, promoting, and supporting the formation of relationships that have the natural ability to procreate."[62] Given the difficulty that opponents of same-sex marriage earlier encountered in offering procreation-related justifications for the same-sex marriage ban, the state "add[ed] a disingenuous twist to the argument: traditional marriages contribute to a stable birth rate which, in turn, ensures the state's long-term economic stability."[63] The court summarily dismissed this justification and the "disingenuous twist":

> These arguments are not those of serious people. Though it seems almost unnecessary to explain, here are the reasons why. Even assuming the state has a legitimate interest in promoting procreation, the Court fails to see, and Defendant never explains, how the exclusion of same-sex couples from marriage has any effect whatsoever on procreation among heterosexual spouses. Excluding same-sex couples from marriage does not change the number of heterosexual couples who choose to get married, the number who choose to have children, or the number of

[57] Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *7–8 (W.D. Ky. Feb. 12, 2014).
[58] *Id.* at *8.
[59] *Id.*
[60] Love v. Beshear, No. No. 3:13–CV–750–H, 2014 WL 2957671, at *5 (W.D. Ky. July 1, 2014).
[61] *Id.* at **6–7.
[62] *Id.* at *8.
[63] *Id.*

children they have.[64]

E. VIRGINIA

In a challenge to Virginia's same-sex marriage ban, opponents of same-sex marriage offered three justifications in support of the ban: "(1) tradition; (2) federalism; and (3) 'responsible procreation' and 'optimal child rearing.' "[65] Both the first and the third of these justifications implicated children and the family. With regard to the first, promoting tradition was argued to be a means of protecting children from being taught that same-sex relationships are equivalent to different-sex marriages and of preventing both the institution of marriage and the status of children from being devalued.[66] With regard to the third justification (i.e., responsible procreation and optimal child rearing), the court found:

> This rationale fails under the applicable strict scrutiny test as well as a rational-basis review. Of course the welfare of our children is a legitimate state interest. However, limiting marriage to opposite-sex couples fails to further this interest. Instead, needlessly stigmatizing and humiliating children who are being raised by the loving couples targeted by Virginia's Marriage Laws betrays that interest.[67]

The court later added that "[t]he 'for-the-children' rationale rests upon an unconstitutional, hurtful and unfounded presumption that same-sex couples cannot be good parents."[68] The court also rejected the related argument that same-sex and different-sex couples are not similarly situated for purposes of the Equal Protection Clause because the "the Commonwealth's primary purpose for recognizing and regulating marriage is responsible procreation and child-rearing."[69] The court found this argument to be inconsistent with earlier rationalizations of the Virginia same-sex marriage ban, which stated that marriage should be limited to different-sex couples regardless of whether those couples procreate.[70]

F. TEXAS

In a challenge to the Texas same-sex marriage ban, the opponents of same-sex marriage offered only two justifications for the ban: "(1) to increase the likelihood that a mother and a father will be in charge of childrearing; and (2) to encourage stable family environments for responsible procreation."[71] The court found that these justifications could not save the Texas same-sex marriage ban, even on rational-basis review, both because the court denied the asserted link between marriage and procreation and because the marriage ban "causes needless stigmatization and humiliation for children being raised by the loving same-sex couples being targeted."[72]

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[64] *Id.*
[65] Bostic v. Rainey, 970 F. Supp. 2d 456, 473 (E.D. Va. 2014).
[66] *Id.* at 474.
[67] *Id.* at 478.
[68] *Id.* at 479.
[69] *Id.* at 480.
[70] *Id.* at 481.
[71] De Leon v. Perry, 975 F. Supp. 2d 632, 653 (W.D. Tex. 2014).
[72] *Id.* at 653, 654.

G. TENNESSEE

In a challenge to the Tennessee same-sex marriage ban as it applied to six same-sex couples who married before moving to Tennessee, a federal district court issued a preliminary injunction after finding that the plaintiffs were likely to succeed on the merits.[73] In assessing the plaintiffs' likelihood of success, the court summarized the justifications offered by the opponents of same-sex marriage in support of the ban:

> With respect to the plaintiffs' Equal Protection Clause challenge, the defendants offer arguments that other federal courts have already considered and have consistently rejected, such as the argument that notions of federalism permit Tennessee to discriminate against same-sex marriages consummated in other states, that Windsor does not bind the states the same way that it binds the federal government, and that Anti-Recognition Laws have a rational basis because they further a state's interest in procreation, which is essentially the only "rational basis" advanced by the defendants here.[74]

Then, in discussing the harms to the plaintiffs that would be redressed through the issuance of an injunction, the court considered not only harms that the plaintiffs themselves would suffer but also harms that their children would suffer. The court explained that "there is … an imminent risk of potential harm to [the plaintiffs'] children during their developing years from the stigmatization and denigration of their family relationship."[75] For a lesbian couple who were plaintiffs in the suit, the harms were "particularly compelling" because one of them was pregnant and the baby's birth was imminent.[76] If there were "any complications or medical emergencies associated with the baby's birth," then the other member of the couple would need to be able to make medical decisions for her spouse or child and might even encounter difficulty visiting her spouse or child in the hospital.[77]

H. MICHIGAN

Michigan's adoption laws permit only singles and married couples to adopt.[78] This necessarily prevents both members of an unmarried couple—including all same-sex couples—from adopting in the state.[79] In a challenge to this limitation brought by a same-sex couple, a federal district court invited the plaintiffs to amend their complaint to include a challenge to the Michigan same-sex marriage ban, because their injury was actually traceable not to the Michigan adoption laws but to their inability to marry due to the state's ban on same-sex marriage.[80] The plaintiffs amended their complaint as suggested by the court, and, after denying both a motion to dismiss and cross-motions for summary judgment, the court held a trial that revolved largely

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[73] Tanco v. Haslam, No. 3:13-cv-01159, 2014 WL 997525, at *1–2 (M.D. Tenn. Mar. 14, 2014).
[74] *Id.* at *6.
[75] *Id.* at *7.
[76] *Id.*
[77] *Id.*
[78] MICH. COMP. LAW ANN. § 710.24 (West, Westlaw through P.A. 2014, No. 150, 153–168, of the 2014 Regular Session, 97th Legislature).
[79] DeBoer v. Snyder, 973 F. Supp. 2d 757, 760 (E.D. Mich. 2014).
[80] *Id.*

around the social science research regarding the outcomes of children raised by same-sex parents.[81]

At trial, the opponents of same-sex marriage offered the following justifications in support of the Michigan same-sex marriage ban: "(1) providing an optimal environment for child rearing; (2) proceeding with caution before altering the traditional definition of marriage; and (3) upholding tradition and morality."[82] With regard to the first justification, the court outright rejected the expert testimony offered by the opponents of same-sex marriage and accepted that offered in support of legally recognizing same-sex marriage.[83] The court found, among other things, that there was no support for the notion that children raised by same-sex couples have worse outcomes than children raised by different-sex couples, that there is no rational relationship between the optimal child-rearing justification and the state's same-sex marriage ban, and that the ban "actually fosters the potential for childhood destabilization" especially when the legally recognized parent dies and the non–legally recognized parent must pursue a long and complicated guardianship proceeding to gain custody of the child.[84]

It is worth quoting at length from the court's opinion explaining its outright rejection of Mark Regnerus's expert testimony offered at trial in support of the same-sex marriage ban. Opponents of same-sex marriage had hoped that Regnerus's testimony and the study upon which it was based would help them to turn the tide after a series of judicial and legislative setbacks, permitting them to win not only this case but also future same-sex marriage litigation:[85]

> The Court finds Regnerus's testimony entirely unbelievable and not worthy of serious consideration. The evidence adduced at trial demonstrated that his 2012 "study" was hastily concocted at the behest of a third-party funder, which found it "essential that the necessary data be gathered to settle the question in the forum of public debate about what kinds of family arrangement are best for society" and which "was confident that the traditional understanding of marriage will be vindicated by this study." In the funder's view, "the future of the institution of marriage at this moment is very uncertain" and "proper research" was needed to counter the many studies showing no differences in child outcomes. The funder also stated that "this is a project where time is of the essence." Time was of the essence at the time of the funder's comments in April 2011, and when Dr. Regnerus published … in 2012, because decisions such as *Perry v. Schwarzenegger* and *Windsor v. United States* were threatening the funder's concept of "the institution of marriage."
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> While Regnerus maintained that the funding source did not affect his impartiality as a researcher, the Court finds this testimony unbelievable. The funder clearly wanted a certain result, and Regnerus obliged. Additionally, the [study] is flawed on its face, as it purported to study "a large, random sample of American young adults (ages 18–39) who were *raised* in different types of family

[81] *Id.* at 760–68.
[82] *Id.* at 770.
[83] *Id.* at 770–71.
[84] *Id.* at 770–72.
[85] Erik Eckholm, *Opponents of Same-Sex Marriage Take Bad-for-Children Argument to Court*, N.Y. TIMES, Feb. 23, 2014, at A16.

> arrangements" (emphasis added), but in fact it did not study this at all, as Regnerus equated being raised by a same-sex couple with having ever lived with a parent who had a "romantic relationship with someone of the same sex" for any length of time. Whatever Regnerus may have found in this "study," he certainly cannot purport to have undertaken a scholarly research effort to compare the outcomes of children raised by same-sex couples with those of children raised by heterosexual couples. It is no wonder that the [study] has been widely and severely criticized by other scholars, and that Regnerus's own sociology department at the University of Texas has distanced itself from the [study] in particular and Dr. Regnerus's views in general and reaffirmed the … APA [American Psychological Association] position statement.[86]

I. INDIANA

In a challenge to the Indiana same-sex marriage ban, a federal district court judge granted a preliminary injunction prohibiting the state from enforcing the ban against a same-sex couple who had married in Massachusetts, where one of the spouses had ovarian cancer and her death was imminent.[87] In assessing the likelihood that the plaintiffs would prevail on the merits in their facial challenge to the ban, the court found that the state interests asserted in support of the ban, which centered on procreation and child rearing, were no more likely to survive rational-basis review in this case than they had been in the mounting number of district court decisions around the country striking down state bans on same-sex marriage as unconstitutional.[88]

Weeks later, the same court struck down the Indiana same-sex marriage ban as facially violating the Constitution.[89] In analyzing the due process challenge to the ban, the court applied strict scrutiny to the ban because it infringes upon the fundamental right to marry.[90] The only justification offered in support of the ban was the state's interest "in encouraging the couple to stay together for the sake of any unintended children that their sexual union may create."[91] Even assuming that this is an important interest, the court found that the state's marriage laws were not " 'closely tailored' to that interest" because Indiana law is both overinclusive (by prohibiting certain different-sex couples who can accidentally procreate from marrying because of their consanguinity) and underinclusive (by failing to prohibit different-sex couples who cannot or do not wish to procreate from marrying).[92] The court undertook an independent equal protection analysis, applying rational-basis review because sexual-orientation-based classifications are not yet subjected to heightened scrutiny in the Seventh Circuit.[93] Ultimately, the court concluded that

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[86] *DeBoer*, 973 F. Supp. 2d at 766 (citations omitted).
[87] Baskin v. Bogan, No. 1:14-CV-00355-RLY-TAB, 2014 WL 1814064, at *1 (S.D. Ind. May 8, 2014).
[88] *Id.* at *3–4.
[89] Baskin v. Bogan, No. 1:14-CV-00355-RLY-TAB (S.D. Ind. June 25, 2014), *available at* http://www.jconline.com/story/news/2014/06/25/court-fuling-indiana-same-sex-marriage-documents/11358567/.
[90] *Id.* at 20.
[91] *Id.*
[92] *Id.* at 20–21.
[93] *Id.* at 22, 24.

"[t]he connection between these rights and responsibilities and the ability to conceive unintentionally is too attenuated to support such a broad prohibition."[94]

J. IDAHO

In a challenge to the Idaho same-sex marriage ban, the primary justification that opponents of same-sex marriage offered in support of the ban "relate[d] to the State's interest in maximizing child welfare."[95] However, the court ultimately found that, "[f]ailing to shield Idaho's children in any rational way, Idaho's Marriage Laws fall on the sword they wield against same-sex couples and their families."[96] Another proffered justification likewise focused on child welfare, with the opponents of same-sex marriage arguing that the state was marshaling its limited resources by restricting marriage to different-sex couples because of their natural procreative ability.[97] This justification failed, too, because it was simultaneously overinclusive—providing access to government resources to different-sex couples who cannot or do not wish to procreate—and underinclusive—withholding access to government resources from same-sex couples with children.[98]

K. OREGON

In a challenge to the Oregon same-sex marriage ban, the defendants offered two justifications in support of the ban: (1) tradition and (2) "protecting children and encouraging stable families."[99] The court found that only the second justification constituted a legitimate state interest.[100] Despite its finding that "protecting children and promoting stable families is certainly a legitimate governmental interest, the state's marriage laws do not advance this interest—they harm it."[101]

The court found support for its conclusion in the existence of domestic partnerships in Oregon, which were created in part to promote the stability of same-sex couples with children yet were recognized by the legislature as a lesser legal status than marriage.[102] This lesser status did nothing more than "burden, demean, and harm gay and lesbian couples and their families so long as [the state's] current marriage laws [stood]."[103] And given the state's professed interest in protecting all children, as expressed in its laws, the court failed to see the link between the same-sex marriage ban and the protection of children drawn by the defendants.[104] Indeed, the court noted that "[t]he realization that same-gender couples make just as good parents as opposite-gender couples is supported by more than just common sense; it is also supported by 'the vast majority of

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[94] *Id.* at 28.
[95] Latta v. Otter, No. 1:13-cv-00482-CWD, 2014 WL 1909999, at *21 (D. Idaho May 13, 2014).
[96] *Id.* at *24.
[97] *Id.* at *24–25.
[98] *Id.* at *25.
[99] Geiger v. Kitzhaber, 6:13–CV–01834–MC, 2014 WL 2054264, at *9 (D. Or. May 19, 2014).
[100] *Id.*
[101] *Id.* at *11.
[102] *Id.*
[103] *Id.*
[104] *Id.* at *12.

scientific studies' examining the issue."[105] The court further failed to see the relationship between the same-sex marriage ban and responsible procreation: "A couple who has had an unplanned child has, by definition, given little thought to the outcome of their actions. The fact that their lesbian neighbors got married in the month prior to conception seems of little import to the stork that is flying their way."[106] Nor did the court find any relationship between the ban and "natural" procreation in light of "[t]he state's interest … in a child's well-being regardless of the means of conception."[107]

L. PENNSYLVANIA

In a challenge to the Pennsylvania same-sex marriage ban, opponents of same-sex marriage offered the following justifications in support of the ban: "the promotion of procreation, child-rearing and the well-being of children, tradition, and economic protection of Pennsylvania businesses."[108] Nevertheless, the opponents of same-sex marriage actually "defend[ed] only the first two aims, stating that numerous federal and state courts have agreed that responsible procreation and child-rearing are legitimate state interests and providing extensive authority for that proposition."[109] Yet, applying heightened scrutiny, the court found that the state's marriage ban "is not substantially related to an important governmental interest."[110] In describing the facts underlying its decision, the court described at great length the difficulties encountered by the plaintiff couples with children:

> For those couples who have had children, like Dawn Plummer and Diana Polson, the non-biological parent has had to apply for a second-parent adoption. Dawn expresses that she and Diana are presently saving money so that she can legally adopt their second son, J.P. Until the adoption is complete, she has no legal ties to J.P., despite that, together, she and Diana dreamed of welcoming him to their family, prepared for his birth, and functioned as a married couple long before having him. Christine Donato, who together with Sandy Ferlanie completed a second-parent adoption in similar circumstances, describes the process as "long, expensive, and humiliating." The couples choosing to adopt, like Fernando Chang-Muy and Len Rieser, had to undergo a two-step process, incurring double the costs, in which one became their child's legal parent and, later, the other petitioned for a second-parent adoption. For the children of these couples, it can be difficult to understand why their parents are not married or recognized as married. In the words of Deb Whitewood [one of the plaintiffs], "It sends the message to our children that their family is less deserving of respect and support than other families. That's a hurtful message."[111]

M. WISCONSIN

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[105] *Id.*
[106] *Id.* at *13.
[107] *Id.*
[108] Whitewood v. Wolf, No. 1:13-CV-1861, 2014 WL 2058105, at *15 (M.D. Pa. May 20, 2014).
[109] *Id.*
[110] *Id.*
[111] *Id.* at *2.

In a challenge to Wisconsin's same-sex marriage ban, the federal district court rejected arguments made by the ban's supporters that "marriage's link to procreation is the sole reason that the Supreme Court has concluded that marriage is protected by the Constitution."[112] In defense of the ban, its supporters offered the following set of justifications: "(1) preserving tradition; (2) encouraging procreation generally and 'responsible' procreation in particular; (3) providing an environment for 'optimal child rearing'; (4) protecting the institution of marriage; (5) proceeding with caution; and (6) helping to maintain other legal restrictions on marriage."[113] Most of these justifications ended up revolving around or implicating procreation and child rearing.

With regard to the second justification, the court, which applied heightened scrutiny, found it difficult to lend the procreation and "responsible" procreation arguments any credence, especially given that Wisconsin does sanction a particular form of marriage (i.e., between first cousins) *only* if the couple affirms its inability to reproduce.[114]

With regard to the third justification, the court found a lack of connection between the same-sex marriage ban and providing an optimal environment for child rearing; it also found this argument to be inconsistent with the "responsible" procreation argument, which is based on the notion that same-sex couples do not need marriage to be responsible parents because they cannot procreate accidentally.[115] Moreover, the court found that "the most immediate effect that the same-sex marriage ban has on children is to foster less than optimal results for children of same-sex parents by stigmatizing them and depriving them of the benefits that marriage could provide."[116] This "failure to consider the interests of part of the very group" that the law purportedly was intended to protect was only "further evidence of the law's invalidity."[117]

With regard to the fourth and fifth justifications (i.e., protecting the institution of marriage and proceeding with caution), supporters of the ban maintained their focus on children and argued that they feared that opening marriage to same-sex couples would shift marriage from a " 'child-centric' " to an " 'adult-centric' " institution.[118] In addition, opening marriage to same-sex couples would, according to the supporters of the ban, result in " 'confusion of social roles linked with marriage and parenting.' "[119] The court doubted that protecting the institution of marriage in this way would be considered a legitimate state interest, but, even so, the court failed to find a connection between the same-sex marriage ban and the fears raised by the supporters of the ban.[120]

N. COLORADO

In the most cursory of the decisions regarding state same-sex marriage bans, a federal

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[112] Wolf v. Walker, No. 14-CV-64-BBC, at 27 (W.D. Wis. June 6, 2014), *available at* http://www.scribd.com/doc/228494508/3-14-cv-00064-118.
[113] *Id.* at 63.
[114] *Id.* at 70–74.
[115] *Id.* at 75–76.
[116] *Id.* at 77.
[117] *Id.*
[118] *Id.* at 78 (quoting Defendants' Brief at 57).
[119] *Id.* (quoting Lynn Wardle, *"Multiply and Replenish": Considering Same–Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL'Y 771, 799 (2001)).
[120] *Id.* at 79–81.

district court issued a preliminary injunction enjoining enforcement of Colorado's same-sex marriage ban but stayed that injunction pending the outcome of the petition for writ of certiorari in *Kitchen v. Herbert*, which is the pending challenge to the Utah same-sex marriage ban.[121] Because the defendants, who presented "a far from united front," did not oppose issuance of a preliminary injunction, the court engaged in a very limited analysis in its opinion.[122] Indeed, the court did not even enumerate—let alone delve into—the justifications proffered in support of the ban; rather, the court relied entirely upon the opinions in the two cases already decided by the U.S. Court of Appeals for the Tenth Circuit in finding that a preliminary injunction should be issued prohibiting enforcement of the Colorado same-sex marriage ban.[123]

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Notwithstanding that all of these decisions formally addressed only the ability of same-sex couples to marry, an important common thread running through all of the cases is procreation and child rearing—a thread that was weaved into the arguments of both supporters and opponents of same-sex marriage. Indeed, in several of the suits, the children of the same-sex couples challenging these state same-sex marriage bans were also named plaintiffs.[124] In the end, all of these federal judges picked up the thread of procreation and child rearing and weaved it into their decisions. In their decisions, the courts ultimately considered not only the legal rights of the same-sex couples themselves but also the importance of relationship recognition to their children (current, expected, or contemplated). They rejected heteronormative arguments that procreation and child rearing can and should take place only in the context of different-sex (preferably married) couples. And they affirmatively validated same-sex couples as appropriate and acceptable parents.

III. REVENUE RULING 2013-17

Following the *Windsor* decision, the federal government acted quickly to issue guidance to same-sex couples. In August 2013, the IRS issued Revenue Ruling 2013-17, which is its principal guidance on the application of the *Windsor* decision to the federal tax laws.[125] That revenue ruling is best known for its adoption of a generous "place of celebration" rule (instead of a less generous "place of residence" or "place of domicile" rule) for purposes of determining which same-sex marriages will be respected for federal tax purposes.[126] Less well known, however, is that the

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[121] Burns v. Hickenlooper, No. 14-CV-01817-RM-KLM, at 2 (D. Colo. July 23, 2014), *available at* http://cdn.lgbtqnation.com/assets/2014/07/Colo-Burns-v-Hickenlooper-ruling.pdf; *see supra* notes 17–38 and accompanying text.

[122] *Burns*, No. 14-CV-01817-RM-KLM, at 2–3.

[123] *Id.* at 4–5.

[124] Baskin v. Bogan, No. 1:14-CV-00355-RLY-TAB, 2014 WL 1814064, at *1 (S.D. Ind. May 8, 2014); Bourke v. Beshear, No. 3:13-CV-750-H, 2014 WL 556729, at *2 (W.D. Ky. Feb. 12, 2014); Whitewood v. Wolf, No. 1:13-CV-1861, 2014 WL 2058105, at *1 (M.D. Pa. May 20, 2014).

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

[126] *Id.* at 203–04. For a discussion of the problems with this guidance and the open questions that it has left regarding which same-sex marriages will be recognized for federal tax purposes, see Infanti, *Moonscape*, *supra* note 7, and Infanti, *Big (Gay) Love*, *supra* note 7.

ruling also addressed the application of the gendered spousal provisions in the Internal Revenue Code (Code) to married same-sex couples.[127]

In Revenue Ruling 2013-17, the IRS had little trouble concluding that, when used in the Code, gender-neutral terms such as "marriage" and "spouse" would clearly encompass same-sex marriages and same-sex spouses following the *Windsor* decision.[128] In fact, the IRS stated that "[t]his is the most natural reading of those terms; it is consistent with *Windsor*, in which the plaintiff was seeking tax benefits under a statute that used the term 'spouse,' and a narrower interpretation would not further the purposes of efficient tax administration."[129] But there are more than thirty provisions in the Code that specifically refer and apply to "husband" and "wife" rather than to "spouses."[130] A search of Treasury Regulations interpreting the Code for specific

[127] Rev. Rul. 2013-17, § 2, 2013-38 I.R.B. 201, 202–03.
[128] *Id.* at 202.
[129] *Id.* (citation omitted).
[130] I.R.C. §§ 21(d)(2) (permitting either a husband or wife, but not both, to be deemed gainfully employed while a full-time student for purposes of determining the amount of the dependent care assistance credit); 22(e)(1) (requiring married taxpayers to file joint returns as a condition of claiming the credit for the elderly and disabled); 38(c)(6) (rules for determining limitation on general business credit of married taxpayers filing separately); 42(j)(5) (treating husband and wife as one partner for purposes of determining whether special rules for recapturing the credit by partnerships will apply); 62(b)(3) (requiring married qualified performing artists to file joint returns as a condition of taking their unreimbursed business expenses as an above-the-line deduction); 121(b)(2), (d)(1) (special rules applicable to husband and wife for purposes of determining amount of, and eligibility for, exclusion from gross income for gain on the sale of a principal residence); 165(h)(5)(B) (treating husband and wife filing a joint return as a single individual for purposes of the limitation on casualty losses); 179(b)(4) (treating husbands and wives who file separately as a single taxpayer for purposes of the dollar limitations on elective expensing of depreciable assets); 213(d)(8) (applying the rules in § 6013, *infra*, in determining a taxpayer's marital status for purposes of the deduction for medical expenses); 219(g)(4) (treating husbands and wives who live apart and file separate returns as unmarried for purposes of determining the limitations on a deduction for retirement savings); 274(b)(2)(B) (treating husband and wife as a single taxpayer for purpose of a limitation on the deduction for gifts); 643(f) (treating husband and wife as one person for purposes of determining whether to treat multiple trusts as a single trust); 682 (alimony trusts); 761(f) (exempting certain joint ventures conducted by husband and wife from being treated as a partnership for federal tax purposes); 911(b)(2)(c), (d)(9) (respectively, containing special rules for dealing with community income and delegating authority to the U.S. Department of Treasury to promulgate rules addressing the situation where both a husband and wife have income eligible to be excluded under § 911); 1244(b) (setting the amount of ordinary loss that a husband and wife filing a joint return may claim with regard to "§ 1244 stock"); 1272(a)(2)(E) (antiabuse rule in an exception to the application of the original issue discount rules); 1313 (treating husband and wife as related taxpayers for purposes of the provisions mitigating the application of the statute of limitations in the case of inconsistent positions taken by the taxpayer, a related taxpayer, or the IRS); 1361(c)(1)(A)(i) (treating husband and wife as a single shareholder for purposes of the 100-sharedholder limitation on S corporations); 2040(b) (special rule for inclusion of jointly held property with a right of survivorship in the gross estate of a decedent spouse); 2516 (gift tax treatment of transfers of property incident to divorce); 6013

references to "husband" or "wife" turned up nearly 250 regulations with such references in rules or examples applying those rules.[131] Prior to the *Windsor* decision, some worried that, even were the Supreme Court to strike down section three of DOMA, married same-sex couples would still not be treated equally under the Code because they would not be able to take advantage of these gendered tax provisions—including, most notably, the provision that permits married couples to file a joint return.[132]

Reading the gendered terms "husband" and "wife" in these Code and Treasury Regulations sections in a gender-neutral fashion required more explanation and justification than did the gender-neutral interpretation of the gender-neutral term "spouse." To begin, the IRS interpreted the *Windsor* decision as applying broadly to the federal tax laws and not just to the estate tax issue presented in that case, which concerned the availability of the estate tax marital deduction to a gender-neutral "surviving spouse."[133] In addition, the IRS worried about the constitutional implications of *not* reading the terms "husband" and "wife" in a gender-neutral fashion:

The Fifth Amendment analysis in *Windsor* raises serious doubts about the

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(joint federal income tax returns); 6014 (delegating to the U.S. Department of Treasury authority to prescribe regulations addressing situations where a husband and wife elect to have the IRS compute their taxes for them); 6017 (special rule for computing self-employment taxes); 6166(b)(2)(B) (attribution rule in provision extending time to pay estate taxes where estate consists largely of a closely held business); 6212(b)(2) (detailing ways in which a notice of deficiency may be addressed to husbands and wives filing joint returns); 6231(a)(1)(B) (treating husband and wife as one person for purposes of determining whether a partnership will be exempted from unified audit procedures); 6231(a)(12) (treating a joint partnership interest held by husband and wife as if it were held by one person); 7428(c)(2) (treating husband and wife as a single contributor for purposes of limiting the circumstances in which a charitable contribution will remain valid despite the revocation of an organization's charitable status); 7701(a)(17) (reading the references in §§ 682 and 2516, *supra*, to "husband" and "wife" to include former husbands and former wives and, where appropriate, reading the terms "husband" and "wife" interchangeably); 7872(f)(7) (husband and wife treated as a single person for purposes of recharacterizing below-market-rate loans) (Westlaw current through Pub. L. No. 113-93, excluding Pub. L. No. 113-79, approved Apr. 1, 2014).

[131] I conducted this search on June 9, 2014 in WestlawNext. I first clicked on "Federal Materials" and then on "Code of Federal Regulations (CFR)." In the table of contents, I selected "Title 26–Internal Revenue" and entered "text(husband or wife)" in the search bar at the top of the page. This search returned 247 results that included regulations promulgated under the Code sections collected *supra* note 130 as well as under other Code sections.

[132] *E.g.*, Frank S. Berall, *Update on Evolving Legal Status of Same-Sex Marriages*, 37 EST. PLAN. 21, 23–24 (2010); *see* I.R.C. § 6013(a) ("A husband and wife may make a single return jointly of income taxes … even though one of the spouses has neither gross income nor deductions … ."); William Stevenson, Nat'l Council for Taxpayer Advocacy, *Open Letter to IRS Commissioner and Members of Congress*, 132 TAX NOTES 203 (2011) (relaying the IRS's pre-*Windsor* position that same-sex couples were prohibited from filing joint returns not only because of section three of DOMA but also because § 6013, by using the terms "husband" and "wife," limits joint filing to married different-sex couples).

[133] Rev. Rul. 2013-17, § 2, 2013-38 I.R.B. 201, 202; *see* I.R.C. § 2056.

> constitutionality of Federal laws that confer marriage benefits and burdens only on opposite-sex married couples. In *Windsor*, the Court stated that, "[b]y creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of Federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect." Interpreting the gender-specific terms in the Code to categorically exclude same-sex couples arguably would have the same effect of diminishing the stability and predictability of legally recognized same-sex marriages. Thus, the canon of constitutional avoidance counsels in favor of interpreting the gender-specific terms in the Code to refer to same-sex spouses and couples.[134]

The IRS further concluded that a gender-neutral reading of the terms "husband" and "wife" would be consistent with: (1) a provision in the Code that allows these terms to be read interchangeably; (2) a provision in the Dictionary Act that requires masculine words to be read as including the feminine, unless the context indicates otherwise; and (3) the legislative history of the provision permitting joint income tax filing, which appears to use the gendered terms "husband" and "wife" interchangeably with the gender-neutral phrase "married taxpayers."[135] Finally, the IRS argued that a gender-neutral reading of the terms "husband" and "wife" would both ensure equal treatment of similarly situated taxpayers and "foster[] administrative efficiency because the [IRS] does not collect or maintain information on the gender of taxpayers."[136]

The IRS's reading of these terms is, in my opinion, quite appropriate. Nevertheless, certain of its arguments in support of that reading are weak. In particular, the IRS's arguments regarding the gender-neutral interpretation's consistency with the Code, Dictionary Act, and legislative history of the joint return provision ignores the fact that both of these statutory provisions as well as the legislative history all date from a time when different-sex marriage was the only legally permitted form of marriage.[137] If given the opportunity, opponents of same-sex marriage would surely argue that the IRS's interpretation is *inconsistent* with the understanding of Congress when it enacted the relevant statutory provisions and drafted the cited legislative history. The IRS's argument regarding administrative efficiency is also weak because the IRS certainly could collect information regarding gender by adding no more than a box on the return in between each spouse's name and Social Security number, where gender could be indicated with a click of the mouse or a check mark (for the Luddites among us).[138]

I point these weaknesses out not to undermine the IRS's interpretation, which is amply

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[134] Rev. Rul. 2013-17, § 2, 2013-38 I.R.B. 201, 202 (citation omitted).

[135] *Id.* at 202–03; *see* I.R.C. §§ 6013 (permitting joint filing); 7701(a)(17) (regarding the interchangeability of the terms "husband" and "wife"), (p)(1)(3) (referring to 1 U.S.C.A. § 1 (West 2005), which provides that the masculine includes the feminine).

[136] Rev. Rul. 2013-17, § 2, 2013-38 I.R.B. 201, 203.

[137] *Id.* (citing a 1951 Senate report as the relevant legislative history of the joint return provision); Internal Revenue Code of 1954, Pub. L. No. 83-591, 68A Stat. 1, 912 (enacting I.R.C. § 7701(a)(17)); Act of July 30, 1947, Pub. L. No. 80-278, ch. 388, 61 Stat. 633.

[138] In fact, some academics might be quite pleased at the possibility of being able to study IRS statistics of income broken down by taxpayer gender.

supported by its other arguments, but to underscore the extent to which the IRS might be viewed as taking an aggressive posture in Revenue Ruling 2013-17. In addition to adopting the more generous "place of celebration" rule for purposes of determining marital status for federal tax purposes,[139] the tone of the IRS's discussion in the section of the ruling regarding the interpretation of the gendered terms "husband" and "wife" is persuasive and quasi-adversarial in nature.[140] That is, it includes every conceivable argument in support of the IRS's interpretation and makes noticeably little mention of counterarguments. To understand how the IRS's position might have been quite different from (i.e., far less generous than) what it was in Revenue Ruling 2013-17, one need only imagine the *Windsor* decision being issued during the administration of a president less supportive of same-sex marriage.[141] From this perspective, it is clear that the IRS implemented and interpreted *Windsor* as favorably as possible to same-sex couples in order to achieve as gender-neutral (really as sexual-orientation-neutral) conceptualization of marriage as possible in the federal tax laws.[142]

IV. ACCENTUATED HETERONORMATIVITY

The heteronormativity of the tax incentives for procreation that we will explore next stands in sharp relief against the background sketched in the previous two parts of this essay. In Part II, we explored the federal court decisions validating same-sex couples as equally worthy of legal recognition and as equally good parents as different-sex couples. Then, in Part III, we witnessed how the IRS has done its best to translate this judicial vision into the application and enforcement of the federal tax laws by striving for a sexual-orientation-neutral conceptualization of marriage. In this Part, we will turn to contrasting these steps toward erasing the legal differences between same-sex and different-sex couples with tax incentives that—because of their inherent heteronormativity—draw a sharp distinction between these two classes of married couples insofar as incentivizing procreation and family formation is concerned.

The primary tax incentives for procreation and family formation are the deduction for medical expenses, the adoption credit, and the exclusion for employer-provided adoption

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[139] *See supra* note 4 and accompanying text.

[140] Memorandum from Eric Holder, Jr., U.S. Attorney Gen., to Barack Obama, U.S. President, at 2 (June 20, 2014) ("[T]he Department drew on all of its expertise to ensure that the agencies' actions had firm legal support … ."), *available at* http://www.justice.gov/iso/opa/resources/972201462010393090478 5.pdf

[141] *Compare* I.R.S. Chief Couns. Advice 2006-08-038 (Feb. 24, 2006) (under the George W. Bush administration, opining that the application of California's community property laws to same-sex couples would *not* be respected for federal tax purposes), *with* I.R.S. Chief Couns. Advice 2010-21-050 (May 5, 2010) (under the Obama administration, reversing this position and concluding that the application of California's community property laws to same-sex couples *would* be respected for federal tax purposes).

[142] Memorandum from Eric Holder, Jr., *supra* note 140, at 1 ("I am pleased to report that agencies across the federal government have implemented the *Windsor* decision to treat married same-sex couples the same as married opposite-sex couples for the benefits and obligations for which marriage is relevant, to the greatest extent possible under the law."); *id.* at 2 ("[T]he policy of this Administration has been to recognize lawful same-sex marriages as broadly as possible, to ensure equal treatment of for all members of society regardless of sexual orientation.").

assistance [143] In keeping with the focus of this symposium, we will interrogate the heteronormativity of these tax incentives through the lens of compensated surrogacy, which may be used by different-sex couples, lesbian couples, and single women experiencing fertility problems and is the only available option to procreate for gay couples and single men. Before proceeding, however, it is worth noting that there are also postbirth tax incentives for children—like the child credit, the additional personal exemption for dependents, the dependent care assistance credit, and the exclusion for employer-provided dependent care assistance.[144] These postbirth incentives do not, however, relate directly to procreation and family formation but to child rearing, which brings them outside the scope of this essay.

A. MEDICALIZATION OF PROCREATION

The heteronormativity in the tax incentives for procreation and family formation lies in their complete medicalization. In operation, the only tax incentive available for procreative activity is the deduction for medical expenses. As we will see, the tax incentives for adoption are confined to family formation separate and apart from procreation (i.e., they apply to children who have been born to one set of parents, given up for adoption, and then adopted by a different parent or parents) and are unavailable to those using a surrogate to assist with procreation. Adoption expenses—like all other surrogacy-related expenses—are deductible, if at all, as medical expenses.

In earlier work examining how the deduction for medical expenses furthers heteropatriarchal domination, I have explained at length how the federal tax laws, by viewing procreation through a medical lens, proceed on the assumption that couples can "naturally" procreate and will only need assistance procreating when there is a medical problem with fertility that interferes with the natural procreative process.[145] That there might be others—whether same-

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[143] I.R.C. §§ 23, 137, 213 (Westlaw current through Pub. L. No. 113-93, excluding Pub. L. No. 113-79, approved Apr. 1, 2014).

[144] I.R.C. §§ 21, 24, 129, 151(c).

[145] To summarize with a brief quote:

> By medicalising procreation as it does, section 213 … always already furthers heteropatriarchal domination. … With its construction and corporealisation of the body family, section 213 certainly betrays an outsized focus on the traditional family model of the taxpayer/husband, wife and dependants.
>
> At a more basic level, the patriarchal and heterosexual aspects of this domination stem from the unceasing reference to "infertility" treatments. Referring to ART [i.e., assisted reproductive technology] as "infertility treatment" conjures up the image of a different-sex couple encountering difficulties in getting pregnant. But this paints only the most partial of pictures of the groups who use ART to procreate.
>
> Increasingly, same-sex couples and single men and women (whether straight or gay) use ART to create nontraditional families. …

Anthony C. Infanti, *Dismembering Families*, *in* CHALLENGING GENDER INEQUALITY IN TAX POLICY MAKING 159, 169–70 (Kim Brooks et al. eds, 2011)

sex couples or singles—who need assistance to procreate goes either unnoticed or ignored.[146]

1. *Medical Expense Deduction*

Section 213 is the Code provision that allows taxpayers to deduct medical expenses. This provision is aimed at taxpayers who incur such a significant amount of medical expenses that these expenses will "affect [their] ability to pay federal income tax."[147] To this end, § 213 allows a deduction for "the expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, or a dependent … to the extent that such expenses exceed 10 percent of adjusted gross income."[148] As I have noted elsewhere, "assisted reproductive technologies (ART) such as *in vitro* fertilization, intracytoplasmic sperm injection, and/or surrogacy … can be rather costly and often are not covered by insurance, making them an excellent candidate for deduction under section 213 if they qualify as 'medical care.' "[149]

For purposes of § 213, "medical care" is defined in relevant part as "amounts paid for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."[150] After reiterating this definition, the Treasury Regulations go on to explain:

> Amounts paid for operations or treatments affecting any portion of the body, including obstetrical expenses and expenses of therapy or X-ray treatments, are deemed to be for the purpose of affecting any structure or function of the body and are therefore paid for medical care. Amounts expended for illegal operations or treatments are not deductible. *Deductions for expenditures for medical care allowable under section 213 will be confined strictly to expenses incurred primarily for the prevention or alleviation of a physical or mental defect or illness.* Thus, payments for the following are payments for medical care: hospital services, nursing services (including nurses' board where paid by the taxpayer), medical, laboratory, surgical, dental and other diagnostic and healing services, X-rays, medicine and drugs … , artificial teeth or limbs, and ambulance hire. However, an expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care.[151]

Historically, there has been some debate about—and vacillation by the IRS over—whether expenses associated with reproduction (or the choice not to reproduce) constitute "medical care" as defined by the Code and Treasury Regulations.[152] In informal guidance, the IRS has indicated that "fertility enhancement" expenses (e.g., *in vitro* fertilization) and even an infertile individual's cost of obtaining an egg donor (including associated legal fees) can qualify as deductible medical

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[146] *Id.*
[147] *Id.* at 160.
[148] I.R.C. § 213(a).
[149] Infanti, *supra* note 145, at 167.
[150] I.R.C. § 213(d)(1)(A).
[151] Treas. Reg. § 1.213-1(e)(1)(ii) (1960).
[152] Tessa Davis, *Reproducing Value: How Tax Law Differentially Values Fertility, Sexuality & Marriage*, 19 CARDOZO J.L. & GENDER 1, 6–12 (2012); Infanti, *supra* note 145, at 167.

expenses.[153] The IRS has, however, opposed the deductibility of the cost of a surrogate as a medical expense.[154] Nevertheless, out of apparent fear of an adverse decision, the IRS did settle an early Tax Court case regarding the deductibility of surrogacy expenses in favor of the taxpayers, who were a married different-sex couple experiencing significant fertility problems.[155]

In 2008, the Tax Court issued the first judicial opinion regarding the deductibility of surrogacy expenses. The case, *Magdalin v. Commissioner*, involved an admittedly fertile, single gay man who procreated with the help of two separate gestational surrogates and who sought to deduct expenses relating to the egg donations, the gestational surrogacies, and the legal expenses associated with obtaining this assistance in procreating as well as with establishing the parentage of his children.[156] The Tax Court viewed the medical expense deduction as a narrow exception to the general rule that there is no deduction for personal, living, or family expenses and, in keeping with the italicized language in the quoted text above, "requir[ed] a causal relationship … between a medical condition and the expenditures incurred in treating that condition."[157] The Tax Court ultimately denied the taxpayer a deduction for his surrogacy-related expenses because (1) he "had no medical condition or defect, such as, for example, infertility, that required treatment or mitigation" and (2) the expenses "did not affect a structure or function of *his* body."[158] The U.S. Court of Appeals for the First Circuit summarily affirmed the Tax Court's decision because

> the various expenses incurred by petitioner were not for the treatment of any underlying medical condition suffered by the taxpayer; … he stipulated that he was not infertile and that his previous children had been produced by natural processes

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[153] I.R.S. Pub. No. 502, Medical and Dental Expenses 8 (2013) (fertility enhancement expenses); I.R.S. Info. Ltr. 2005-0102, 2005 WL 1564598 (Mar. 29, 2005) (egg donor); I.R.S. Priv. Ltr. Rul. 2003-18-017 (Jan. 9, 2003) (egg donor).

[154] *See* Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1160–61 (2004) (describing the IRS's position in a 1994 Tax Court case that settled in favor of the taxpayer). The IRS has continued to take this position since settling that case. *E.g.*, I.R.S. Info. Ltr. 2004-0187, 2004 WL 2984978 (Sept. 13, 2004); I.R.S. Info. Ltr. 2002-0291, 2002 WL 31991849 (Aug. 12, 2002).

[155] Katherine Pratt, *Deducting the Costs of Fertility Treatment: Implications of* Magdalin v. Commissioner *for Opposite-Sex Couples, Gay and Lesbian Same-Sex Couples, and Single Women and Men*, 2009 WIS. L. REV. 1283, 1306 ("After the emotional testimony of Mrs. Sedgwick in which she recounted the sad story of her years of unsuccessful fertility treatment, counsel met with Judge Jacobs in his chambers. After the meeting, the case settled in favor of the Sedgwicks. Presumably, the IRS settled to avoid an adverse decision in the case.").

[156] Magdalin v. Comm'r, 96 T.C.M. (CCH) 491, 491 (2008), *aff'd*, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,150 (1st Cir. 2009).

[157] *Id.* at 492; *see* I.R.C. § 262 (Westlaw current through Pub. L. No. 113-93, excluding Pub. L. No. 113-79, approved Apr. 1, 2014) (disallowing deductions for personal, living, and family expenses). The language in the Treasury Regulations requiring a disease or illness in all cases is at odds with the language of the Code, which defines "medical care" using a disjunctive "or" rather than a conjunctive "and." A plain reading of the Code indicates that "amounts paid … for the purpose of affecting any structure or function of the body," I.R.C. § 213(d)(1)(A), should be deductible regardless of the presence of disease or illness. Pratt, *supra* note 155, at 1330.

[158] *Magdalin*, 96 T.C.M. (CCH) at 493 (emphasis added).

> in conjunction with the woman who was his wife at the time. In addition, the procedures were not for the purposes of affecting any structure or function of taxpayer's own body. Rather, they affected the bodies of the gestational carriers, who … were not his dependents.[159]

Thus, having failed to demonstrate the existence of a medical condition necessitating the expenses or that the expenses affected a structure or function of his own body, the courts concluded that the taxpayer incurred these procreative expenses for personal reasons.[160]

The Tax Court's and First Circuit's analysis affects more than just taxpayers who wish to deduct their out-of-pocket expenses for obtaining assistance with procreation using a surrogate. It also affects tax treatment every place in the Code that incorporates by reference the definition of "medical care" in § 213.[161] Thus, for example, it will negatively affect the ability of taxpayers to receive tax-free reimbursements of surrogacy-related expenses from employer-provided health insurance plans (in the rare case when this coverage is available).[162]

2. *Adoption Tax Incentives*

When a couple secures the assistance of a surrogate to procreate, adoption is often necessary to ensure that both members of the couple have a legal relationship with their child. As mentioned above, there are two different tax incentives for adoption: (1) the adoption credit and (2) the exclusion for employer-provided adoption assistance. These two tax incentives work in tandem. For those taxpayers whose employers have created adoption assistance programs (often as part of a cafeteria plan of fringe benefits), an exclusion from the taxpayer-employee's gross income is available for the employer's reimbursement of "qualified adoption expenses" up to a specified per-child cap that is adjusted annually for inflation (for 2014, the cap is $13,190).[163] For those whose employers have not created such a program (or for those who choose not to avail themselves of an available program), a nonrefundable credit is available in an amount equal to the taxpayer's "qualified adoption expenses" up to the same per-child cap (again, $13,190 for 2014).[164] Both the exclusion and the credit are phased out at higher income levels.[165] The exclusion and the credit are coordinated because any amounts reimbursed by an employer under an adoption assistance program are ineligible for the credit (i.e., a taxpayer can take either the exclusion or the credit with respect to a given expense, but not both).[166]

The exclusion and the credit are also coordinated because they share a common definition

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[159] *Magdalin*, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,150.
[160] *Magdalin*, 96 T.C.M. (CCH) at 493.
[161] Infanti, *supra* note 145, at 173 n.5.
[162] I.R.C. § 105(b).
[163] *Id.* § 137; Rev. Rul. 2013-35, § 3.18, 2013-47 I.R.B. 537, 542.
[164] I.R.C. §§ 23, 26; Rev. Rul. 2013-35, § 3.03, 2013-47 I.R.B. 537, 539–40. Though nonrefundable, the unused portion of the credit is available for carryover to the following five taxable years. I.R.C. § 23(c).
[165] I.R.C. §§ 23(b)(2), 137(b)(2).
[166] *Id.* § 23(d)(1)(D); *see* Notice 97-9, § III(A), 1997-1 C.B. 365 ("An individual may claim both a credit and an exclusion in connection with the adoption of an eligible child. An individual may not, however, claim both a credit and an exclusion for the same expense.").

of "qualified adoption expenses."[167] Notably, the definition of "qualified adoption expenses" prohibits the exclusion or crediting of expenses related either to (1) "carrying out any surrogate parenting arrangement" or (2) "the adoption by an individual of a child who is the child of such individual's spouse."[168] By carving out these expenses, Congress has made the adoption tax incentives unavailable to married couples who have formed a family and who wish the law to fully recognize that family. These incentives are, as a practical matter, available only when one set of individuals procreates and gives their child up for adoption, and another individual or set of individuals later adopts that child. As a result, the expenses of adopting a child born through a surrogacy arrangement are deductible, if at all, only as medical expenses.[169] This ensures the complete medicalization of the tax incentives related to procreation.

B. THE BODY(IES) FAMILY

1. *Pre*-Windsor

In earlier work predating *Windsor* and the demise of section three of DOMA, I described how § 213 creates and corporealizes the so-called traditional family into a "body family."[170] As mentioned above, a taxpayer can deduct not only his own expenses for medical care but also those of his spouse and dependents.[171] In operation, by aggregating the medical expenses of the entire family, § 213 treats an illness or disease affecting one member of the body family as if it affected the entire family:[172]

> This corporealisation of the body family is perhaps most easily understood when considered from the perspective of the reproductive functions of the body. Reproduction is not a solitary function, by which I mean that the taxpayer/husband cannot reproduce on his own. Rather, it takes the taxpayer *and* his wife—each contributing genetic material through a sexual union of two bodies—to reproduce on *their* own. In the context of section 213, reproduction can be seen not as a function of the individual taxpayer's body but as a function that can only truly be fulfilled by and through the body family, of which the individual taxpayer's body forms no more than a part.[173]

In keeping with this view of reproduction as a function of the "traditional" body family (rather than of its constituent parts), § 213 goes so far as to "allow[] a deduction for the cost of medical treatment of a healthy person in order to mitigate the impact of a disease on the reproductive function of a different person's body so that the two can together—as the body family—fulfill

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[167] I.R.C. §§ 23(d), 137(d).
[168] *Id.* § 23(d)(1)(B), (C).
[169] Pratt, *supra* note 154, at 1159–60.
[170] Infanti, *supra* note 145, at 166–69.
[171] *See supra* note 148 and accompanying text.
[172] Infanti, *supra* note 145, at 166–67.
[173] *Id.* at 167 (footnote omitted). Indeed, this is exactly how the IRS appears to have seen reproduction in *Magdalin*. Magdalin v. Comm'r, 96 T.C.M. (CCH) 491, 493 n.6 (2008), *aff'd*, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,150 (1st Cir. 2009) ("[R]espondent makes the unexplained assertion that respondent 'does not believe that procreation is a covered function of petitioner's male body within the meaning of section 213(d)(1).' ").

their collective desire to procreate."[174] For instance, a deduction under § 213 is available for the expenses incurred when a wife who has no fertility issues herself must undergo *in vitro* fertilization to overcome her husband's infertility in order to become pregnant.[175] With regard to the married different-sex couple, then, infertility is a medical problem that affects the entire body family, and it is unnecessary to attribute the problem to either of the spouses individually for purposes of § 213.[176]

Before *Windsor*, DOMA dismembered nontraditional families for purposes of § 213. Even if a same-sex couple were married under state law, their relationship was not recognized for federal tax purposes. Accordingly, the availability of a deduction under § 213 for infertility treatments or for the cost of a surrogate had to be determined with respect to each spouse individually because there was no aggregation of expenses.[177] Thus, before *Windsor*, § 213 neither created nor corporealized nontraditional families into a "body family." Now that same-sex marriages are recognized for federal tax purposes, troubling questions arise regarding whether the "sharp distinctions"[178] that § 213 formerly drew between married different-sex couples and married same-sex couples persist.

2. *Post*-Windsor

a. *Married Different-Sex Couples*

In *Magdalin*, the Tax Court left for another day the "lurking questions as to whether (and, if so, to what extent) expenditures for IVF procedures and associated costs (e.g., a taxpayer's legal fees and fees paid to, or on behalf of, a surrogate or gestational carrier) would be deductible in the presence of an underlying medical condition."[179] Long before *Windsor*, commentators made convincing arguments that these "lurking questions" should be answered affirmatively for infertile married different-sex couples.[180] In light of the strength of these arguments as well as the IRS's decision to settle an early surrogacy case in favor of an infertile married different-sex couple out of apparent fear of losing,[181] married different-sex couples should quite clearly be permitted to deduct the costs associated with surrogacy as a medical expense when those costs are incurred to overcome fertility problems. After all, married different-sex couples would have no (medical) reason to secure the assistance of a surrogate in the absence of fertility problems because they

[174] Infanti, *supra* note 145, at 169.
[175] *Id.*
[176] *Id.* at 173.
[177] *Id.* ("[I]n the case of non-traditional families, section 213 places questions about the identity of the recipient of medical treatments front and centre in any analysis of the deductibility of expenses associated with ART. These questions come to the foreground because section 213 generally works to dismember non-traditional families. In other words, section 213 refuses to see the non-traditional family as a unit capable of procreation. Instead of seeing a family, section 213 sees an individual who, by himself or herself, is incapable of procreation." (footnote omitted)).
[178] *Id.*
[179] Magdalin v. Comm'r, 96 T.C.M. (CCH) 491, 493 (2008), *aff'd*, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,150 (1st Cir. 2009).
[180] Davis, *supra* note 152, at 15; Infanti, *supra* note 145, at 167; Pratt, *supra* note 155, at 1320–22.
[181] *See supra* note 155 and accompanying text.

could "naturally" procreate (at a significantly lower cost).

b. *Married Same-Sex Couples Without Fertility Problems*

If both spouses in a married same-sex couple are fertile, following *Magdalin* it is equally clear that the couple should *not* be permitted to deduct the costs associated with surrogacy because of the absence of both an underlying disease or illness and any treatment being administered to one of the same-sex spouses.[182] Fertile same-sex couples would therefore receive the same tax treatment as married different-sex couples without fertility problems. Despite appearing to be similarly situated, however, these same-sex and different-sex couples might actually face quite different circumstances that justify treating them differently.

Married different-sex couples who have no fertility problems cannot deduct the costs of a surrogate to assist with procreation because those medical expenses lack the necessary causal relationship with a medical condition. In other words, fertile married different-sex couples have no disease or illness that prevents them from procreating naturally. As a result, the only reason to secure a surrogate to assist with procreation would be purely personal (and not medical).

Even in the absence of fertility problems, married same-sex couples cannot simply procreate "naturally." But the extent to which others must be involved—and which others—depends on whether we are speaking of a lesbian couple or a gay couple. A fertile lesbian couple is in a situation closer to that of a different-sex couple in the sense that involving a surrogate in procreation would not be medically indicated but rather a matter of choice. In other words, not facing any fertility issues, either of the members of the lesbian couple could become pregnant and carry the couple's child. Thus, fertile different-sex couples and fertile lesbian couples do seem to be similarly situated and similar tax treatment (at least vis-à-vis deducting the costs of a surrogate) seems justified.

For a fertile gay couple, however, how they procreate is not purely a matter of personal choice or preference. A gay couple cannot procreate without the aid of a surrogate. Involving a surrogate would not be medically indicated—because neither the sperm donor/father nor the surrogate would have fertility problems—but it would be a practical necessity. If reproduction is truly a function of the body family, why should surrogacy-related costs not be deductible under § 213 when the surrogate is involved to overcome the couple's inability to have children on their own? The primary obstacle to answering this question affirmatively is the heteronormative assumption underlying § 213 that medical intervention is "necessary" in the context of procreation only when a fertility problem exists.

This heteronormative assumption has broader implications that could lead to drawing a distinction between two different groups of bodies family. For purposes of § 213, the federal tax laws could very well see one group of bodies family—that is, the "traditional" bodies family with married different-sex couples at their core—as being naturally capable of procreation and, therefore, eligible to claim the tax incentives for procreation in § 213. At the same time, the federal tax laws might see another group of bodies family—that is, the "nontraditional" bodies family with married same-sex couples at their core—as being inherently incapable of procreation and, therefore, excluded from the group eligible to claim the tax incentives for procreation in § 213.

[182] Davis, *supra* note 152, at 18; Infanti, *supra* note 145, at 172–73.

This distinction would be in keeping with how § 213 sees reproduction "not as a function of the individual taxpayer's body but as a function that can only truly be fulfilled by and through the body family, of which the individual taxpayer's body forms no more than a part."[183] Although drawing such a distinction between traditional and nontraditional families would not change the result for fertile gay couples, it might affect the treatment of same-sex couples with fertility problems, as discussed below.

c. *Married Same-Sex Couples With Fertility Problems*

If a fertile same-sex couple would encounter an insurmountable hurdle in the *Magdalin* case, one might expect an infertile same-sex couple to have a better chance of qualifying for the tax incentives for procreation in § 213, just as infertile married different-sex couples do.[184] Because all infertile couples—whether same-sex or different-sex—require medical assistance to procreate, one might expect that these similarly situated couples would be treated similarly. But the heteronormative assumption underlying § 213 might still prove to be a barrier between same-sex couples and § 213. As mentioned above, the IRS and/or the courts might very well draw a distinction—whether de jure or de facto—between married different-sex couples and married same-sex couples because only the former can "naturally" procreate.

This view would be consistent with the Tax Court's opinion in the *Magdalin* case. To demonstrate the necessary causal relationship between the expenses and a medical condition, the Tax Court required Magdalin to prove both "(1) 'that the expenditures were an essential element of the treatment' and (2) 'that they would not have otherwise been incurred for nonmedical reasons.' "[185] The latter requirement may prove to be particularly troublesome for same-sex couples. As discussed above, an infertile gay couple must use a surrogate—and, in a gestational surrogacy, an egg donor, too—in order to procreate whether or not the couple is experiencing fertility problems. Thus, the involvement of a surrogate is not occasioned by male infertility but by the fact that neither spouse is capable of furnishing the necessary egg or womb.

The *Magdalin* court's focus on whose body actually received the treatment would only compound the difficulty of overcoming this requirement. The treatment would not be administered to a part of this nontraditional body family (i.e., neither of the same-sex spouses would receive treatment); rather, just as in *Magdalin*, the treatments would be administered to the surrogate and egg donor, who are unlikely to be the couple's dependents for tax purposes.[186] Moreover, neither the surrogate nor the egg donor would be acting as a substitute for an impaired function or element of the infertile spouses' bodies because the spouses are incapable themselves of supplying an egg or a womb even in the absence of fertility issues. This severely undercuts arguments by analogy to other areas (e.g., kidney donation) where expenses of third parties have qualified for deduction—analogies that are heavily relied upon to qualify the surrogacy expenses of infertile

[183] Infanti, *supra* note 145, at 167.
[184] *See supra* Part IV.B.2.a.
[185] *Magdalin*, 96 T.C.M. (CCH) at 492 (quoting Jacobs v. Comm'r, 62 T.C. 813, 819 (1974)).
[186] *See* I.R.C. § 213(a) (Westlaw current through Pub. L. No. 113-93, excluding Pub. L. No. 113-79, approved Apr. 1, 2014) (incorporating and modifying the definition of "dependent" in § 152(d), which would require the surrogate or egg donor to live with the couple, be a member of their household, and receive more than half of her support from the couple in order to qualify as a dependent).

married different-sex couples for deduction.[187]

Infertile lesbian couples would have a better argument for deducting many of the expenses associated with use of a surrogate; however, there would still be a question regarding whether the cost of obtaining sperm would be deductible. Like the infertile gay couple, an infertile lesbian couple must obtain sperm to procreate regardless of whether or not the couple is experiencing fertility problems.[188]

Potentially thornier issues arise if only one of the spouses in a same-sex couple is infertile and the other is fertile. Because these nontraditional bodies family cannot "naturally" procreate, the aggregation of functions and expenses that occurs in the context of the "traditional" body family might not occur with fertile/infertile same-sex couples. Because procreation, even though a function of the same-sex spouse's individual bodies, is not a function of their body family, it would not be surprising if each spouse's body were considered separately for purposes of § 213 because they each have the same reproductive capability. In other words, so long as one same-sex spouse's reproductive system is functioning, why would the body family not avail itself of that system to procreate, just as we assume that different-sex couples will procreate naturally if their reproductive systems are working properly? If adopted, this approach would create a sharp divide between married same-sex and married different-sex couples. On the one hand, the federal tax laws would pay no attention to whether a husband were infertile so long as his wife were unable to carry a child because this would impair the reproductive function of the body family. On the other hand, which spouse procreates—and why—might be of much greater import when § 213 is applied to married same-sex couples. The couple's (personal and/or tax-motivated) choice not to have the fertile spouse procreate might significantly undercut (if not wholly eliminate) any arguments in favor of deductibility because these same-sex couple would, in essence, be treated the same as the single taxpayer in *Magdalin*.

C. THE MORE THINGS CHANGE…

When the IRS issued Revenue Ruling 2013-17, the Secretary of the Treasury promised that the ruling would provide same-sex couples with " 'certainty and clear, coherent tax-filing guidance.' "[189] As the discussion above amply demonstrates, "certainty" is not an adjective that applies to the tax treatment of expenses incurred by married same-sex couples—and, particularly, married gay couples—procreating with the aid of a surrogate. It appears that sharp distinctions may continue to be made under § 213 between traditional and nontraditional families even after the *Windsor* decision. With regard to fertile couples, § 213 may treat similarly couples who are not similarly situated (particularly as we compare married different-sex and married gay couples). With regard to infertile couples, § 213 may treat married different-sex couples more leniently than married same-sex couples. The medical expense deduction should be available to married different-sex couples so long as the wife is unable to carry a child, regardless of whether the husband is experiencing any fertility issues. In contrast, even were one or both same-sex spouses experiencing fertility problems, the medicalization of procreation in § 213 might very well erect an insuperable barrier to accessing this tax incentive because the couple cannot "naturally"

[187] *See* Pratt, *supra* note 155, at 1321–22, 1324–25.
[188] Davis, *supra* note 152, at 17; Infanti, *supra* note 145, at 173.
[189] Lowrey, *supra* note 5.

procreate. In other words, with regard to infertile couples, § 213, as currently construed, is quite likely to treat similarly situated couples dissimilarly.

These distinctions—both extant and inchoate—are inconsistent with the tenor of the *Windsor* decision and its progeny as well as the spirit of Revenue Ruling 2013-17. The *Windsor* Court placed great emphasis on removing the stigma and disadvantages that DOMA imposed on married same-sex couples (as compared to married different-sex couples).[190] In its opinion, the Court spoke of the "equal dignity" of same-sex couples and how DOMA restricted same-sex couples' "freedom and choice."[191] The IRS seems to have done its best in Revenue Ruling 2013-17 to carry this rhetoric of equality and dignity into the application of the federal tax laws.[192] Expanding the focus beyond the same-sex couple, *Windsor* and its progeny also considered the effect of same-sex marriage bans on the children of same-sex couples and on same-sex couples' ability to form a family—in some cases specifically addressing the situation of couples with as yet unborn children. As explored at length above, the growing number of decisions striking down state same-sex marriage bans have all considered the importance of relationship recognition to the children (current, expected, or contemplated) of same-sex couples, rejected heteronormative arguments that procreation and child rearing can and should take place only in the context of different-sex couples, and affirmatively validated same-sex couples as appropriate and acceptable parents.[193]

The rhetoric of *Windsor* and its progeny as well as of Revenue Ruling 2013-17 starkly contrast with a legal landscape that, if unabetted, will very likely result in the denial of access to § 213 for married same-sex couples. As Katherine Pratt explained before *Windsor*:

> Denying a medical expense deduction for fertility treatment costs increases the after-tax cost for the treatment, which increases the cost barrier to ART access and indirectly restricts use of ARTs. In the *Magdalin* case, the taxpayer assumed that loss of the tax deduction is the legal equivalent of a prohibition on access to ARTs.[194]

Thus, far from validating same-sex couples as persons and as parents, the current construction of § 213 would have the effect of creating a financial disincentive for same-sex couples to procreate—and for gay couples, who cannot procreate without the assistance of a surrogate, § 213 might erect an insuperable financial barrier to procreation. And the distinction that § 213 may continue to draw between married same-sex and married different-sex couples will not be erased when the last of the state-level same-sex marriage bans falls. Put differently, the distinction between traditional and nontraditional families is not a function of the incorporation of state-level discrimination into the federal tax laws but a function of the heteronormative assumption underpinning § 213 that the only couples who can or should procreate are those capable of doing so "naturally"—and these couples only need (medical) assistance with procreation if they have

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[190] United States v. Windsor, 133 S. Ct. 2675, 2693 (2013).
[191] *Id.*
[192] *See supra* Part III.
[193] *See supra* Part II.
[194] Pratt, *supra* note 155, at 1337.

fertility issues.[195] The contrast in treatment is made even starker by the fact that the courts have resoundingly rejected heteronormative arguments that procreation should take place only within different-sex couples—arguments that differ little in substance from the heteronormative assumptions underpinning § 213 regarding the context in which procreation does (should?) occur. In short, rather than having the effect of reducing the heteronormativity of § 213, the *Windsor* decision, its progeny, and Revenue Ruling 2013-17 all appear to have had the perverse effect of exacerbating and accentuating the heteronormativity of that Code provision as it applies to surrogacy-related expenses.

V. RENEWING THE CHALLENGE TO § 213

The taxpayer in *Magdalin*, who represented himself, argued that "denying him a medical expense deduction for fertility treatment costs violated his right to reproductive autonomy and his right to be free from sex discrimination because, in his view, loss of the deduction would deny men access to ARTs."[196] The Tax Court summarily dismissed the taxpayer's argument (and the First Circuit never even addressed it), stating:

> Although petitioner at times attempts to frame the deductibility of the relevant expenses as an issue of constitutional dimensions, under the facts and circumstances of his case, it does not rise to that level. Petitioner's gender, marital status, and sexual orientation do not bear on whether he can deduct the expenses at issue.[197]

Taking this constitutional challenge more seriously, Katherine Pratt examined the operation of § 213, as interpreted by the Tax Court in *Magdalin*, and found the provision immune from attack because the statute is facially neutral, does not bar access to assisted reproductive technology, and draws distinctions that were not borne of animus toward lesbians and gay men.[198]

Both the Tax Court's and Pratt's evaluation of Magdalin's constitutional challenge to the application of § 213 to his surrogacy-related expenses predated the *Windsor* decision. *Windsor* and its progeny appear to have changed this legal landscape significantly enough that the door to constitutional scrutiny may now be open. As discussed above, the federal court decisions following *Windsor* have all resoundingly rejected heteronormative justifications regarding procreation and child rearing as legitimate grounds for discriminating against same-sex couples. Though unarticulated, these same justifications lurk below the surface of § 213 as taken-for-granted assumptions that have informed the application of that provision by the IRS and the courts. Making the case against the current construction of § 213 even stronger, a growing chorus of federal courts—at both the trial and appellate levels—have been finding that sexual-orientation-based

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[195] Davis, *supra* note 152, at 2 ("Under the Code—as presently interpreted by the IRS and the Tax Court—some persons are properly parents, while others are not. Some persons' reproductive decisions are valued and therefore encouraged. Others' are not. Thus, the deductibility of fertility treatments under Section 213 ultimately rests on normative judgments about whose reproduction we value and whom we deem to be proper parents.").

[196] Pratt, *supra* note 155, at 1341.

[197] Magdalin v. Comm'r, 96 T.C.M. (CCH) 491, 493 (2008), *aff'd*, 2010-1 U.S. Tax Cas. (CCH) ¶ 50,150 (1st Cir. 2009).

[198] Pratt, *supra* note 155, at 1337–44.

classifications should be subjected to heightened scrutiny, which makes those classification far more vulnerable to constitutional challenge.[199]

Interestingly, the ostensible neutrality of § 213 made it more difficult to challenge. On its face, the statute draws no distinction based on sexual orientation (or gender), as it defines "medical care" in a neutral fashion. The only distinction that § 213 explicitly draws is between those who are married (and who are treated as part of a larger body family whose illnesses, medical issues, and medical expenses can be aggregated) and those who are unmarried (and who are treated as individuals who are generally unable to aggregate their medical expenses with those of other taxpayers).[200] But that neutrality existed only on the surface of the statute and greatly benefited from DOMA's masking effect.[201] By treating all same-sex couples as unmarried, DOMA permitted § 213 to draw a sharp distinction between traditional and nontraditional families—and, more particularly, between married different-sex and married same-sex couples—without actually appearing to do so.[202]

But now that *Windsor* has struck down section three of DOMA, the discriminatory application of § 213 should be transparent and visible rather than hidden and masked. Instead of just drawing a sharp distinction between married and unmarried taxpayers, the current construction of § 213 threatens to draw a sharp distinction between married same-sex and married different-sex couples—based on outdated assumptions regarding who does (and ought to) procreate that the courts have repeatedly rejected. Section 213 will likely validate and provide monetary support for married different-sex couples who wish to procreate when they have tried and failed to do so on their own—including support for obtaining the assistance of a surrogate. At the same time, however, § 213 will likely deny the same level of validation and support to same-sex couples—and, when it comes to surrogacy, seems to especially stigmatize, deter, and perhaps completely impede procreation by gay couples. Because § 213 now aggregates the expenses of all married couples, whether same-sex or different-sex, this distinction is no longer based on marital status (as recognized by the federal government) but turns directly on the sexual orientation of the married couple attempting to procreate.[203]

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[199] *See* Whitewood v. Wolf, No. 1:13–CV–1861, 2014 WL 2058105, at *11 n.10 (M.D. Pa. May 20, 2014) (collecting cases finding that heightened scrutiny applies to sexual-orientation-based classifications).

[200] I.R.C. § 213(a) (Westlaw current through Pub. L. No. 113-93, excluding Pub. L. No. 113-79, approved Apr. 1, 2014).

[201] Pratt, *supra* note 155, at 1338 ("Although the definition of 'medical care' is facially neutral, it draws various status-based distinctions as applied to reproductive/procreative medical care, based on (1) fertility/infertility, (2) marital status, (3) sex, and (4) sexual orientation." (footnote omitted)).

[202] Infanti, *supra* note 145, at 171–73.

[203] To be clear, I am not arguing here that there is a right to tax-subsidized procreation as an incident of the right to marry. Rather, I am arguing that it may be unconstitutional—especially if the courts apply heightened scrutiny—to draw a sharp distinction when conferring tax benefits based on the sexual orientation of a married couple where those benefits are conferred upon the historically favored group and continue to be withheld from the group that has historically been discriminated against. Indeed, it is this framing of the question that leads to the inclusive

The cover that one unconstitutional statute provided to another arguably unconstitutional statute has now been removed. The time is ripe to strip away more of the remaining discrimination in § 213 (though perhaps not all of it quite yet).[204] This task could be accomplished in a quite modest fashion, by simply applying the well-accepted canon of statutory construction that " 'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.' "[205] To avoid constitutional questions and with a nod to the changed legal landscape, the IRS or the courts could choose to interpret the definition of "medical care" in § 213 more broadly than they have done in the past when considering the propriety of deducting procreation-related expenses—just as they chose to strike down section three of DOMA and to implement that decision in as sweeping a fashion as possible.[206] Rather than having the deductibility of medical expenses for procreation turn on the existence of a diagnosis of infertility, the IRS or the courts could simply acknowledge that reproduction is a function of all human bodies—and not just a function of the body family.[207] By acknowledging that reproduction is a function of each individual's body, the IRS or the courts could then acknowledge that the medical steps taken by same-sex couples to procreate—including obtaining the assistance of a surrogate—are "for the purpose of affecting" this "function" of the human body by allowing those who are otherwise incapable of procreating

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interpretation of § 213 proposed in the text below, which, in turn, opens the possibility of broadening access to these tax benefits beyond married couples. *See infra* notes 207–208 and accompanying text.

[204] Naturally, equalizing only the treatment of married same-sex and married different-sex couples under § 213 does nothing to aid those who choose to enter into a marriage alternative (e.g., a civil union or domestic partnership), those who choose not to seek legal recognition of their relationship, or those who choose to remain single. As I have argued elsewhere, a better approach would be to eliminate the married couple as a unit for federal tax purposes and to make the federal tax laws relationship neutral. *See generally* Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605. The argument that I make below that the IRS and/or the courts should recognize that procreation is a function of each individual's body is both in keeping with and furthers that project.

[205] Jones v. United States, 529 U.S. 848, 857 (2000) (quoting United States *ex rel.* Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)).

[206] *See* United States v. Windsor, 133 S. Ct. 2675, 2697 (2013) (Roberts, J., dissenting) (speaking "of the argument the majority has chosen to adopt"); *id.* at 2698 (Scalia, J., dissenting) (speaking of the majority's eagerness and hunger to reach the merits of the case); *id.* at 2705 (accusing the majority of adopting "rootless and shifting … justifications" for its decision); *id.* at 2707 ("Some might conclude that this loaf could have used a while longer in the oven. But that would be wrong; it is already overcooked. The most expert care in preparation cannot redeem a bad recipe. The sum of all the Court's nonspecific hand-waving is that this law is invalid … ."); *see also supra* Parts II and III. After all, a different result in the 2008 presidential election would not only have likely affected how the IRS chose to implement the *Windsor* decision, *see supra* note 141 and accompanying text, but could very likely have also swung the composition of the Supreme Court in a way that would have flipped the composition of the dissent and majority in that case.

[207] *See supra* note 173 and accompanying text.

without assistance to do so.[208] In fact, such an interpretation would be entirely consistent with the IRS's reliance upon this very same canon of construction in Revenue Ruling 2013-17, where the it interpreted the gendered terms "husband" and "wife" in a gender-neutral fashion in order to avoid raising constitutional questions.[209] Such an interpretation would also be in keeping with the promise of the *Windsor* decision and its progeny, which have focused strongly on the impact of discrimination on the procreative and child-rearing capabilities of same-sex couples.

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Following *Windsor*, many seem to think that the battle for "marriage equality" at the federal level is essentially over. After all, the new battlefront seems to be at the state level where LGBT rights organizations are vigorously fighting the remaining state same-sex marriage bans. This sense that the federal tax laws now treat same-sex couples the same as they treat different-sex couples is only compounded by the IRS's outwardly generous approach in applying the *Windsor* decision to the federal tax laws. But we should not be lulled into thinking that there are no remaining vestiges of sexual-orientation-based discrimination left in the federal tax laws post-*Windsor*. DOMA may have been the most obviously heteronormative aspect of the federal tax laws, but it was by no means the only way in which heteronormativity has crept into the Code. In this essay, I have continued my work exploring the gap between the promise of *Windsor* and the reality faced by same-sex couples as they navigate a tax system that was crafted over decades when discrimination on the basis of sexual orientation was not only legal but also so normal and natural that it became part of the unnoticed background of our existence. It will take time to uncover all of the ways in which heteronormativity persists in the federal tax laws post-*Windsor* and to suggest means of redressing this continued sexual-orientation-based discrimination. This symposium on "Compensated Surrogacy After *Windsor*" has provided a nice opportunity to highlight an important way in which the federal tax laws continue to discriminate on the basis of sexual orientation and to suggest a means of redressing that discrimination.

[208] I.R.C. § 213(d)(1)(A) (Westlaw current through Pub. L. No. 113-93, excluding Pub. L. No. 113-79, approved Apr. 1, 2014); *see* Davis, *supra* note 152, at 34–39. Naturally, by focusing on the individual, this interpretation would be ripe for later expansion of the tax benefits for procreation beyond the married couple. *See supra* notes 203 and 204.

[209] *See supra* note 134 and accompanying text.