

Same-Sex Marriages Are Not Created Equal: United States v. Windsor and Its Legal Aftermath in Louisiana

Mallory Chatelain

Repository Citation

Mallory Chatelain, *Same-Sex Marriages Are Not Created Equal: United States v. Windsor and Its Legal Aftermath in Louisiana*, 75 La. L. Rev. (2014)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol75/iss1/13>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kayla.reed@law.lsu.edu.

Same-Sex Marriages Are Not Created Equal: *United States v. Windsor* and Its Legal Aftermath in Louisiana^{a1}

INTRODUCTION

Meet Jonathan. Jonathan tells you that he has been in a relationship with his significant other for seven years, and you cannot resist asking why they have not already gotten married. Jonathan could give you a number of predictable reasons for this postponement: age, school, and finances are just a few. But when Jonathan tells you that he is unsure, his answer surprises you, not because Jonathan is unsure of the reason he is not married, but because he is unsure of whether he is already married. You do not understand. How can Jonathan not know whether he is married? The answer is simple: after their wedding in Iowa—a state that permits same-sex marriage—Jonathan and his significant other, Derek, returned home to Louisiana to find that, although they were considered married under many provisions of federal law, they were not considered married at all under Louisiana law.

In fact, Jonathan Robicheaux and Derek Penton are a same-sex couple who live in New Orleans, and Robicheaux has filed suit against the state of Louisiana for failing to recognize his same-sex marriage.¹

Copyright 2014, by MALLORY CHATELAIN.

a1. The author recognizes that the state of same-sex marriage in the United States and Louisiana, specifically, is subject to constant change. For example, in September 2014, days before the publication of this Comment, a Louisiana state court judge ruled the state's ban on same-sex marriage unconstitutional in the context of juvenile adoption. See Richard Burgess, *Judge Rules State's Ban on Same-Sex Marriage Unconstitutional*, THE ADVOCATE (Sept. 23, 2014), <http://theadvocate.com/home/10341269-125/judge-rules-states-ban-on>, archived at <http://perma.cc/KL3P-FGRT>. The state appealed the trial court's ruling, and the trial court stayed the enforcement of the controversial decision. *Id.* Thus, the decision had "no immediate impact on the status of same-sex marriages in Louisiana." *Id.* As of the publication date of this Comment, Louisiana still maintained express constitutional and legislative bans on same-sex marriage, evidencing the state's historically strong public policy against such marriages. It should be noted that this Comment's argument is premised on the fact that same-sex marriage is unconstitutional in Louisiana.

1. See Amended Complaint at 1–2, *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014) (No. 13-CV-05090), available at http://spiveyesq.com/uploads/Amended_Complaint_2_clean.pdf, archived at <http://perma.cc/P5FX-RVD4>. See also Tania Dall, *Local Same-Sex Couple Sues State To Have Their Marriage Recognized*, WWLTV (Sept. 20, 2013, 10:07 PM), <http://www.wwltv.com/news/Local-Same-Sex-Couple-Sues-Attorney-General-Caldwell-For-Equal-Rights-224662651.html>, archived at <http://perma.cc/UE4S-88X5>; Scott Satchfield, *Same-Sex N.O. Couple Challenging State's Gay Marriage Laws with*

In his complaint, Robicheaux alleges the unconstitutionality of provisions of Louisiana law that both prohibit same-sex marriages in the state and refuse to recognize same-sex marriages validly performed in other states.² These provisions include Louisiana Constitution Article XII, Section 15, defining marriage in Louisiana as between one man and one woman, and Louisiana Civil Code article 3520, designating same-sex marriage as a violation of strong public policy in Louisiana.³ Robicheaux argues that as long as Louisiana refuses to recognize existing same-sex marriages, same-sex couples living in the state will not be afforded numerous federal protections to which they are now entitled as a result of the United States Supreme Court's decision in *United States v. Windsor*, such as the tax and social security benefits that are typically available to spouses.⁴

In its landmark decision, the Supreme Court held that Section 3 of the Defense of Marriage Act (DOMA), which defined marriage for federal law purposes as "between one man and one woman," was unconstitutional.⁵ As a result, federal agencies are no longer

Federal Suit, FOX (Aug. 5, 2013, 9:45 PM), <http://www.fox8live.com/story/22961782/same-sex-no-couple-challenging-states-gay-marriage-laws-with-federal-suit>, archived at <http://perma.cc/75VZ-Q7PJ>.

2. Amended Complaint, *Robicheaux*, *supra* note 1.

3. *Id.* See also LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012).

4. See Amended Complaint, *Robicheaux*, *supra* note 1, at 4-5; *United States v. Windsor*, 133 S. Ct. 2675 (2013); see also Dall, *supra* note 1. In September 2014, a federal district judge held, in *Robicheaux v. Caldwell*, that the provisions of Louisiana law that define marriage as between one man and one woman and prohibit the recognition of same-sex marriage as a violation of the state's strong public policy "do not infringe the guarantees of the Equal Protection and Due Process Clauses of the United States Constitution." Order and Reasons at 32, *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910 (E.D. La. 2014) (No. 13-CV-05090), available at <https://sblog.s3.amazonaws.com/wp-content/uploads/2014/09/Louisiana-marriage-ruling-9-3-14.pdf>, archived at <http://perma.cc/VTV5-A7BY>. The plaintiffs appealed that decision to the United States Court of Appeals for the Fifth Circuit. See James Queally & Michael Muskal, *Bucking Trend, Federal Judge Upholds Gay Marriage Ban in Louisiana*, L.A. TIMES (Sept. 3, 2014, 5:13 PM), <http://www.latimes.com/nation/nationnow/la-na-nn-louisiana-marriage-ban-20140903-story.html>, archived at <http://perma.cc/8FTD-RN4R>; Richard Wolf, *String of Gay Marriage Victories Broken in Louisiana*, USA TODAY (Sept. 3, 2014, 6:16 PM), <http://www.usatoday.com/story/news/nation/2014/09/03/gay-marriage-louisiana/15021785>, archived at <http://perma.cc/3MQ4-Y7X4>.

5. *Windsor*, 133 S. Ct. 2675. See also 1 U.S.C. § 7 (2012); Pete Williams & Erin McClam, *Supreme Court Strikes Down Defense of Marriage Act*, NBC POLITICS (June 26, 2013, 7:04 AM), <http://nbcpolitics.nbcnews.com/news/2013/06/26/19151971-supreme-court-strikes-down-defense-of-marriage-act->

prohibited from recognizing same-sex marriage.⁶ However, the post-*Windsor* guidance that these agencies have issued is anything but clear and consistent, particularly pertaining to tax, Social Security, and military benefits.⁷ Additionally, the fundamental shifts and differences in federal agencies' policies toward same-sex marriage create significant conflicts for states that do not recognize same-sex marriage, such as Louisiana.⁸

The first of these conflicts between post-*Windsor* federal agency policy and Louisiana law stems from Louisiana's requirement that its taxpayers use the same filing status on their state and federal tax returns.⁹ Under the Internal Revenue Service's post-*Windsor* guidance, married same-sex couples are required to file as married under federal law.¹⁰ However, in accordance with the Louisiana

paves-way-for-gay-marriage-to-resume-in-california?lite, archived at <http://perma.cc/FJ3E-X48T>; *SSA's Post-Windsor Guidance May Provide Clues About IRS's Position*, TAX WARRIOR CHRONICLES (Aug. 21, 2013), <http://www.taxwarriors.com/blog/bid/185502/SSA-s-Post-Windsor-Guidance-May-Provide-Clues-About-IRS-s-Position>, archived at <http://perma.cc/VUR6-UJBC>.

6. See TAX WARRIOR CHRONICLES, *supra* note 5; Carol V. Calhoun, *Who is a Spouse? Different Federal Agencies Take Differing Approaches After Windsor*, EMP. BENEFITS LEGAL RES. SITE (Aug. 13, 2013), <http://benefitsattorney.com/who-is-a-spouse-different-federal-agencies-take-differing-approaches-after-windsor/>, archived at <http://perma.cc/MN89-FHHQ>.

7. See Program Operations Manual System GN 00210.001: Windsor Same-Sex Marriage Claims – Introduction, SOCIAL SEC. ADMIN. (Sept. 6, 2013), available at <http://policy.ssa.gov/poms.nsf/lnx/0200210001>, archived at <http://perma.cc/Q33X-P4RN>. See also TAX WARRIOR CHRONICLES, *supra* note 5; Calhoun, *supra* note 6.

8. See Annie Lowrey, *Gay Marriages Get Recognition From the I.R.S.*, N.Y. TIMES (Aug. 29, 2013), <http://www.nytimes.com/2013/08/30/us/politics/irs-to-recognize-all-gay-marriages-regardless-of-state.html>, archived at <http://perma.cc/M63J-9JYJ>; Mark Ballard, *Same-Sex Tax Rules Create Trouble for La.*, THE ADVOCATE (Sept. 5, 2013), <http://theadvocate.com/home/6964271-125/new-same-sex-marriage-tax-rules>, archived at <http://perma.cc/67KE-Q9YZ> [hereinafter Ballard, *Same-Sex Tax Rules Create Trouble*]; Julia O'Donoghue, *Commission to Study Federal Influence on Louisiana's Definition of Marriage*, THE TIMES-PICAYUNE (Sept. 10, 2013), http://www.nola.com/politics/index.ssf/2013/09/commission_to_study_federal_in.html, archived at <http://perma.cc/CC4X-E8SV>.

9. See Louisiana Resident Income Tax Return Form (IT-540) (2012), available at [http://www.revenue.louisiana.gov/forms/taxforms/IT540i\(2012\)F.pdf](http://www.revenue.louisiana.gov/forms/taxforms/IT540i(2012)F.pdf), archived at <http://perma.cc/W7C8-T66C>; see also O'Donoghue, *supra* note 8.

10. Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>; LA. CONST. art. XII, § 15. See also TIM BARFIELD, LA. DEP'T OF REVENUE, REVENUE INFORMATION BULLETIN NO. 13-024 (Sept. 13, 2013), available at <http://www.rev.state.la.us/forms/lawspolicies/RIB%2013-024.pdf>,

Department of Revenue's response to this federal policy change, married same-sex taxpayers cannot file as married on their Louisiana tax returns, because the state does not recognize same-sex marriage.¹¹ A similar conflict arises from the Social Security Administration's requirement that a state's public retirement system provide benefits that are substantially equivalent to those provided by the federal Social Security program in order to qualify as an adequate substitute.¹² Although the Social Security Administration will provide married retirement benefits to some married same-sex couples after *Windsor*, Louisiana's retirement system is precluded from providing such benefits to same-sex couples, because doing so would be a recognition of same-sex marriage in violation of the state's constitution and Civil Code.¹³ The final conflict between federal agency policy and Louisiana law after the *Windsor* decision began with the Department of Defense's directive that all military departments provide married military benefits to married same-sex couples.¹⁴ Because the Louisiana National Guard is prohibited

archived at <http://perma.cc/3SS2-UVZJ>; Susanne Pagano, *Louisiana Won't Accept Same-Sex Marriage on State Income Tax Returns*, DAILY TAX REP. (BNA) (Sept. 20, 2013), http://news.bna.com.ezproxy.law.lsu.edu/dtln/DTLNWB/split_display.adp?fedfid=36647880&vname=dtrnot&jd=a0e1x2k3f0&split=0, archived at <http://perma.cc/QPQ7-T2MU>; *Gay Marriage Not Accepted on Louisiana Tax Form, Revenue Secretary Says*, THE TIMES-PICAYUNE (Sept. 13, 2013, 7:49 PM), http://www.nola.com/politics/index.ssf/2013/09/louisiana_gay_marriage_taxes_i.html, archived at <http://perma.cc/5Y7V-47F7> [hereinafter *Gay Marriage Not Accepted On Louisiana Tax Form*]; Mark Ballard, *La. Department of Revenue: Gay Couples Must File Separately*, THE ADVOCATE (Sept. 16, 2013), <http://theadvocate.com/home/7050818-125/revenue-gay-couples-file-married>, archived at <http://perma.cc/BYD5-J7YL> [hereinafter Ballard, *La. Department of Revenue*].

11. See BARFIELD, *supra* note 10; *Gay Marriage Not Accepted on Louisiana Tax Form*, *supra* note 10; Ballard, *La. Department of Revenue*, *supra* note 10.

12. See LOUISIANA STATE EMPLOYEES' RETIREMENT SYS., *Compact Guide to LASERS 2* (Apr. 2011), http://www.lasersonline.org/uploads/CompactGuideToLASERS_FINAL_web.pdf, archived at <http://perma.cc/94EQ-QHBH>; Slide 16, *Introduction to Section 218: State and Local Coverage*, SOCIAL SEC. ADMIN. (2008) [hereinafter Slide 16, *Introduction to Section 218: State and Local Coverage*], available at www.ssa.gov/section218training/documents/Resource_3.ppt, archived at <http://perma.cc/RQ7Z-GALG?type=pdf>.

13. See LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012); Program Operations Manual System GN 00210.100: Same-Sex Marriage – Benefits for Aged Spouses, SOCIAL SEC. ADMIN. (Sept. 17, 2013), available at <http://policy.ssa.gov/poms.nsf/lnx/0200210100>, archived at <http://perma.cc/8A6Z-58AQ>.

14. See Memorandum from the Secretary of Defense to the Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness (Aug. 13, 2013), available at <http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf>,

from recognizing same-sex marriages within the state, it initially refused to process same-sex couples' requests for married military benefits.¹⁵ However, the Louisiana National Guard has since developed a technical workaround that requires granting temporary federal status to its personnel, creating additional hardships for married same-sex couples living in Louisiana.¹⁶

In order to resolve the post-*Windsor* conflicts between federal agency policy and relevant state law in the areas of tax, Social Security, and military benefits, Louisiana must choose to either recognize same-sex marriage or make several changes to its current laws. Because Louisiana is unlikely to recognize same-sex marriage in the near future due to its strong public policy to the contrary,¹⁷ changes in state law are necessary to remedy the problems currently plaguing Louisiana's same-sex couples.¹⁸ First, Louisiana should repeal its law requiring Louisiana taxpayers to use the same filing status on both their state and federal tax returns.¹⁹ Second, the state should reform its current retirement system to allow married same-sex couples living in Louisiana to receive married benefits by permitting its employees to participate in the federal Social Security program in lieu of the state's own

archived at <http://perma.cc/TPE8-97CD>.

15. See Lauren McGaughy, *Louisiana National Guard Refuses to Accept Pentagon Policy on Same-Sex Benefits*, THE TIMES-PICAYUNE (Sept. 5, 2013, 2:57 AM), http://www.nola.com/politics/index.ssf/2013/09/gay_marriage_guard_louisiana.html, archived at <http://perma.cc/QEL2-H7N3>.

16. See Melinda Deslatte, *National Guard Sites to Take Same-Sex Benefit Form*, THE ADVOCATE (Dec. 6, 2013), <http://theadvocate.com/news/7766686-123/national-guard-sites-to-take>, archived at <http://perma.cc/9D8Q-4VQH>; Josh Hicks, *Louisiana to Process Military Benefits for Same-Sex Spouses Despite State Ban*, WASH. POST (Dec. 4, 2013, 1:27 PM), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/12/04/louisiana-to-process-military-benefits-for-same-sex-spouses-despite-state-ban/>, archived at <http://perma.cc/KZK3-PNQP>; LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012); see also *infra* Part IV.C.

17. See LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012). Additionally, in upholding Louisiana's constitutional and state law bans on same-sex marriage, the United States District Court for the Eastern District of Louisiana became the first federal court to rule against marriage equality since the Supreme Court's decision in *Windsor*. See Order and Reasons, *Robicheaux*, *supra* note 4, at 27 (recognizing "the near-unanimity of the many other federal courts that have spoken to this pressing issue" of the unconstitutionality of state law bans on same-sex marriage); see also Queally & Muskal, *supra* note 4; Wolf, *supra* note 4.

18. See *infra* Part IV.

19. See *infra* Part IV.A.

retirement plan.²⁰ Finally, Louisiana should eliminate its National Guard's employment status requirement that prevents most of its employees from processing the claims of same-sex couples for married military benefits.²¹

Part I of this Comment provides background information on the status of same-sex marriage in the United States as well as in Louisiana and discusses the aftermath of the Supreme Court's decision in *United States v. Windsor*. Part II then outlines how the policies of federal agencies concerning same-sex marriage have changed post-*Windsor*, focusing on the approaches of the Department of Defense, the Internal Revenue Service, and the Social Security Administration. Part III examines the conflicts between these federal agencies' policies and Louisiana's laws and policies regarding same-sex marriage. Finally, Part IV proposes several alternative solutions to remedy the problems currently plaguing the state's same-sex couples.

I. SAME-SEX MARRIAGE IN THE UNITED STATES

The United States is anything but united on the issue of same-sex marriage; in fact, same-sex marriage has been the subject of widespread debate throughout the country for decades.²² Same-sex couples in the United States have been fighting for marriage rights since the 1970s, yet over 30 years passed before these rights were first recognized.²³ In 2004, Massachusetts became the first state to legalize same-sex marriage, and 18 other states and the District of Columbia have done so since 2004.²⁴ Additionally, federal judges

20. See *infra* Part IV.B. As the law currently stands, only Louisiana state employees are required to participate in Louisiana's retirement system, whereas all other employees in Louisiana already have the option to participate in the federal Social Security program.

21. See *infra* Part IV.C.

22. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1423 (1993).

23. *Id.* at 1423–24.

24. These states are: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington. *Same Sex Marriage Fast Facts*, CNN (July 28, 2014, 7:14 PM), <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/index.html>, archived at <http://perma.cc/YMD8-5UBK>. In response to the Supreme Court's decision in *Windsor* and the resulting federal agency policy changes, New Jersey became the fourteenth state to legalize same-sex marriage. *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013) (granting plaintiffs' motion for summary judgment and ruling that New Jersey must allow same-sex couples to marry "in order to obtain equal protection of the law" after the Supreme Court's decision in *United States v. Windsor*). Following the New Jersey state judge's

in Arkansas, Colorado, Florida, Idaho, Indiana, Kentucky, Michigan, Oklahoma, Texas, Utah, Virginia, and Wisconsin have declared these states' bans on same-sex marriage unconstitutional.²⁵

However, the 19 remaining states, including Louisiana, have continued to uphold express bans on same-sex marriage found in their constitutional amendments, state laws, or both.²⁶ For example, Louisiana bans same-sex marriage both in its constitution and in its Civil Code.²⁷ In 2004, the same year that same-sex marriage was first legalized in the United States, Louisiana voters approved a

decision, Hawaii, Illinois, and New Mexico became the next three states to legalize same-sex marriage in the closing months of 2013. *Same Sex Marriage Fast Facts*, *supra*. It should be noted that these numbers are accurate as of the publication date of this Comment.

25. *Same Sex Marriage Fast Facts*, *supra* note 24. See also *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013); *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014). After the judge in *Kitchen* held that Utah's ban on same-sex marriage was unconstitutional, the state of Utah appealed and filed requests for emergency stays of the federal district judge's decision in both the District Court and the Tenth Circuit. Adam Liptak, *Utah Ruling Means No Respite for the Supreme Court on Same-Sex Marriage*, N.Y. TIMES (Dec. 26, 2013), <http://www.nytimes.com/2013/12/27/us/utah-ruling-means-no-respite-for-the-supreme-court-on-same-sex-marriage.html>, archived at <http://perma.cc/9668-3ULM>. When both requests were denied, the state requested a stay pending appeal from Justice Sotomayor, the Circuit Justice for the Tenth Circuit, who referred the matter to the Supreme Court. See *Application to Stay Judgment Pending Appeal, Herbert v. Kitchen*, 134 S. Ct. 893 (2014) (No. 13A687), available at <https://web.archive.org/web/20140401034009/http://attorneygeneral.utah.gov/wp-content/uploads/sites/6/2013/12/Application-for-Stay.pdf>, archived at <http://perma.cc/HTU7-QJHP>. The Supreme Court granted the stay of the Utah federal district judge's decision pending appeal before the Tenth Circuit. See generally *Herbert v. Kitchen*, 134 S. Ct. 893 (2014). Due to the Supreme Court's decision in *Kitchen*, the judge in *Bishop* granted a similar stay pending appeal before the Tenth Circuit. *Bishop*, 962 F. Supp. 2d at 1296.

26. *Same Sex Marriage Fast Facts*, *supra* note 24.

27. Because Louisiana is a mixed law jurisdiction, it is worth briefly noting that although Louisiana is within the majority regarding its common law counterparts' positions on same-sex marriage within the United States, the state is significantly not aligned with a group of European civil law countries in its refusal to recognize same-sex marriages. See *id.*; see also PEW RESEARCH CTR., GAY MARRIAGE AROUND THE WORLD (2014), available at <http://www.pewforum.org/2013/12/19/gay-marriage-around-the-world-2013/>, archived at <http://perma.cc/YQ37-ZL8J>. Among the ten European countries that have legalized same-sex marriage are Spain and France, both of which have had a substantial influence on the formation of Louisiana's laws. *Id.* See also Raphael J. Rabalais, *The Influence of Spanish Laws and Treatises on the Jurisprudence of Louisiana: 1762-1828*, 42 LA. L. REV. 1485 (1982). Additionally, another 13 European countries have legalized some version of same-sex civil unions or other partnerships. GAY MARRIAGE AROUND THE WORLD, *supra*.

constitutional ban on same-sex marriage.²⁸ Article XII, Section 15, of the Louisiana Constitution provides that “[m]arriage in the state of Louisiana shall consist only of the union of one man and one woman.”²⁹ Additionally, Louisiana Civil Code article 3520 expressly prohibits the state from recognizing same-sex marriages, even if validly perfected in another state:

A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.³⁰

Despite constitutional and state-law bans on same-sex marriage, approximately one-third of married same-sex couples live in states that do not legally recognize same-sex marriage.³¹ As of 2010, there were 8,076 same-sex couples living in Louisiana.³² Approximately 21% of these same-sex couples identified themselves as spouses on the 2010 Census and considered themselves to be married, notwithstanding Louisiana’s laws that expressly prohibit same-sex marriage.³³ As a result of this discrepancy, the legal status of married same-sex couples who live in Louisiana, as well as in other states where same-sex marriages are not recognized, remains in flux.

A. The Supreme Court Weighs In: United States v. Windsor

Contributing to the confusion on the state of same-sex marriage in the United States for both federal and state law purposes is the Supreme Court’s landmark decision in *United States v. Windsor*.³⁴ In 1996, President Bill Clinton enacted DOMA, the purpose of which was to “define and protect the institution of marriage” under federal law.³⁵ For almost 20 years prior to the *Windsor* decision, Section 3 of DOMA defined marriage, for federal law purposes, as

28. O’Donoghue, *supra* note 8.

29. LA. CONST. art. XII, § 15.

30. LA. CIV. CODE art. 3520(B) (2012).

31. Lynette Roberson, *I Thee Wed: The Constitutional Implications of Hollingsworth v. Perry and U.S. v. Windsor* (July 19, 2013) (unpublished notes) (on file with the author).

32. GARY J. GATES & ABIGAIL M. COOKE, THE WILLIAMS INST., LOUISIANA CENSUS SNAPSHOT: 2010 (2010), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census2010Snapshot_Louisiana_v2.pdf, archived at <http://perma.cc/9JHS-DWTY>.

33. *Id.*

34. See *United States v. Windsor*, 133 S. Ct. 2675 (2013).

35. Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996).

“only a legal union between one man and one woman as husband and wife.”³⁶ Over 1,000 federal statutes and regulations incorporated this limited definition of marriage, demonstrating DOMA’s vast reach and extent.³⁷

Nevertheless, the authority to define and regulate marriage has historically been left to the states rather than the federal government.³⁸ DOMA deviated from this tradition, forcing same-sex couples to live as married under state law that permitted same-sex marriage but as unmarried under federal law that did not.³⁹ In this way, DOMA deprived married same-sex couples of “the benefits and responsibilities that come with the federal recognition of their marriages,” such as receiving federal marital benefits.⁴⁰ The Supreme Court relied on this deviation in holding that Section 3 of DOMA was unconstitutional as a violation of equal protection, due process, and federalism principles because it was “a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”⁴¹ However, the Supreme Court’s holding does not require states to legalize same-sex marriage or recognize same-sex marriages legally contracted in other states.⁴²

B. The Aftermath of Windsor: States Respond

Although the Supreme Court in its *Windsor* decision did not hold that all states must recognize same-sex marriage, it may have nudged those states that neither banned nor permitted same-sex marriage to legalize such unions.⁴³ For example, the Supreme Court’s decision to invalidate DOMA prompted New Jersey to legalize same-sex marriage under an equal-protection theory. A New Jersey district court judge stated that although “several federal agencies have acted to extend marital benefits to same-sex married couples” post-*Windsor*, not all married same-sex couples are being treated equally due to discrepancies between the federal agencies’ policies and state laws.⁴⁴ Instead, same-sex couples

36. 1 U.S.C. § 7 (2012); TAX WARRIOR CHRONICLES, *supra* note 5.

37. See *Windsor*, 133 S. Ct. at 2692, 2694. Among these federal laws controlled by DOMA were provisions pertaining to tax, Social Security, and military benefits. *Id.* See also 1 U.S.C. § 7 (2012).

38. *Windsor*, 133 S. Ct. at 2689–90.

39. *Id.* at 2694.

40. *Id.* at 2693.

41. *Id.* at 2695. See also Williams & McClam, *supra* note 5.

42. *Windsor*, 133 S. Ct. at 2696.

43. Ballard, *Same-Sex Tax Rules Creates Trouble*, *supra* note 8.

44. *Garden State Equality v. Dow*, 82 A.3d 336 (N.J. Super. Ct. Law Div. 2013).

living in states that do not recognize same-sex marriage are being denied these federal benefits solely because of the states' refusal to recognize their marriages.⁴⁵ Due to their ineligibility for federal benefits, the court addressed how same-sex couples living in these states are harmed "in a wide range of contexts," whereas opposite-sex couples are not, "for no reason other than the label placed upon their relationships by the [s]tate."⁴⁶ As a result of this unequal treatment, the New Jersey federal district court judge ruled that the state must allow same-sex couples to marry "in order to obtain equal protection of the law" in light of the *Windsor* decision, and the state did not appeal.⁴⁷

However, not all states are following New Jersey's lead; instead, some are continuing to uphold their strict laws against same-sex marriage. For example, Louisiana reaffirmed its constitutional and state-law bans on same-sex marriage in administrative rulings following the *Windsor* decision.⁴⁸ These rulings stated that Louisiana officials are "bound to support and uphold the Constitution and laws of the state of Louisiana," making any recognition of same-sex marriage "a clear violation of Louisiana's Constitution."⁴⁹ As a result, same-sex marriages in Louisiana remain invalid and unrecognized under the state's constitution and other laws, despite many post-*Windsor* changes in federal law.⁵⁰

II. POST-*WINDSOR* FEDERAL AGENCY POLICY CHANGES

Prior to being struck down by the Supreme Court in *United States v. Windsor*, Section 3 of DOMA controlled the manner in which federal agencies defined marriage for federal law purposes.⁵¹ As a result of the *Windsor* decision, federal agencies are no longer prohibited from recognizing same-sex marriage.⁵²

45. See, e.g., *id.* at 368–69.

46. *Id.*

47. *Id.*

48. *Gay Marriage Not Accepted on Louisiana Tax Form*, *supra* note 10.

49. *Id.*

50. *Id.* One should note that a Louisiana state court judge held Louisiana's ban on same-sex marriage unconstitutional in September 2014. Nevertheless, as of the publication date of this Comment, the state had decided to appeal that controversial decision directly to the Louisiana Supreme Court, and thus, the trial court stayed the enforcement of the ruling pending the Louisiana Supreme Court's resolution of the case. Therefore, Louisiana's express constitutional and legislative bans on same-sex marriage remained in effect when this Comment was published.

51. *United States v. Windsor*, 133 S. Ct. 2675, 2692, 2694 (2013).

52. Program Operations Manual System GN 00210.001, *supra* note 7.

Instead, these agencies are working with the United States Department of Justice to interpret *Windsor* and issue guidance on how their policies toward same-sex marriage are changing.⁵³ Among these federal agencies, the Department of Defense, the Internal Revenue Service, and the Social Security Administration have issued regulations and instructions on how they will handle same-sex marriage for purposes of their respective programs.⁵⁴ Despite this positive development for same-sex couples, agencies have taken inconsistent positions in their guidance on fundamental same-sex marriage issues, such as which same-sex marriages will be recognized for federal law purposes.⁵⁵ Because the promulgated regulations and instructions rest on an interpretation of the Supreme Court's decision and other federal law, "there is a clear need" for guidance that is "coordinated among the various [federal] agencies."⁵⁶ Nevertheless, whereas the Department of Defense and the Internal Revenue Service are aligned with other federal agencies in their adoption of a state-of-celebration rule, the Social Security Administration instead adopted a state-of-domicile rule.⁵⁷

A. State-of-Celebration Rule

Federal agencies that have adopted a state-of-celebration rule for purposes of determining the validity of same-sex marriages under federal law look to the law of the state in which the same-sex couple was married, regardless of the law of the state in which the same-sex couple is domiciled.⁵⁸ Accordingly, as long as a same-sex couple is legally married in a state that permits same-sex

53. See *id.*; TAX WARRIOR CHRONICLES, *supra* note 5; Memorandum from the Secretary of Defense to the Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness, *supra* note 14.

54. Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>; Program Operations Manual System GN 00210.100, *supra* note 13; Memorandum from the Secretary of Defense to the Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness, *supra* note 14. The Department of Labor, the Department of Homeland Security, and the Department of Veteran Affairs are among other federal agencies that have issued post-*Windsor* guidance; however, their changes in policy are beyond the scope of this Comment. See also TAX WARRIOR CHRONICLES, *supra* note 5; Calhoun, *supra* note 6.

55. See Calhoun, *supra* note 6; see also *infra* Parts II.A–B.

56. Calhoun, *supra* note 6.

57. Program Operations Manual System GN 00210.001, *supra* note 7; TAX WARRIOR CHRONICLES, *supra* note 5.

58. See TAX WARRIOR CHRONICLES, *supra* note 5; Calhoun, *supra* note 6.

marriage, the same-sex couple will be eligible for federal married benefits under a state-of-celebration rule. Both the Department of Defense and the Internal Revenue Service, as well as several other federal agencies, have incorporated state-of-celebration rules into their post-*Windsor* administrative guidance.⁵⁹

1. *The Department of Defense's Memorandum*

In light of the *Windsor* decision, the Secretary of Defense issued a memorandum to all military departments outlining the changes in the Department of Defense's benefits policies for same-sex married couples.⁶⁰ According to this directive, the Department of Defense amended its policy "to treat all married military personnel equally" and to "construe the words 'spouse' and 'marriage' to include same-sex spouses and marriages."⁶¹ Accordingly, the Department of Defense decided to "make the same benefits available to all military spouses, regardless of whether they are in same-sex or opposite-sex marriages."⁶² The directive also incorporated a state-of-celebration rule in its post-*Windsor* policy changes, stating that the Department of Defense "will continue to recognize all marriages that are valid in the place of celebration" of the marriage.⁶³

Additionally, the Department of Defense acknowledged in its directive that same-sex couples who are stationed in states that prohibit same-sex marriage will have to marry in a state that recognizes same-sex marriage in order to become eligible for these newly extended married military benefits.⁶⁴ As a result, the Department of Defense decided to grant non-chargeable leave to military personnel in same-sex relationships in order to "provide accelerated access to the full range of benefits offered to married [same-sex] military couples."⁶⁵ Finally, the Department of Defense

59. See Calhoun, *supra* note 6. Although their specific rulings are outside the scope of this Comment, the Department of Labor, the Department of Defense, and the Department of Homeland Security have all incorporated a state-of-celebration rule in their post-*Windsor* instructions. See TAX WARRIOR CHRONICLES, *supra* note 5.

60. Memorandum from the Secretary of Defense to the Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness, *supra* note 14.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* Military personnel on active duty typically earn a standard period of leave that allows them to be away from their unit for a given period of time. *Leaves and Passes*, Army Reg. 600-8-10, at 3 (Aug. 4, 2011), <http://www.apd>

urged “expeditious implementation” of the policy changes announced in its directive in order to remain true to its commitment of “ensuring that all men and women who serve our country and their families are treated fairly and equally.”⁶⁶

2. *The Internal Revenue Service’s Revenue Ruling*

More than 200 federal provisions and regulations relating to internal revenue laws involve marriage, the definition of which was previously controlled by DOMA.⁶⁷ In response to the Supreme Court striking down DOMA’s definition of marriage, the Internal Revenue Service issued Revenue Ruling 2013-17 to provide guidance on how the agency will handle same-sex marriage for purposes of federal tax returns.⁶⁸ The Revenue Ruling provides that the Internal Revenue Service will recognize all legal same-sex marriages for federal tax purposes.⁶⁹ According to the Internal Revenue Service, the Supreme Court recognized that its *Windsor* decision would have significant implications on the administration of tax in the United States.⁷⁰ The Internal Revenue Service also stated that the Supreme Court’s “Fifth Amendment analysis in *Windsor* raises serious doubts about the constitutionality of [f]ederal laws that confer marriage benefits and burdens only on opposite-sex married couples” as opposed to on same-sex married

.army.mil/pdffiles/r600_8_10.pdf, archived at <http://perma.cc/4UXD-E9WT>. Non-chargeable leave is an absence from duty that is not charged against the standard period of leave granted to all military personnel. *Id.* at 21. If same-sex military personnel have to travel to another state to marry in order to take advantage of these federal military benefits, any leave that they take to do so will be non-chargeable. Memorandum from the Secretary of Defense to the Secretaries of the Military Departments Under Secretary of Defense for Personnel and Readiness, *supra* note 14.

66. *Id.*

67. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 202 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>.

68. See *United States v. Windsor*, 133 S. Ct. 2675 (2013); 1 U.S.C. § 7 (2012); Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>.

69. See Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>; see also Lowrey, *supra* note 8.

70. See Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 202 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>.

couples as well.⁷¹ As a result, the Internal Revenue Service concluded that the definition of marriage for federal tax purposes should include the legal marriages of same-sex couples.⁷²

To determine whether a same-sex couple will be considered married for purposes of their federal tax return, Revenue Ruling 2013-17 adopts a state-of-celebration rule.⁷³ Like the Department of Defense's rule, the Internal Revenue Service's state-of-celebration rule considers same-sex couples legally married as long as the couple was married in a state that permits same-sex marriage.⁷⁴ As a result, a same-sex couple will be considered lawfully married for federal tax purposes "even if they are domiciled in a state that does not recognize the validity of same-sex marriages."⁷⁵ This decision is consistent with the Internal Revenue Service's policy of over 50 years focusing on the state of celebration of the marriage in order to "achieve uniformity, stability, and efficiency" in the administration of federal tax law.⁷⁶ The Internal Revenue Service believes that, in most federal tax contexts, a state-of-domicile rule would "present serious administrative concerns" and "lead to uncertainty" for taxpayers.⁷⁷

As an example, the Internal Revenue Service discussed in its Revenue Ruling the administration of employee benefit plans under a state-of-domicile rule.⁷⁸ Under this regime, employers and plan administrators would be required to inquire into whether each employee is married and, if so, whether that employee's spouse is of the same sex as the employee.⁷⁹ Further, employers and plan administrators would need to continually track the states of domicile of all current and former employees who are married to spouses of the same sex, because if these same-sex couples moved to a state where same-sex marriage is not recognized, they would no longer be eligible for married benefits.⁸⁰ For these reasons, the administration of employee benefit plans under a state-of-domicile rule would become increasingly complex and challenging for

71. *Id.*

72. *See id.* at 203.

73. *See id.*; *see also* Calhoun, *supra* note 6.

74. *See* Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 203 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* *See also* Calhoun, *supra* note 6.

80. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 203 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>. *See also* Calhoun, *supra* note 6.

employers and plan administrators.⁸¹ Accordingly, the Internal Revenue Service chose to avoid these additional problems and complications by implementing a state-of-celebration rule to govern same-sex marriage.⁸² Nevertheless, the Social Security Administration continues to use a state-of-domicile rule in its post-*Windsor* guidance on how same-sex marriage will be handled for federal married benefits purposes.⁸³

B. State-of-Domicile Rule

In contrast to a state-of-celebration rule, a state-of-domicile rule looks to the law of the state in which the same-sex couple is domiciled to determine whether the couple is married for federal law purposes.⁸⁴ In this way, if a same-sex couple is legally married in a state that permits same-sex marriage, but later becomes domiciled in a state that does not recognize same-sex marriage, the same-sex couple will not be eligible for federal married benefits. Although most federal agencies have adopted a state-of-celebration rule, the Social Security Administration has continued to apply a state-of-domicile rule in its post-*Windsor* administrative guidance.⁸⁵

The Social Security Administration provides benefit programs consisting of retirement, survivors, and disability benefits to 90% of employees in the United States.⁸⁶ As a result, the Social Security

81. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 203-04 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>. See also Calhoun, *supra* note 6.

82. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 203-04 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>.

83. This continued use subjects the Social Security Administration to the very complexities and challenges that were contemplated by the Internal Revenue Service in its decision to adopt a state-of-celebration rule. *Id.* See also Calhoun, *supra* note 6. For example, Social Security administrators must now “undertake determinations of marital status far more complex than just determining whether the employee’s current state of residence permits same-sex marriage.” Calhoun, *supra* note 6. Instead, these administrators are tasked with continually tracking the states of domicile of all current and former claimants who are married to spouses of the same sex. See Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 203-04 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>; Calhoun, *supra* note 6.

84. See Calhoun, *supra* note 6.

85. Program Operations Manual System GN 00210.100, *supra* note 13. See also *supra* note 6.

86. *Social Security Handbook* § 108, SOCIAL SEC. ADMIN. (June 16, 2005), http://www.socialsecurity.gov/OP_Home/handbook/handbook.01/handbook-0108.html, archived at <http://perma.cc/4RBA-9946>.

Administration and its employees are responsible for administering an overwhelming majority of employee benefit plans throughout the country. In response to the *Windsor* decision, the Social Security Administration updated its Program Operations Manual System (POMS), which provides its employees with instructions on how to process claims for Social Security benefits.⁸⁷ The post-*Windsor* instructions direct employees of the Social Security Administration to approve only some same-sex couples' claims for married benefits and to hold the processing of all other same-sex couples' claims pending further guidance.⁸⁸ Specifically, the Social Security Administration's instructions, POMS GN 00210.100 (GN 210.100), implement a state-of-domicile rule by providing two requirements for the approval of same-sex spouses' claims for married Social Security benefits.⁸⁹ First, like a state-of-celebration rule, the same-sex couple must have been married in a state that permits same-sex marriage.⁹⁰ Second, the same-sex couple must be domiciled in a state that recognizes same-sex marriage either (i) at the time of the couple's application for Social Security benefits or (ii) while the couple's claim for benefits is pending final determination.⁹¹ In all other situations where these requirements are not met, GN 210.100 instructs employees of the Social Security Administration to place a hold on the processing of the same-sex couple's claim as set out in POMS GN 00210.005 (GN 210.005).⁹²

Also in GN 210.100, the Social Security Administration lists a number of situations in which claims should either be approved or held under the provision's state-of-domicile rule.⁹³ Recall the same-sex couple Jonathan and Derek who were married in Iowa, a state that permits same-sex marriage, before subsequently

87. *Policy Information Site - About POMS*, SOCIAL SEC. ADMIN., <https://secure.ssa.gov/apps10/>, archived at <http://perma.cc/388W-9SF3>.

88. Program Operations Manual System GN 00210.100, *supra* note 13. See also TAX WARRIOR CHRONICLES, *supra* note 5.

89. Program Operations Manual System GN 00210.100, *supra* note 13. See also Calhoun, *supra* note 6.

90. Program Operations Manual System GN 00210.100, *supra* note 13.

91. *Id.*

92. *Id.* See also Program Operations Manual System GN 00210.005: Same-Sex Marriage or Non-Marital Legal Relationship - Holding Certain Claims, Appeals, Post-Eligibility Actions, and Post-Entitlement Actions, SOCIAL SEC. ADMIN. (Aug. 23, 2013), available at <http://policy.ssa.gov/poms.nsf/lnx/0200210005>, archived at <http://perma.cc/R4N8-Z487>. When a Social Security Administration employee determines that a claim should be held pursuant GN 210.005, that employee is instructed to enter a hold code, which delays the processing of the claim for at least 60 days pending further instruction. Program Operations Manual System GN 00210.005, *supra*.

93. Program Operations Manual System GN 00210.100, *supra* note 13. See also TAX WARRIOR CHRONICLES, *supra* note 5.

returning to their home in Louisiana, a state that does not recognize same-sex marriage.⁹⁴ According to the Social Security Administration, if Jonathan and Derek filed a claim for married Social Security benefits after returning to Louisiana, their claim should be held pending further instruction.⁹⁵ However, if Jonathan and Derek were domiciled in Iowa at the time of their marriage and filed a claim for married Social Security benefits before moving to and becoming domiciled in Louisiana, their claim should be approved.⁹⁶ Further, if after their wedding Jonathan and Derek became domiciled in Iowa, or another state that permits same-sex marriage, and later filed a claim for married Social Security benefits, their claim should also be approved.⁹⁷

III. RESULTING CONFLICTS BETWEEN FEDERAL AGENCIES' POLICIES AND LOUISIANA LAW

The drastic changes in federal agencies' policies on same-sex marriage after the Supreme Court's decision in *Windsor* have created significant conflicts for states that do not recognize same-sex marriage, such as Louisiana.⁹⁸ Specifically, the policy changes made by the Internal Revenue Service, the Social Security Administration, and the Department of Defense pose several problems when applied in Louisiana in an attempt to administer federal married tax, Social Security, and military benefits to married same-sex couples living in the state.

A. Filing Status Showdown: The Internal Revenue Service v. Louisiana Law

According to state law, Louisiana taxpayers are required to use the same filing status on their state and federal tax returns.⁹⁹ Louisiana implemented this requirement as a policy decision, concluding that linking the state and federal income tax processes is more convenient for its taxpayers.¹⁰⁰ However, the Internal

94. See generally Amended Complaint, *Robicheaux*, *supra* note 1; see also Dall, *supra* note 1; Satchfield, *supra* note 1.

95. Program Operations Manual System GN 00210.100, *supra* note 13.

96. *Id.*

97. *Id.*

98. See *supra* note 8.

99. See Louisiana Resident Income Tax Return Form (IT-540) (2012), available at [http://www.revenue.louisiana.gov/forms/taxforms/IT540i\(2012\)F.pdf](http://www.revenue.louisiana.gov/forms/taxforms/IT540i(2012)F.pdf), archived at <http://perma.cc/W7C8-T66C>; see also *Gay Marriage Not Accepted on Louisiana Tax Form*, *supra* note 10.

100. See Ballard, *La. Department of Revenue*, *supra* note 10.

Revenue Service's post-*Windsor* guidance, Revenue Ruling 2013-17, poses a significant problem for same-sex couples living in Louisiana, a state that expressly bans any legal recognition of same-sex marriage.¹⁰¹

Revenue Ruling 2013-17 states that all legally married same-sex couples will be recognized for federal tax purposes.¹⁰² As a result, legally married same-sex couples are now prohibited from filing as "single" or as "head of household" on their federal tax returns, since both of these filing statuses denote that a taxpayer is legally unmarried.¹⁰³ Instead, same-sex couples are required under federal law to file either together as "married filing jointly" or individually as "married filing separately" under Revenue Ruling 2013-17.¹⁰⁴ However, according to Louisiana's Secretary of Revenue, Louisiana will not adopt the federal filing status regime for its same-sex taxpayers.¹⁰⁵

In response to Revenue Ruling 2013-17, Louisiana's Secretary of Revenue issued Louisiana Revenue Information Bulletin No. 13-024 (LA RIB 13-024), which provides filing instructions to Louisiana taxpayers who are in same-sex relationships.¹⁰⁶ Under LA RIB 13-024 and "[i]n compliance with the Louisiana Constitution, the Louisiana Department of Revenue shall not recognize same-sex marriages when determining filing status" for Louisiana's state tax returns.¹⁰⁷ Instead, LA RIB 13-024 provides that "[i]f a taxpayer's federal filing status of married . . . is pursuant to IRS Revenue Ruling 2013-17, the taxpayer must file a separate Louisiana return as single."¹⁰⁸ Although same-sex marriages are now being recognized for federal tax purposes under Revenue Ruling 2013-17, these marriages, by definition, are in direct conflict with Louisiana Constitution Article XII, Section 15,

101. See Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>.

102. *Id.* at 204. See also Lowrey, *supra* note 8.

103. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>; Ballard, *La. Department of Revenue*, *supra* note 10.

104. See Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>; see also BARFIELD, *supra* note 10.

105. BARFIELD, *supra* note 10.

106. *Id.*

107. *Id.* See also Pagano, *supra* note 10; *Gay Marriage Not Accepted on Louisiana Tax Form*, *supra* note 10; Ballard, *La. Department of Revenue*, *supra* note 10.

108. See *supra* note 10.

because they are not “union[s] of one man and one woman.”¹⁰⁹ Further, LA RIB 13-024 states that Louisiana officials, including the Secretary of Revenue, are “bound to support and uphold the Constitution and the laws of the state of Louisiana.”¹¹⁰ As such, any recognition of a married filing status for same-sex couples on Louisiana’s state tax return “would be a clear violation of Louisiana’s Constitution” and other state laws.¹¹¹ However, in drafting LA RIB 13-024 to prohibit Louisiana taxpayers from violating the state’s constitution, Louisiana’s Secretary of Revenue forces same-sex couples who live in Louisiana to violate another state law.

If married same-sex taxpayers who live in Louisiana comply with LA RIB 13-024, they are automatically in violation of “the state law that specifically requires taxpayers to use the same status . . . on state tax returns as they do on federal tax returns.”¹¹² Because the Louisiana Department of Revenue has not yet “formally decouple[d] the state and federal forms,” the Secretary of Revenue’s ruling and the state law are in direct conflict.¹¹³ As a result, married same-sex couples living in Louisiana are left in limbo, and this conflict between federal and state law regarding tax return filing status creates significant and undesirable consequences for these taxpayers.¹¹⁴

B. Substantially Equivalent Benefits? The Social Security Administration v. LASERS

Another conflict between post-*Windsor* federal agency policy and Louisiana law is that Louisiana has its own public retirement system for state employees, which must provide benefits that are substantially equivalent to Social Security benefits in order to

109. Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>; LA. CONST. art. XII, § 15. See also *supra* note 10.

110. See *supra* note 10.

111. See *supra* note 10.

112. Ballard, *La. Department of Revenue*, *supra* note 10. See also *Gay Marriage Not Accepted on Louisiana Tax Form*, *supra* note 10.

113. Ballard, *La. Department of Revenue*, *supra* note 10.

114. *Louisiana at Odds with Federal Benefits Rules: Analysis*, THE TIMES-PICAYUNE (Oct. 6, 2013, 7:59 PM), http://www.nola.com/opinions/baton-rouge/index.ssf/2013/10/louisiana_at_odds_with_federal.html, archived at <http://perma.cc/ET2-Y34J> [hereinafter *Louisiana at Odds with Federal Benefits Rules*] (stating that same-sex couples living in Louisiana will have to “work out a way to file differing tax statuses at the federal and state levels” in order to get the federal tax benefits newly extended to them by the Internal Revenue Service).

qualify as an alternative to the federal program.¹¹⁵ However, the Social Security Administration's post-*Windsor* guidance, which allows some married same-sex couples to receive married benefits, raises doubts as to the equivalence of the benefits provided to Louisiana employees, because any recognition of same-sex marriage is against the state's strong public policy.¹¹⁶

On July 2, 1991, Social Security participation became mandatory for those state employees who are not members of a public retirement system.¹¹⁷ As defined by the Social Security Administration, a retirement system is a "pension, annuity, retirement, or similar fund or system" that is maintained by a state government.¹¹⁸ In order for a state to opt out of providing Social Security benefits to its employees, the state must instead implement a retirement program that qualifies as an alternative to Social Security by "provid[ing] retirement benefits substantially equivalent to the retirement portion of Social Security."¹¹⁹ Among the many retirement benefits that Social Security provides are spousal benefits, which therefore must also be provided by a state's retirement system in order for it to serve as a substitute for Social Security.

In 1946, the Louisiana State Legislature established the Louisiana State Employees' Retirement System (LASERS), which is a public retirement system that is mandatory for Louisiana state employees.¹²⁰ As a defined-benefit retirement plan, LASERS provides its members not only with retirement benefits, but also with disability, spousal, and survivor benefits.¹²¹ Because the state government maintains LASERS and, prior to *Windsor*, provided benefits substantially equivalent to the retirement portion of Social Security, LASERS was considered an adequate alternative to the

115. See *Compact Guide to LASERS*, *supra* note 12, at 2; Slide 16, *Introduction to Section 218: State and Local Coverage*, *supra* note 12.

116. Program Operations Manual System GN 00210.100, *supra* note 13; LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012).

117. Program Operations Manual System RS 01505.001: Introduction to Section 218 and State and Local Coverage, SOCIAL SEC. ADMIN. (Nov. 19, 2009), available at <http://policy.ssa.gov/poms.nsf/lnx/0301505001>, archived at <http://perma.cc/3HAZ-RPXF>.

118. Social Security Act, 42 U.S.C. § 218(b)(4) (2012); See Slide 16, *Introduction to Section 218: State and Local Coverage*, *supra* note 12.

119. See Slide 16, *Introduction to Section 218: State and Local Coverage*, *supra* note 12. See also 26 C.F.R. § 31.3121(b)(7)-2 (2000).

120. *Compact Guide to LASERS*, *supra* note 12, at 2; *Social Security Impact, LOUISIANA STATE EMPLOYEES' RETIREMENT SYS.*, <http://www.lasersonline.org/site352.php#1c>, archived at <http://perma.cc/XT22-NY8F> (last visited Apr. 7, 2014).

121. *Social Security Impact*, *supra* note 120.

federal Social Security program.¹²² Additionally, because LASERS previously qualified as a substitute to the federal Social Security program, members of LASERS have not been eligible to receive Social Security benefits.¹²³ However, in light of the Social Security Administration's post-*Windsor* instructions to approve some same-sex couples' claims for married benefits, LASERS may no longer be considered a qualifying substitute to the federal Social Security program, because married same-sex couples are prohibited from receiving married LASERS benefits under Louisiana law.¹²⁴

Under GN 210.100, the federal Social Security program now provides spousal benefits to same-sex couples who were married in a state that permits same-sex marriage and are domiciled in a state that recognizes same-sex marriage, either at the time of application or while the couple's claim is pending final determination.¹²⁵ According to the examples provided by the Social Security Administration, there is at least one situation in which married same-sex couples who live in Louisiana qualify for married Social Security benefits: if a same-sex couple is married and domiciled in a state that permits same-sex marriages at the time that they *file* their claim for married Social Security benefits, the Social Security Administration instructs its employees to approve the couple's claim, even if the couple subsequently becomes domiciled in Louisiana before their claim is approved.¹²⁶

Qualifying for married Social Security benefits in this manner becomes a strong possibility for same-sex couples such as Jonathan Robicheaux and Derek Penton as well as the other 21% of same-sex couples who live in Louisiana and think of themselves as married.¹²⁷ Regardless of whether the Social Security Administration's instructions are further expanded as promised,¹²⁸

122. See *supra* note 119; see also *Social Security Handbook* § 108, *supra* note 86.

123. *Social Security Impact*, *supra* note 120.

124. See *supra* note 119; LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012); see also Program Operations Manual System GN 00210.100, *supra* note 13.

125. Program Operations Manual System GN 00210.100, *supra* note 13.

126. *Id.*

127. See generally Amended Complaint, *Robicheaux*, *supra* note 1; GATES & COOKE, *supra* note 32.

128. The Social Security Administration has promised to "develop and implement additional policy and processing instructions" in the near future to supplement those instructions that have already been issued. *Important Information for Same-Sex Couples*, SOCIAL SEC. ADMIN., <http://www.ssa.gov/same-sex-couples/>, archived at <http://perma.cc/8Q9X-LUY9> (last visited Apr. 7, 2014). See also Ann Carrns, *Same-Sex Couples Are Urged to Apply for Social Security Spousal Benefits*, N.Y. TIMES (Sept. 17, 2013), <http://www.nytimes>

allowing same-sex couples who live in Louisiana to qualify for married benefits presents a problem due to Louisiana's conflicting state law.¹²⁹ Nevertheless, in developing its post-*Windsor* policies and procedures, the Social Security Administration "continues to work closely with the Department of Justice," which has taken additional steps to give legally married same-sex couples "the same privileges, protections, and rights" as opposite-sex couples under federal law, "even in states where same-sex marriages are not recognized."¹³⁰ Although the Social Security Administration's current interpretation of *Windsor* makes a conflict in Louisiana less likely to occur, its probable replacement of a state-of-domicile rule with a state-of-celebration rule will only intensify the discrepancy between federal policy and state law.¹³¹ By instructing its employees to approve the claims of all lawfully married same-sex couples for married Social Security benefits—regardless of whether the same-sex couple is domiciled in a state that does not recognize same-sex marriages—the Social Security Administration would dramatically increase the number of same-sex couples who live in Louisiana and qualify for married Social Security benefits.¹³² However, all Louisiana same-sex couples who are state

.com/2013/09/17/your-money/same-sex-couples-are-urged-to-apply-for-social-security-spousal-benefits.html, archived at <http://perma.cc/LV8N-ADWW>; Program Operations Manual System GN 00210.100, *supra* note 13.

129. See LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012).

130. Eric Holder, Attorney General, U.S. DEP'T OF JUSTICE, *Attorney General Eric Holder Delivers Remarks at the Human Rights Campaign Greater New York Gala* (Feb. 10, 2014), <http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140210.html>, archived at <http://perma.cc/QA5P-4UCW>.

131. See Program Operations Manual System GN 00210.100, *supra* note 13. *But see* TAX WARRIOR CHRONICLES, *supra* note 5 (stating that whether the Social Security Administration will ultimately adopt a broader stance in its post-*Windsor* instructions to include the previously-held claims of some same-sex couples remains unclear, but also noting that the Social Security Administration's position appears to be inconsistent with those of several other federal agencies). Although their specific rulings are outside the scope of this Comment, the Department of Labor, the Department of Defense, and the Department of Homeland Security have all incorporated a state-of-celebration rule into their post-*Windsor* instructions. TAX WARRIOR CHRONICLES, *supra* note 5. See also Calhoun, *supra* note 6. Additionally, the Social Security Administration is encouraging members of same-sex marriages or other legal same-sex relationships to apply for spousal benefits right away, even if these same-sex couples live in a state that prohibits same-sex marriage, in anticipation of additional policy and processing instructions. *Important Information for Same-Sex Couples*, *supra* note 128. See also Carrns, *supra* note 128.

132. Program Operations Manual System GN 00210.100, *supra* note 13; Rev. Rul. 2013-17, 2013-38 I.R.B. 201 (Sept. 16, 2013), *available at*

employees are currently ineligible to receive Social Security benefits due to their mandatory participation in LASERS, under which they cannot receive married benefits because of express prohibitions against the recognition of same-sex marriage in Louisiana.¹³³

Under current Louisiana law, LASERS cannot provide married benefits to same-sex couples because of the state's definition of marriage under the constitution and Civil Code.¹³⁴ In order for Louisiana to opt out of the otherwise mandatory federal Social Security system, the state must implement a retirement system that provides benefits deemed to be substantially equivalent to those provided by the Social Security Administration.¹³⁵ Although LASERS previously qualified as an adequate alternative to the federal program, in light of the Social Security Administration's post-*Windsor* instructions to approve some same-sex couples' claims for married benefits, the benefits provided by LASERS may no longer be considered substantially equivalent.¹³⁶ Whereas same-sex couples living in Louisiana could potentially qualify for married benefits under the federal Social Security program, members of LASERS are not eligible to receive married benefits under any circumstances due to conflicting Louisiana law.¹³⁷ Because the Social Security Administration determines whether a state's retirement plan provides benefits that are substantially equivalent to Social Security benefits, LASERS will likely no longer qualify as a substitute to Social Security.¹³⁸ Further, if the Social Security Administration determines that LASERS is deficient, Louisiana will no longer have a public retirement system, making federal Social Security coverage mandatory for the state's employees.¹³⁹

<http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>.

133. See *Social Security Impact*, *supra* note 120; LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012).

134. LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012).

135. See *supra* note 119.

136. See *supra* note 119; see also Program Operations Manual System GN 00210.100, *supra* note 13.

137. See Program Operations Manual System GN 00210.100, *supra* note 13; LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012).

138. Program Operations Manual System RS 01505.001: *Introduction to Section 218 and State and Local Coverage*, SOCIAL SEC. ADMIN. (Nov. 19, 2009), available at <http://policy.ssa.gov/poms.nsf/lnx/0301505001>, archived at <http://perma.cc/3HAZ-RPXF>.

139. Social Security Act, 42 U.S.C. § 218(b)(4) (2012); Slide 16, *Introduction to Section 218: State and Local Coverage*, *supra* note 12.

C. Taking Aim at the Pentagon: The Department of Defense v. The Louisiana National Guard

A final conflict between federal agency policy and Louisiana law after the *Windsor* decision was initially presented when the Department of Defense directed all military departments to provide married military benefits to same-sex couples and Louisiana's National Guard refused.¹⁴⁰ The Louisiana National Guard has since refined its position to allow some of its employees to process same-sex couples' requests for married military benefits,¹⁴¹ but this workaround still conflicts with Louisiana's strong public policy against recognizing same-sex marriages in the state.¹⁴²

Despite the Department of Defense's memorandum to all military departments directing them to provide married military benefits to married same-sex couples, the Louisiana National Guard initially refused to process requests from same-sex military personnel seeking to take advantage of these benefits.¹⁴³ In support of the Louisiana National Guard's defiance of the post-*Windsor* Pentagon directive, its lieutenant colonel and spokesman pointed to Louisiana's laws that expressly ban the recognition of same-sex marriage in the state.¹⁴⁴ Not only does Louisiana's constitution define marriage as only between a man and a woman, but Louisiana's Civil Code also prevents the recognition of "the assertion of any right or claim" that arises out of a same-sex marriage.¹⁴⁵ Thus, according to the Louisiana National Guard, Louisiana law does not allow "state officials to take part in an act that recognizes same-sex marriage," which purportedly includes processing same-sex couples' requests for federal married military benefits.¹⁴⁶

However, the Louisiana National Guard developed a workaround to the discrepancy between the Pentagon's policy and Louisiana law that now allows married same-sex couples stationed in the state to take advantage of federal married military

140. McGaughy, *supra* note 15.

141. *National Guard Changes Same-Sex Policy*, THE ADVOCATE (Dec. 11, 2013), <http://theadvocate.com/home/7767424-125/national-guard-changes-same-sex-policy>, archived at <http://perma.cc/RRU2-GSNB>. See also Hicks, *supra* note 16.

142. Deslatte, *supra* note 16; Hicks, *supra* note 16; LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012).

143. McGaughy, *supra* note 15.

144. *Id.* See also LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012).

145. LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012).

146. McGaughy, *supra* note 15.

benefits.¹⁴⁷ In response to the Secretary of Defense's speech chastising states whose National Guards were defying the Pentagon and "refusing to treat all members of the military equally," Louisiana's National Guard changed its policy on processing federal married benefit requests from same-sex military personnel.¹⁴⁸ Rather than outrightly refusing to process requests from same-sex couples, the Louisiana National Guard instead decided to grant some of its employees temporary federal status in order to allow them to handle these couples' married military benefit requests without violating state law.¹⁴⁹ Although Louisiana National Guard personnel are state employees due to the Guard's status as part of Louisiana's military department, the state's National Guard "can become federalized under certain situations."¹⁵⁰ According to the Louisiana National Guard's lieutenant colonel and spokesman, this policy puts Louisiana more in line with the Pentagon's directive while ensuring that no National Guard personnel violate the state's constitution as state employees.¹⁵¹

IV. REMEDYING POST-*WINDSOR* CONFLICTS FOR LOUISIANA'S MARRIED SAME-SEX COUPLES

To resolve post-*Windsor* conflicts between federal agency policy and state law in areas such as tax, Social Security, and military benefits, Louisiana must choose to either recognize same-sex marriage or make several changes to its laws. By far the most drastic, but also the most comprehensive, solution to the conflicts between federal agency policy and Louisiana law after *Windsor* is for the Louisiana legislature to legalize same-sex marriage.

After the Supreme Court's decision to invalidate Section 3 of DOMA, "several federal agencies have acted to extend marital benefits to same-sex married couples."¹⁵² However, same-sex couples living in states that do not recognize same-sex marriage, such as Louisiana, are being denied these federal benefits solely

147. See *supra* note 141.

148. *Hagel Says Louisiana National Guard Policy on Gay Couples 'Wrong'*, THE TIMES-PICAYUNE (Nov. 1, 2013, 2:31 PM), http://www.nola.com/politics/index.ssf/2013/11/chuck_hagel_louisiana_gay_righ.html, archived at <http://perma.cc/REH5-TCRL> [hereinafter *Hagel Says Louisiana National Guard Policy on Gay Couples 'Wrong'*]. See also *supra* note 142.

149. Deslatte, *supra* note 16; Hicks, *supra* note 16.

150. Deslatte, *supra* note 16.

151. *Id.* See also *National Guard Changes Same-Sex Policy*, *supra* note 141.

152. *Garden State Equality v. Dow*, 82 A.3d 336, 368 (N.J. Super. Ct. Law Div. 2013).

because of these states' positions on the issue.¹⁵³ Further, same-sex couples living in Louisiana are being harmed "in a wide range of contexts" due to their ineligibility for federal benefits, particularly tax, Social Security, and military benefits.¹⁵⁴ In light of these post-*Windsor* federal protections for same-sex couples, a district court judge in New Jersey held that the state was required to recognize same-sex marriages, prompting New Jersey to become the first state to legalize same-sex marriage since the Supreme Court's decision.¹⁵⁵ Following New Jersey's lead, Hawaii, Illinois, and New Mexico also legalized same-sex marriage,¹⁵⁶ and federal district court judges in Arkansas, Colorado, Florida, Idaho, Indiana, Kentucky, Michigan, Oklahoma, Texas, Utah, Virginia, and Wisconsin held these states' prohibitions against the recognition of same-sex marriage unconstitutional.¹⁵⁷ For these reasons, perhaps Louisiana should effectively eliminate all of the current conflicts between state law and post-*Windsor* federal agency policy by also allowing same-sex couples to marry.¹⁵⁸

Although this may be the most efficient way to handle the conflicts between federal and state policy on same-sex marriage, Louisiana lawmakers are unlikely to reach the same conclusion as New Jersey and New Mexico courts due to fundamental differences in these states' policies and laws. Whereas Louisiana law contains an express constitutional ban of same-sex marriage, New Jersey's and New Mexico's laws neither banned nor permitted these marriages before they became legal.¹⁵⁹ Louisiana Civil Code article 3520 reinforces the state's constitutional ban, stating that recognizing same-sex marriage in Louisiana goes against the strong public policy of the state.¹⁶⁰ However, both

153. *Id.* at 368.

154. *Id.* at 368–69. *See also Hagel Says Louisiana National Guard Policy on Gay Couples 'Wrong'*, *supra* note 148.

155. *See Garden State*, 82 A.3d at 369.

156. *Same Sex Marriage Fast Facts*, *supra* note 24.

157. *See supra* note 25.

158. *See supra* Parts III.A–C; *see also Garden State*, *supra* note 24, at 369.

159. *See* LA. CONST. art. XII, § 15; *Same Sex Marriage Fast Facts*, *supra* note 24. Moreover, as previously mentioned, the federal district judge presiding over the *Robicheaux* case upheld Louisiana's constitutional and state law bans on same-sex marriage in September 2014. Order and Reasons, *Robicheaux*, *supra* note 4, at 32. As a result, the Louisiana federal district court became the first federal court to rule against marriage equality since the Supreme Court's decision in *Windsor*. *See id.* at 27 (recognizing "the near-unanimity of the many other federal courts that have spoken to this pressing issue" of the unconstitutionality of state law bans on same-sex marriage). *See also* Queally & Muskal, *supra* note 4; Wolf, *supra* note 4.

160. LA. CIV. CODE art. 3520 (2012).

Hawaii and Illinois previously had constitutional or state-law bans on recognizing same-sex marriages before they legalized same-sex marriage.¹⁶¹ Nevertheless, Louisiana officials have continued to uphold Louisiana's laws prohibiting the recognition of same-sex marriage within the state despite the numerous federal protections extended to same-sex couples after *Windsor*.¹⁶² Although the solution to legalize same-sex marriage in Louisiana would serve as a complete remedy to conflicting law problems currently plaguing same-sex couples who live in the state, it is unlikely to be implemented by the legislature. As a result, Louisiana lawmakers must instead adopt alternative solutions to the discrepancies between post-*Windsor* federal agency policy and Louisiana state law in areas such as tax, Social Security, and military benefits.¹⁶³

A. Resolving the Filing Status Showdown: Eliminate Louisiana's Mirroring Status Requirement

After announcing that Louisiana would not adopt the Internal Revenue Service's married filing status regime for married same-sex couples living in the state, the Louisiana Department of Revenue offered a solution to the resulting discrepancy between state and federal tax return filing statuses. In accordance with this proposed solution, married same-sex couples living in Louisiana will be required to create a dummy federal tax return for state tax return filing status purposes in order to comply with both Revenue Ruling 2013-17 and LA RIB 13-024.¹⁶⁴ That is, first the same-sex couple must file either as "married filing jointly" or as "married filing separately" on their federal tax returns pursuant to Revenue Ruling 2013-17.¹⁶⁵ Then, the same-sex couple must complete a

161. *Same Sex Marriage Fast Facts*, *supra* note 24.

162. *See supra* note 10; *see also* Order and Reasons, *Robicheaux*, *supra* note 4, at 32 (holding that the provisions of Louisiana law that define marriage as between one man and one woman and prohibit recognition of same-sex marriage as a violation of the state's strong public policy "do not infringe the guarantees of the Equal Protection and Due Process Clauses of the United States Constitution").

163. *See Louisiana at Odds with Federal Benefits Rules*, *supra* note 114 (stating that because this likely will not be the last time that federal regulations are at odds with Louisiana's policies on same-sex marriage, Louisiana judges "will be left sifting through lawsuits to determine where same-sex couples stand in the state").

164. Ballard, *Same-Sex Tax Rules Create Trouble*, *supra* note 8; Ballard, *La. Department of Revenue*, *supra* note 10.

165. Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>; Ballard, *Same-Sex Tax Rules Create Trouble*, *supra* note 8.

second “dummy” federal tax return, this time filing as “single” or as “head of household,” in order to get the necessary information for their Louisiana tax return to comply with LA RIB 13-024.¹⁶⁶

However, this proposed dummy federal tax return solution contradicts Louisiana’s policy against hassling and inconveniencing its taxpayers. When Louisiana chose to mirror the federal tax return form by requiring its taxpayers to use the same filing status on their state and federal returns, the state’s lawmakers did so with the convenience of its taxpayers in mind.¹⁶⁷ For the sake of efficiency, Louisiana officials do not want the state’s tax form to become separated from the federal tax form, as this would create difficulty for all taxpayers.¹⁶⁸ Nevertheless, this policy decision to link the state and federal tax return forms creates an even more significant problem for legally married same-sex taxpayers who live in Louisiana because it requires them to complete an additional federal form. Further, Louisiana’s decision to uphold its laws regarding tax return filing status disregards the interests of same-sex couples and therefore unfairly discriminates against them. Additionally, legally married same-sex taxpayers who follow this proposed dummy federal tax return procedure are still in violation of Louisiana’s law requiring its taxpayers to use the same filing status on their state returns as they did on their federal returns.¹⁶⁹ Although the married same-sex couple’s state tax return filing status would mirror the filing status that they used on their dummy federal tax return, it would not mirror the filing status that they used on their actual federal tax return.

As a result, the Louisiana legislature should instead adopt an alternative solution: repeal the state law that requires Louisiana taxpayers to use the same filing status on both their state and federal tax returns. By eliminating Louisiana’s mirroring filing status requirement, Louisiana lawmakers would allow married same-sex couples to file as married on their federal tax returns but as unmarried on their state tax returns without violating any other

166. See BARFIELD, *supra* note 10; Ballard, *Same-Sex Tax Rules Create Trouble*, *supra* note 8.

167. Ballard, *La. Department of Revenue*, *supra* note 10.

168. If the state and federal forms were decoupled, all Louisiana taxpayers would face “the hassle of calculating different income levels and different tax liabilities based on different rules and different forms” *Id.* Instead, under the current system, Louisiana taxpayers provide information only once on their federal tax forms, which generate the correct numbers to insert in their state tax forms. *Id.*

169. See Louisiana Resident Income Tax Return Form (IT-540) (2012), available at [http://www.revenue.louisiana.gov/forms/taxforms/IT540i\(2012\)F.pdf](http://www.revenue.louisiana.gov/forms/taxforms/IT540i(2012)F.pdf), archived at <http://perma.cc/W7C8-T66C>.

Louisiana laws.¹⁷⁰ Additionally, same-sex couples in Louisiana would be able to comply with both Revenue Ruling 2013-17 and LA RIB 13-024 without the hassle of completing an additional dummy federal tax return, thus upholding Louisiana's policy in favor of taxpayer convenience.¹⁷¹ Although there would no longer be an absolute requirement that Louisiana taxpayers' state filing status mirror their federal filing status, opposite-sex taxpayers could continue to use the information from their federal tax returns to complete their state tax returns by simply using the same filing status on both returns as they always have. In this way, the link between the state and federal income tax processes would remain intact, advancing Louisiana's policy objectives in originally creating the mirroring status requirement without simultaneously hassling married same-sex couples who are attempting to take advantage of newly offered federal married tax benefits while living in Louisiana.¹⁷² For these reasons, the alternative solution to repeal Louisiana's mirroring filing status requirement seems to benefit taxpayers, and therefore advance state policy objectives, more than the proposed solution to create a dummy federal tax return procedure.

B. Providing Substantially Equivalent Benefits: Make LASERS Optional Rather Than Mandatory

One possible solution to the conflict between the Social Security Administration's policy of providing married spousal benefits to some same-sex couples and Louisiana's policy against the recognition of same-sex marriage is for Louisiana lawmakers to amend LASERS to make it optional rather than mandatory for all state employees, therefore avoiding the potential overhaul of Louisiana's public retirement system for failing to provide

170. See Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>; BARFIELD, *supra* note 10; Ballard, *Same-Sex Tax Rules Create Trouble*, *supra* note 8.

171. See Ballard, *La. Department of Revenue*, *supra* note 10. Although this solution would not completely ameliorate the problems plaguing same-sex taxpayers in Louisiana, it would improve them. Louisiana's same-sex taxpayers would still have to use different filing statuses on their federal and state tax returns, but they would no longer have to create a "dummy" federal return for state return purposes. Even though this solution requires a different filing status procedure for same-sex taxpayers, the proposed solution is far less complicated than the current regime.

172. *Id.* See Rev. Rul. 2013-17, 2013-38 I.R.B. 204 (Sept. 16, 2013), available at <http://www.irs.gov/pub/irs-irbs/irb13-38.pdf>, archived at <http://perma.cc/4MLB-MMH4>.

substantially equivalent benefits to the federal Social Security program.¹⁷³ Because LASERS is currently mandatory as a general rule for all Louisiana state employees, its members, including married same-sex couples, are not eligible to receive Social Security benefits.¹⁷⁴ This means that same-sex members of LASERS who would otherwise qualify for married Social Security benefits under the Social Security Administration's post-*Windsor* instructions are not permitted to receive them.¹⁷⁵ However, if the state makes LASERS optional rather than mandatory, married same-sex couples living in Louisiana could opt into the federal system and draw Social Security benefits in lieu of LASERS benefits. In this way, same-sex couples would receive the married benefits to which they are entitled under federal law, and Louisiana would avoid any violation of its constitution or Civil Code.

Federal law, which generally governs determinations of Social Security coverage for state employees, allows Louisiana to implement such a scheme under Section 218 of the Social Security Act.¹⁷⁶ Section 218 permits states to enter voluntary agreements with the Social Security Administration to provide Social Security coverage to state employees.¹⁷⁷ These federal-state agreements are known as Section 218 Agreements, which Louisiana entered into

173. Under current Louisiana law, membership in LASERS is mandatory for all state employees except those who are specifically excluded or provided an option. See LA. REV. STAT. ANN. § 11:411(1) (2012). Among those state employees for whom membership in LASERS is optional are elected and appointed officials, employees who are at least 60 years of age at the time of employment, employees who are at least 55 years of age and "have credit for at least forty quarters in the Social Security system," and employees who are members of another Louisiana public retirement system. LA. REV. STAT. ANN. §§ 11:411(4), (7)(a)–(b) (2012). Examples of public retirement systems other than LASERS include Teachers' Retirement System of Louisiana (TRSL), Louisiana School Employees' Retirement System (LASERS), and Louisiana State Police Retirement System (LSPRS). See LA. REV. STAT. ANN. § 11:4(A)(1) (2012).

174. *Social Security Impact*, *supra* note 120.

175. See Program Operations Manual System GN 00210.100, *supra* note 13; LA. CIV. CODE art. 3520 (2012).

176. 42 U.S.C. § 418 (2012); Program Operations Manual System SL 20001.210: Determinations Regarding Section 218 Agreements, SOCIAL SEC. ADMIN. (Dec. 11, 2003), available at <http://policy.ssa.gov/poms.nsf/lnx/192001210>, archived at <http://perma.cc/EHK7-WZ8C>.

177. 42 U.S.C. § 418 (2012). See also Program Operations Manual System SL 20001.201: Program Overview, SOCIAL SEC. ADMIN. (Dec. 12, 2003), available at <http://policy.ssa.gov/poms.nsf/lnx/1920001201>, archived at <http://perma.cc/56QA-J5EM>; John Neely Kennedy, *Social Security*, LOUISIANA DEP'T OF THE TREASURY, <https://www.treasury.state.la.us/Home%20Pages/SocialSecurity.aspx>, archived at <http://perma.cc/668L-QR JW> (last visited Apr. 7, 2014) [hereinafter Kennedy, *Social Security*].

with the Social Security Administration in 1952.¹⁷⁸ According to Section 218, states can amend their agreements to extend Social Security coverage to any employees to whom the agreements did not previously apply, regardless of whether these employees were previously members of a public retirement system, such as LASERS.¹⁷⁹ Additionally, certain states, including Louisiana, have the option of dividing their retirement systems into two categories.¹⁸⁰ Thus, one of these categories could be composed of LASERS members who desire Social Security coverage under the state's Section 218 Agreement, such as same-sex couples.

If Louisiana adopted the proposed solution to make LASERS optional rather than mandatory for state employees, the retirement system could conduct the process by allowing its members to either remain a member of LASERS or opt into the Social Security program.¹⁸¹ Based on this option, Louisiana could then request that the Social Security Administration amend its existing Section 218 Agreement to include former members of LASERS who instead opted to receive Social Security benefits in accordance with the

178. Kennedy, *Social Security*, *supra* note 177.

179. 42 U.S.C. § 418(a)(1), (c)(4) (2012). "The Commissioner of Social Security shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this title to services performed by individuals as employees of such State." *Id.* § 418(a)(1).

180. *Id.* § 418(d)(6)(C). *See also* John Neely Kennedy, *Referendum Instructions and Forms*, TREASURER OF THE STATE OF LOUISIANA [hereinafter Kennedy, *Referendum Instructions*], available at <https://www.treasury.state.la.us/Home%20Pages/SocialSecurity.aspx>, archived at <http://perma.cc/LHY6-6KSL> (follow "Referendum Instructions-Forms--FULLSS 2014-condensed" hyperlink). "Louisiana law allows a political subdivision of the State of Louisiana the following two methods by which employees who are covered by a retirement system may choose to pay Social Security: 1. Coverage can be on an 'all or none' basis . . . 2. Coverage can be on a divided basis." *Id.*

181. The first step in the Social Security referendum process would be the adoption of a resolution by LASERS to allow its members to engage in a divided vote under the instructions of the Louisiana Treasurer, who is responsible for administering Social Security coverage to state employees in accordance with federal law. Kennedy, *Referendum Instructions*, *supra* note 180; Kennedy, *Social Security*, *supra* note 177. Under these state and federal divided coverage provisions, each member of LASERS would be able to make an individual choice as to whether he or she wishes to be provided federal Social Security coverage or continue receiving benefits under the state's retirement system. *See* 42 U.S.C. § 418(d)(6)(C) (2012); *see also* Kennedy, *Referendum Instructions*, *supra* note 180. Louisiana would then separate those members of LASERS who opted to receive Social Security coverage under the state's Section 218 Agreement into a separate retirement system, which would presumably include married same-sex couples living in the state. *Id.* *See* 42 U.S.C. § 418(d)(6)(C) (2012).

Social Security Act.¹⁸² In this way, Social Security coverage would extend to married same-sex couples who were previously mandatory members of LASERS, allowing these couples to receive the federal married benefits to which they are entitled.

Nevertheless, there are significant practical considerations that make Louisiana's willingness to adopt the proposed solution less likely. By being allowed to choose whether to participate in the federal Social Security program in lieu of LASERS, same-sex couples would be electing to move into a new retirement plan, which LASERS provides as an example of an irrevocable decision.¹⁸³ Yet LASERS operates under "the assumption that irrevocable decisions *cannot* be changed," because if members are allowed to make these irrevocable decisions, "they will generally choose to do so only if it is in their best interest."¹⁸⁴ The decision to draw Social Security benefits in lieu of receiving LASERS benefits would certainly be in the best interest of same-sex couples in Louisiana, in that they would be provided married benefits under the federal Social Security program but not under LASERS.¹⁸⁵ However, a decision that is in the best financial interest of LASERS members "is not in the best financial interest of the retirement system," which "continues to be a major economic driver" for the state of Louisiana by impacting its economy and investing in its companies.¹⁸⁶ As a result, Louisiana has a substantial interest in protecting LASERS by rejecting any proposal that would allow members of LASERS to participate in another benefit plan, such as the federal Social Security program.

For example, if Louisiana were to implement a scheme to make LASERS optional rather than mandatory for all state employees, the state could potentially face significant consolidation concerns. Allowing Louisiana's employees to leave LASERS for the federal Social Security program poses a threat to its viability as an independent retirement system, perhaps prompting lawmakers to consolidate LASERS with other retirement plans in order to create a larger public pension system.¹⁸⁷ However, according to a financial analysis conducted by LASERS, "consolidation . . . is neither cost

182. 42 U.S.C. § 418(a)(1) (2012).

183. *Compact Guide to LASERS*, *supra* note 12, at 17.

184. *Id.* (emphasis in original).

185. See Program Operations Manual System GN 00210.100, *supra* note 13; LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012).

186. *Compact Guide to LASERS*, *supra* note 12, at 5, 17. Because "[o]ver 90% of LASERS retirees live in Louisiana," the retirement system's economic impact amounts to \$782 million. *Id.* Additionally, "LASERS invests over \$230 million in Louisiana companies." *Id.*

187. *Id.* at 6–7.

effective nor beneficial to . . . the State of Louisiana.”¹⁸⁸ In fact, if LASERS assets were merged into a larger fund, the transaction costs associated with this merger “could have an upfront cost” of approximately \$30 million to \$44 million.¹⁸⁹ Further, the investment returns of LASERS to its members “are among the highest in the nation,” such that Louisiana employees are unlikely to receive higher returns under a different retirement plan.¹⁹⁰

Notwithstanding these considerations, another practical implication of amending LASERS to be optional rather than mandatory for all state employees may make implementing this scheme a financially prudent solution for Louisiana. State contributions are among the sources of funding for LASERS benefits, but Louisiana has not always contributed the amount necessary to fund the system.¹⁹¹ As a result of “the many years of insufficient contributions from the [s]tate,” a large initial unfunded accrued liability prompted Louisiana lawmakers to amend its constitution to require a state contribution equal to the full amount “necessary to fund the normal cost of benefits for LASERS members.”¹⁹² In addition to this accruing benefits portion, Louisiana’s contribution to LASERS is also comprised of a debt payment for the state’s unfunded accrued liability, which consists of the initial debt as well as other factors such as investment losses and unfunded benefit enhancements.¹⁹³ Although implementing a scheme that makes LASERS optional would not reduce Louisiana’s initial unfunded accrued liability, it could reduce the state’s long-term unfunded accrued liability by eliminating these other factors in the future. Additionally, Louisiana could potentially eliminate approximately 2% of its overall operating budget by implementing a scheme that does not require state employees to participate in

188. *Id.* at 6.

189. As of January 31, 2011, the total assets of LASERS amounted to \$8.94 billion. *Id.* at 3. According to LASERS, “[t]ransaction costs associated with merging \$9 billion in assets into a larger fund could have an upfront cost conservatively of \$30 million to \$44 million.” *Id.* at 6.

190. *Id.* at 7.

191. *Id.* at 2, 4. Benefits through LASERS were granted to Louisiana employees from the beginning, but they were not always fully funded by the state. *Id.* at 4. This resulted in a large initial unfunded accrued liability, or initial debt, which comprises approximately 70% of the state’s annual contribution. *Id.* The other 30% represents the costs of benefits for LASERS members. *Id.* In the 2010-2011 fiscal year, the state contributed approximately 30% of LASERS’ total revenue; the other two sources of funding for LASERS benefits are investment earnings and employee contributions. *Id.* at 2.

192. *Id.* at 4.

193. *Id.* In the 2010-2011 fiscal year, over 70% Louisiana’s contribution to LASERS was in payment of the state’s debt. *Id.*

LASERS.¹⁹⁴ For these reasons and in light of a far more expansive solution—a complete overhaul of Louisiana’s definition of marriage—eliminating the mandatory component of LASERS to allow all Louisiana employees to receive federal Social Security benefits may be the lesser of two evils for the state.

However, another potential solution combines the positive financial implications of making LASERS entirely optional yet eliminates practical concerns over consolidation with a larger public pension system while continuing to avoid the potential overhaul of Louisiana’s public retirement system.¹⁹⁵ Rather than making LASERS optional for all state employees, the Louisiana legislature should create an exception to the mandatory nature of LASERS for the state’s same-sex couples. By exempting same-sex couples from required participation in LASERS, Louisiana would be allowing same-sex couples to receive married Social Security benefits to which they are entitled under federal law, while still preserving the integrity of its public retirement system and its constitution’s definition of marriage.¹⁹⁶ In this way, retirement benefits available to same-sex couples in Louisiana would be equivalent to those provided by the Social Security Administration under federal law, thus allowing LASERS to continue to operate as the state’s public retirement system.¹⁹⁷ Also, consolidation concerns would not be as great under this regime because, rather than all state employees, only same-sex couples would be making the irrevocable decision to leave LASERS for the federal Social Security program.¹⁹⁸ Still, Louisiana could eliminate a portion of its overall operating budget by making the retirement system optional only for same-sex couples because the state would

194. *Id.* at 5.

195. *See id.* at 4, 6–7.

196. *See supra* note 185. In several circumstances, federal law provides states with the option to include or exclude certain services and individuals from Social Security coverage under Section 218 agreements with the Social Security Administration. *See* 42 U.S.C. § 418(c)(5)–(6) (2012); Kennedy, *Referendum Instructions*, *supra* note 180. Two such examples are agricultural laborers and students. *Id.* § 418(c)(5); Kennedy, *Referendum Instructions*, *supra* note 180. Additionally, Louisiana currently excludes from LASERS “persons who are already contributing members in any other retirement system,” which presumably includes a federal retirement system such as the Social Security Program. *See* LA. REV. STAT. ANN. § 11:411(2) (2012). As a result, the state could exclude married same-sex couples, or married couples in general, from LASERS and amend its Section 218 agreement with the Social Security Administration to include these couples as an additional coverage group to which Social Security benefits will extend. *See* 42 U.S.C. § 418(a)(1) (2012).

197. *See supra* note 115; *see also* Program Operations Manual System GN 00210.100, *supra* note 13.

198. *See Compact Guide to LASERS*, *supra* note 12, at 6–7.

nevertheless be making less of a contribution to LASERS than it currently is while the system is mandatory as a general rule.¹⁹⁹ Additionally, the Louisiana legislature has already created numerous exceptions to the mandatory nature of LASERS for state employees who are members of another Louisiana public retirement system.²⁰⁰ Although married same-sex couples in Louisiana would be members of the federal Social Security program rather than another state retirement system, the effect of the exception would be similar to those that are already present in Louisiana law. Because it incorporates the same financial benefits, eliminates consolidation concerns, and maintains the viability of the state's mandatory public retirement system, the solution to make LASERS optional only for same-sex couples rather than for all state employees is likely the more ideal option for Louisiana to remedy its conflict with the Social Security Administration's current and future post-*Windsor* policy changes.²⁰¹

C. Keeping the Peace: Remove the National Guard's Temporary Federalization Requirement

In response to its blatant defiance of the Department of Defense's directive that all military departments should provide married military benefits to married same-sex couples, the Louisiana National Guard implemented a solution that essentially circumvents the Louisiana laws that are in direct conflict with Pentagon policy.²⁰² The Louisiana National Guard proposed an employment status workaround that acts as "an employment classification tweak," allowing the Louisiana National Guard to technically say that its employees are not violating the state's prohibition on recognizing same-sex marriage because they are being temporarily federalized.²⁰³ As such, when Louisiana National Guard personnel disobey the state's constitutional ban and strong public policy against the recognition of same-sex marriage within Louisiana, they will purportedly be doing so as federal, rather than state, employees.²⁰⁴

199. *Id.* at 5.

200. See LA. REV. STAT. ANN. §§ 11:411(1), 11:411(7)(b) (2012).

201. See *Compact Guide to LASERS*, *supra* note 12, at 4, 6–7.

202. *National Guard Changes Same-Sex Policy*, *supra* note 141. See also Hicks, *supra* note 16.

203. *Hagel Says Louisiana National Guard Policy on Gay Couples 'Wrong'*, *supra* note 148.

204. See LA. CONST. art. XII, § 15; LA. CIV. CODE art. 3520 (2012); see also *supra* note 149.

Although the Louisiana National Guard's change in policy on processing same-sex couples' married benefit requests is progress compared to its initial refusal, the temporary status requirement is unreasonable in light of "the extra hoops National Guard families [will] have to jump through."²⁰⁵ The proposed employment status workaround makes accessing married military benefits more of a hassle for same-sex couples in Louisiana in that only those Louisiana National Guard personnel that have been granted temporary federal status are allowed to process same-sex couples' requests.²⁰⁶ In addition, states with laws similar to Louisiana's constitutional and Civil Code provisions either immediately complied with Pentagon policy, such as Alabama, or later changed their positions to allow all state National Guard personnel to process married military benefit requests from same-sex couples "without fussing with employee status," such as West Virginia.²⁰⁷ For these reasons, the Louisiana National Guard should eliminate its employment status requirement by allowing all of its employees to process married military benefit requests from same-sex couples without receiving temporary federal employment status. In this way, same-sex couples will be able to receive married military benefits without the difficulty of trying to determine which Louisiana National Guard employees have the requisite federal status to process their benefit requests.²⁰⁸

Nevertheless, although the Louisiana National Guard's current method of compliance with Pentagon policy purports not to violate Louisiana's constitutional and state law bans on same-sex marriage, since National Guard personnel can only process same-sex couples' requests under temporary federal status, both the workaround and this proposed solution will put Louisiana National

205. Emma Margolin, *National Guard Ends Holdout on Same-Sex Marriage Benefits*, MSNBC (Dec. 14, 2013, 11:20 AM), <http://www.msnbc.com/news-national/national-guard-ends-holdout-lgbt-benefits>, archived at <http://perma.cc/5K-RFGQ>.

206. See *National Guard Changes Same-Sex Policy*, *supra* note 141; *Hagel Says Louisiana National Guard Policy on Gay Couples 'Wrong'*, *supra* note 148; Hicks, *supra* note 16.

207. Margolin, *supra* note 205; Hicks, *supra* note 16. See also ALA. CODE § 30-1-19 (1998) (defining marriage "as between a man and a woman" and stating that same-sex marriages are invalid in the state of Alabama); W. VA. CODE ANN. § 48-2-603 (2001) (stating that same-sex marriages will not be given effect by the state of West Virginia).

208. See Margolin, *supra* note 205; *National Guard Changes Same-Sex Policy*, *supra* note 141; *Hagel Says Louisiana National Guard Policy on Gay Couples 'Wrong'*, *supra* note 148; Hicks, *supra* note 16.

Guard employees in direct violation of Louisiana's Civil Code.²⁰⁹ Louisiana Civil Code article 3520 provides that "a [same-sex] marriage contracted in another state shall not be recognized in [Louisiana] for any purpose, including the assertion of any right or claim as a result of the purported marriage."²¹⁰ Under the plain meaning of this article, Louisiana National Guard employees, whether under temporary federal status or not, are recognizing same-sex marriages by processing married same-sex couples' claims for married military benefits within the state.²¹¹ In this way, and in order to completely resolve the discrepancy between Louisiana law and the Pentagon's directive to provide married military benefits to all married same-sex couples, the state must reconsider legalizing, or at least legally recognizing, same-sex marriages.

CONCLUSION

Because approximately 33% of same-sex couples in the United States live in states that do not recognize same-sex marriage, shifts in federal agency policy in the aftermath of the Supreme Court's decision in *United States v. Windsor* are causing substantial problems with conflicting state laws.²¹² Married same-sex couples living in states that do not recognize same-sex marriage are being denied access to a number of post-*Windsor* federal protections to which they are entitled, including tax, Social Security, and military benefits.²¹³ As a result, these same-sex couples are being harmed in a wide range of contexts, the most significant of which is unequal treatment under federal law due to conflicting state laws' prohibitions on recognizing same-sex marriages.²¹⁴

For these reasons, the 19 states that do not recognize same-sex marriage, including Louisiana, must change their laws either to recognize these marriages or to resolve the discrepancies between state laws and federal policies on same-sex marriage. Short of

209. See *Louisiana at Odds with Federal Benefits Rules*, *supra* note 114; LA. CONST. art. XII, § 15; LA. CIV. CODE. art. 3520 (2012).

210. LA. CIV. CODE. art. 3520 (2012).

211. *Id.* Same-sex couples' married military benefit requests are assertions of a claim resulting from a same-sex marriage, which is a purpose for which same-sex marriages will not be recognized in Louisiana according to the article. *Id.*

212. Lynette Roberson, *I Thee Wed: The Constitutional Implications of Hollingsworth v. Perry and U.S. v. Windsor* (July 19, 2013) (unpublished notes) (on file with the author).

213. See *Garden State Equality v. Dow*, 82 A.3d 336, 368 (N.J. Super. Ct. Law Div. 2013); see also *supra* note 8.

214. *Garden State*, 82 A.3d at 368.

recognizing same-sex marriage, Louisiana should repeal its law that requires taxpayers to use the same filing status on their state returns as they do on their federal returns, reform its current retirement system to allow married same-sex couples who live in Louisiana to receive married benefits by permitting them to opt out of LASERS and instead receive Social Security benefits, and eliminate its employment status requirement for processing same-sex couples' claims for federal married military benefits.

*Mallory Chatelain**

* J.D./D.C.L., 2015, Louisiana State University, Paul M. Hebert Law Center. I would like to thank Professors Ed Richards and Philip Hackney for the incredible amount of time and effort spent offering comments, suggestions, and improvements throughout the entire writing process. I would also like to thank all of the members of the *Louisiana Law Review*, particularly Minia Bremenstul and McClain Schonekas, for their invaluable guidance over the past year. And of course, to my amazing family, words cannot describe how appreciative I am of your unending love and support. This work is dedicated, in loving memory, to Angelina Theresa Brocato Judice, my beloved grandmother and my inspiration for all things pertaining to "the law."