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# DOMA Disruption: Until April 15th Do We Part

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## Introduction

Nothing is certain in this world except death and taxes. On the other hand, same-sex couples face nothing short of uncertainty in approaches to estate planning and income tax preparation because of the Defense of Marriage Act ("DOMA").[1] What should be an equalizing and universal process for all Americans instead reflects, at its worst, targeted and institutionalized discrimination against gay and lesbian couples.[2] In any case, state revenue departments and all taxpayers are left with a range of policy contradictions, inefficiencies, and irrational inequalities stemming directly from DOMA.

Congress passed the Defense of Marriage Act in 1996 to prohibit the federal government from recognizing same-sex marriage. Section 3 of DOMA operates in sweeping terms:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[3]

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[1] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7,28 U.S.C. § 1738C (2006)).

[2] The discussion predominantly utilizes the term "gay" as inclusive of all same-sex couples for the sake of simplicity. There is no need for a functional distinction between gay men or lesbian women to interpret federal or state tax provisions.

[3] Defense of Marriage Act (DOMA), 1 U.S.C. §7 (2006). Section 2 of DOMA states:

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

28 U.S.C. § 1738C (2006). Section 2 purportedly leaves the matter of interstate same-sex marriage recognition in the hands of states. Some scholars believe the section is superfluous, because the Full Faith and Credit Clause would not require states to recognize marriages originating out of state in the first place. *See* Patricia A. Cain, *Doma and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 483 (2009) . Regardless of constitutionality, section 2 is not relevant to the issues of taxation explored in this paper.

DOMA is both the source and enforcement mechanism of statutory and ministerial prejudice against same-sex couples. As a result discrimination against gay Americans is directly propagated and enforced by the United States Government.

*United States v. Windsor* challenged DOMA in front of the Supreme Court of the United States for the first time in March of 2013.[4] The respondent, Edith Schlain Windsor, challenged DOMA in her capacity as executor of her late wife Thea Clara Spyer's estate. The couple was legally married under the laws of New York State. Following Spyer's death, the estate owed $363,053 in federal estate taxes for the sole reason that the federal government did not recognize the couple's marriage.[5] Our discussion will show Windsor's plight is but one particular instance of a disparity between same-sex and opposite-sex married couples created by DOMA.

This article proceeds in three parts, and its purpose is not to focus on the procedural viability of any one individual claim. Part I focuses on understanding who is procedurally capable of challenging DOMA in the context of tax litigation. Then we will shift our focus in Part II towards the DOMA disruptions that burden the federal and state income tax systems. A fundamental goal of the examination is to understand the manner in which federal and state tax systems interact such that taxpayers and states benefit from conformity, how DOMA disrupts conformity, and the particular disparities resulting from DOMA's disruption. This further accomplished through examination of both particular injuries to same-sex couples or in the context of irrational inequalities created by DOMA. Lastly, Part III seeks to explore the particular cruelties DOMA creates for same-sex partners with respect to taxation of estates and gratuitous transfers. Peppered throughout Parts II and III are recommendations to minimize DOMA's impact where relevant. This framework will garner insight to the complex litigation

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[4] *See Windsor v. United States*, 699 F.3d 169, 176 (2d Cir. 2012), No. 12-307 *argued* (U.S. Mar. 27, 2013).
[5] *Id.*

strategy undertaken by advocates of same-sex marriage and opponents of DOMA by drawing attention to the issues faced by same-sex partners and married opposite-sex couples alike. Discussing the merits or assessing the likelihood of any particular claim successfully challenging DOMA is not the goal.

**Part 1: Taxpayer Standing and DOMA**

Plaintiffs have directly challenged DOMA on multiple legal grounds with varying degrees of success.[6] Notable claims, pertinent to section 3, primarily allege DOMA violates the Equal Protection Clause and the Tenth Amendment.[7] Such claims allege DOMA is unconstitutional "as applied" to facts specific to the particular plaintiff.[8] Many commentators agree that DOMA is either facially unconstitutional or unconstitutional as applied to the entirety of the Internal Revenue Code ("IRC" or "the Code"), but such argument carries little weight in the context of tax litigation.[9] The taxpayer must still have standing to challenge a particular Code provision. For that reason a constitutional attack on DOMA will only proceed when the particular taxpayer is harmed by the particular provision.[10] Accordingly, it is unlikely any court will ever find a taxpayer has standing to challenge the totality of DOMA's interaction with the IRC on the basis of constitutional arguments. Taxpayers only have standing to challenge individually harmful provisions.[11] Thus, in practice a plaintiff is only capable of challenging a

[6] Significant challenges have argued DOMA violates the Equal Protection Clause, the Tenth Amendment, the Due Process Clause of the Fifth Amendment, and the Full Faith and Credit Clause. *See* Marisa Nelson, *The IRS Moves Toward Income Tax Equality for Same-Sex Couples Despite DOMA*, 45 U.S.F. L. REV. 1145, 1156 (2011). Full Faith and Credit Clause claims have been argued least successfully for the reasons discussed *supra* note 3.
[7] *See Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1, 10 (1st Cir. 2012) (affirming DOMA violates the Equal Protection Clause but concluding it does not run afoul of the Tenth Amendment); *see also Windsor*, 699 F.3d 169. (holding section 3 of DOMA violates equal protection).
[8] *See* Cain, *supra* note 3, at 484.
[9] *Id.*
[10] *See, e.g., Johnson v. United States*, 422 F. Supp. 958, 964 (N.D. Ind. 1976), *aff'd sub nom. Barter v. United States*, 550 F.2d 1239 (7th Cir. 1977); *see also* Cain, *supra* note 3, at 518.
[11] *See, e.g., Mapes v. United States*, 576 F.2d 896, (Ct. Cl. 1978).

very specific set of Code provisions due to procedural constraints.[12] Lastly, taxpayer must not voluntarily subject themselves to a "pocketbook injury," i.e. willingly place themselves at a disadvantage, in order to challenge a statute on a constitutional basis, or they will not have standing.[13]

By the same token, an "as applied challenge" to DOMA, from an individual taxpayer, could be inherently crippled. DOMA is a mixed bag of benefits and harms as applied to different partnered gay taxpayers.[14] Tax law in general results in different outcomes and mixed effects when applied to married couples. Previous attempts by opposite-sex married couples to challenge provisions of the Code as discriminatory have failed for that reason.[15] "The courts have ruled consistently that tax law is rational even though it creates benefits for some couples and detriments for others."[16]

An additional hurdle to mounting a litigation offense against DOMA is the (Tax) Anti-Injunction Act ("TAIA"), which is presently codified in the modern Code at section 7421(a).[17] "[N]o suit for the purpose of restraining the assessment of collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom

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[12] *See* Cain, *supra* note 3, at 484.
[13] *Johnson*, 422 F. Supp. at 964.
[14] There are occasions for well-advised same-sex couples to materially benefit under provisions of the Code. Professor Theodore P. Seto discusses, to great extent, how same-sex couples can reduce their overall tax liability in ways that straight married couples cannot. The unintended benefits to gay couples are the consequence of "some 250 special rules applicable to the income taxation of spouses…and other persons related by marriage…" Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1531 (2008). Collectively, these related-party provisions function to provide or deny benefits under the Code. Our discussion stipulates that same-sex couples are denied the primary, or Congressionally intended, benefits of marriage. There are instances when opposite-sex married couples are purposefully denied tax benefits. Accordingly, there are numerous examples of such "unintended" benefits to gay couples. These all stem from DOMA preventing the federal government from recognizing a same-sex couple's marriage. I will point out instances of unintended benefits to gay couples where appropriate, because it furthers the argument that DOMA leads to irrational results under the Code. *See generally*, *id*., at 1548-49.
[15] *See, e.g.*, *Druker v. Commissioner*, 697 F.2d 46 (2d Cir. 1982); *Mapes*, 576 F.2d at 896; *Johnson*, 422 F. Supp. 958.
[16] Cain, *supra* note 3, at 484-85.
[17] I.R.C. § 7421(a) (2006).

such tax was assessed."[18] The TAIA was originally passed in 1867,[19] and operates in conjunction with the Declaratory Judgment Act to create an insurmountable obstacle to declaratory judgments against tax statutes, with few exceptions.[20] For this reason, tax litigation develops only when a real taxpayer presents a real case or controversy. A taxpayer may only seek relief through one of two path limited by statute and administrative procedure. In any event, there must first be an underpayment or an overpayment of taxes owed. If the taxpayer underpays, the IRS will assess a deficiency, and the taxpayer can challenge the IRS in the United States Tax Court without first making payment.[21] Alternatively, if a taxpayer overpays, they can seek a refund from the Service. Following a notice of disallowance from the Service, the taxpayer can sue for the refund in federal district court.[22]

Understanding these procedural limitations of tax litigation is of particular importance in order to structure a challenge to DOMA as applied to the IRC. The facts must confirm the taxpayer's claim for a reduction in taxes owed solely on the basis of marital status.[23] In this light, Edith Windsor contends that, as applied to her, DOMA violates equal protection guarantees of

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[18] *Id.*

[19] *See* Tax Anti-injunction Act, Pub. L. 38-169, 14 Stat. 475 (1867) (codified at I.R.C. § 7421(a) (2006)).

[20] The Declaratory Judgment Act stipulates:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes…, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (2006); *see also* Cain, *supra* note 3, at 507.

[21] *See* I.R.C. § 6231(a) (2006).

[22] *See* I.R.C. § 6532(a) (2006); I.R.C. § 7422(a) (2006). Deciding to bring a lawsuit in Tax Court or district court is a determination made on a case by case basis. Nevertheless, in either context proper taxpayer standing is required. *See* Cain, *supra* note 3, at 507.

[23] Remember, taxpayers are not always individuals. It might be possible for a corporate entity or employer with standing to challenge DOMA on the basis of payroll taxes due; the provision of health benefits to an employee's non-spouse is imputed income. *See generally* I.R.C. § 152 (2006). *But see* Cain, *supra* note 3, at 507 (asserting only same-sex married taxpayers have standing).

the Fifth Amendment.[24] Only a married same-sex couple, or surviving same-sex spouse, has standing to challenge DOMA in the context of federal taxation.[25]

**Part 2: Taxation of Income**

*Taxpayers rely on federal tax rules to complete state income tax returns.*

Many of the burdens imposed by DOMA are the result of discrepancies in the requirements of state revenue systems. Conformity of state tax code definitions and calculation methods to federal analogs benefited both taxpayers and states long before the enactment of DOMA in 1996. Notably, there is no requirement that a state follow the federal code on any level. Nevertheless, harmonization between federal and state taxation authorities provides taxpayers with a clear and ascertainable benefit. For example, conforming definitions of income, expenses, or credits simplify a taxpayer's bookkeeping process and necessarily reduce preparation costs.[26] In many states, a preparer utilizes a completed federal return to complete a state return subject to only a few adjustments.[27]

*States rely on federal tax rules for efficiency and enforcement.*

Although less obvious, states stand to save a great amount of time and money if they conform to the federal code when modeling their revenue system. Federal tax definitions are more likely to be interpreted and tested by court rulings and regulatory guidance. Thus, a state that tacks its own definitions to the Service is indirectly rewarded with vast amounts of federal guidance, which freely enables the state to conduct its own audits for very complex and particularized tax issues. Perhaps more importantly, states experience further cost savings by a

[24] Brief for Respondent at 14-15, *United States v. Windsor*, No. 12-307 (Feb. 26, 2013).
[25] *See Smelt v. Cnty. of Orange*, 447 F.3d 673, 683-684 (9th Cir. 2006). This is one of the rare instances where actual use of the term "marriage" may be crucial. The 9th Circuit found domestic partners, who are afforded equivalent rights equivalent to married couples under California law, do not have standing to challenge DOMA; they lack of an actual "marriage." *Id.*; *see also* Cain, *supra* note 3, at 507.
[26] *See* Carlton Smith & Edward Stein, *Dealing with DOMA: Federal Non-Recognition Complicates State Income Taxation of Same-Sex Relationships*, 24 COLUM. J. GENDER & L. 29, 33 (2012).
[27] *See generally id.*

primary reliance on federal audits. The administrative savings to state revenue departments are easily perceived. The marginal rate of state personal income taxes is typically low. Thus, providing state revenue departments the resources to diligently audit returns filed would offer a comparatively nominal payoff. By comparison, the IRS stands to collect significantly more money, because the federal income tax rate is higher. Moreover, this allows states to piggyback on both the threat and eventual result of a federal audit. The threat functions as the primary enforcement mechanism to encourage taxpayers' accurate reporting. By the same token, states with a conforming tax code recover additional revenue whenever the federal audit reveals an underpayment.[28]

*DOMA's primary injury is the disruption of conformity between state and federal tax rules.*

As outlined above, when states that collect personal income taxes choose to conform to federal tax definitions and filing status, both state revenue departments and taxpayers stand to benefit. At this point it would be beneficial to discuss how DOMA disrupts the equilibrium by throwing a wrench in the definitional system. The practical result of "DOMA requires that couples in state-recognized same-sex relationships file as single or as head of household for federal income tax purposes and not be treated as married for purposes of computing any benefit or limitations in their federal taxable income."[29] Thus, in non-recognition states, the result is very simple but unfair. Partners can each file as single or one could file as head of household, but they lose the potential benefits of joint filing.

The situation is more confusing in states where same-sex marriage is recognized, because DOMA forces nonconformity between state and federal practices. Ultimately, this leads to financial burdens on taxpayers, inefficiency for the state, and uncertainty for both. Recognition

[28] *Id.* at 33.
[29] *Id.*

states treat gay couples as married, and for the purpose of state income taxes same-sex couples can then file a joint return. However, as DOMA precludes these couples from filing a joint federal return, extra preparation time and expense is required.[30]

*The crucial role of conforming state and federal definitions.*

To understand how DOMA frustrates a conforming state and federal tax system we need to know how the process of conformance operates to benefit straight married couples. States that impose personal income taxes require a computation of "taxable income" to determine the amount of tax owed. On the federal level, calculating taxable income starts with gross income, which is then adjusted and reduced by deductions and exemptions.[31] At the state level, the process of computing taxable income often starts by tallying income items based on the federal definition. The instructions to taxpayers in some states explicitly identify line items from the federal return that must be transferred to the state return.[32] Federal and state conformance is even more pronounced for other states. For example, Oregon's personal income tax returns require inputting taxable federal income into the very first line.[33] "The entire taxable income of a resident of [Oregon] is the federal taxable income of the resident as defined in the laws of the United States…"[34]

Additionally, many states give income tax "credits patterned on or computed with respect to the amount of federal credits."[35] The earned income tax credit is a potentially valuable federal

[30] *Id.* at 31.
[31] *See generally* I.R.C. §§62-63 (2006); *see also* Smith, *supra* note 26, at 34.
[32] *See* Smith, *supra* note 26, at 34. For example, in Iowa business income/(loss) is the same amount from the federal schedule. Taxpayers are explicitly instructed to transfer the amount from the federal schedule. This allows "piggybacking on all of the federal allowable business deductions and their limitations…" and simplifies the state return. *Id.* at 34.

[33] *Id.*
[34] OR. REV. STAT. § 316.048 (1999).
[35] Smith, *supra* note 26, at 35. Credits are either refundable or non-refundable. Non-refundable credits can reduce the amount of tax owed down to zero. A refundable credit can reduce tax owed to zero, and the excess credit

anti-poverty credit.[36] States wishing to further the goal of a federal credit often provide a state income tax credit that is calculated as a percentage of the federal credit.[37] We will also explore how DOMA inhibits same-sex married couples from collecting credits in our discussion of preparation burdens.[38] The manner in which taxpayers, or their paid preparers, utilize items defined by the federal tax return to simplify the process and expense incurred in the preparation of a state return should now be clear.

*The simplicity of matched filing status.*

Next, it is prudent to discuss the interaction between federal and state filing status and the context in which the modern categories arose.[39] There are currently four federal rate tables to determine tax on individuals.[40] Congress has adjusted the rates and categories at points throughout the Code's history. For example, Congress created the joint return in 1948, reflecting the public's desire to allow married couples to file a single return.[41] In 1969, Congress adjusted rates to mitigate the income splitting advantage originally possible under joint returns.[42]

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amount is deemed an overpayment. In other words, it can be refunded. *See* I.R.C. §21 (2006), for an example of a non-refundable credit; *see also* I.R.C. §32 (2006), for an example of a refundable credit.

[36] *See generally* I.R.C. § 32 (2006).

[37] *See* Smith, *supra* note 26, at 35. Iowa and New York both grant a percentage of the federal earned income credit. *Id.* at 88.

[38] *See infra* text accompanying note 56.

[39] The term "filing status" distinguishes the applicable rate table under which an individual is taxed.

[40] I.R.C. §§ 1(a) Married individuals filing joint returns and surviving spouses; (b) Head of households; (c) Unmarried individuals; (d) Married individuals filing separately.

[41] *See* Smith, *supra* note 26, at 39. The actual impetus is much more complex, because Congressional action was essentially forced by the United State Supreme Court decision *Poe v. Seaborn*, 282 U.S. 101 (1930). *Seaborn* sanctioned spouses residing in community property states ability to claim half of the community property on separate single income tax returns. *Id.* Thus, married couples in community property states benefited under the progressive rates of the federal tax system, because each spouse had half the income and twice the bracket to fill. Congress responded to pressure from the public in common law property states by creating joint returns, and making it unfavorable for a married couple to file separately under the rate structure. *See* Seto, *supra* note 14, at 1562-63.

[42] *See* Smith, *supra* note 26, at 40. Congress compromised on the rate structure to mitigate the benefits of income splitting, but "marriage penalties" or "marriage bonuses" remain and are fact specific. Accordingly, in cases where a marriage penalty would result (e.g. couples with two high-wage earners), coupled gay taxpayers benefit under the Code, because they must file single returns. A married heterosexual couple may only file as married or married filing separately. *See* Seto, *supra* note 14, at 1564.

These infrequent but significant alterations to filing status and rate structure are worthy of mentioning. "Joint-return filing status…originated as an anti-abuse measure, not as the result of an effort to identify some theoretically proper 'taxable unit.'[43] In my opinion, the changes reflect a consistent historical desire by Congress to not only simplify the filing process but also place no particular filing status in a privileged position. Presently, all states "mimic the federal filing statuses of single, head of household, married filing separately, and married filing jointly – piggybacking on the federal definition of each status."[44]

A matching, or parallel, state and federal fling status is common, because the states utilize the federal definitions of who can file under each status. Parallel status is not typically required or automatic in most instances.[45] A married opposite-sex couple has the choice to file a joint federal return or a married filing separately return, but Congress actively discourages married couples from filing separately through less favorable rates and restrictions on credits.[46] However, some states, like New York and New Jersey, require a married filing separately state return to match that federal return status.[47] The advantages of parallel filing status are also apparent when considering the incidental benefits to states in making piggyback adjustments after the results of federal audits. Without a matched filing status, the figures will no longer match.[48] Ultimately, although the states have complete discretion in designing their revenue

[43] Seto, *supra* note 14, at 1563.
[44] Smith, *supra* note 26, at 40.
[45] *Id.* However, parallel status is the practical effect of using the federal definitions for unmarried individuals. Nevertheless, no state insists on conforming federal and state filing status. *Id.* at 41.
[46] *Id*. at 40. Filing status is of course a fact sensitive decision, and under the right conditions married filing separately provides advantages.
[47] N.Y. TAX LAW § 651(b)(1) (McKinney 2006); N.J. STAT. ANN. § 54A:8-3.1(b) (West 2002); *see also* Smith, *supra* note 26, at 41.
[48] *See* Smith, *supra* note 26, at 41.

collection systems, they logically choose to mimic the federal system for the sake of their own efficiency and cost. For that reason, it behooves each state to encourage matched filing status.[49]

For an opposite-sex couple, the path and results of conformity between federal and state income tax systems should now be clear and decidedly beneficial. Summarily, conformity allows a straight married couple to file one joint federal return. They can then use that return to complete a single joint state return. For a same-sex couple, which is married in a recognition state, section 3 of DOMA turns the entire system on its head.

*DOMA destroys the benefits of a conforming state and federal system by increasing the filing burden on same-sex couples.*

Let us use New York State as representative of the filing framework a same-sex married couple, residing in a recognition state, will follow.[50] New York statutorily recognized the right of same-sex partners to be married effective July 24, 2011. Five days later, the New York Department of Taxation and Finance issued the following guidance:

> Same-sex married couples must file New York personal income tax returns as married, even though their marital status is not recognized for federal tax purposes. This means they must file their New York income tax returns using a married filing status (e.g., married filing jointly, married filing separately), even though they may have used a filing status of single or head of household on their federal returns. In addition, to compute their New York tax, they must recompute their federal income tax (e.g., their federal income, deductions, and credits) as if they were married for federal purposes.[51]

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[49] Imagine the IRS is the "first-mover" in the revenue collection market. The Service controls resources that state revenue departments cannot match and reaches economies of scale in processing returns such that they are a monopoly. However, state revenue departments want their share. Theoretically, estates could create their own revenue collection system from scratch, but they would be foolish to do so. State revenue departments are content to be the second movers and benefit as free-riders under the system pioneered by the Service. Instead of fronting innovation costs to develop a revenue collection system, states sink minimal imitation costs to mirror the federal tax system and reap the revenue collection rewards.

[50] In *Lewis v. Harris*, 908 A.2d 196 (2006), the Supreme Court of New Jersey required state lawmakers to enact a marriage equivalent statutory structure or amend the marriage statute to allow same-sex marriage. New Jersey created civil unions inclusive of the rights accorded to married couples without using the term marriage. *See* N.J. STAT. ANN. § 37:1-28 (West 2007). New Jersey's filing system closely conforms to the federal system, and various aspects encourage matched state and federal filing status. *See generally* N.J. STAT. ANN. § 54A:8-3.1 (West 2012).

[51] N.Y.S. Dep't of Tax. & Finance, Tech. Adv. Memo TSB-M-11(8)1 (July 29, 2011), *available at* http://www.tax.ny.gov/pdf/memos/multitax/m11_8c_8i_7m_1mctmt_1r_12s.pdf.

DOMA similarly disrupts conformance to federal filing in states that allow civil unions, domestic partnerships, and marriage equivalents. For example, New Jersey accords same-sex partners rights equivalent under marriage by way of civil unions.[52] New Jersey's filing system conforms closely to the federal system, and various aspects encourage matched state and federal filing status.[53] Form NJ-1040's instructions advise all residents they generally "must use the same filing status on your New Jersey return as you do for Federal income tax purposes, unless you are a partner in a civil union."[54] Thus, same-sex couples are explicitly segregated from all that is applicable to the general population for the purpose of compliance with DOMA.[55]

Thus in recognition states same-sex couples are either required to compute their federal income tax as if they were married or must do so in practice to facilitate completing the state return. This commonly leads to a gay couple creating a pro-forma or "dummy" federal return.[56] Continuing our example, a married gay couple in New York must prepare, at a minimum, four income tax returns compared to the two required by a married straight couple.[57] Each spouse will separately file a single federal return. They also must then create a dummy joint federal return. The dummy return provides the information required to complete a joint New York State income tax return. The inefficiencies are apparent. Furthermore, the process apparently confusing

[52] See 2006 N.J. Laws 103, § 2 (adding N.J. Stat. Ann. § 37:1-28 (West 2007)).
[53] *See supra* text accompanying note 50.
[54] N.J. Dep't of Treas., Div. of Tax., 2012 Form NJ-1040 (2012), *available at* http://www.state.nj.us/treasury/taxation/pdf/current/lines1-13.pdf.

[55] 2012 NJ-1040 instructions specify that "[p]artners in a civil union recognized under New Jersey law must file their New Jersey income tax returns using the same filing statuses accorded spouses under New Jersey Gross Income Tax Law. Civil union partners may not use the filing status single." *Id.*
[56] *See* Smith, *supra* note 26, at 63. Some state revenue departments, like New York State, explicitly require the federal computation. *Id.* Additionally, in states, like New Jersey, with income tax systems that highly conform to federal terms and definitions, it would be impractical or impossible to complete the state return without a matched filing status federal return available for reference. *Id.* at 72. For instance it would be impossible to calculate the New Jersey earned income tax credit without a matching federal return. *See supra* text accompanying note 37.
[57] Straight and gay couples alike may have to prepare more returns if they are married but filing separately.

enough for most same-sex partners that the New York revenue department attempts clarification by instructing: "Don't submit this *federal as if married* return to the IRS. Use it only to complete your New York return and keep it with your tax documents."[58]

The expense of preparing two additional tax returns per year for the duration of a marriage is quite difficult to assess objectively, because every taxpayer's situation is unique. Understandably, complying with DOMA could easily double preparation costs.[59] It should be emphasized that these are additional preparation fees only. Increased preparation costs are incurred by same-sex married couples above and beyond the amount of income tax owed, which is discussed in the next section.

*DOMA artificially segregates same-sex couples from the normal outcomes of income splitting through joint filing. This results in either superior or inferior tax efficiency, but the results are never equal to similarly situated heterosexual married couples.*

"In a progressive rate environment, splitting a single stream of income into two separately taxable streams is often advantageous."[60] Congress effectively formalized the results of income splitting between spouses after authorizing married couples to file a single joint return.[61] For that reason, a married heterosexual couple will almost always inevitably benefit

[58] *Personal Income Tax Information for Same-Sex Married Couples,* N.Y.S. Dep't of Tax. & Finance, http://www.tax.ny.gov/pit/pit_mea.htm (last modified May 17, 2012), *quoted in* Smith, *supra* note 26, at 63.
[59] The New York Times partnered with a research fellow from the Tax Policy Center in 2009 to attempt such an analysis. At the time they concluded a hypothetical gay couple living in New York State would pay an additional $12,300 in fees over a forty-six year marriage just to prepare their taxes. Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. TIMES, Oct. 3, 2009, http://www.nytimes.com/2009/10/03/your-money/03money.html?_r=0; *see also* Tara Siegel Bernard & Ron Lieber, *How a Column on Expenses for Gay Couples was Reported*, N.Y. TIMES, Oct. 3, 2009, http://documents.nytimes.com/how-a-column-on-expenses-for-gay-couples-was-reported#p=1 [hereinafter *Workbook*]. New York State did not yet allow gay marriage so gay couples still needed to file separate state returns. However, I believe the results are still illustrative, because the net amount of returns prepared is the same. That is to say, a gay couple in New York still prepares four income tax returns, but the dummy federal return is not filed.
[60] Seto, *supra* note 14, at 1560.
[61] Married couples no longer need to contract splitting their income, and couples in common law states are on an equal footing with their community property state counterparts for the purposes of federal income taxation. *See supra* text accompanying note 41 (for a discussion of the historical context).

through a tax savings, or be subject to a tax increase, solely by virtue of their joint filing status.[62] In other words, joint filing will result in either a "marriage bonus" or a "marriage penalty," but the net amount of tax owed is consistently different when compared against two single-filers.[63]

In the context of income splitting, DOMA's prohibition against same-sex joint-filers creates abnormal results.[64] First, DOMA outright denies same-sex couples the opportunity to get a "marriage bonus."[65] Second, DOMA ensures gay couples forever escape the "marriage penalty."[66] The mechanics of the marriage bonus or marriage penalty always require a fact specific analysis for each couple.[67] Nevertheless, the Code's current rate structure indicates two general rules. Income splitting generally functions to benefit couples with a single-earner, and joint filing will produce a marriage bonus.[68] Alternatively, if both spouses have equivalent earnings, joint filing leads to a marriage penalty.[69]

Looking at specific examples makes DOMA's impact with respect to income splitting apparent. Take a hypothetical couple, Allen and Betty, who file jointly. Allen is the sole earner,

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[62] We assume that a married couple will almost always file a jointly, because of the less favorable married-filing-separately rates. *See* Seto, *supra* note 14, at 1562.
[63] *Id.*
[64] Tax outcomes are highly fact sensitive. However, I use the term "abnormal" to indicate the results are in conflict with principles of common sense; similarly situated taxpayers should be subject to the same level of federal taxation.
[65] This statement is only true for common law property states. On the other hand, it is arguably quite false when considering a same-sex couple living in a community property state such as California. I will attempt to point out differences where appropriate as we continue our discussion. As a technical matter, gay couples cannot receive the marriage bonus, as defined *infra* note 68, because they are not "spouses" under DOMA. However, gay couples in community property states that allow gay marriage or equivalents must split their income in half. Therefore, they can benefit from a marriage bonus akin to that originally debated in *Poe v. Seaborn*, 282 U.S. 101 (1930) (as discussed *supra* note 41); *see also* Seto, *supra* note 14, at 1567.
[66] *See* Seto, *supra* note 14, at 1567.
[67] DOMA ensures same-sex couples in community property states are effectively exempt from application of the Congressional "compromises" that originally resulted in joint returns and later mitigated the marriage bonus for joint-filers. *See supra* text accompanying note 42. Thus, a potential community property marriage bonus is even greater than that which heterosexual couples receive today. *See* Seto, *supra* note 14, at 1567.
[68] "Income splitting essentially allows the higher-earning spouse to shift some of his or her earnings to the other spouse. Through this shift, the higher-earning spouse enjoys a lower tax rate." Wendy Richards, *An Analysis of Recent Tax Reforms from A Marital-Bias Perspective: It Is Time to Oust Marriage from the Tax Code*, 2008 WIS. L. REV. 611, 620 (2008).
[69] "The marriage penalty refers to the higher taxes that a working couple faces once they are married relative to what their obligation would be as single taxpayers. Marriage penalties are the highest when both spouses earn equivalent incomes." *Id.* at 625.

and his wife Betty stays at home to care for their son Sam. Allen's income is taxed under the larger joint brackets so Allen pays a lower effective tax rate than he would as a single-filer on account of the marriage bonus.[70] Assume the same facts; however, DOMA requires lesbian couple Alice and Betty to file separate federal income tax returns. All of Alice's income is taxed under the narrower single taxpayer brackets.[71] The same-sex couple receives no marriage bonus.[72]

The flipside of joint filing is potential exposure to the marriage penalty.[73] At this point we have established that the marriage penalty affects couples only if both spouses earn roughly equivalent amounts.[74] Altering our earlier example,[75] assume Allen and Betty both start working and each earn $150,000 in 2013. The have a combined adjusted gross income of $350,000.[76]

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[70] Originally, the tax brackets for married couples were double the income for single taxpayers. As discussed, *supra* note 42, Congress decreased the marriage bonus and created a marriage penalty by narrowing the brackets in 1969. Thus brackets for married taxpayers are still larger, but no longer double, than those of single taxpayers. *See* Richards, *supra* note 68, at 622.

[71] Alice may also qualify as a head of household. The example assumes the couple resides in a common law property state. However, if Alice and Betty live in a community property state, state law splits the income into the single-filer brackets, and they would receive a marriage bonus. Notably, heterosexual couple Allen and Betty must share a narrower joint bracket regardless of whether they live in a community property state. Otherwise they face the unfavorable rates of the married filing separately status. I assume *Seaborn* is still good law, because the Service has indicated so in a private letter ruling and further guidance on their website. *See Seaborn*, 282 U.S. 101; *see also* I.R.S. Priv. Ltr. Rul. 2010-21-048 (May 28, 2010); *see also* Internal Revenue Serv., *Questions and Answers for Registered Domestic Partners and Same-Sex Spouses in Community Property States* (Feb. 20, 2013), http://www.irs.gov/uac/Questions-and-Answers-for-Registered-Domestic-Partners-and-Same-Sex-Spouses-in-Community-Property-States.

[72] Determining a hypothetical straight or same-sex couple's marriage bonus would be merely illustrative, because the dollar figure will be specific to that couple. Be that as it may, a real life example from the New York Times documents DOMA related issues faced by a gay couple in New York. One partner is the primary earner and his husband is a stay-at-home father. The couple could save around $7,000 per year in federal income taxes just by filing jointly and receiving a marriage bonus. *See* Tara Siegel Bernard, *However Justices Rule, Issues Remain*, N.Y. TIMES, Mar. 22, 2013, http://www.nytimes.com/2013/03/23/your-money/a-supreme-court-victory-wont-flatten-same-sex-hurdles.html.

[73] *See supra* text accompanying note 70.

[74] *See supra* note 69.

[75] For the purposes of this example, I do not account for personal exemptions; disregard any effects of their son Sam; assume the pair takes the standard deduction; and give no consideration to applicable credits or the alterative minimum tax; However, these oversimplifications do not undermine the illustrative value, because I calculate our same-sex couple's tax owed in the same manner.

[76] Allen and Betty's taxable income is $338,100. *See* I.R.C. § 63 (2013) (subtracting the married filing jointly standard deduction of $11,900); *see also* Internal Revenue Serv., *Itemizing vs. Standard Deduction: Six Facts to Help You Choose* (Mar. 20, 2013), http://www.irs.gov/uac/Newsroom/Itemizing-vs-Standard-Deduction-Six-Facts-to-Help-You-Choose [hereinafter *Standard Deduction*].

They file a joint tax return and owe $110,416.10 in federal income tax.[77] Our lesbian couple, Alice and Betty, is still prohibited from filing a joint federal tax return by DOMA. As separate single taxpayers, they each have an adjusted gross income of $150,000.[78] However, the pair each owe $41,630 individually; they owe $83,260 in federal income tax as a couple.[79] By escaping the marriage penalty, Alice and Betty pay $27,156.10 *less* than a similarly situated straight couple *every year*.[80] "As the couples' income declines, the income-splitting gay couple's advantage over their heterosexual married counterparts declines as well, disappearing entirely when their taxable income reaches…lower income levels."[81]

Outside of hypotheticals, the marriage penalty seems a much more prevalent phenomenon than the marriage bonus.[82] This is likely a combination of factors as couples increasingly prefer, or require, two incomes, and Congress deliberately attempted to mitigate the marriage bonus under the modern rate structure.[83] The marriage penalty is estimated to affect approximately half of married couples, but the extent of the penalty paid would be difficult to accurately measure.[84]

The New York Times partnered with a senior fellow at the Tax Policy Center to determine the costs of being a gay couple and compared those against a similarly situated

[77] *See* I.R.C. § 1(a) (2013) (to calculate tax imposed on married individuals filing jointly).
[78] Alice and Betty each have a taxable income of $144,050. *See* I.R.C. § 63 (2013) (subtracting the single standard deduction of $5,950); *see also Standard Deduction*, *supra* note 76.
[79] *See* I.R.C. § 1(c) (2013) (to calculate tax imposed on unmarried individuals). Note that the savings could be greater if one spouse manages to qualify as a head of household. *See id.* at § 1(b).
[80] For an example that calculates the marriage penalty without making any of the simplifications of our discussion, s*ee* Seto, *supra* note 14, at 1567. Professor Seto's calculations are based on 2007 rates but lead to the same conclusion. A well-off same-sex couple is sometimes very well served by DOMA's interference with the Code. *Id.*
[81] *Id.* at 1568.
[82] Although there are plenty of real world examples to demonstrate DOMA's impact on the marriage bonus, *see supra* text accompanying note 72, our discussion utilizes calculated figures when discussing the marriage penalty to further emphasize this point.
[83] *See supra* text accompanying note 70.
[84] *See* Cain, *supra* note 3, at 502.

straight couple.[85] After two months and over 900 simulated tax returns, the results exposed particularly profound differences which favor same-sex couples under conditions that result in a marriage penalty for straight married couples.[86] The article contemplated best-case and worst-case outcomes. "In all cases, the heterosexual couples ended up paying more in taxes, sometimes because they had more income and sometimes because of the so-called marriage penalty."[87] Not surprisingly, the marriage bonus benefitted married straight couples with a primary breadwinner. However, the benefit was not enough to offset additional taxes owed on account of greater accumulation in retirement accounts and from collecting a spouse's additional social security and pension income. The single-earner couple represented a worst-case scenario for same-sex couples, but they still paid $15,027 less in federal income tax than the equally situated straight couple over the course of their union for the aforementioned reasons.[88] Under the best-case scenario a gay couple paid $112,146 less than an opposite-sex married couple. 'That is the marriage penalty rearing its ugly head.'[89] The fact is DOMA forces single-filer status on same-sex couples. The surprising, likely unintended, consequence is that for all the burdens DOMA inflicts on gay couples, straight married couples have a quantifiable disadvantage compared to gay couples whenever the marriage penalty comes into play.[90] In my opinion the result is even more perverse given Congressional intent to subject well-off heterosexual couples to the

[85] *See Workbook, supra* note 59, at 3.
[86] This statement is strictly limited to findings implicating the marriage penalty and the results revealed in the article with respect income tax imposed. It should not be minimized that overall the cost of being a gay couple was found to be substantially greater than that of a straight couple under best and worst case conditions over the course of the relationship. *See generally Workbook, supra* note 59.
[87] *See id.* at 23.
[88] *Id.*
[89] *Id.* (statement by senior fellow at the Tax Policy Center).
[90] Remember, the marriage penalty arises only in couples with two roughly equivalent earners. *See supra* text accompanying note 69.

marriage penalty. This windfall to high-income same-sex spouses only serves to emphasize the irrationality of DOMA.[91]

*DOMA undermines the benefits provided to same-sex couples contrary to intent of the employer.*

Employer-provided benefits to a heterosexual employee's spouse or children are not included as taxable income.[92] Section 3 of DOMA bars this exclusion for a gay couple benefiting; because the employee's partner is not a "spouse." Therefore, the employee must include the benefit as taxable income.[93]

Gay employees clearly stand to gain from DOMA's demise since they are currently taxed to a greater extent than straight coworkers if their employer provides healthcare for partners. Perhaps more interesting is the alignment of that interest with employers' goals. Managing employee benefit plans is highly complex and an expensive process for employers. Moreover, employers increasingly want to attract talent regardless of whether those employees are gay. DOMA irks some of the nation's most prominent employers by further cutting into their bottom lines. They "may incur cost and administrative burden [from] 'workarounds.'[94] Even though same-sex marriage is not universally recognized, large employers routinely straddle operations across the country. Thus, if a large employer has workers in a recognition state, they must maintain dual payroll systems to administer various functions of tax withholding and payroll for

[91] The escape hatch DOMA creates from the marriage penalty is but one of numerous abnormal results. For further examples, Professor Seto provides an excellent and very extensive analysis. *See generally* Seto, *supra* note 14. DOMA's prevention of the related-party rules grants same-sex couples a multitude of opportunities with regard to deferring recognition of gain, recognizing or creating artificial losses, and avoiding recognition of discharged debt. *Id.*

[92] *See* I.R.C. § 105 (2013) (amounts paid by the employer for health care are included in gross income unless for benefit of employee, spouse, or dependent or child under twenty-seven).

[93] *Id.*

[94] Brief of 278 Emp'rs and Orgs. Rep. Emp'rs as Amici Curiae Supporting Respondent at 15, *United States v. Windsor*, No. 12-307 (Feb. 27, 2013). Employers attempt to workaround discriminatory effects of DOMA by creating additional benefit structures to compensate their employees. *See id.*

the sole purpose of DOMA compliance.[95] The redundancy and inefficiency results in substantial administrative costs that employers are not pleased with. On top of that, federal discrimination harms morale. In this context, it is wholly unsurprising that over 278 organizations signed on urging the Supreme Court to overturn DOMA.[96]

If Windsor is successful, employer-provided health insurance benefits are an area ripe for redefinition under the Code. So long as DOMA stands, straight employees are entitled to tax-exempt benefits, and gay employees have higher taxable incomes,[97] and employers will continue to create inefficient and costly workaround benefit structures. If DOMA is overturned, the process can be simplified if we allow the employer's policy to determine the benefit. Obviously, many states will continue to be non-recognition states. Therefore, the Service should respect the employer's decision about entitlement to benefits, regardless of sexual orientation. This is a more logical alternative to federally defining marriage, and might even reduce provisions in the Code related to treatment of those benefits.

Furthermore, if an employer determines that a beneficiary is eligible for spousal benefits, tax policy should not impede that employee from receiving the same tax-free benefits available to co-workers. There are three principal reasons. Primarily, handing control over to employers conforms to the free-market foundation and traditions of the United States. Employers should be able to attract the most talented employees without restrictions based upon sexual orientation. DOMA presently inhibits an employer's ability to compensate competitively by providing benefits to all of their workers. Second, "[t]his approach would relieve Congress from trying to

[95] *See id.* at 25.
[96] *See id.* at 36; *see also* Erik Eckholm, *Corporate Call for Change in Gay Marriage Case*, N.Y. TIMES, Feb. 27, 2013, http://www.nytimes.com/2013/02/28/business/companies-ask-justices-to-overturn-gay-marriage-ban.html?ref=business&_r=0.
[97] *See supra* text accompanying note 92.

create a workable definition of 'domestic partner' or 'significant other.'[98] If anything DOMA demonstrates Congress cannot, or should not, be allowed to legislate the definition of marriage, because they have created a powder keg of irrational results, inefficiency, and have previously acted with discriminatory animus. States have traditionally regulated important family law relationships, and abdicating further control over areas of traditional family law and should continue to do so. Lastly, allowing employers to decide whether such benefits are tax-exempt advances provisions already embodied in the IRC encouraging "a broader social and economic policy to provide health insurance to more working Americans and their families."[99] If prominent American want to further those policies by expanding company coverage to same-sex spouses, DOMA should not be allowed to burden their efforts to do so.

## Part 3: Transfer Taxes

*Unification of estate and gift taxes.*

In order to start understanding how DOMA functions to the detriment of same-sex couples with respect to both gift and estate transfers, a basic understanding of the current system is necessary as a preliminary matter. Most importantly, the Tax Reform Act of 1976 unified the rate schedule for lifetime and deathtime transfers.[100] For this reason, the rates impose tax on transfers progressively during life and death on a cumulative basis.[101] However, the unified rate schedule also allows for a unified credit against any tentative tax imposed on both gratuitous and estate transfers.[102] Logically, the credit first functions to offset potential gift tax during the

[98] Cain, *supra* note 3, at 516.
[99] *Id.*
[100] Tax Reform Act, Pub. L. No. 94-455, 90 Stat. 1520 (1976); I have not attempted to provide a complete historical analysis of the fluctuating rate and lifetime credit amounts, because that is far beyond the scope of this paper. I will note various alterations in rates and credit amounts when relevant to our discussion. However, for the purposes of our DOMA limited analysis, assume all hypothetical transfers are made in 2013 or thereafter.
[101] *See* I.R.C. § 2502 (2013); *id.* § 2001.
[102] *See id.* § 2010 (2013); *id.* § 2505; The unified credit is functionally equivalent to an exemption. I will sometimes refer to the unified credit as a lifetime credit or lifetime exemption. The basic exclusion amount is $5 million. This

transferor's lifetime.[103] Upon the transferor's death, any remaining portion can be applied against the estate tax.[104]

Important to consider is that although both the estate and gift tax transfer statutes independently provide a credit, the manner of calculation prevents double dipping. Furthermore, the gift tax must be computed in order to determine the amount of estate tax payable.[105] "In general, the estate tax is determined by applying the unified rate schedule to the aggregate of cumulative lifetime and at death transfers and then subtracting the gift taxes payable on the lifetime transfers."[106] Lastly, note the statutory unified credit is currently $5 million, and the portion of a deceased spouse's unused exclusion is portable to the surviving spouse. Thus married couples can share a $10 million lifetime credit.[107] In that light, we can finally proceed to our analysis of DOMA's implications for same-sex couples.

*Gifts: DOMA imposes tax ramifications on all gratuitous transfers between same-sex couples.*

Keep in mind throughout our discussion that "[w]here property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the

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amount is adjusted, or indexed, to increase with the cost of living. *Id.* § 2010 (2013); *id.* § 2505; *id.* § 1(f)(3). For 2013, the unified credit amount is $5,250,000. I will continue to use the statutory amount, $5 million, for the sake of simplicity. However, if specific calculations are noted, it can be assumed the adjusted amount was utilized for the corresponding year in question. *See* Rev. Proc. 2013-15, 2013-5 I.R.B. 444.

[103] *See* I.R.C. § 2505 (2013).

[104] *See id.* § 2010; *id.*§ 2001(b).

[105] *Id.*

[106] *Internal Revenue § 545*, Corpus Juris Secundum, (Mar. 2013);

> Using more specific statutory terminology, the computation can be stated as a series of steps, the first of which is to ascertain the value of the decedent's gross estate and to compute there from the decedent's taxable estate. The value of the taxable estate is determined by subtracting from the value of the gross estate the authorized exemption and deductions. The next step is to determine the amount of the adjusted taxable gifts made by the decedent, and to add the amount of the taxable estate to the amount of the adjusted taxable gifts; then, a tentative tax must be computed on such sum using the unified rate schedule. The next step is to subtract from such tentative tax the total amount of gift tax which would have been payable on post-1976 gifts made by the decedent if the rates schedules under Code section 2001(c) (as in effect at the time of his death) had been in effect at the time of the gifts. The result obtained is the estate tax imposed. Of course, to compute the net amount of estate tax payable, the amount of the tax imposed must be reduced by the amount of the unified credit and the amount of any other allowable credit.

*Id.*

[107] *See* I.R.C. § 2010(c) (2013).

value of the property exceeded the value of the consideration shall be deemed a gift…"[108] Each person can give any other person a gift of up to $14,000 every year without considering any tax implications.[109] However, once a gratuitous transfer to an individual exceeds the annual exclusion amount there are tax consequences. "Whether any tax is actually due as a result of such gift depends on whether the donor has utilized his or her lifetime $5 million exemption."[110] During a person's life each transfer to an individual in excess of the annual exclusion reduces the "balance" of the donor's lifetime credit exemption. After the exemption is fully depleted, the donor must pay taxes on every gift in excess of the annual exclusion. Presently, the tax rate on those transfers is forty percent.[111]

DOMA places same-sex couples at a distinct disadvantage in some very significant ways. First, let us consider how the gratuitous transfers of a heterosexual married couple are treated under the Code. Any gifts or transfers of present value between a husband and wife qualify for an unlimited marital deduction.[112] Second, a husband and wife can effectively pool their annual exclusion when gifting outside the marriage. That is to say, a married couple can transfer $28,000 annually to any individual without repercussion. Similarly, the lifetime estate and gift tax exemption of a married couple is doubled to $10 million.[113]

DOMA section 3 prohibits federal recognition of gay marriages, and same-sex spouses are not entitled to the marital deduction.[114] Every single gratuitous transfer between partners that

[108] I.R.C. §2512(b) (2013).
[109] *See* I.R.C. § 2503(b) (2013) (the exclusion is $10,000 adjusted for the cost of living). In 2013, the annual exclusion is $14,000. *See id.* § 1(f)(3).
[110] Bernard L. McKay, *When Saying "I Do" Does Not Do It: Estate Planning for Same-Sex Couples*, 21 No. 5 OHIO PROB. L.J. 7, 16 (2011).
[111] *See* I.R.C. § 2001 (2013). For example, assume you already depleted the lifetime exemption but still generously decide to buy your mother a new home. The house is fairly priced at $1,014,000, but the total cost to you will be $1414,000. The gift tax rate is 40% and thus you owe an extra $400,000 in taxes.
[112] *See id.* § 2053.
[113] *See id.* § 2513(a) (gifts are considered as made by one-half each).
[114] *See* Mckay, *supra* note 110, at 16.

exceeds the annual gift exclusion will reduce the donor's lifetime credit or result in tax owed. Recall that our definition of gifts includes all transfers of present value without receipt of full consideration. Since the annual exclusion is per individual, not per gift, most routine transactions germane to any marriage have tax implications for same-sex couples. Consider a married gay couple where one partner pays the mortgage, the car insurance, and the credit card bills. What if the other partner makes a withdrawal from their joint bank account? All these mundane transfers occur in most marriages at one point or another, but only same-sex spouses face federal tax consequences.

Perhaps the Service will never enforce proper gift reporting between same-sex couples, but administrative grace is not comparable to equal treatment. It is correct to say that the vast majority of Americans, gay or straight, will never pay any gift tax now that the lifetime exemption is $5 million.[115] All the same, the federal tax code is not static. In the last twenty years, the unified lifetime exemption was as low as $600,000, and the top rate was fifty-five percent.[116] Under that rate structure, there is comparatively little room for lifetime transfers between same-sex spouses and passing an estate to the surviving same-sex spouse. The broad range in exemption limits and top rates demonstrate that gay couples, married or partnered, should not presume to escape taxation in the future based solely on the current unified credit level. For that reason, allowing same-sex spouses access to the unlimited marital deduction is imperative in order to approach federal tax parity with opposite-sex couples.

On top of the limitations on transfers between same-sex spouses, DOMA prevents a gay couple from pooling their annual gift exclusion. Thus, joint gifts from same-sex partners to other individuals require the partners to attribute or apportion the amount of gift received from each

[115] *See* I.R.C. § 2010 (2013).
[116] *See* Julie Garber, *Exemption From Federal Estate Taxes: 1997-2013*, (2013), http://wills.about.com/od/understandingestatetaxes/a/estatetaxchart.htm (showing a historical rate table).

partner separately.[117] Disallowing same-sex couples to pool their annual exclusion directly financially burdensome and will always result in a greater tax consequence relative to a similarly situated married straight couple. Moreover, attempting to minimize the tax discrepancy leads to further incidental expenses, the process is inefficient, and results in an increased filing burden for same-sex couples.[118]

*Estates: DOMA results in estate tax consequences for all same-sex couples following the death of a partner.*

The same federal unified credit and transfer tax exemption is utilized to determine what, if any, estate tax is owed. Again, the current exemption is $5 million.[119] "This exemption amount determines the amount of assets that can pass free of federal estate tax at one's death (if not used during life)."[120] The marital deduction once again functions as the vital component to shelter a surviving spouse from paying any federal estate tax.[121] Accordingly, DOMA's preclusion of federal recognition for same-sex spouses can impose a severe financial burden for the surviving partner.[122] The result is particularly cruel given that such transfers only occur following a

[117] *See* I.R.C. 2513(a) (2013). At first glance this appears an easily sidestepped consequence, but remember gifts are not always monetary. It is not so easy to spilt some forms of property, as we later determine. *See infra* note 118.
[118] Consider this admittedly tedious hypothetical to illustrate those burdens. A lesbian couple, Alice and Betty, want to gift the family's $30,000 car to their son Sam before he leaves for college. With no tax planning, the partner already holding title, Alice, could complete the gift and be taxed on $16,000; the amount in excess of the annual gift exclusion. However, the taxable amount could be minimized to $3,000 with some careful planning. This would require Alice, as titleholder, to "gift" half the vehicle to Betty first by adding her to the title. Alice needs to file a gift tax return and is taxed on $1,000 of the $15,000 "gift" to Betty; half the vehicle value still exceeds the annual exclusion. Next, they jointly pass the car to Sam. Both Alice and Betty file separate gift tax returns since they cannot file jointly. They are each taxed on $1,000; the excess amount attributed to their respective halves. Following that exhaustive example, compare the process with straight married couple; Allen and Betty. Allen holds title, and he transfers it to Sam. Allen owes gift tax on $2,000 since he and Betty's combined annual exclusion is $28,000. They file one gift tax return. In both cases, the taxable amount reduces the lifetime credit before requiring a payment. *See id.* 2503(b); *see also* Form 709 (2012), *available at* http://www.irs.gov/pub/irs-pdf/f709.pdf; *see also supra* text accompanying note 106.
[119] *See supra* text accompanying note 102.
[120] Mckay, *supra* note 110, at 16.
[121] *See id.* at 16. Technically, it is the decedent's estate that bears primary responsibility for taxes owed. In this sense the surviving spouse's inheritance is indirectly reduced. However, where the estate is insufficiently funded to pay taxes owed, transferees are responsible for payment. *See* I.R.C. § 6901 (2013); *see also* 31 U.S.C. 3713(b).
[122] *See* Mckay, *supra* note 110, at 16.

partner's death.[123] Moreover, the potential tax liability could be quite large since the top rate is forty-percent.[124]

Married gay couples face an additional pitfall whenever they own property as joint tenants with a right of survivorship. The entire value of property jointly owned by unmarried persons is generally included in the gross estate of the first owner to die. This amount can only be reduced by the amount of consideration the survivor proves she contributed to acquire the property.[125] Joint owners who are married stand in a materially privileged position, because only one-half the value of joint property is included in the decedent's gross estate. The rule stands regardless of which spouse provided consideration.[126]

A heterosexual married couple can utilize the marital deduction, paired with property held as joint tenants with rights of survivorship, to pass the half interest included in the decedent's gross estate to the surviving spouse without any estate tax consequence.[127] Primarily, DOMA refuses to give the unlimited marital deduction from same-sex couples. Second, if partners do attempt to mitigate the amount of property included in the first decedent's gross estate, they must document the amount of consideration each partner independently contributed.[128] Otherwise, the entire value is included and potentially taxable.

If DOMA is not overturned, I believe the current iteration and application of the marital deduction under estate and gift tax rules should be reconsidered. The deduction was initially

[123] In this context, the Supreme Court will hear a challenge to DOMA from Edith Windsor. In her supporting brief, Ms. Windsor recounts a life of discrimination on the basis of her sexual orientation, which culminated in an obligation to pay an estate tax of $363,053 after her wife died. *See generally* Brief for Respondent, *United States v. Windsor*, No. 12-307 (Feb. 26, 2013).
[124] *See* I.R.C. § 2001 (2013).
[125] *See id.* § 2040(a); *see also* Mckay, *supra* note 110, at 16.
[126] *See* I.R.C. § 2040(b) (2013); *see also* Mckay, *supra* note 110, at 16.
[127] *See* Mckay, *supra* note 110, at 16-17.
[128] *Id.* Imagine how complex the documentation requirement becomes once mortgages are involved in property purchases. Furthermore, surviving partners could subject themselves to scrutiny with respect to unreported gratuitous transfers.

nonexistent, and only emerged as a 50% deduction following unequal tax consequences to married couples in community and non-community property states.[129] In 1981, Congress created the unlimited marital deduction.[130] I do not advocate the end of the marital deduction, but aim to demonstrate that we should not feel constrained by recent history while altering or expanding the Code going forward.

"Two people who are responsible for each other's financial well-being should not be hit by a transfer tax when transfers are made between them."[131] At minimum, this is the apparent implication of the law from 1981 forward. Assuming this remains the prevailing view, federalist principles encourage extending the marital deduction to spouses in recognition states and partners in states that allow spousal equivalent civil unions.[132] Arguably, the marital deduction evolved from the view that imposing any tax on the surviving spouse's right to continued enjoyment of marital assets is deplorable. That view should be affirmed with respect to committed same-sex partners.

In the even DOMA is struck down, ideally Congress would take further action to ensure equal protection of partners living in all states. However, the political reality of such an endeavor is unlikely in the near-term. Furthermore, it would encourage Congress to statutorily define a marital relationship again post DOMA.[133] Rather than Congressional intervention, I suggest the IRS administratively decide to recognize marriages regardless of residency. For example, a same-sex couple could get married in a recognition state and continue to reside in a non-recognition state without any resulting inequalities under the federal tax system. Although I

[129] *See* Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 821-22 (2008).
[130] *Id.*
[131] Cain, *supra* note 3, at 516.
[132] *See id.*
[133] I find this method impractical and imprudent given Congress' last attempt to define personal relationships. Moreover, the approach invokes greater complexity and uncertainty under the Code if Congress were to create an additional filing status.

recognize time and expense to travel to a recognition state could be considerable, my opinion is that these burdens are mitigated by the resulting simplicity and certitude.[134]

## Conclusion

I am hopeful the Supreme Court of the United States will invalidate DOMA, because I firmly believe the statute is discriminatory at its core. That was my initial impression upon commencing my research, and it has not changed. Nevertheless, I did not expect to discover some of the truly inane and irrational results discussed throughout our analysis. In particular, DOMA's implications for the marriage bonus in community property states and the marriage penalty everywhere were quite surprising. Moreover, when I considered the social and revenue policies behind the relevant Code sections, the illogical results prompted by DOMA were further emphasized.

Interestingly, I had originally believed the transfer tax portion of our discussion would be most relevant to overturning DOMA. Perhaps that was prompted by Edith Windsor's battle currently before the Court. However, I now feel that if Windsor is unsuccessful, future cases will come from individuals with imputed income related to employer-provided healthcare for same-sex spouses. This is primarily because the estate and gift tax unified credit has increased, at least for the time being, to $5 million. At these levels, I doubt we will see many taxpayers with standing to challenge DOMA on constitutional grounds related to the estate tax in the near future.

Lastly, I would like to make some final recommendations in case DOMA is not discarded. There are legitimate distinctions between federal and state tax laws enforced by DOMA. Instead of patchwork resources for same-sex partners, I believe it would be beneficial if the distinctions between same-sex and opposite-sex married couples are formalized in recognition states. In other

[134] There's never been a right for committed opposite-sex couples to file joint tax returns. It is the legal act of getting married that provides the key to joint filing. My suggestion above is in the same spirit by requiring an affirmative act on the part of same-sex couples.

words, more guidance from state revenue departments would eliminate confusion for taxpayers and revenue departments. Finally, the guidance issued by the Service embraces the DOMA related eccentricities relevant to community property states. This demonstrates that the Service is willing to ease the burden on same-sex taxpayers where possible. Similar to my wish for states, I hope the Service also recognizes and provides more formal guidance on issues where same-sex and opposite-sex spouses differ under the Code. Finally, I return to my opening sentiment that paying taxes should be an equalizing process for all Americans. While DOMA stands that is not possible, but through acknowledgment and exploration of the problems it creates, taxpayers can eliminate uncertainty and maximize tax efficiency.