A TAXING DIVORCE: A SOLUTION TO DOMA'S TAX INEQUITIES IN SAME-SEX DIVORCE

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I. INTRODUCTION

Federal taxes are an integral part of the United States' economy, and both the federal income and gift tax systems affect individuals' daily decisions.[1] Indi-

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[1] *See* Stephen T. Black, *Same-Sex Marriage and Taxes*, 22 BYU J. PUB. L. 327, 327 (2008) ("Our tax system, while frequently criticized for its complexity, has the flexibility to encourage or influence behavior. It is used to try to influence people's spending habits to 'jump-start' the economy or encourage business to buy more fixed assets."). *See also* Tara Siegel Bernard, *Some Tax Breaks Unavailable for Same-Sex Couples*, N.Y. TIMES, Apr. 16,

viduals contribute a substantial portion of federal government's tax revenue,[2] with little relation to an individual's age,[3] sex, marital status,[4] race, or disability.[5] Instead, the federal income tax system is explicitly premised on an individual's "ability to pay,"[6] theoretically ensuring that similarly situated[7] taxpayers pay the same federal income tax.[8] Additionally, while the federal gift tax system is not necessarily premised on the same progressive rate system as the federal income tax system,[9] both systems share principles of equity.[10] However, not all individuals or groups of individuals enjoy the benefits of equitable taxation.[11]

The Defense of Marriage Act ("DOMA") inherently undermines the equita-

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2012, http://bucks.blogs.nytimes.com/2012/04/16/some-tax-breaks-unavailable-to-same-sex-couples/.

[2] STATISTICS OF INCOME DIV., IRS, 2010 TAX STATISTICS, *available at* http://www.irs.gov/pub/irs-soi/10taxstatscard.pdf (Individual income gross tax collection totals over $1 trillion and gift gross tax collection totals over $3 billion.).

[3] *But see* 26 U.S.C. § 22 (2008) (allowing a tax credit for a taxpayer over 65).

[4] *But see* 26 U.S.C. § 1 (2008) (regarding the filing status based on marital status).

[5] *But see* 26 U.S.C. § 22 (2008) (allowing a tax credit for a retired taxpayer "who, when he retired, was permanently and totally disabled").

[6] *See* MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION 28 (6th ed. 2009) ("Tax equity requires that those with greater ability to pay taxes should pay more tax.").

[7] *See* CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 2 (Sherwood Kohn et al. eds., 1997) ("According to the principle of equal treatment, married couples who have equal incomes should pay the same income taxes. . . .").

[8] *See* GRAETZ & SCHENK, *supra* note 6, at 28 (finding that taxpayers "with the same income ordinarily would pay the same amount of tax regardless of the source and use of their income. . . ."). *See also* Anthony C. Infanti, *Bringing Sexual Orientation and Gender Identity into the Tax Classroom*, 59 J. LEGAL EDUC. 3, 7 (2009). *But see generally* Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191 (2008) (noting that non-economic differences may warrant tax inequity).

[9] *Compare* GRAETZ & SCHENK, *supra* note 6, at 32 (defending progressive rates under the essential principle of federal income taxation on the ability to pay), *with* DOUGLAS A. KAHN ET AL., FEDERAL TAXATION OF GIFTS, TRUSTS, AND ESTATES 9 (3d ed. 1997) (stating that a major reason for having gift and estate taxes is to reduce large concentrations of wealth).

[10] *See* Matthew Fry, Comment, *One Small Step for Federal Taxation, One Giant Leap for Same-Sex Equality: Revising § 2702 of the Internal Revenue Code to Apply Equally to All Marriages*, 81 TEMP. L. REV. 545, 549-50 (2008) (citing Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677, 704-07 (2000) ("The periodic imposition of a tax on accumulated wealth seems a basic prerequisite for a nation that purports to embrace notions of equality and fairness.").

[11] Jason St. Amand, *Same-Sex Couples Feel Like Second Class Citizens on Tax Day*, EDGE BOSTON, Apr. 17, 2012, http://www.edgeboston.com/news/national//132061/same_sex_couples_feel_like_second_class_citizens_on_tax_day.

ble principles in the federal tax systems.[12] DOMA restricts the federal recognition of marriage to a "legal union between one man and one woman as husband and wife," and DOMA additionally states "the word 'spouse' refers only to a person of the opposite sex who is a husband or wife."[13] The Internal Revenue Code (the "Code") is silent, however, as to whether DOMA affects the tax status of same-sex couples legally married under state law.[14] Nevertheless, DOMA "has had a profound effect" on federal tax law.[15]

Under current law, DOMA denies married same-sex couples ("same-sex couples") the federal benefits that married opposite-sex couples ("opposite-sex couples") receive, including federal tax spousal exemptions.[16] While same-sex couples may utilize practical tax-planning solutions, these alternatives are cumbersome, expensive, and insufficient.[17] Moreover, DOMA unexpectedly affects same-sex couples when they are most vulnerable: during a divorce.[18] Same-sex couples are not entitled to the "same tax-free division of assets" as opposite-sex couples for federal tax purposes, "even in states that recognize same-sex marriage."[19] The Code's application of DOMA's definition of *spouse* causes a dichotomy and tax inequity between same-sex and opposite-sex couples for their respective divorces.[20]

Interestingly, despite DOMA's negative impact, the Internal Revenue Ser-

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[12] *See* 1 U.S.C. § 7 (2006) (restricting federal recognition of marriage).

[13] *Id.*

[14] Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 TAX LAW. 407, 426 (2008) (citing Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 493 (2000) ("Thus, the message from Congress, as currently embedded in the tax laws, is that same-sex couples are not worthy of spousal treatment and, furthermore, their treatment under the tax laws is not even worthy of discussion.")).

[15] Marisa Nelson, Comment, *The IRS Moves Toward Income Tax Equality for Same-Sex Couples Despite DOMA*, 45 U.S.F. L. REV. 1145, 1145 (2011).

[16] *See* Carolyn Satenberg, Note, *Joint Bank Accounts in New York: Confusion, Discrimination, and the Need for Change*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 607, 616 (2011).

[17] *See generally* Anthony M. Brown, *Estate Planning for Same-Sex Couples: Practicalities, Precautions, Perils and Proposals*, 12 FLA. COASTAL L. REV. 217 (2010); C. Quince Hopkins, *Family, Life, and Legacy: Planning Issues for the Lesbian, Gay, Bisexual, and Transgender Communities*, 12 FLA. COASTAL L. REV. 1 (2010); Bernard L. McKay, *When Saying "I Do" Does Not Do It: Estate Planning for Same-Sex Couples*, 21 PROB. L.J. OHIO 185 (2011) (explaining some of the estate-planning options for same-sex couples). *But see* Satenberg, *supra* note 16, at 610 (noting that the time and money spent on estate-planning does not assure equitable results, especially for taxation purposes).

[18] *See generally* Patricia A. Cain, *Taxation of Same-Sex Couples at "Divorce,"* 2011 A.B.A. TAX. SEC.

[19] Susan L. Pollet, *Breaking Up Is Hard[er] to Do*, 83 N.Y. ST. B.J. 10, 13 (2011) (citing Tara Siegel Bernard, *For Gay Couples, 'Traditional' Isn't Always an Option*, N.Y. TIMES, July 28, 2010, http://bucks.blogs.nytimes.com/2009/11/17/for-gay-couples-traditional).

[20] *See generally* Cain, *supra* note 18.

vice ("IRS") provides some tax incentives, relative to opposite-sex couples, for some unmarried same-sex couples ("same-sex partnerships") to marry.[21] However, the IRS also imposes financial barriers for same-sex couples to get the same equitable division in a divorce[22] as similarly situated opposite-sex couples.[23] Massachusetts serves as one of the leading states for laws benefiting same-sex relationships, including divorce law.[24] Despite Massachusetts' laws, the federal government continues to limit the number and extent of tax benefits applicable to same-sex couples relative to similarly situated opposite-sex couples.[25] This Note proposes possible legislation to correct the horizontal tax inequity between same-sex and opposite-sex couples, and to establish an equitable division of assets following both a same-sex and opposite-sex divorce.

First, Section II explains DOMA's advent and continued influence over federal law, most notably the Code. Second, Section II then describes the recently updated divorce laws in Massachusetts, one of the first states to allow persons in a same-sex partnership to marry and to adjudicate the dissolution of same-sex marriages. Massachusetts divorce laws illustrate the intersection between state domestic relations laws and federal taxation laws. Third, Section II also explores the income, gift, and estate tax implications of the division of assets between former same-sex spouses upon dissolution of their marriage. A survey of some of the relevant federal tax provisions, including transfers and gifts, establishment of trusts, and alimony payments provides an illustration. Fourth, Section II examines DOMA's exacerbation of the inequities between same-sex and opposite-sex couples, and same-sex and opposite-sex divorces under the Code.

Next, Section III considers DOMA's lack of justifications and rationales for the tax inequities imposed on similarly situated same-sex and opposite couples during and following a divorce. Finally, this Note posits two possible solutions to the parity concerns under the Code. First, Congress should repeal Section 3

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[21] Keeva Terry, *Same-Sex Relationships, DOMA, and the Tax Code: Rethinking the Relevance of DOMA to Straight Couples*, 20 COLUM. J. GENDER & L. 384, 392-93 (2011) (arguing that same-sex couples, unlike opposite-sex couples, are not permitted to file jointly and therefore they do not have to worry about a marriage penalty, but the same-sex couple can pool their resources like an opposite-sex couple). *See also* Cain, *supra* note 18, at Table 2 (detailing the federal income tax disparity between hypothetical same-sex and opposite-sex couples).

[22] *See* 27 C.J.S. *Divorce* § 874 (2005) (describing a state's equitable division of marital assets statute as direction for courts to divide the marital assets equitably at the marriage's dissolution according to what is just and proper under the circumstances of the divorce).

[23] *See* Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113, 115 & 156 n.165 (2008).

[24] *See generally* Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73 (2011).

[25] *See* discussion *infra* Parts II.C, II.D.

of DOMA,[26] broadening the definitions of "marriage" and "spouse" to bring federal tax law in cohesion with state domestic relations law. In the alternative, the IRS should revise the Code's definition of the term "spouse" and "marriage" to be more inclusive of the diverse couples in the United States for federal income, estate, and gift tax purposes.[27] As this Note discusses, DOMA is unconstitutional because it promulgates an inequitable tax scheme.[28] Legislative action to amend the Code's application to same-sex couples may best solve the tax inequity caused by DOMA. In fact, the IRS has resolved tax inequities for opposite-sex couples through legislative action in the past.[29] The IRS should amend the Code to correct the tax inequity between same-sex and opposite-sex couples, and to further align the Code with fundamental tax policy.

II. LEGAL BACKGROUND

A. *The History of DOMA*

In 1996, Congress passed DOMA as a direct reaction to *Baehr v. Lewin*.[30] In the *Baehr* case, decided in 1993, the Supreme Court of Hawai'i suggested that Hawai'i would soon recognize same-sex marriage.[31] While the Supreme Court of Hawai'i held that the state constitution did not grant a fundamental right of same-sex partners to marry, the court also held that (1) states as sovereign entities have the exclusive "power to regulate marriage" and (2) marriage is a partnership that includes an economic pooling of resources.[32] More memorably, the *Baehr* Court also held that the applicable Hawai'i statute, both facially and as applied, unconstitutionally denied same-sex partners access to marriage.[33] The Hawai'i statute constituted a sex-based classification, and therefore, was subject to a "strict scrutiny" test.[34] Opponents of same-sex marriage worried that the *Baehr* decision to legalize same-sex marriages in Hawai'i would compel other states to recognize these unions under the Full Faith and Credit Clause

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[26] 1 U.S.C. § 7 (1996) ("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.").

[27] *See generally* Dennis J. Ventry, Jr., *Saving* Seaborn*: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459 (2011).

[28] *See generally infra* Part IV.E.

[29] *See* H.R. REP. No. 432, 98th Cong., 1491-97 (2d Sess. 1984). *See also* 26 U.S.C. § 1041(a) (2008) (amending the prior *Davis* rule).

[30] Danielle Johnson, Comment, *Same-Sex Divorce Jurisdiction: A Critical Analysis of* Chambers v. Ormiston *and Why Divorce Is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States*, 50 SANTA CLARA L. REV. 225, 227 (2010).

[31] *See generally* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

[32] *Id.* at 58.

[33] *Id.* at 60-63.

[34] *Id.* at 60-67.

of the United States Constitution,[35] potentially disrupting state sovereignty in domestic relations laws.[36] Congress responded to these opponents' concerns by passing DOMA.[37] The DOMA House Report expressed "four governmental interests advanced by [passing DOMA]: (1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources."[38] DOMA continues to affect the relationships between and among same-sex couples and similarly situated opposite-sex couples, raising concerns by advocates both for and against same-sex marriage.[39]

Pursuant to DOMA, the federal government denies recognition of same-sex marriages for federal purposes,[40] despite several states' recognition of same-sex marriage.[41] As previously mentioned, DOMA limits the definition of marriage for federal law to the "legal union between one man and one woman as husband and wife" and the definition of spouse to only "a person of the opposite sex who is a husband or a wife."[42] Additionally, DOMA granted states the option to refuse to recognize same-sex marriages legalized in other states.[43] Exercising the option, some states passed "mini-DOMAs," banning same-sex marriage within the state and declaring its recognition void under public policy.[44] While DOMA does not require states to recognize any relationship between same-sex couples, some states have chosen to legally recognize same-sex marriage through judicial[45] and legislative decisions.[46] Additionally, some

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[35] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

[36] Joanna Grossman, *Resurrecting Comity: Revising the Problem of Non-Uniform Marriage Laws,* 84 OR. L. REV. 433, 436 (2005).

[37] H.R. REP. NO. 104-664, at 2 (1996).

[38] *Id.* at 12.

[39] *See generally* M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081 (2010). *See also generally* Joshua Baker & William C. Duncan, *As DOMA Goes . . . Defending DOMA and the State Marriage Measures*, 24 REGENT U. L. REV. 1 (2011).

[40] 1 U.S.C. § 7 (2006).

[41] *See infra* notes 45-46 and accompanying text.

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

[43] *See* ALISON M. SMITH, CONG. RESEARCH SERV., RL 31994, SAME-SEX MARRIAGE: LEGAL ISSUES 3 (2012).

[44] 28 U.S.C. § 1738C (2006). *See also* Grossman, *supra* note 36, at 447-48.

[45] In 2003, the Supreme Judicial Court of Massachusetts held that the denial of marriage rights to same-sex couples violated the state constitution. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003). The Connecticut, California, and Iowa supreme courts also recognized marriage between same-sex couples. *See* Kerrigan v. Comm'r of

judicial decisions have raised concerns about DOMA's constitutionality and the validity of its alleged governmental interests.[47]

Many same-sex marriage advocates have challenged DOMA in courts on various constitutional grounds, including the Full Faith and Credit Clause, the Tenth Amendment, and the Fourteenth Amendment's Equal Protection and Due Process Clauses.[48] On February 23, 2011, the Obama Administration released a decision that it would cease defending DOMA, finding that DOMA is an unconstitutionally discriminatory legislative act, a promising first step towards a favorable constitutional challenge against DOMA.[49] However, DOMA continues to be valid law,[50] and therefore still affects the daily lives of same-sex couples, especially during tax season and during divorce.[51]

B. *DOMA's Impact on the Federal Tax Code*

The federal and state governments recognize marriage as creating a new social and economic status for individuals.[52] However, this new social and economic status is not available for all individuals.[53] Opposite-sex couples enjoy several federal rights that DOMA denies same-sex couples.[54] However, not all

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Pub. Health, 957 A.2d 407, 482 (Conn. 2008); *In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008); Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009); *but see* Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (upholding the Marriage Protection Act, or Proposition 8, which defines marriage in California as between a man and a woman, though validating all same-sex marriages previously granted in California).

[46] The Maine, New Hampshire, Vermont, New York, Maryland, and Washington legislatures legalized same-sex marriages without judicial action. *See* ME. REV. STAT. ANN. tit. 19-A, § 650-A (2009); N.H. REV. STAT. ANN. § 457:1-a (2009); VT. STAT. ANN. tit. 15, § 8 (2010); N.Y. DOM. REL. LAW § 10-a (McKinney 2011); MD. CODE ANN. FAM. LAW § 2-201 (West 2013); WASH. REV. CODE § 26.04.010 (2012).

[47] *See* Nelson, *supra* note 15, at 1149-52.

[48] *Id.* at 1145.

[49] *See* Letter from Eric H. Holder, Jr., Attorney Gen., U.S. Dep't of Justice, to John A. Boehner, Speaker of the House of Representatives 1 (Feb. 23, 2011) ("After careful consideration . . . the President of the United States has made the determination that . . . [DOMA], as applied to same-sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment.").

[50] *See id.* (stating that while the President will not be upholding DOMA, the Act is still valid under federal law).

[51] *See generally In re* Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011) (holding that the same-sex couple-petitioners' ability to file jointly turned on the court's interpretation and application of DOMA).

[52] *See generally* Majorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413 (1996).

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

[54] A report from the United States General Accounting Office identified 1,138 federal statutory provisions in the United States Tax Code "in which marital status is a factor in

opposite-sex couples receive benefits from these federal rights.[55] Scholars criticize the legal system's incongruence in marriage recognition between the federal and state governments because the current laws undermine the tax system's consistency and equality values.[56] Further, precedential United States Supreme Court cases hold that the states, not the federal government, have the right to determine its residents' marital status.[57] DOMA's current application conflicts with the Supreme Court's continued recognition that "there is no federal law of domestic relations."[58] DOMA creates confusing policy and precedent because federal tax law previously depended upon state law determinations[59] of what is "family" and "marriage,"[60] creating confusing policy and precedent.

While DOMA's effects on the federal recognition of same-sex marriage remain unsurprising, the lack of discussion or protest among tax experts and the lack of discussion regarding tax law during the House and Senate DOMA hearings continue to shock tax-equity advocates.[61] The Code has close to 200 provisions related to marital status, all of which depend on the federal definition of a spouse.[62] The Code fails to define "spouse" or "marriage," and therefore, the IRS defers to DOMA to dictate the working definition.[63] DOMA serves as a "marked change for the tax code which has always deferred to state law to

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determining or receiving benefits, rights, and privileges." *See* Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

[55] *See* Terry, *supra* note 21, at 385 (demonstrating that, in some instances, opposite-sex couples pay more federal income tax than similarly situated same-sex couples).

[56] Daniel Milstein, Note, *'Til Death Do Us File Joint Income Tax Returns (Unless We're Gay)*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 451, 452 (2011).

[57] *See* Terry, *supra* note 21, at 420.

[58] De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (holding that a statute that deals with familial relationships is "primarily a state concern").

[59] *Compare* 1 U.S.C. § 7 (2006), *and* Loving v. Virginia, 388 U.S. 1, 7 (1967) ("[M]arriage is a social relation subject to the State's police power. . . ."), *with* Ensminger v. Comm'r, 610 F.2d 189, 191 n.4 (4th Cir. 1979) (citing Nat'l League of Cities v. Usery, 426 U.S. 833, 842-43 (1976) (describing the importance of state deference in matters within the state police powers because of "the essential character of the state government within our federal system")).

[60] *See* Patricia A. Cain, *Federal Tax Consequences of Civil Unions*, 30 CAP. U. L. REV. 387, 389-90 (2002) (implying that the states have deference in determining whether two parties are legally married under the laws of the state of their domicile).

[61] Nelson, *supra* note 15, at 1146 (citing Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 492 (2009); *Defense of Marriage Act: Hearing on S. 1740 Before the S. Comm. on the Judiciary*, 104th Cong. (1996)).

[62] Letter from Dayna K. Shah, *supra* note 54.

[63] Fry, *supra* note 10, at 554 (citing Nancy J. Knauer, *Heteronormativity and the Federal Tax Policy*, 101 W. VA. L. REV. 129, 162 (1998)).

determine marital status."[64]

At best, the history of DOMA demonstrates a haphazard consideration of its application to same-sex couples' lives.[65] On the other hand, in the worst possible light, DOMA is purely discriminatory.[66] Indeed, in debates prior to DOMA's passing, Congress noted DOMA's predominately negative effects on same-sex couples, especially for federal tax purposes.[67]

One of the most relevant tax provisions for all couples allows married taxpayers to choose whether they wish to file income taxes jointly with their spouse.[68] An opposite-sex couple's option to file income taxes jointly more likely than not decreases that couple's overall tax burden.[69] The choice to file jointly is not available to same-sex couples, regardless of their marital status, because of DOMA's definition of a spouse.[70] DOMA limits the definition of a spouse such that federal laws and programs cannot recognize or extend the benefits of marriage to same-sex couples.[71] One tax advocate opines that "[u]nless and until Congress repeals DOMA, the IRS cannot legally extend 'marital' tax benefits, nor even recognition" to same-sex couples in the United States.[72] The exclusion of same-sex couples from joint-filing creates one of the first inequities for similarly situated same-sex and opposite-sex couples: the often-cited income tax's marriage penalty.[73]

The income tax's marriage penalty affects an opposite-sex couple that "pays higher federal income taxes as a result of [the couple's] marriage than they would pay if they remained single and filed individual returns."[74] For example,

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[64] Nancy J. Knauer, *Heteronormativity and the Federal Tax Policy*, 101 W. VA. L. REV. 129, 163 (1998).

[65] *See* Terry, *supra* note 21, at 387-88.

[66] *See* Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI-KENT L. REV. 481, 492–93 (2009).

[67] Infanti, *supra* note 14, at 426 (citing Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 493 (2000)).

[68] 26 U.S.C. § 1 (2011).

[69] *See* MOVEMENT ADVANCEMENT PROJECT ET AL., UNEQUAL TAXATION AND UNDUE BURDENS FOR LGBT FAMILIES (2012), *available at* http://www.lgbtmap.org/file/unequal-taxation-undue-burdens-for-lgbt-families.pdf.

[70] *See* Milstein, *supra* note 56, at 478 ("[S]ame-sex couples married under state law are not considered married under DOMA for federal tax purposes. . . .").

[71] Fry, *supra* note 10, at 556 (citing Christopher T. Nixon, *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples As Are Currently Granted to Married Couples?: An Analysis in Light of Horizontal Equity*, 23 S. ILL. U. L.J. 41, 44 (1998)).

[72] Fry, *supra* note 10, at 556 (citing Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363, 364 (2002)).

[73] Knauer, *supra* note 64, at 212.

[74] *See* Terry, *supra* note 21, at 387-88 (citing Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA 45, 45 (Karen Brown & Mary Louise Fellows eds., 1996)).

two spouses that earn a similar amount of income may pay higher income taxes than two single individuals with the same amount of income because, by jointly filing their taxes, these spouses must combine income, and, thus, the Code subjects these spouses to a higher marginal tax bracket.[75] This marriage tax penalty does not affect same-sex couples because these parties are "not *permitted* to file jointly for federal income tax purposes, but [opposite-sex couples] are required to file as married persons."[76] This tax treatment encourages both same-sex and opposite-sex couples to consider marriage's effect on their income tax filing status.[77] Therefore, same-sex couples that earn similar incomes actually avoid this marriage penalty and may benefit from their exclusion from filing jointly as a married couple.[78] Same-sex couples' inability to file jointly may harm them financially, however.

Additionally, same-sex couples' inability to file a joint federal tax return complicates their state tax returns, which only furthers these couples' desire to file joint federal tax returns.[79] DOMA's definition of a spouse does not apply to state income tax requirements.[80] Despite a same-sex couple's ability to file jointly under state income tax rules, some states use the federal income tax return as a starting point for computing the state tax return.[81] Therefore, same-sex couples often need to "translate their two 'single' federal returns into a mock 'joint' federal return before they can then complete their 'joint' state tax return."[82] New York State requires same-sex couples to file a joint state tax

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[75] Christopher T. Nixon, *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as Are Currently Granted to Married Couples?: An Analysis In Light of Horizontal Equity*, 23 S. ILL. U. L.J. 41, 47 (1998) (citing Jeanette Anderson Winn & Marshall Winn, *Till Death Do We Split: Married Couples and Single Persons Under the Individual Income Tax*, 34 S.C. L. REV. 829, 836 (1983)). *See also* Michael A. Johnson, *A Gap in the Analysis: Income Tax and Gender-Based Wage Differentials*, 85 GEO. L.J. 2287, 2304-06 (1997) (arguing that Congress should revise the Code to eliminate the marriage tax penalty).

[76] Terry, *supra* note 21, at 392 (emphasis added) (citations omitted). *See also* 26 U.S.C. § 1 (2011) (allowing opposite-sex couples some discretion).

[77] *See* Terry, *supra* note 21, at 387-88 (citing Dorothy A. Brown, *The Marriage Bonus/ Penalty in Black and White*, in TAXING AMERICA 45, 46 (Karen Brown & Mary Louise Fellows eds., 1996) ("Empirical evidence suggests that economic factors, including tax liabilities, play a role in the decision to marry.")).

[78] *See generally* Nixon, *supra* note 75.

[79] *See generally* Susan Donaldson James, *IRS Makes Gay Parents 'Lie,' Shortchanging 2 Million Children*, ABC NEWS, Apr. 16, 2012, http://abcnews.go.com/Health/irs-makes-gay-parents-lie-shortchanging-million-children/story?id=16147428#.T45Tg5pAa0Y.

[80] *Compare* 26 U.S.C. § 1 (2011), *and* 1 U.S.C. § 7 (2006), *with* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2002), *and* MASS. GEN. LAWS ch. 62 § 1(g) (2011).

[81] *See* TIR 04-17: Massachusetts Tax Issues Associated with Same-Sex Marriages, July 7, 2004, http://www.mass.gov/dor/businesses/help-and-resources/legal-library/tirs/tirs-by-years/2004-releases/tir-04-17-massachusetts-tax-issues-associated.html.

[82] *See* Infanti, *Bringing Sexual Orientation and Gender Identity into the Tax Classroom*,

return and attach a "dummy" joint federal tax return.[83] This "dummy" system can be expensive and time-consuming for these same-sex couples, and constitutes a cost that most, if not all, opposite-sex couples may avoid by filing jointly.[84]

DOMA's effect on tax law is not limited to joint-filing status discretion.[85] DOMA also affects the equitable division of assets in a typical same-sex divorce by creating uncommon and confusing tax consequences compared with similarly situated opposite-sex couples.[86] A closer examination of divorce laws in Massachusetts quickly indicates that divorcing same-sex couples encounter numerous inequitable economic barriers to obtaining their divorce and even some equally unintended tax benefits.

C. *Massachusetts Divorce Law*

Even after same-sex couples receive the right to legally marry in their home state, these couples encounter problems due to discrepancies between their home state's domestic relations laws and federal income tax recognition.[87] One of the most prominent emerging problems for same-sex couples is the struggle to equitably dissolve their marriages. The current divorce rate in the United States is fifty percent.[88] Divorce rates in states with legalized same-sex marriage are among the lowest in the country,[89] but dissolutions of same-sex marriages still occur, as evidenced by recent caselaw.[90]

Massachusetts divorce law serves as one of the leading guides for same-sex

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supra note 8, at 26-27 (citing Catherine Martin Christopher, Note, *Will Filing Status Be Portable? Tax Implications of Interstate Recognition of Same-Sex Marriage*, 4 PITTSBURGH TAX REV. 137, 141, 143-46 (2007)).

[83] G.M. Filisko, *Patchwork Partnering: States Can't Agree on the Legal Status of Same-Sex Couples*, 97-NOV A.B.A. J. 18, 19 (2011).

[84] *See id.*

[85] *See infra* Part I.D.

[86] *See generally* Cain, *supra* note 18.

[87] *See generally* Cerutti-O'Brien v. Cerutti-O'Brien, 928 N.E.2d 1002 (Mass. 2010). *See also generally* Oppenheimer, *supra* note 24.

[88] John M. Yarwood, Note, *Breaking Up Is Hard to Do: Mini-DOMA States, Migratory Same-Sex Marriage, Divorce, and a Practical Solution to Property Division*, 89 B.U. L. REV. 1355, 1362 (2009) (citing BETZAIDA TEJADA-VERA & PAUL D. SUTTON, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR JANUARY 2008, NAT'L VITAL STATS. REP., Aug. 21, 2008, at 1, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_03.pdf ("listing from January 2007 to January 2008, 7.3 marriages per 1,000 people and 3.6 divorces per 1000 for a divorce rate of approximately 50%")).

[89] Danielle Kurtzleben, *Divorce Rates Lower in States with Same-Sex Marriage*, U.S. NEWS & WORLD REPORTS, July 6, 2011, *available at* http://www.usnews.com/news/articles/2011/07/06/divorce-rates-lower-in-states-with-same-sex-marriage (citing as low as 40.2 percent of the number of marriages ended in divorce in 2009).

[90] *See* C.M. v. C.C., 867 N.Y.S.2d 884 (Sup. Ct. 2008); Gonzalez v. Green, 831 N.Y.S.2d 856 (Sup. Ct. 2006).

couples because Massachusetts has one of the longest histories of granting same-sex marriages.[91] Same-sex divorces can be far more complicated than same-sex marriages, and often include complications that "stem from living in a state with different laws than the state where the marriage took place."[92] State divorce laws are particularly important in states that have legalized same-sex marriage because some such states, including Massachusetts, require that partners to establish state residency before the state may grant the couple a divorce.[93] This requirement creates issues within and among states for the recognition and dissolution of same-sex marriages.[94] The right to divorce is equally important for both same-sex and opposite-sex couples, because both sets of couples depend on established state laws to disentangle their respective financial relationships, and to give both sets of couples a neutral arbiter, a judge, to navigate the legal system.[95]

Massachusetts chronicles a unique path towards marriage equality, and Massachusetts addressed the judicial treatment of same-sex divorce earlier than many other states.[96] Massachusetts became the first state to allow same-sex couples to legally marry within the state.[97] Chapter 208 of the Massachusetts Domestic Relations Laws governs divorce in the state for both same-sex and opposite-sex couples.[98] All couples are entitled to a fault or no-fault divorce,[99] and either category of divorce filing may be contested[100] or uncontested.[101] The couples' residency may determine the appropriate venue to file a divorce,

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[91] *See generally Cerutti-O'Brien*, 928 N.E.2d at 1002; Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 263 (Mass. 2006); Salucco v. Alldredge, 17 Mass. L. Rptr. 498 (Sup. Ct. 2004); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2002).

[92] Pollet, *supra* note 19, at 13 (citing Sue Horton, *The Next Same-Sex Challenge: Divorce*, L.A. TIMES, July 25, 2008, http://articles.latimes.com/2008/jul/25/local/me-gaydivorce25).

[93] *See* MASS. GEN. LAWS ch. 208, § 5 (2010).

[94] *See* 2 MASS. PRAC., FAMILY LAW AND PRACTICE § 27:2 (3d ed. 2012) (defining domicile for a divorce jurisdiction). *But see* Chambers v. Ormiston, 935 A.2d 956, 963 (R.I. 2007) (refusing to dissolve the marriage at all, fearing that the divorce will recognize the same-sex relationship in states that do not recognize same-sex marriage).

[95] Pollet, *supra* note 19, at 14 (citing Marcelle S. Fischler, *The Right to Divorce*, N.Y. TIMES, June 6, 2009, http://www.nytimes.com/2009/06/07/fashion/weddings/07FIELD.html).

[96] *See generally* MASS. GEN. LAWS ch. 208.

[97] *See generally Goodridge*, 798 N.E.2d at 941.

[98] *See generally* MASS. GEN. LAWS ch. 208.

[99] *Id.* § 1 (1977) (permitting a plaintiff to file for divorce for adultery, impotency, desertion, substance abuse, abusive relationship, refusal or neglect of support, or irretrievable breakdown of the marriage).

[100] *Id.* § 1B (1986) (describing the divorce process where only one party believes there has been an irretrievable breakdown of the marriage).

[101] *Id.* § 1A (1985) (describing the divorce process where both parties agree there is an irretrievable breakdown of the marriage).

with the state deferring judgment to the county where the marriage originated unless hardship or convenience dictates otherwise.[102] Monetary concerns affect both divorcing same-sex and opposite-sex couples.[103] The Probate and Family Court of the appropriate jurisdiction may award alimony to either party, and "may assign to [either party] all or any part of the estate of the other [party]."[104] The parties are also entitled to equitable division of the property with wide, but not unlimited, judicial discretion.[105] These divisions of property become particularly important for divorcees because these divisions may create realization of property and other taxable events.[106]

DOMA limits the ability of Massachusetts Probate and Family Courts to apply federal benefits law for same-sex divorces, even though these courts must apply these benefits for opposite-sex divorces.[107] Divorce provides both same-sex and opposite-sex couples with the appropriate closure to proceed with their lives economically through a fair and equitable division of their property.[108]

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[102] *Id.* § 6 (1986) (determining the venue with jurisdiction over the divorce proceeding). The recognition of same-sex divorces where the parties married within Massachusetts, but lived, and intended to settle, in another state is an issue beyond the scope of this Note. *See* Cerutti-O'Brien v. Cerutti-O'Brien, 928 N.E.2d 1002 (2010) (holding that the same-sex couple married in Massachusetts but lived in Florida at the time of the divorce proceeding, and therefore, the Massachusetts court lacked subject-matter jurisdiction to grant the divorce). Equally problematic, but also beyond the scope of this Note, is Massachusetts' residential duration requirement and its problems for parties seeking a divorce. *See* MASS. GEN. LAWS ch. 208, § 5 (2011).

[103] *See generally* David Rae, Op-Ed, *Watch Out for Gay Divorce Tax*, ADVOCATE.COM (Oct. 24, 2012, 11:47 PM), http://www.advocate.com/business/2012/10/25/watch-out-gay-divorce-tax.

[104] MASS. GEN. LAWS ch. 208, § 34 (2011) (text of section as amended by 2011, 124, Secs. 1 and 2 effective March 1, 2012). The court may consider a wide variety of factors in determining the amount of alimony, such as the length of the marriage, the conduct of the parties during the marriage, the parties' occupations, and sources and amounts of income, among other factors. *Id.*

[105] *See* Williams v. Massa, 728 N.E.2d 932 (Mass. 2000) (ensuring equitable, rather than equal, division of the property at the dissolution of a marriage). *See also* Mahoney v. Mahoney, 681 N.E.2d 852 (Mass. 1997) (conferring broad discretion to the judge to make equitable property divisions).

[106] *See* United States v. Davis, 370 U.S. 65 (1962) (recognizing gain on transfer of property to a spouse in exchange for the release of marital claims). *See also* 26 U.S.C. § 682 (2011) (taxing the income from a trust to a recipient spouse). *But see* 26 U.S.C. § 1041 (2008) (superseding *Davis* by providing that no gain or loss is recognized on any transfer of property between spouses).

[107] 2 MASS. PRAC., FAMILY LAW AND PRACTICE § 26:19 (2011). This topic is also beyond the scope of this Note, and its inclusion merely demonstrates some of the obstacles facing same-sex couples in dissolving their marriage beyond federal taxation law.

[108] *See* Yarwood, *supra* note 88, at 1362 (citing Jessica Hoogs, Note, *Divorce Without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners Through a*

Although same-sex couples use the same divorce proceeding as opposite-sex couples, the financial results are wildly different, especially in taxation.[109] Because of the disparity in their financial results as compared to opposite-sex couples, same-sex couples are less able to obtain the appropriate resolution and dissolution of their marriages.[110]

D. *Trusts, Transfers, and Alimony*

DOMA affects the financial consequences of dissolving a marriage. Code Sections 1 and 7703 determine a party's marital status for federal tax purposes,[111] but DOMA prohibits same-sex couples from filing joint returns.[112] Except for the waning marriage penalty,[113] the Code intentionally rewards federally recognized marital relationships through "unambiguously preferential tax treatment."[114] This treatment ignores the economic reality of same-sex couples' lives by treating their finances as inherently separate.[115]

The current Code favors opposite-sex couples when this couple transfers assets from one spouse to the other spouse, an integral part of the economic reality of married life.[116] For example, Code Section 1041 states that no gain or loss is recognized when a *spouse* transfers property to his or her *spouse*.[117] This unrecognized tax event favors opposite-sex couples because the provision permits these spouses to exchange property without acquiring income.[118] Additionally, Code Section 2523 permits a spouse in an opposite-sex couple to take a deduction for estate and gift tax purposes when he or she transfers to his or

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Comparative Analysis of European and American Domestic Partner Laws, 54 HASTINGS L.J. 707, 707, 716 (2003) (internal citation omitted)).

[109] *See* Rae, *supra* note 103.

[110] *See* Pollet, *supra* note 19, at 13.

[111] "There is hereby imposed on the taxable income of—(1) every married individual (as defined in Code Section 7703) who makes a single return jointly with his spouse under Code Section 6013." 26 U.S.C. § 1(a) (2011). "A husband and wife may make a single return jointly of income taxes." 26 U.S.C. § 6013(a) (2006).

[112] GRAETZ & SCHENK, *supra* note 6, at 476 (explaining that because of DOMA's limited definition of marriage, the IRS has held state laws recognizing same-sex marriages to be "irrelevant and joint returns will not be permitted").

[113] *See* Nancy Kubasek et al., *Amending the Defense of Marriage Act: A Necessary Step Toward Gaining Full Legal Rights for Same-Sex Couples*, 19 AM. U. J. GENDER SOC. POL'Y & L. 959, 969 (2011).

[114] Knauer, *supra* note 64, at 169.

[115] *See* Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 465 (2000).

[116] *See generally* Wendy S. Goffe, *Income Tax and Other Tax Ramifications of Same-Sex Marriage, Domestic Partnerships, and Civil Unions*, PRAC. TAX. LAW (2012).

[117] 26 U.S.C. § 1041 (2008) (emphasis added).

[118] *Id.* Recognition and realization of gain is based on the difference between the adjusted basis at the time of the exchange and the realized amount in the hands of the recipient spouse.

her spouse.[119] Collectively, these tax provisions protect opposite-sex couples, under the principle of co-ownership, from recognizing gain when the transfers merely change name, rather than form or substance.[120]

Divorce proceedings frequently require an equitable division of marital assets.[121] Spouses in an opposite-sex couple may transfer unlimited amounts of wealth between themselves while avoiding the gift or estate tax.[122] However, in a same-sex couple, a wealthier spouse's transfer of assets to his or her less wealthy spouse may trigger federal gift taxes that "create [ ] inevitable tension between states that recognize same-sex marriage and the federal government."[123] Congress believed taxing transfers between spouses was inappropriate, especially while the spouses remained married.[124] Congress intended the transfers between spouses to be tax-free because Congress regarded spouses to be a single economic unit.[125] This rationale should apply to same-sex couples, but DOMA denies these couples the federal recognition of the common practice of existing as an economic unit.[126] This disparate treatment leads to recognition of transfer within a same-sex couple.[127]

The recognition of transfers within a same-sex couple also applies during divorce proceedings.[128] Divorce proceedings may require transferring property

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[119] 26 U.S.C. § 2523 (1997) ("where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's *spouse*, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value") (emphasis added).

[120] *See* Infanti, *supra* note 14, at 21.

[121] *See* Stephanie Hunter McMahon, *To Have and To Hold: What Does Love (of Money) Have to Do with Joint Filing?*, 11 NEV. L.J. 718, 746 (2011) (citing Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113, 115 & 156 n.165 (2008)).

[122] 26 U.S.C.A. § 2523 (1997) (allowing a marital deduction where a donor transfers by gift an interest in property to his or her donee spouse); 26 U.S.C.A. § 2056 (1997) (allowing a marital deduction for the value of any interest in property "passes or has passed from the decedent to his [or her] surviving spouse").

[123] Brown, *supra* note 17, at 218.

[124] Staff of Joint. Comm. on Tax'n, 98th Cong., 2d Sess., General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984 at 710 (Comm. Print 1984).

[125] CARLYN S. MCCAFFREY & MELISSA G. SALTEN, STRUCTURING THE TAX CONSEQUENCES OF MARRIAGE AND DIVORCE 116 n.9 (The Little, Brown Tax Practice Series, 1995 ed.). "Regardless of the extent to which they pool their resources, married opposite-sex couples are treated as a single economic unit for tax purposes and transfers within that unit are, therefore, wholly disregarded." Infanti, *supra* note 14, at 428 (citing H.R. Rep. No. 98-432, at 1491 (1984), *reprinted in* 1984 U.S.C.C.A.N. 697, 1134 ("The committee believes that, in general, it is inappropriate to tax transfers between spouses.")).

[126] Infanti, *supra* note 14, at 427-28.

[127] *Id.* at 428.

[128] *See generally* Nicole M. Pearl & Carlyn S. McCaffrey, *Effect of Same-Sex Marriage Laws on Estate Planning*, 39 ESTPLN 3 (2012).

owned by a spouse in a same-sex couple to the other spouse, or making alimony payments, leading to potential gift tax consequences.[129] While scholars cite evidence that taxes have a small but statistically significant effect on an opposite-sex couple's decision whether to marry[130] and their decision whether to divorce,[131] taxes' effect on same-sex couples' decision to divorce is relatively undocumented.

Though Congress narrowed the scope of possible taxable events, taxpayers' transfers pursuant to a divorce settlement may still trigger taxable consequences.[132] The Court held in *United States v. Davis* that if opposite-sex spouses transferred wealth after their divorce, or if the court did not require payments pursuant to a marital settlement until after the spouses divorced, then the marital deduction provisions protected the transfer from the gift or estate tax.[133] However, the IRS repealed the *Davis* holding by enacting and applying Code Section 1041 for spousal transfers stemming from a divorce.[134] Section 1041 sought to "close the trap for the unwary," and to protect parties who considered property jointly owned during the marriage, but, upon divorce, the federal government recognized this property's equal division as a taxable consequence.[135]

To protect divorcing taxpayers, the IRS enacted additional provisions to accommodate the lengthy process of settling a divorce and these assets' equitable division.[136] For example, Code Section 1041(a) establishes a grace period to cover not only transfers between spouses during marriage, but also transfers between former spouses that are "incident to a divorce."[137] A transfer is incident to a divorce if the transfer "occurs within 1 year after the date on which the marriage ceases," or if the transfer "is related to the cessation of the mar-

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[129] *See* Badgett, *supra* note 39, at 1091 (stating that the events could be taxable or count against the lifetime unified credit for the gift and estate tax). *See also* IRS, U.S. DEP'T OF THE TREASURY, INTRODUCTION TO ESTATE AND GIFT TAXES 4-5 (2009), *available at* http://www.irs.gov/pub/irs-pdf/p950.pdf.

[130] *See* James Alm & Leslie A. Whittington, *Does the Income Tax Affect Marital Decisions?* 48 NAT'L TAX J. 565, 571 (1995).

[131] *See* Stacy Dickert-Conlin, *Taxes and Transfers: Their Effects on the Decision to End a Marriage*, 73 J. PUB. ECON. 217, 218 (1999).

[132] *See* 26 U.S.C. § 1041 (2008).

[133] *See generally* United States v. Davis, 370 U.S. 65 (1962) (taxpayers who transferred property pursuant to a divorce settlement must recognize gain or loss even though they did not receive any other property or cash settlement in return). *See also* MCCAFFREY & SALTEN, *supra* note 125, at 48.

[134] 26 U.S.C. § 1041(a) (2008) (providing, as a general rule, that "no gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of) (1) a spouse, or (2) a former spouse, but only if the transfer is incident to a divorce").

[135] MCCAFFREY & SALTEN, *supra* note 125, at 267 (quoting H.R. REP. No. 432, 98th Cong., 1491-97 (2d Sess. 1984)).

[136] *See* 26 U.S.C. § 1041 (2008).

[137] 26 U.S.C. § 1041(a) (2008).

riage."[138] Further, the IRS protects marital property's divisions from realization, including the sale of a co-owned home.[139] Finally, a transfer pursuant to a divorce does not have to be supported by consideration[140] to avoid the gift tax because the transfer would not be founded on a promise or agreement, a requirement for recognition of a taxable event.[141]

Additionally, the IRS expanded these divorce exceptions to include transfers applying to a marital settlement, but only if the court "has [the] power to decree a settlement of all property rights or to vary the terms of a prior settlement agreement."[142] Other transfers, such as under a marital settlement or prenuptial agreement, also may be eligible for the gift tax exclusion, if the IRS finds the necessary consideration under Code Section 2516.[143] Section 2516 states that if the transfer is a treatment or a relinquishment of support rights, or "other immediately enforceable rights" arising upon dissolution of marriage, then that transfer shall be deemed consideration in money or money's worth.[144] This provision significantly broadens the scope of transfers pursuant to a divorce by grounding the tax treatment in not only domestic relations law, but also contract law,[145] a common principle affecting the interpretation of divorce law in both the twentieth and twenty-first centuries.[146]

The Code's clarification of the contract interpretation of marriage protects divorcing taxpayers, but only if their transfers fit certain criteria.[147] A marital right is considered sufficient consideration if the right is "relinquished for a consideration in money or money's worth," and if the transfer is "a bona fide sale for an adequate and full consideration in money or money's worth."[148] If the property is transferred for less than an "adequate and full consideration in money or money's worth," then the IRS may consider the exceeded amount to

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[138] 26 U.S.C. § 1041(c) (2008). Temp. Treas. Regs. § 1.1041-1T, Q&A (6-7) (as amended in 2003).

[139] *See* Rev. Rul. 81-292, 1981-2 C.B. 158 (1981).

[140] *See generally* 26 U.S.C. § 1001 (1993).

[141] *See generally* Harris v. Comm'r, 340 U.S. 106 (1950).

[142] MCCAFFREY & SALTEN, *supra* note 125, at 267 (quoting Rev. Rul. 60-160, 1960-1 C.B. 374 (1960)).

[143] 26 U.S.C § 2516 (1984) ("where husband and wife enter into a written agreement relative to their marital and property rights[,]" any transfers of property or interests in property to either spouse to settle his or her marital or property rights "shall be deemed to be transfers made for a full and adequate consideration in money or money's worth").

[144] MCCAFFREY & SALTEN, *supra* note 125, at 253.

[145] *See generally* Gonzalez v. Green, 831 N.Y.S.2d 856 (Sup. Ct. 2006) (recognizing the applicability of enforcing the dissolution of marriage as a contractual agreement).

[146] *See generally* Marvin v. Marvin, 557 P.2d 106 (Cal. 1976).

[147] *See* 26 U.S.C. § 2043 (1984).

[148] 26 U.S.C. § 2043(a) (1984). *See also* 26 U.S.C. § 2043(b) (1984) (excluding "a relinquishment or promised relinquishment of dower or curtesy" as consideration).

be a gift.[149] The courts also interpreted the tax effects for the relinquishment of marital rights to protect divorcing taxpayers from the gift tax.[150] For example, under Code Section 1041,[151] IRS does not subject a transferor to any gain or loss from a transfer of property, regardless of the parties' intent.[152] Furthermore, the transferee may exclude the gift from his or her income, and take the transferor's adjusted basis for the gifted property.[153] This provision protects both divorcing spouses in a opposite-sex couple by shielding them from the property transfer's tax implications, effectively overruling the *Davis* rule from prior Supreme Court precedent.[154] However, these provisions do not apply, and, therefore, do not protect same-sex couples during either their marriage or divorce settlements.[155] Under current federal law, these provisions result in tax consequences for a same-sex couple's property transfer because, under the federal definition of marriage, these transfer do not qualify for exclusion.[156]

The tax consequences of a property transfer pursuant to a divorce settlement both positively and negatively impact same-sex couples' finances. Scholars emphasize that same-sex couples may use their tax exclusions to their financial benefit.[157] For example, if a woman in a same-sex couple sells depreciated stock shares to her partner, then the transferor-partner would realize and recognize a loss to deduct from her federal income tax.[158] A woman in an opposite-sex couple, however, could not recognize this loss because the IRS considers the opposite-sex couple to be a family under Code Section 267.[159] This inequi-

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[149] 26 U.S.C. § 2512(b) (1981).

[150] *See generally* Pearl & McCaffrey, *supra* note 128, at 3.

[151] Treas. Reg. § 1.1041-1T(a) Q&A (4) (limiting Code Section 1041 to only transfers of property, not transfers of services).

[152] 26 U.S.C. § 1041(a) (2008); 26 U.S.C. § 1041(b)(1) (2008) (explaining that a transfer is a gift, even if neither party intended to bestow gratuitous benefits on the other).

[153] Boris I. Bittker & Lawrence Lokken, *Transfers Between Spouses and Former Spouses [Revised]*, FED. TAX'N INCOME, EST. & GIFTS ¶ 44.6 (2011) (citing Godlewski v. CIR, 90 TC 200 (1988)).

[154] *See* United States v. Davis, 370 U.S. 65 (1962) (holding that, in a divorce settlement, a transfer of separately owned property is treated as a taxable transfer in consideration for the transferee's marital rights). *See also* Parsley v. Comm'r, T.C. Summ. Op. 2011-35 (applying Code Section 1041 to any property transfer between spouses).

[155] *See generally* Sean R. Weisshart, *Strategies to Minimize Estate and Gift Tax for Same-Sex Couples*, 37 EST. PLAN. 33 (2010).

[156] *See generally id.*

[157] *See generally* Anthony Rickey, *Loving Couples, Split Interests: Tax Planning in the Fight to Recognize Same-Sex Marriage*, 23 BERKELEY J. GENDER L. & JUST. 145 (2008); William P. Kratzke, *The Defense of Marriage Act (DOMA) Is Bad Tax Policy*, 35 U. MEM. L. REV. 399 (2005).

[158] *See* Pearl & McCaffrey, *supra* note 128, at 4 (citing 26 U.S.C. § 267 (2008) (disallowing deductions for losses resulting from the sale of property between related parties)).

[159] *See* Infanti, *supra* note 8, at 13-14 (citing 26 U.S.C. §§ 165(c)(2), 267(b), (c)(4), 1211(b) (2008)).

table treatment between same-sex and opposite-sex couples ignores the economic reality that same-sex couples also pool their resources like similarly situated, opposite-sex couples.[160] Therefore, the same-sex couples benefit from the resulting transfer's mere "paper" transaction by deducting a loss on their tax returns, a tax-planning option that is unavailable to similarly situated, opposite-sex couples.[161]

Same-sex couples also suffer from negative and inequitable tax treatment compared with similarly situated, opposite-sex couples. For instance, both same-sex and opposite-sex couples may sell or transfer their primary residence following a divorce.[162] If a spouse owned the home and used it as his or her primary residence for at least two of the previous five years preceding the sale, Code Section 121(a) generally allows this spouse a tax-free gain of up to $250,000 when the home is sold.[163] However, for same-sex couples, this property sale may also trigger taxable capital gains exceeding the tax-free exclusion,[164] resulting in a recognized, harmful taxable event; the IRS does not recognize this sale as a taxable event for similarly situated, opposite-sex couples.[165]

Under the Code, same-sex couples are further disadvantaged compared with similarly situated, opposite-sex couples because same-sex couples cannot claim the benefits of unrecognized transfers between spouses for income tax purposes or the estate tax marital deductions.[166] Together, these benefits allow opposite-sex, but not same-sex, couples to transfer property between spouses without tax recognition.[167] Further, under the IRS's current rules and regulations, if a woman lives in her same-sex partner's home, the IRS may require the non-owner partner to pay monthly rent to the homeowner partner.[168] Likewise, the IRS may require the homeowner partner to include the rental payments in her gross income, and may require this partner to pay income taxes on these rental pay-

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[160] *See* H.R. REP. No. 432, Pt. II, 98th Cong., 1491 (2d Sess. 1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 697, 1134 (finding that "a husband and wife are a single economic unit").

[161] *See* Pearl & McCaffrey, *supra* note 128, at 4 (citing 26 U.S.C. § 267 (2010)).

[162] 26 U.S.C. §§ 121(a) & 1041 (2008) (allowing a tax-free gain of up to $250,000 per individual when a home is sold and treating the transfer of property as a non-recognition event).

[163] James A. Fellows, *Tax Issues*, 40 REAL EST. L. J. 218, 226 (2011).

[164] *See generally* Timony J. Vitollo, *The DOMA Disparity: Transfer Taxation of Same-Sex Spouses in Community Property and Common Law States*, 26-APR PROB. & PROP. 10 (2012).

[165] *See* Fellows, *supra* note 163, at 226-27.

[166] Infanti, *supra* note 14, at 427 (citing 26 U.S.C. §§ 1041, 2056, and 2523 (2008) (applying only to transfers to a "spouse")).

[167] Infanti, *supra* note 14, at 427.

[168] Infanti, *supra* note 14, at 427.

ments.[169]

Furthermore, gifts may also trigger unfavorable tax treatment for same-sex couples while similarly situated, opposite-sex couples may avoid these exchanges' taxable recognition.[170] If a partner in a same-sex couple makes a gratuitous conveyance to his or her partner, the transfer may trigger a gift tax.[171] Although the gift tax unified credit[172] shelters some gift transfers from taxes, these transfers also reduce the available gift tax unified credit for lifetime use, which is particularly important at death.[173] If a same-sex couple uses the gift tax unified credit on a transfer to her same-sex partner,[174] the gifting spouse's lifetime exemption amount is reduced dollar for dollar for the amount she can pass tax-free to her estate at her death.[175] The Code protects similarly situated, opposite sex couples from this situation under Code Section 2523.[176]

In a second scenario, instead of simply transferring the property, if a partner in a same-sex couple decides to purchase a one-half interest in the property from her partner, the same-sex couple avoids the possible gift tax, but likely triggers income tax.[177] In the alternative, if a same-sex spouse exchanges half of her interest in her home to her same-sex ex-spouse for some of her ex-spouse's stock, both spouses recognize gain.[178] Finally, if a same-sex couple divorces and decides to sell the marital home, then the sale will be a taxable event, while Code Section 1041 protects a divorcing opposite-sex couple.[179] These incongruities affect essential divorce planning because, despite the parties' intentions, the Code may nevertheless recognize these transfers as taxable gifts.

Same-sex couples may also experience additional complexities in estate planning because the government requires them to file as single taxpayers. Same-sex couples may face the "Sisyphean task"[180] of compiling their financial

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[169] *See* Infanti, *supra* note 8, at 13-14 (citing 26 U.S.C. § 61(a)(5) (2008)).

[170] 26 U.S.C. § 1041 (2008).

[171] Treas. Reg. § 25.2511-1(c), (h)(5) (1997).

[172] An amount excluded against the imposition of the gift tax. 26 U.S.C. § 2505 (2008).

[173] *Compare* 26 U.S.C. § 2505(a) (2008) *with* 26 U.S.C. § 2501 (2008).

[174] Same-sex spouses are not recognized as related parties to qualify for the familial exception. *See* 26 U.S.C. § 267 (2008); 26 U.S.C § 1041 (2008).

[175] Robert W. Wood, *Gay or Straight, Marriage Matters—For Taxes*, FORBES.COM, August 17, 2010, *available at* http://www.forbes.com/2010/08/17/gay-marriage-divorce-taxes-irs-personal-finance-tax-lawyer-wood.html.

[176] Infanti, *supra* note 8, at 22 (citing 26 U.S.C. § 2523 (2008) (allowing a gift-tax deduction for spousal transfers)).

[177] Infanti, *supra* note 8, at 23.

[178] *See generally* Wood, *supra* note 175.

[179] *See* Infanti, *supra* note 8, at 23-24. *See also* 26 U.S.C. § 1041 (2008) (stating that no gain or loss shall be recognized on transfers of property between spouses, or former spouses, if incident to a divorce).

[180] AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE ONLINE (5th ed. 2011)

records to prove both the pooling of their resources and the net interspousal transfer amount, solely because the Code fails to recognize the inherent similarities between same-sex and opposite-sex couples' economic relationships.[181] Transfers above the annual deductions within a same-sex couple, including grocery purchases, travel expenses, and Christmas presents, are likely to be taxable gifts.[182] For income tax purposes, the Code treats a non-spousal transfer as income for the donor spouse; for the recipient spouse, the Code treats the transfer as either: an excludible gift, an excludible support payment, taxable income, or some combination of these three treatments.[183] For gift tax purposes, the Code treats this same non-spousal transfer for the donee spouse as either: a taxable gift, "a non-taxable payment made in exchange for rendering domestic services or for furnishing some other consideration in money or money's worth," a nontaxable support payment, or some combination of the these three treatments.[184] Both of these tax scenarios affect same-sex couples because of DOMA's definition of spouse and the Code's refusal to recognize the couple's status as spouses.

The Code protects some completed transfers from gift tax recognition.[185] A gift tax annual exclusion currently renders a certain amount non-taxable per year for transfers between same-sex spouses.[186] If the total amount of transfers between these partners exceeds the annual exclusion, then the remaining gifts deplete the gifting spouse's gift tax unified credit for that year.[187] Once the gifting spouse exhausts this credit, the IRS recognizes his or her transfers and taxes them.[188] Under DOMA, the federal government's treatment of same-sex couples as non-spouses reduces these taxpayers' gift tax annual exclusions and unified credits more quickly than for similarly situated, opposite-sex couples.[189]

As previously mentioned, the effects of this discriminatory taxation system may continue after divorce if divorcing spouses must pay permanent periodic

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(defining Sisyphean as "endlessly laborous or futile"), *available at* www.abdictionary.com/word/search.html?q=sisyphean&submit.x=0&submit.y=0.

[181] Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 797-98 (2004).

[182] Fry, *supra* note 10, at 557 (citing 26 U.S.C. §§ 2523 (1997) and 2501 (2004)).

[183] Infanti, *supra* note 14, at 426 (citing Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 785 (2004)).

[184] Infanti, *supra* note 14, at 426 (citing Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 785-86 (2004)).

[185] *Compare* 26 U.S.C. § 1001(b) (1984) *with* 26 U.S.C. § 1001(c) (1984).

[186] *See* Rev. Proc. 2008-66, § 3.30, 2008-45 I.R.B. 1107.

[187] *See* 26 U.S.C. § 2505(a)(1) (2008). *See also supra* note 172 and accompanying text.

[188] *See* Internal Revenue Serv., Dep't of Treasury, Instructions for Form 709, at 12 (2008); *see also* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 511(d), (f)(3), 901, 115 Stat. 38, 70-71, 150.

[189] Infanti, *supra* note 181, at 786-87.

alimony, or support money.[190] Federal income tax law currently taxes the recipient of alimony.[191] Both same-sex and opposite-sex couples may continue to split income after a marriage ends by paying alimony, but only a divorcing opposite-sex couple may elect into the alimony inclusion-deduction structure under Code Sections 71 and 215.[192] These sections permit an alimony-paying spouse to shift income to a lower-earning spouse and allow the alimony-paying spouse to receive a deduction for these spousal payments, potentially further reducing her tax payments.[193] Because these tax provisions only apply to spouses under the federal law definition of marriage, same-sex couples face further disadvantages even after a divorce.

Individual incomes within an opposite-sex couple determine whether the opposite-sex couple's ability to split income is a positive, negative, or neutral tax aspect of the couple's marriage.[194] However, if individuals in a same-sex couple contribute disproportionately to their marriage, the IRS may treat the higher-contributing partner as if he made a transfer to the lower-contributing partner, regardless of the higher-contributing partner's intent.[195] As previously mentioned, these transfers may be treated as taxable events for income tax purposes, gift tax purposes, or both.

The Code excludes opposite-sex couples' transfers as unrecognized gain because the government acknowledges their income-splitting.[196] Same-sex couples' income-splitting transactions with unequal contributions also applies to a support arrangement, where one divorcing partner must pay income tax on her wages while her same-sex ex-partner pays no income tax on the support payments.[197] The more confusing and frightening situation is when the transfer represents a combination of part support, part gift, for income tax purposes; or part nontaxable support payment, part taxable gift, for gift tax purposes.[198] These numerous combinations negatively impact same-sex couples' ability to effectively plan financially because the Code does not consistently characterize

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[190] *See* MASS. GEN. LAWS. ch. 208 § 34 (2012).

[191] 26 U.S.C. § 71 (1986); *see also* Rykiel v. Rykiel, 838 So. 2d 508 (Fla. 2003).

[192] *See* Infanti, *supra* note 8, at 26.

[193] Infanti, *supra* note 8, at 26.

[194] *See* Infanti, *supra* note 8, at 25 (citing Cong. Budget Office, *For Better or For Worse: Marriage and the Federal Income Tax* 29-30 (1997) (indicating that in 1996, 21 million couples paid a marriage penalty, 25 million couples received a marriage bonus, and 3 million couples were unaffected)).

[195] *See* Infanti, *supra* note 8, at 28.

[196] *See generally* Revenue Act of 1948, 62 Stat. 110 (1948).

[197] *See* BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS ¶ 10.2.6 (2d. ed. 1993) (excluding opposite-sex intrafamily transfers). *But see* Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 TUL. J.L. & SEXUALITY 97, 115-16 (1991) (finding that the same logic does not apply to same-sex couples).

[198] *See* Infanti, *supra* note 8, at 29. *See also* Cain, *supra* note 197, at 125. *See also* Rev. Rul. 68-379, 1968-2 C.B. 414.

transfers between same-sex spouses, resulting in up to treble taxation.[199]

One way to avoid taxable transfers is to create a grantor retained income trust (a "GRIT"), which first pays income to the grantor for a specified term, then pays the principal to a beneficiary.[200] In earlier Code regulations and laws, a transferor in an opposite-sex marriage could overvalue the GRIT's expected income and undervalue a gift to his or her spouse.[201] Overvaluing the income would result in a deduction for the transferor and undervaluing the gift would minimize the recipient spouse's includable income.[202] Code Section 2702 changed this manipulation by creating special valuation rules,[203] which effectively eliminated the prior adjusting of the taxable income and transferred gift amounts by opposite-sex couples through a GRIT.[204]

A partner in a same-sex marriage may still use a GRIT to transfer a gift in trust to his or her partner and benefit from avoiding the special valuation rule under Code Section 2702.[205] Therefore, unlike opposite-sex couples, a same-sex couple may avoid both gift and estate tax liabilities because Code Section 2702 applies only to transfers "to (or for the benefit of) a member of the transferor's family."[206] Furthermore, Code Section 2701(e)(2) defines "an applicable family member . . . with respect to any transfer" as "(A) the transferor's spouse, (B) an ancestor of the transferor or the transferor's spouse, and (C) the spouse of any ancestor."[207] Under this section, DOMA's treatment of same-sex couples as non-spouses excludes same-sex spouses from the definition of an "applicable family member," and, therefore, same-sex couples avoid the special

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[199] *See generally* Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 375 (1995).

[200] Michael V. Bourland & Jeffrey N. Myers, *Estate Planning for the Family Business Owner: Hot Topics Under the 2001 Tax Act and Transfer Planning: Grantor Trusts Including Grantor Retained Interest Trusts and Intentionally Defective Grantor Trusts*, SH005 A.L.I.-A.B.A. Course of Study Materials (2002), *available at* http://www.bwwlaw.com/downloads/mvb/2002%20aliaba/2002%20GTv12.htm.

[201] Fry, *supra* note 10, at 559.

[202] *See* 26 U.S.C. § 641 (2007).

[203] Fry, *supra* note 10, at 556 (citing 26 U.S.C. § 2702(a)(2) (2006) and Keith Depies, *Grantor Trusts and Zero Valuation Rules*, 1997 TAX ADVISER 75, 75). The new rules established that the transferor's retained interest equaled zero, and these rules "assess[ed] gift taxation on the entire amount transferred to the trust," despite the transferor's retained income interest. *Id.*

[204] *See* 26 U.S.C. § 2702(a)(1) (1996) (applying only to "applicable family member"). *See also* 26 U.S.C. § 2701(e)(2) (1996).

[205] 26 U.S.C. § 2702 (2006) (applying a retained interest at zero for transfers from a trust to a family member).

[206] Fry, *supra* note 10, at 556 (citing Brian R. Selvin & Allen V. Brown, *Post Civil-Union Planning: The Tax and Estate Planning Issues Faced by the Nontraditional Family*, 189 N.J. L.J. 48, 48 (2007) *and* 26 U.S.C § 2702(a)(1) (1996)).

[207] 26 U.S.C. § 2701(e)(2) (1996).

valuation rules targeted at opposite-sex couples.[208] The Code's inconsistent treatment of families allows same-sex couples, but not opposite-sex couples, to continue the "arbitrary and abusive elimination of value" in GRITs for their tax benefit.[209]

Moreover, some experts recommend estate-planning strategies despite their potential unenforceability.[210] However, the additional costs of maintaining a trust or planning an estate, such as trustee commissions, may limit the applicability of these solutions.[211] Despite the need to avoid taxation on these assets at divorce, the time and money necessary to re-title assets to the trust may outweigh these trusts' benefits, especially for individuals with lower incomes.[212]

An audit by the IRS presents an additional concern for same-sex couples. If the IRS chooses to audit a same-sex couple and determines a deficiency in the amount they owe, this couple carries the burden to prove that the transfers' value and treatment are valid under the relevant and current tax and property laws.[213] If the same-sex couple fails to meet this burden and cannot show reasonable cause for the deficit, both spouses may be liable not only for additional taxes, but also for interest and penalties.[214] The IRS requires same-sex couples to comply with recordkeeping and reporting requirements to verify the amount and validity of their transfers, which could include every penny that the couple spends, saves, or gives away.[215] The IRS protects opposite-sex couples from these burdens through joint-filing status and income-splitting privileges,[216] nonrecognition of transfers between spouses,[217] and the deduction of gifts between spouses.[218] These provisions are not available to same-sex couples because of

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[208] Fry, *supra* note 10, at 560.

[209] Fry, *supra* note 10, at 560-61 (citing Walton v. Comm'r, 115 T.C. 589, 601 (2000) and Keith Depies, *Grantor Trusts and the Zero Valuation Rules*, 1997 TAX ADVISER 75, 75).

[210] *See* Tara Siegel Bernard, *Seven Tips for Dissolving Gay Unions*, N.Y. TIMES (Nov. 18, 2009), http://bucks.blogs.nytimes.com/2009/11/18/gay-divorce-part-2/?pagem (suggesting prenuptial agreements, second-parent adoptions, and tax planning for the dissolution of civil unions and same-sex marriages). *See also generally* Raymond Prather, *Considerations, Pitfalls, and Opportunities That Arise When Advising Same-Sex Couples*, 24 PROBATE & PROP. 24 (2010).

[211] Meghan V. Alter, *The High Price for Leveling the Playing Field: The Socioeconomic Divide in Estate Planning for Same-Sex Couples*, 25 QUINNIPIAC PROB. L.J. 32, 43-44 (2011).

[212] *See* Joel C. Dobris et al, *Estates and Trusts* 424, 554-56 (3d. ed. 2007).

[213] *See* Tax. Ct. R. 142(a)(1); United States v. Janis, 428 U.S. 433, 440 (1976); Welch v. Helving, 290 U.S. 111, 115 (1933).

[214] Infanti, *supra* note 8, at 31 (citing Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 790-97 (2004)).

[215] *Id.* at 31. *See* Treas. Regs. §§ 1.6001-1(a) (as amended in 1990) and 25.6001-1(a) (as amended in 1977).

[216] 26 U.S.C. § 1 (2011).

[217] 26 U.S.C. § 1041 (2008).

[218] 26 U.S.C. § 2523 (1997).

DOMA.[219] Even after a divorce, opposite-sex couples are aided by the alimony inclusion-deduction structure, unlike similarly situated, same-sex couples.[220] The differences in the tax treatment between same-sex and opposite-sex divorces indicate that the IRS fails to treat similarly situated taxpayers equally under the Code, despite important equitable tax policies.[221] These differences reflect the disparate impact that DOMA inflicts on married same-sex couples.[222] DOMA imposes inequities within the Code.[223] As more same-sex couples marry, the conflict between DOMA and the Code will become increasingly problematic.[224]

III. ARGUMENT

A. *Importance of a Solution to the Tax Inequities in Divorce Proceedings*

A divorce reflects one of the most public aspects of a couple's relationship because most divorces involve a neutral arbitrator—usually a judge—to equitably divide the marital assets.[225] Therefore, the need for privacy during a divorce is an important concern. Same-sex and opposite-sex couples enjoy a "zone of privacy," emphasized in the analogous cases, *Planned Parenthood v. Casey*[226] and *Lawrence v. Texas*;[227] however, the federal government still probes into the financial dealings between same-sex couples.[228] The government may even expect married same-sex couples to fabricate their identities and tax filing statuses, despite the couples' economic realities and risks of incurring tax fraud penalties.[229] In fact, some scholars recommend married same-sex couples file as single taxpayers and wait to see if the IRS randomly chooses to audit them, thereby playing the "audit lottery."[230] Unfortunately, the option to play the audit lottery may be particularly problematic for same-sex couples who choose to file for divorce because the inherently public nature of legalized divorce proceedings may expose these couples' false claims of single status to

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[219] Cain, *supra* note 66, at 501-02.

[220] 26 U.S.C. §§ 71 (1986) and 215 (1984). *See* Infanti, *supra* note 8, at 32. *See also supra* text accompanying note 170.

[221] *See* Kornhauser, *supra* note 52, at 1433.

[222] *See supra* Part II.D.

[223] *See supra* Part II.D.

[224] Terry, *supra* note 21, at 389.

[225] Marcelle S. Fischler, *The Right to Divorce*, N.Y. TIMES, June 6, 2009, http://www.nytimes.com/2009/06/07/fashion/weddings/07FIELD.html.

[226] *See generally* Planned Parenthood v. Casey, 505 U.S. 833 (1992).

[227] *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).

[228] *See* Infanti, *supra* note 8, at 25. *See also* Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677, 696-97 (2000) (providing narratives of same-sex couples' estate tax audits).

[229] Fry, *supra* note 10, at 568.

[230] Infanti, *supra* note 14, at 426 (citing Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 803 (2004)).

the federal government and the IRS.[231]

This tax uncertainty also produces practical and policy considerations for all married couples. Both same-sex and opposite-sex couples invariably try to adjust their private behavior to reduce their collective taxes.[232] Indeed, Judge Learned Hand once eloquently stated, "any one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose that pattern which will best pay the Treasury."[233] In fact, bright-line rules may influence couples' behavior by reducing the tax costs of divorce, leaving more money to be divided between the divorcing same-sex spouses.[234] Bright-line rules also further the tax policy that "tax consequences must be immediate and clear, not uncertain or speculative."[235] Relatedly, allowing same-sex couples to determine the tax consequences of divorce-related transactions furthers the domestic relations policy to encourage former spouses to negotiate.[236] Therefore, the government should encourage a tax system that structurally minimizes the amount of tax avoidance for all married couples, while acknowledging that marriage, and therefore divorce, affects all couples' relative abilities to pay taxes.[237]

Furthermore, Congress should not consider the cost of extending the federal tax benefits enjoyed by opposite-sex couples to similarly situated same-sex couples because these costs represent a minimal adjustment in federal tax revenues or expenditures.[238] In fact, some scholars posit that the IRS would force same-sex couples to pay the marriage penalty, increasing the federal tax revenue.[239] While recent amendments to the federal income tax law diminished the impact of any marriage penalty on opposite-sex couples,[240] and, notwithstanding any remaining applicability of the marriage tax penalty, most opposite-sex couples still choose to file jointly, which strongly indicates that same-sex

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[231] Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 643 (2010).

[232] *See generally* Black, *supra* note 1, at 327.

[233] Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934).

[234] Arnes v. Commissioner, 102 T.C. 522, 541 (1994) (Beghe, J., concurring).

[235] Karen Moulding & National Lawyers Guild, *Duty to Advise Regarding Tax Consequences*, 1 SEXUAL ORIENTATION AND THE LAW § 4:2 (2012) (citing *Divorce and Separation: Consideration of Tax Consequences in Distribution of Marital Property*, 9 A.L.R. 5th 568).

[236] Stephen A. Lind et al., *Fundamentals of Corporate Taxation: Cases and Materials* 279 (7th ed. 2008).

[237] *See* McMahon, *supra* note 121, at 746.

[238] *See* Nixon, *supra* note 75, at 59 n.97.

[239] *See* Nixon, *supra* note 75, at 59 (citing M. V. Badgett & Josh A. Goldfoot, *For Richer, For Poorer: The Freedom to Marry Debate*, 1 ANGLES 3 (1996)).

[240] Kubasek et al., *supra* note 113, at 969 n.51 (citing Title III ("Marriage Penalty Relief") of Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), Pub. L. 107-16, 115 Stat. 38 (2001)).

couples also will choose to file jointly.[241] Therefore, federal recognition of marital tax benefits may only minimally increase federal expenditures because these costs may be offset by same-sex couples' marriage penalties.[242] Additionally, the accumulation of federal gift tax revenue is not an appropriate policy consideration because "Congress enacted the federal gift tax, not primarily to raise revenue, but rather to ensure the effectiveness of the estate tax in raising revenue."[243] Notwithstanding Congress's policy considerations, correcting an inequity in the gift and estate tax systems may achieve a more predictable, and potentially an even greater, tax revenue.[244]

B. *IRS Rulings Indicate Possibility of Change for Married Same-Sex Couples*

Significantly, the IRS's decisions are not stagnant, and though the IRS currently treats married same-sex couples as "legal strangers," recent substantial exceptions have improved the tax inequities for same-sex couples, thereby suggesting that similar amendments may be possible for divorcing same-sex couples.[245] In May 2010, the IRS both improved and confused the tax situation for same-sex couples by releasing Chief Counsel Advice ("CCA") 201021050 (the "2010 CCA Ruling"), reversing the IRS's ruling in CCA 200608038 in 2006 (the "2006 CCA Ruling").[246] In the 2006 CCA Ruling, the IRS refused to recognize community property rights for California registered domestic partners ("RDPs").[247] In its 2010 CCA Ruling, however, the IRS instructed California RDPs to report one-half of the community income on the partners' federal tax return.[248] While CCAs hold little precedential value except for the

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[241] *See id.* at 969 (citing Jobs and Growth Tax Relief Reconciliation Act of 2003, Pub. L. 108-27, 117 Stat. 752 (2003)). *See also* Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 169-70 (2003) (internal citation omitted).

[242] Nixon, *supra* note 75, at 59 (internal citations omitted).

[243] Fry, *supra* note 10, at 550 (citing Richard Schmalbeck, *Does the Death Tax Deserve the Death Penalty? An Overview of the Major Arguments for Repeal of Federal Wealth-Transfer Taxes*, 48 CLEV. ST. L. REV. 749, 764 (2000)). *See* 26 U.S.C. §§ 2501, 2511 (2006) (finding that Congress could tax inter vivos transfers previously used by some taxpayers to avoid estate tax liabilities).

[244] *See* Fry, *supra* note 10, at 567-68 (finding that the federal government loses tax revenue by allowing certain types of gift and estate tax planning for same-sex couples that are unavailable to opposite-sex couples).

[245] Goffe, *supra* note 116, at 15.

[246] Goffe, *supra* note 116, at 15. *See generally* I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006) and I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010). *But see* Mark Schwanhausser, *Bill Would Give Gay Couples Right to File Taxes as Married Couples But Landmark Victory Would Come With Tax Headaches,* SAN JOSE MERCURY NEWS, Sept. 28, 2006, *available at* 2006 WLNR 16802046.

[247] *See generally* I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006).

[248] *See generally* I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010).

taxpayers to whom the CCA was written,[249] this ruling may also strongly impact same-sex couples.[250]

The federal government's recognition of an opposite-sex couple's income-splitting mirrors extending the 2010 CCA Ruling's principle to all couples, including RDPs, to divide their income.[251] However, the 2010 CCA Ruling may extend to same-sex couples only if the applicable state property law recognizes the income-splitting[252] inherent in same-sex marriages.[253] The 2010 CCA Ruling remedies the federal tax treatment for RDPs to be consistent with opposite-sex couples in community-property states, but fails to provide the same treatment for same-sex couples within the same states.[254] Indeed, like same-sex and opposite-sex divorces in Massachusetts, California same-sex marriages enjoy the same rights and responsibilities as California RDPs and opposite-sex marriages.[255] The inequities among RDPs, opposite-sex marriages, and same-sex marriages appear most apparent in California because of the 2010 CCA Ruling, but these inequities also extend nationally for same-sex couples because they do not receive the same federal tax treatment as the IRS bestowed on Californian RDPs in the 2010 CCA Ruling.[256] Although the federal government refuses to recognize income-splitting for same-sex couples, these couples live together in an economic unit during their marriage, just like persons in RDPs and opposite-sex marriages.[257] These same-sex couples face further disadvantages because the government fails to recognize their pooled resources when they attempt to untangle their assets during divorce.[258]

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[249] *See* 26 U.S.C. §§ 6110(k)(3) (2006) (providing that a "written determination" may not be "used or cited as precedent") and 6110(b)(1) (2006) (stating that "written determination" means a "ruling, determination letter, technical advice memorandum, or Chief Counsel Advice").

[250] *See generally* Rebecca J. Kipper, Comments, *Just a Matter of Fairness: What the Federal Recognition of California Domestic Partners Means in the Fight for Tax Equity*, 15 CHAP. L. REV. 613 (2012).

[251] *See id.* at 644.

[252] Income splitting aggregates a couple's total income and divides this total income in half so that both taxpaying spouses pay one-half of the total income. *See* Patricia Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 812-19 (2008).

[253] *See* Kipper, *supra* note 250, at 638-39 (positing that federal tax law relies on state property law characterizations).

[254] *See id.* at 643.

[255] *See id.* at 643 n.195 (citing S.B. 54, 2009-2010 S., Reg. Sess. (Cal. 2010)) (stating that all same-sex couples married in California are entitled to recognition as spouses, and even same-sex couples from other states are entitled to all of the "rights, benefits, and responsibilities of marriage in California").

[256] *See id.* at 643-46.

[257] *See* Pollet, *supra* note 19, at 13 (citing Tara Siegel Bernard, *For Gay Couples, 'Traditional' Isn't Always an Option*, N.Y. TIMES, July 28, 2010, http://bucks.blogs.nytimes.com/2009/11/17/for-gay-couples-traditional).

[258] *See id.*

While these CCA rulings apply only to income-splitting, and therefore apply only during marriage, the IRS's general principle of treating RDPs as an economic unit also appropriately applies for dissolving same-sex marriages.[259] As previously mentioned, courts officiate the equitable division of the marital assets as an essential part of the dissolution process.[260] The federal government, and specifically the IRS, has not addressed how its 2010 CCA Ruling affects a Californian-RDP dissolution; by pointing to their inherent income-pooling, RDPs could argue that their assets should be divided at divorce, similar to opposite-sex couples, because both sets of partners act as economic units.[261] Further, if the IRS rules in favor of this argument, the government's treatment of divorcing same-sex couples for federal tax purposes will be inequitable compared with persons in dissolving RDPs; unlike persons in RDPs, same-sex couples will not uniformly appreciate income-pooling tax effects, thus creating more disparity and inherent unfairness in the current tax system.[262]

The current disparity among persons in RDPs, opposite-sex spouses, and same-sex spouses also mirrors past inequitable treatment within the Code. Congress amended a similar inequitable and geographic disparate treatment following the *Poe v. Seaborn* case[263] by enacting the Revenue Act of 1948,[264] which established joint filing.[265] Given the state assemblies' joint resolutions calling for the IRS to fix same-sex couples' tax treatment through a revenue ruling, legislation may be a practical and desperately needed solution to the current tax inequities for same-sex couples.[266] Furthermore, some scholars advocate that the IRS should broaden its 2010 CCA Ruling's holding beyond the distinction among state property laws to further correct the IRS's disparate application of federal tax treatment to same-sex and opposite-sex couples, despite

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[259] *See generally* Poe v. Seaborn 282 U.S. 101 (1930) (finding that opposite-sex couples in Washington were allowed to split income for federal income tax purposes). *See also* Revenue Act of 1948, Pub. L. No. 471, § 303, 62 Stat. 110, 111-14 (1948) (finding that where Congress established the joint return, *Poe v. Seaborn* should be extended to all couples regardless of the underlying state law).

[260] *See* Kornhauser, *supra* note 52, at 1432.

[261] *See generally* Vitollo, *supra* note 164.

[262] *See* Kipper, *supra* note 250, at 649.

[263] *See generally* Poe v. Seaborn, 282 U.S. 101 (holding that an opposite-sex couple married in Washington could split their income under a community property statute).

[264] *See generally* Revenue Act of 1948, 62 Stat. 110 (1948) (correcting the inequitable treatment between opposite-sex couples in both community and non-community property states).

[265] *See* Kipper, *supra* note 250, at 623 (citing Revenue Act of 1948, Pub. L. No. 471, §303, 62 Stat. 110, 111-14 (1948)).

[266] *See generally* Assemb. J. Res. 29, 2009-2010 Assemb., Reg. Sess. (Cal. 2010). *See also* S. Comm. on Revenue & Taxation, Bill Analysis on Assemb. J. Res. 29, 2009-2010 Assemb., Reg. Sess. (Cal. 2010), at 4.

the marriage tax penalty's potential burden on some same-sex couples.[267] By focusing on the equitable dissolution of same-sex marriage, rather than the marriage union of same-sex spouses, the federal government may recognize post-hoc the inherent similarities between same-sex and opposite-sex couples without choosing to rule on the legitimacy of their status as married couples.[268] However, the IRS has not yet provided same-sex couples with any guidance to resolve these couples' characterization of interspousal transfers either during or after their marriages.[269]

C. *Judicial Solutions:* In re Balas *and the Importance of a Tax Case*

In the alternative, caselaw may serve as an equitable solution for the currently inequitable tax treatment for some same-sex couples.[270] For instance, where the alimony inclusion-deduction structure in Code Sections 71 and 215 do not apply, *Gould v. Gould*'s "satisfaction of a valid support obligation" language may bar including spousal support payments in the recipient spouse's income.[271] Likewise, by overruling the *Davis* rule, the IRS ruled that a spouse is not taxed on appreciated property received from her divorcing spouse in exchange for the release of her marital rights.[272] The IRS did not release a rationale with this ruling, but the "in lieu of" doctrine may explain the IRS's reasoning.[273] The "in lieu of" doctrine argues that if a recipient transfers rights, such as marital rights, which she would enjoy tax-free, she should also receive the exchanged property tax-free.[274] The doctrine benefits divorcing same-sex couples by grounding the rationale in contract law and avoiding any association with DOMA.[275] While the non-recognition of spousal transfers in Code Section 1041 and the IRS ruling repealing the *Davis* rule may be unavailable to a divorcing same-sex spouse because the Code and the ruling use the word "spouse," the "in lieu of" doctrine is a fundamental federal income tax principle from good caselaw.[276]

Moreover, tax policy may also solve the gift tax inequities caused by

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[267] *See generally* Cain, *supra* note 252. *See also* Fry, *supra* note 10, at 569-70 (suggesting that the benefits of federal recognition through the revision to the tax code may outweigh the burdens because it is "one small step in the direction of equality").

[268] *See* Yarwood, *supra* note 88, at 1387.

[269] Infanti, *supra* note 14, at 426 (citing Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 789 (2004)).

[270] *See* Yarwood, *supra* note 88, at 1387.

[271] *See* I.R.S. Gen. Couns. Mem. 37,571 (June 15, 1978).

[272] *See* Rev. Rul. 67-221, 1967-2 C.B. 63.

[273] *See generally* Lyeth v. Hoey, 305 U.S. 188 (1938).

[274] Karen Moulding & National Lawyers Guild, *Divorce of Dissolution – Division of Property – Income Tax Issues*, *in* 1 SEXUAL ORIENTATION AND THE LAW § 3:29, at 3-66 (2012).

[275] Pearl & McCaffrey, *supra* note 128, at 11.

[276] Moulding, *supra* note 274.

DOMA.[277] Generally, federal law looks to state law for the definition of taxed property rights.[278] If the state divorce law imposes an obligation on one of the spouses to transfer cash or other property pursuant to a divorce settlement, the transferor spouse may receive the necessary consideration in the exchange of her marital rights and obligations.[279] With this necessary consideration, the transfer may be accomplished tax-free for the transferor-spouses and recipient-spouses, and therefore, Code Section 1041 treatment applies to divorcing couples. These solutions, however, may require divorcing same-sex spouses, if audited, to litigate against the IRS for any alleged tax deficiencies.[280] While the aforementioned solutions may be compelling legal analysis,[281] the courts may decide such cases differently, further marginalizing all same-sex couples. Hence, these prior solutions are not an ideal solution for all married or divorcing same-sex couples.

Alternatively, a tax case may correct DOMA's harmful effects as a potentially appropriate, and minimally risky, judicial solution.[282] While the Tax Court has not discussed explicitly the federal government's inequitable treatment of same-sex couples under DOMA, in July 2011, in *In re Balas*, the U.S. Bankruptcy Court held for a same-sex couple's joint bankruptcy petition.[283] The Bankruptcy Court rejected DOMA as a valid argument against extending the same protection in Chapter 13 bankruptcy proceedings to the same-sex couple as to any opposite-sex couple.[284] This court applied heightened scrutiny for discriminatory effects on the married same-sex couple's inability to file a joint petition.[285] The Bankruptcy Court relied on the Ninth Circuit's heightened scrutiny review in *Witt v. Dep't of Air Force*, requiring the government to show that "a justification exists for the application of the policy as applied to the [Petitioner]."[286]

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277 *See generally* Pearl & McCaffrey, *supra* note 128, at 11.

278 *See* Pearl & McCaffrey, *supra* note 128, at 11 (citing Morgan v. Commissioner, 309 U.S. 78 (1940)).

279 *See* Pearl & McCaffrey, *supra* note 128, at 11 (citing Rev. Rul. 68-379, 1968-2 C.B. 414 ("characterizing transfers in satisfaction of support rights as transfers for consideration in money or money's worth")).

280 *See generally* 26 U.S.C. § 7422 (1998).

281 *See* Cain, *supra* note 66, at 506-13 (2009).

282 *See* Filisko, *supra* note 83, at 20 ("A lot of people think what's going to bust DOMA wide open is a tax case. The treatment is utterly different because same-sex [ ] couples get none of the benefits, and we're talking major dollars.").

283 *See generally In re* Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011).

284 *See generally id.*

285 *See generally id.*

286 *See id.* at 575 (quoting Witt v. Dep't of Air Force, 527 F.3d 806, 819 (9th Cir. 2008) (where the application of "Don't Ask, Don't Tell," specifically to the petitioner, significantly furthered the government's interest and where no less intrusive means would achieve substantially the same interest.)).

To this end, the Bankruptcy Court reexamined many of DOMA's purposes in promoting the government's interests: "(1) encouraging responsible procreation and child-bearing, (2) defending and nurturing the institution of traditional heterosexual marriage, (3) defending traditional notions of morality, and (4) preserving scarce resources."[287] The Bankruptcy Court held that the original decision, which declined to extend a same-sex couple's joint bankruptcy petition because of DOMA, failed to pass constitutional muster.[288]

Like the bankruptcy law and policy discussed in *In re Balas*, the federal tax system inequitably applies to same-sex couples and creates unjustifiable tax realities for these couples, which DOMA's justifications fail to support.[289] As previously stated, state domestic relations law—not federal law—traditionally determined marital status,[290] and DOMA's justifications also fail to support overriding the state's power to determine its residents' marital status.[291] The Bankruptcy Court's contemporary reexamination of DOMA's purpose and the Court's rejection of DOMA's rationales indicate that some federal courts may be sensitive to same-sex couples' economic interests. Furthermore, the Bankruptcy Court's ruling suggests that the Tax Court could treat DOMA similarly in a tax case to the Bankruptcy Court's holding, especially in a case involving the tax treatment for same-sex couples in a divorce proceeding.[292]

Most recently, several federal appellate courts explored these same DOMA justifications when adjudicating Equal Protection and federalist claims brought by same-sex couples.[293] Particularly, in *Massachusetts v. United States Dep't of Health & Human Servs.*, the First Circuit unanimously affirmed Judge Tauro's decision that Section 3 of DOMA was unconstitutional under rational basis review for the plaintiffs' Fifth Amendment, Equal Protection, and federal-

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[287] *See* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 388 (D. Mass. 2010) (identifying Congress' four interests in enacting DOMA).

[288] *See generally In re* Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011).

[289] *See* Gill, 699 F. Supp. 2d at 388 (citing the H.R. REP. No. 104-664, at 12-18 (1996). House Report at 11-18). *See also supra* note 38 and accompany text.

[290] H.R. REP. No. 104-664, at 2 (1996) (allowing states to decide for themselves whether to recognize same-sex marriages, and normalizing the definition of marriage throughout federal law).

[291] *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (holding that the state law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will require that the state law be overridden); *see also* Milstein, *supra* note 56, at 483 (finding that DOMA is "wildly under-inclusive").

[292] *See* Oppenheimer, *supra* note 24, at 108-10 (suggesting that an equal protection or due process case may be successful).

[293] *See generally* Massachusetts v. U.S. Dep't of Health, 682 F.3d 1 (1st Cir. 2012), *aff'd* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (appeal of Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) combined with Massachusetts v. U.S. Dep't of Health, 698 F. Supp. 2d 234 (D. Mass. 2010)); Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

ism claims.[294] The First Circuit also found that the federal government must show its interest with "special clarity" when it intervenes into an area typically governed by state law.[295] Most significantly, the First Circuit held that DOMA's treatment of same-sex couples lacked any connection with its "asserted goal of strengthening the bonds and benefits to society of heterosexual marriage."[296] Finally, the First Circuit suggested that courts should evaluate DOMA under a slightly higher standard of review, a beneficial distinction for the future of same-sex civil rights.[297]

The Ninth Circuit also considered a related legal argument in *Perry v. Brown* in examining Proposition 8's amendment to California marriage status.[298] In *Perry v. Brown*, the Ninth Circuit distinguished between the uniquely familial relationship of married couples (whether opposite-sex or same-sex) and other familial relationships.[299] This same decision also held that because "Proposition 8 works a meaningful harm to gays and lesbians by denying to their committed lifelong relationships the societal status conveyed by the designation of 'marriage,'" legitimate state interests must justify this harm to be constitutionally valid.[300] Relatedly, the Ninth Circuit examined Proposition 8's act of exclusion towards same-sex couples when compared with opposite-sex couples, recognizing the former equal status between these two types of couples.[301] On December 7, 2012, the Supreme Court granted the petition for certiorari in *Perry*, however the Court's holding will not likely affect the inequity in the Code.[302] While same-sex couples have never benefitted from equal filing status

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[294] *See generally* Massachusetts v. United States Dep't of Health & Human Servs., 682 F.3d 1.

[295] *Id.* at 15; *see id.* at 13 ("Given that DOMA intrudes broadly into an area of traditional state regulation, a closer examination of the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns.").

[296] *Id.* at 15.

[297] *See id.* ("If we are right in thinking that disparate impact on minority interests and federalism concerns both require somewhat more in this case than almost automatic deference to Congress' will, this statute fails that test.").

[298] *See generally* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012).

[299] *See id.* at 1079 ("We allow spouses but not siblings or roommates to file taxes jointly, for example, because we acknowledge the financial interdependence of those who have entered into an 'enduring' relationship.").

[300] *Id.* at 1081 (citing Romer v. Evans, 517 U.S. 620, 631 (1996)). "'[A] bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* government interest.'" *Id.* at 1084 (quoting United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[301] *See id.* at 1084 (referring to *Romer*'s and *Moreno*'s acts of exclusion).

[302] *See* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), *cert. granted sub nom.* Hollingsworth v. Perry, 81 U.S.L.W. 3075 (U.S. Dec. 7, 2012) (No. 12-144). *See also* Kenji Yoshino, *Commentary on Marriage Grants: Different Ways of Splitting the Difference – The Menu of Options in Hollingsworth v. Perry*, SCOTUSBLOG (Dec. 8, 2012, 9:48AM), http://

or tax treatment relative to similarly situated opposite-sex couples, tax arguments encourage equality and fairness inherent in this decision.

Likewise, the Connecticut District Court examined the lack of federal benefits recognition for same-sex couples,[303] again finding that, prior to the enactment of DOMA, state law ultimately determined the federal government's recognition of marital status.[304] Notably, the Connecticut District Court found that same-sex couples qualified as a suspect class, and, therefore, statutory classifications related to sexual orientation were entitled to heightened judicial scrutiny.[305] The Connecticut District Court still applied rational basis review and held that no rational relationship exists between the denial of federal marital benefits to married same-sex couples and DOMA's rationales,[306] including that Section 3 of DOMA "is at once too narrow and too broad."[307] The decision also subtly addresses the Code's inherent silent "gender-neutral directive" for filing status,[308] DOMA's unintended consequences,[309] and the inequitable treatment among opposite-sex couples, same-sex couples, opposite-sex unmarried partners ("opposite-sex partnerships") and same-sex partnerships.[310] These issues even become applicable to the inequitable tax treatment argument, suggesting that courts may be receptive to equitable and fairness arguments related to tax and other federal marital benefits for same-sex couples.

Finally, the Southern District Court of New York directly addressed DOMA's relationship with the federal estate tax issue in *Windsor v. United States*.[311] In this case, the IRS required the plaintiff to pay estate tax on her same-sex spouse's estate, even though the Code exempts similarly situated, op-

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www.scotusblog.com/2012/12/commentary-on-marriage-grants-different-ways-of-splitting-the-difference-the-menu-of-options-in-hollingsworth-v-perry/ (arguing, without much explanation, that *Perry* offers the Supreme Court at least five different options in its decision).

[303] Pedersen v. Office of Pers. Mgmt., 115 Fair Empl. Prac. Cas. (BNA) 1228, 1239 (D. Conn. July 31, 2012) (addressing the *Baker* issue preclusion by finding that "DOMA impacts federal benefits and obligations, but does not prohibit a state from authorizing or forbidding same-sex marriage").

[304] *See id.* at 1237 (citing Boyter v. Comm'r, 668 F.2d 1382, 1385 (4th Cir. 1981) ("[U]nder the Internal Revenue Code a federal court is bound by state law rather than federal law when attempting to construe marital status.").

[305] *See id.* at 1258 (internal citations omitted).

[306] *Id.* at 1268 (finding that "DOMA in fact infuses complexity and inconsistency into the conferral of federal marital benefits.").

[307] *See id.* at 1263 (quoting Romer v. Evans, 517 U.S. 620, 632 (1996)).

[308] *Id.* at 1237.

[309] *Id.* at 1262 (finding that DOMA's exclusions for same-sex couples "limit[ed] the resources, protections and benefits available to children of same-sex parents").

[310] *See id.* at 1267 (agreeing that DOMA treats same-sex couples identical to same-sex and opposite-sex partnerships, while treating opposite-sex couples differently from any of these groups).

[311] *See generally* Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012).

posite-sex couples from paying some of these same taxes.[312] The district court decided that DOMA was unconstitutional even under rational basis review, thereby, like *Massachusetts v. United States Dep't of Health & Human Servs.*, avoiding the question of sexual orientation's appropriate scrutiny basis.[313] However, the Second Circuit decided "Section 3 of DOMA [was] subject to intermediate scrutiny," and, again, held that DOMA did not withstand judicial review and was unconstitutional.[314] Particularly, this court avoided the "modulation" of rational basis review by broadly construing the quasi-subject class factors in the plaintiffs' favor.[315] The Second Circuit seems to rely, at least in part, on the defendant's alleged concession that "DOMA may not withstand intermediate scrutiny."[316] However, this court's dismissal of the defendant's uniformity rationale proves particularly relevant.[317] The Second Circuit's decision may apply most distinctly to the inequitable tax argument, but its ultimate applicability remains to be seen.[318]

D. *The Optimal Legislative Solution: Change the Internal Revenue Code*

Some scholars argue that Congress should redefine "family" in the Code by including same-sex couples within this new definition.[319] In fact, DOMA does not impede this legislative solution.[320] Tax policy-makers rationalize the exclusion of same-sex couples from the Code, however, by arguing "a same-sex

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[312] *Id.* at 396.

[313] *See id.* at 401-02; *see also generally* Massachusetts v. United States Dep't of Health & Human Servs., 682 F.3d 1 (1st Cir. 2012), *aff'g* Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010).

[314] Windsor v. United States, No. 12-2335-cv(L), at *10 (2d Cir. Oct. 18, 2012).

[315] *See id.*, at *24-34.

[316] *See id.*, at *35.

[317] *See id.*, at *37-8 (finding "more discord and anomaly than uniformity," stating that DOMA perpetuates inefficiencies through its interactions between state and federal laws, and holding that DOMA is an "unprecedented breach of longstanding deference to federalism").

[318] Chris Johnson, *Supreme Court Asked to Hear Conn. Case*, WASHINGTON BLADE, *available at* http://www.washingtonblade.com/2012/08/21/supreme-court-asked-to-hear-conn-doma-case/ ("[T]he Supreme Court has been asked to hear a total four cases within the course of a couple months challenging DOMA . . . [including] *Windsor v. United States* and *Golinski v. Office of Personnel Management*, which have led district courts to overturn DOMA, and the consolidated case of *Gill v. Office of Personnel Management* and *Commonwealth of Massachusetts v. Health & Human Services* [and *Pedersen et al. v. Office of Personnel Management*]"). *But see* Scottie Thomaston, *Plaintiffs in Challenge to Prop 8 Ask the Supreme Court to Decline to Review the Case*, HUFFINGTON POST, *available at* http://www.huffingtonpost.com/scottie-thomaston/prop-8-supreme-court_b_1828992.html (where the plaintiffs filed a petition of opposition to the defendant's petition for a writ of certiorari).

[319] *See* Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1, 48-56 (2005).

[320] *See* Fry, *supra* note 10, at 563 (citing 1 U.S.C. § 7 (2006)) (stating that "DOMA, on

couple is not a family."[321] Despite tax policy-makers' rationalization, married same-sex couples occupy a unique position in the Code by being the only group that is both overtly and covertly discriminated against by the tax laws' application.[322] This discrimination is likely unconstitutional because the Code's exclusion of same-sex couples from filing jointly may not pass even rational basis review, especially for the tax provisions applicable to a divorce.[323] As previously stated, state domestic relations law—not federal law—determine marital status,[324] and DOMA's purposes[325] do not support overriding this determination.[326] Further, the discriminatory tax treatment for divorcing same-sex couples violates key taxation policies, such as equity and fairness.

E. *DOMA's Anti-Federalist Effects on Divorce Law and Its Tax Consequences*

In addition to disrupting the Code, DOMA may undermine the very tenets of federalism for state domestic relations law.[327] The federal government "accepted all state marital status determinations for purposes of federal law" prior to DOMA.[328] While the IRS ruled "the marital status of individuals as determined under state law is recognized in the administration of the federal income tax law,"[329] DOMA seems to directly contradict this ruling.[330]

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its face, does not prohibit classifying and treating same-sex partners as 'family' [in the Internal Revenue Code].").

[321] Knauer, *supra* note 64, at 233.

[322] *See* Infanti, *supra* note 14, at 426.

[323] *See* Oppenheimer, *supra* note 24, at 109.

[324] *See* Sosna v. Iowa, 419 U.S. 393, 404 (1975) (stating that regulation of marriage is "an area that has long been regarded as a virtually exclusive province of the States"). *See also* Pennoyer v. Neff, 95 U.S. 714, 734-35 (1878), *overruled on other grounds by* Shaffer v. Heitner, 20 433 U.S. 186 (1977).

[325] H.R. REP. No. 104-664, at 2 (1996) (allowing states to decide for themselves whether to recognize same-sex marriages, and normalizing the definition of marriage throughout federal law).

[326] *See* Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979) (holding that the state law "must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will require the state law be overridden" (citing United States v. Yazell, 382 U.S. 341, 352 (1966))); *see also* Milstein, *supra* note 56, at 481 (finding that DOMA is "wildly under-inclusive").

[327] *See* Kubasek et al., *supra* note 113, at 972.

[328] *Compare* Massachusetts v. United States Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 238 (D. Mass. 2010) *with* 28 U.S.C. § 1738C (2006).

[329] Rev. Rul. 58-66, 1958-1 C.B. 60.

[330] *Compare* Rev. Rul. 58-66, 1958-1 C.B. 60 *with* 1 U.S.C. § 7 (2006). *But see generally* Boyter v. Comm'r, 74 T.C. 989 (1980) (holding that the determination of marital status must be made in accordance with state law) *and* De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) (stating that "there is no federal law of domestic relations, which is primarily a matter of state concern").

Scholars argue, however, that federal tax benefits are not rights but privileges.[331] These same scholars state that Congress may choose to grant or deny federal tax benefits at its own discretion,[332] and that "Congress may use federal laws to protect federal benefits."[333] Congress may determine when marital status defines who gets federal benefits; nevertheless, states have always determined its residents' marital status.[334] Federal tax law does not currently recognize same-sex marriages because of DOMA, even though these marriages may be recognized in a particular state.[335] Therefore, DOMA encroaches on this federal liberty by preventing married same-sex couples from enjoying federal tax benefits that states confer on these same-sex couples through the state's recognition of the couples' legal status as married partners.[336]

One solution is to force the federal income tax system to respect the state's treatment of earned income for same-sex couples in the same way the income tax system respects voluntary contractual partnership agreements.[337] A state's right to determine its own residents' marital status extends back to *Pennoyer v. Neff*,[338] where the Court declared that "the states have a right to choose which people shall be married and receive the federal benefits designated to them through that state-sanctioned marriage."[339] Recently, in *United States v. Morrison*[340] and *United States v. Lopez*,[341] the Supreme Court further impliedly limited Congress' ability to enact legislation to interfere with the states' treatment of marriage.[342] For these reasons, state law controls in determining the status of a resident's legal interest in the property or income that the federal income

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[331] Nixon, *supra* note 75, at 61 (citing United States v. Winters, 261 F.2d 675, 676 (10th Cir. 1958)).

[332] Nixon, *supra* note 75, at 61 (citing Hoover Motor Express v. United States, 241 F.2d 459, 460 (6th Cir. 1957), *aff'd*, 356 U.S. 38, 40, *reh'g denied*, 356 U.S. 934 (1958)).

[333] Leonard G. Brown III, *Constitutionally Defending Marriage: The Defense of Marriage Act,* Romer v. Evans *and the Cultural Battle They Represent*, 19 CAMPBELL L. REV. 159, 173 (1996); *see, e.g.,* Mansell v. Mansell, 490 U.S. 581 (1989) (explaining that Congress may create federal benefits and limit states' authority over these benefits).

[334] *See* Rev. Rul. 83-183, 1983-2 C.B. (1983) ("Taxpayers who meet the requirements in the state of residence for a valid marriage may file a joint return even though they have never been legally declared married by a court of law.").

[335] *See generally* Mueller v. C.I.R., 39 Fed. App'x. 437 (7th Cir. 2002).

[336] Kubasek et al., *supra* note 113, at 985.

[337] Terry, *supra* note 21, at 416.

[338] *See* Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877).

[339] Kubasek et al., *supra* note 113, at 972 n.64.

[340] *See generally* United States v. Morrison, 529 U.S. 598 (2000).

[341] *See generally* United States v. Lopez, 514 U.S. 549 (1995).

[342] Kubasek et al., *supra* note 113, at 972-73 (citing Derek C. Araujo, *Queer Alliance: Gay Marriage and the New Federalism*, 4 RUTGERS J.L. & PUB. POL'Y 200, 262 (2006)) (finding that "neither the Commerce Clause, the Spending Clause, nor Congress' Section 5 enforcement powers under the Fourteenth Amendment can be used to prohibit states from legalizing same-sex marriage").

tax statute seeks to reach through taxation.[343] Congress should extend marital federal tax benefits, including joint-filing status and non-recognition of spousal transfers, to legally married same-sex couples to comport with its historic deference to the state regulation of marriage.[344]

F. *The Internal Revenue Code's Inequitable Tax Policy Under DOMA*

In 1948, Congress put opposite-sex couples in a more advantageous position than similarly situated, "opposite-sex partners"—and later same-sex couples—by allowing married opposite-sex couples to file jointly.[345] The government computes a couple's total income as a taxable unit because the spouses' combined incomes, not their individual incomes, best describe their collective ability to pay taxes.[346] Collective ability to pay taxes is an important tax policy consideration.[347] "Our income tax is premised on the principle that the burdens of tax ought to be distributed according to relative ability to pay" and "[o]ne of the basic tenets of tax policy is that an accurate measurement of ability to pay taxes is essential to tax fairness."[348] As previously mentioned, the Code's refusal to extend joint filing status to same-sex couples ignores these couples' economic reality and disrupts the fairness in distributing taxes on a "collective ability to pay" theory.[349]

Moreover, the Code treats opposite-sex couples differently from same-sex couples with little regard to the economic reality of same-sex couples' living arrangements as a traditional "family."[350] Like opposite-sex couples, same-sex couples cohabitate and share their financial responsibilities, justifying both opposite-sex and same-sex couples' interest in filing jointly.[351] However, only opposite-sex couples are given the option of filing a joint return, and the Code

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[343] Terry, *supra* note 21, at 409 (quoting Morgan v. Comm'r, 309 U.S. 78, 82 (1940) (establishing the rule from Grp. No. 1 Oil Corp. v. Bass, 283 U.S. 279 (1931)).

[344] Nixon, *supra* note 75, at 52.

[345] *See* Milstein, *supra* note 56, at 460 (citing Revenue Act of 1948, ch. 168, 62 Stat. 110, 117 & 125 (1948)).

[346] *See generally* Revenue Act of 1948, ch. 168, 62 Stat. 110-36 (1948).

[347] *See* McMahon, *supra* note 121, at 746.

[348] Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 92 (1993) (citing WILLIAM A. KLEIN & JOSEPH BANKMAN, FEDERAL INCOME TAXATION 16-17 (9th ed. 1993)); Theodore P. Seto & Sande L. Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 U. PA. L. REV. 1053, 1073 (2006) (quoting Staff of Joint Comm. on Taxation, 108th Cong., Description of Revenue Provisions Contained in the President's Fiscal Year 2005 Budget Proposal 8 (Comm. Print 2004)).

[349] McMahon, *supra* note 121, at 746; *see* Kornhauser, *supra* note 348, at 105.

[350] Fry, *supra* note 10, at 550-51 (citing Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 465 (2000)).

[351] Nixon, *supra* note 75, at 46 (citing Marc A. Fajer, *Toward Respectful Representation: Some Thoughts on Selling Same-Sex Marriage*, 15 YALE L. & POL'Y REV. 599 (1997)).

treats opposite-sex couples as if they split their income equally between them, regardless of whether these opposite-sex couples actually split their income.[352] While the ability to split income may be a positive, negative, or neutral tax aspect of marriage,[353] the tax effects may be even more pronounced during a same-sex couple's divorce.[354] As spouses and joint-filers, opposite-sex couples may use the Code's provisions to prevent the recognition of spousal transfers, thereby treating tax as a neutral factor in their estate-planning and economic activities.[355] This tax neutrality is unavailable to same-sex couples, despite the financial and familial similarities between same-sex and opposite-sex couples.[356]

Although the Second Circuit supported the idea that Congress may treat married couples differently than unmarried individuals in the Code, the Court premised its ruling on horizontal equity.[357] The horizontal equity policy does not support treating similarly situated, opposite-sex and same-sex couples differently in the Code because, unlike married and unmarried individuals, society recognizes that both same-sex and opposite-sex couples engage in substantial and meaningful income-pooling.[358] Therefore, the Code's current tax provisions for opposite-sex and same-sex couples violate tax equity and ignore these couples' economic realities. Thus, Congress should amend its definitions to coincide the Code provisions with current tax policy and practice.

G. *Possibility of Legislative Change and a Proposed Solution*

Congress should redefine the definition of family within the Code by including same-sex couples within this new definition.[359] While scholars advocate challenging DOMA's constitutionality, few advocates work towards amending the Code to expand the definitions of "marriage" and "spouse."[360] As previous-

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[352] *See* Infanti, *supra* note 8, at 26.

[353] *See* Infanti, *supra* note 8, at 26 (citing Cong. Budget Office, *For Better or For Worse: Marriage and the Federal Income Tax* 29-30 (1997) (indicating that, in 1996, 21 million couples paid a marriage penalty, 25 million couples received a marriage bonus, and 3 million couples were unaffected)).

[354] Moulding & National Lawyers' Guild, *supra* note 235, § 4:2, at 4-4 (where family law attorneys must advise divorce clients about the tax consequences in equitable distribution cases, especially in determining whether the division is in fact equitable).

[355] 26 U.S.C. § 1041 (2008).

[356] *See* Infanti, *supra* note 8, at 24-25.

[357] *See* Milstein, *supra* note 56, at 461 (citing Druker v. Comm'r, 697 F.2d 46, 50 (2d Cir. 1982)).

[358] *See generally* Kornhauser, *supra* note 348; Sara Burns, Comment, *Expanding the Marital Deduction: An Analysis of International Transfer Taxation, Their Treatment of the Taxable Unit, and the United States Adequate Marital Deduction*, 25 TEMP. INT'L & COMP. L.J. 247 (2011).

[359] *See* Crawford, *supra* note 319, at 48-56.

[360] Kubasek et al., *supra* note 113, at 961. "[T]he word 'marriage' means only a legal

ly argued, same-sex couples operate similar to opposite-sex couples in their economic affairs, specifically income-splitting.[361] The Code would more accurately reflect the changing structure of American families by extending marital tax benefits to married same-sex couples through a mere reform of the applicable tax definitions while preserving familiar stability.[362] While the IRS chose to circumvent DOMA in previous instances through Private Letter Rulings ("PLR")[363] because of DOMA's inadvertent consequences, this approach may not be enough to ensure equal protection under the Code because the PLRs only apply to the taxpayer with his or her unique facts and circumstances.[364] The IRS's PLRs for same-sex couples indicate the IRS's current stance on a particular issue under a certain set of facts, but these PLRs are not binding upon all same-sex couples.[365] Therefore, by amending the Code to acknowledge married same-sex couples as spouses, the IRS will accomplish its solution more holistically and completely using a bright-line rule. Congress may best solve these concerns by broadening the joint tax filing provisions to include families, therefore not conflicting with Section 3 of DOMA.[366]

The IRS furthers horizontal equity, taxation of the economic unit, taxation based upon economic reality, and taxation based upon "ability to pay" by treating similarly situated same-sex and opposite-sex couples similarly for federal wealth transfer and income taxation purposes.[367] Extending marital federal tax benefits to legally married same-sex couples promotes horizontal equity between opposite-sex and same-sex couples, strengthens the national tax uniformity, encourages simplicity, supports predictability, and aids administrability.[368] For the foregoing reasons, amending the Code to broaden the tax provisions to apply to families is a more effective approach to eradicating DOMA's harmful effects on same-sex couples than litigating a case against DOMA in federal court.[369]

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union between two parties sanctioned by a state law as a marriage, civil union, or domestic partnership. . . ." *Id.* "[T]he word 'spouse' refers only to a person who is a legally recognized marital or domestic partner in a state-sanctioned marriage, domestic partnership, or civil union." *Id.*

[361] *See* Nixon, *supra* note 75, at 46.

[362] *See* Nixon, *supra* note 75, at 57.

[363] A letter issued by the IRS in response to a specific tax question submitted by a taxpayer.

[364] *See* I.R.S. Priv. Ltr. Rul. 2010-21-048 (May 28, 2010).

[365] *See* Goffe, *supra* note 116, at 17.

[366] *See generally* Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006); Knauer, *supra* note 64.

[367] Fry, *supra* note 10, at 562.

[368] *See* Nixon, *supra* note 75, at 53-54.

[369] *See* Kubasek et al., *supra* note 113, at 977 (citing anti-DOMA lawsuits' poor track record, the amount of time to take a case to federal court, the possibility of judicial bias, the

IV. CONCLUSION

The current federal income, gift, and estate tax systems create inequities for similarly situated taxpayers. DOMA established one of the most profound inconsistencies for the modern Code by limiting the definition of "marriage" and "spouse" to exclude legally, state-sanctioned married same-sex couples from federal tax benefits. Today, an estimated 8.8 million gay, lesbian, and bisexual individuals live in the United States.[370] The 2010 Census calculated close to 600,000 same-sex partnerships in the United States and over 130,000 same-sex couples.[371] The number of reported same-sex couples in the United States is also increasing, as indicated by a 300% increase from the 1990 Census to the 2000 Census.[372] These statistics show, now, more than ever before, the importance of protecting these individuals and couples from the federal government's abusive treatment.[373]

Divorcing same-sex couples face discrimination, impermissible invasion of privacy, and inequitable burdens because the federal government treats each partner's transfers pursuant to a divorce settlement as a taxable event.[374] While divorced opposite-sex couples *may* also pay taxes on spousal support payments, the current federal tax system *forces* same-sex couples to keep painstaking records of their income pooling during and after their marriage—for fear of an IRS tax audit.[375] The IRS may also force same-sex couples to prove each and every transfer between the two spouses,[376] even though the IRS does not require married or divorced opposite-sex couples to prove these transfers by completing this extensive account-keeping process.[377]

"seemingly legitimate pro-DOMA arguments," and the risk involved with taking a case against DOMA to the Supreme Court).

370 GARY J. GATES, SAME-SEX COUPLES AND THE GAY, LESBIAN, BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY 1 (The Williams Inst., UCLA Sch. of Law ed., 2006), *available at* http://escholarship.org/uc/item/8h08t0zf.

371 *Census: 131,729 Gay Couples Report They're Married*, NPR (Sept. 27, 2011), http://www.npr.org/2011/09/27/140859242/census-131-729-gay-couples-report-theyre-married (estimating that about seventy percent of same-sex couples are legally married).

372 Madeleine N. Foltz, Comment, *Needlessly Fighting an Uphill Battle: Extensive Estate Planning Complications Faced by Gay and Lesbian Individuals, Including Drastic Resort to Adult Adoption of Same-Sex Partners, Necessitate Revision of Maryland's Intestacy Law to Provide Heir-At-Law Status for Domestic Partners*, 40 U. BALT. L. REV. 495, 498 (2011).

373 *See* Michelle D. Layser, *Tax Justice and Same-Sex Domestic Partner Health Benefits: An Analysis of the Tax Equity for Health Plan Beneficiaries Act*, 32 U. HAW. L. REV. 73, 74 (2009).

374 *See supra* Part III.

375 *See* MOVEMENT ADVANCEMENT PROJECT, UNEQUAL TAXATION AND UNDUE BURDENS FOR LGBT FAMILIES (April 2012), http://www.lgbtmap.org/file/unequal-taxation-undue-burdens-for-lgbt-families.pdf.

376 *See* Infanti, *supra* note 181, at 797-99.

377 *See* Infanti, *supra* note 181, at 797-99.

Both bankruptcy and federal court decisions seem sympathetic to detrimental and inequitable treatment of same-sex couples under DOMA because of the government's non-recognition of federal marital benefits to same-sex couples. The Supreme Court of the United States may ultimately decide this issue in *Windsor*, after granting its petition for certiorari.[378] The Equal Protection, heightened scrutiny, federalism, and Tenth Amendment arguments raised in the lower courts' decisions may be deciding factors for the Court. However, even if the Court rules on this issue of inequitable treatment for same-sex couples under DOMA, the IRS may need to resolve further issues caused by the Court's decision, either for or against DOMA. The Court may leave the IRS faced with inequity and fairness considerations to resolve through its provisions and rulings. Therefore, litigating a case may not solve all of the practical tax concerns for divorcing same-sex couples.

Thus, Congress should amend the Code to more accurately reflect the changing American family and comply with its tax policies and rationales. DOMA's inequitable effects on multiple provisions of the Code do not withstand heightened scrutiny review.[379] Only if the federal government corrects the inherently flawed DOMA or implements a broader definition of "family" for joint filing and other tax provision purposes will similarly situated same-sex and opposite-sex couples receive equitable treatment under the Code.

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[378] *See* United States v. Windsor, No. 12-2335-cv(L), at *10 (2d Cir. Oct. 18, 2012); *cert. granted*, 81 U.S.L.W. 3116 (U.S. Dec. 7, 2012) (No. 12-307) (considering "whether Section 3 of DOMA violates the Fifth Amendment's equal protection of the laws as applied to persons of the same sex who are legally married under the laws of their State" and also "whether the Executive Branch's agreement with the court below that DOMA is unconstitutional deprives this Court of jurisdiction to decide this case; and whether the Bipartisan Legal Advisory Group of the United States House of Representatives has Article III standing in the case").

[379] *See supra* Part III.C.