Loving Couples, Split Interests: A Call for Tax Planning in the Fight to Recognize Same Sex Marriage

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ABSTRACT: A fundamental tension exists between the Defense of Marriage Act, which forbids the Internal Revenue Service and the federal judiciary from recognizing same-sex marriages, and the Internal Revenue Code, which uses marital status to identify parties likely to collude in order to minimize their collective tax burden. Homosexual couples married under state law are arguably exempt from anti-abuse rules promulgated over fifteen years ago to eliminate tax shelter strategies employed by heterosexual couples. This essay suggests that homosexual rights advocates can exploit this tension through the use of relatively simple tax planning devices, as part of a campaign to repeal the Defense of Marriage Act itself. Such a campaign would center upon legal challenges forcing the Service either officially to allow a “gay tax shelter” or, for the first time, to recognize same-sex relationships for the purpose of tax law.

“RULE 4: Make the enemy live up to its own book of rules.”

As three men and one woman sit at a DC watering hole after work discussing the highlights of their lives, the conversation turns towards matters of taxation. Two of the men, married in Massachusetts, grouse about the fact that they cannot file as a married couple for federal tax purposes. The third man, a gay rights activist, agrees with his

1 Saul Alinsky, Rule for Radicals: A Pragmatic Primer for Realistic Radicals (1971).
2 Internal Revenue Serv., U.S. Dep’t of Treasury, Instructions: Form 1040, at 16-17 (2005), http://www.irs.gov/pub/irs-pdf/i1040.pdf (“For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife.”) Among the burdens suffered by same-sex couples who cannot file jointly are the complex mental gymnastics involved in untangling the financial activities of two commingled lives in order to report them to the IRS, and the simple cost in effort (and perhaps preparer’s fees) required to file two returns. See Nancy J. Knauer, Heteronormativity and Federal Tax Policy, 101 W. Vir. L. Rev. 129, 216-17 (1998).
friends that federal policy with respect to homosexual marriage constitutes an indignity, but leavens his condemnation with concern that federal courts are not a happy hunting grounds for advocates of same-sex rights. The conversation quickly becomes heated, with the married couple—let us call them Mr. and Mr. Kent—insisting that their rights should not be sacrificed to the best interests of “the movement,” while the activist counsels for patience, remarking upon the legislative backlash that occurred outside Massachusetts after Goodridge v. Dept. of Public Health. Meanwhile, none of the men notice that the lady at the table has been silent.

Ms. Stone (as we shall call her) is quiet only because she is deep in thought. As a tax attorney, Ms. Stone has a quite different perspective on the relationship between tax and marriage. She recognizes that the “secular ritual” of joint filing is a powerful recognition of a married relationship. Yet she also knows that the Code does not view marriage as an unmitigated virtue. Far from it: many if not most of the Code provisions dealing with marriage explicitly view couples as conspirators likely to collude against the fisc. Casebook tax law is replete with examples of married couples brought before the Tax Court to answer for their collaboration. Against such a background, Ms. Stone wonders whether the ability to simultaneously combine one’s interests with another while at the same time preventing the Internal Revenue Service from observing such collusion might serve as a benefit.

3 See infra notes 112-118 and text accompanying.
4 See infra note 116.
5 See supra note 1.
This Article describes how the four friends mentioned above—the two Kents, the activist, and the attorney Stone—might take advantage of the peculiar relationship between the tax code and social policy not to minimize tax liability, but in order to encourage the federal government to grant equal recognition to homosexual relationships. In so doing, the article relies heavily upon recent work by two tax scholars, one focusing upon the relationship between income tax and protest, and the other pondering the unintended benefits that the Code may bestow upon same sex taxpayers.

The first of these authors, Anthony Infanti, recently published a *cri du couer* expressing the particular depression of a homosexual couple during tax time. Like many members of a homosexual partnership—indeed, much like our fictional Mr. Kent—Infanti complains that, “Each year, when tax season comes around, I feel the legal eraser scraping against me once again as the federal government returns to ensure that it has removed all trace of my relationship.” He aims his rhetoric squarely at the Defense of Marriage Act, the definitional statute that prevents any member of the executive or legislative branch from considering two men or two women to be married. While

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7 So far as I know, no conversation like the one described above has ever taken place. The four characters I describe serve two purposes. First, readers who are not tax specialists will likely find it much easier to understand the detailed tax shelter described in Part II if the structure is presented as the outcome of decisions made between realistic parties, not abstract entities. Second, the four characters mentioned herein are amalgams of the individuals with whom I have discussed this idea over the course of the last two years.


9 *Id.*

Infanti’s imagery at times becomes more flowery than precise,\(^{11}\) he ends his article with the suggestion that homosexual couples should, *en masse*, engage in a kind of taxation-based “guerilla warfare” in order to assert their rights.\(^{12}\)

Unfortunately, Infanti’s imagined insurgency is of the peasants-with-pitchforks variety. He envisions thousands of California domestic partners and Massachusetts couples filing their returns jointly, together with a cover letter expressing why they are doing so.\(^{13}\) Exactly why one should expect to profit from this is not immediately apparent. Infanti suggests that such protest might frustrate the service, much as a denial of service attack brings down a website.\(^{14}\) But the IRS is not a website hosted on a computer that slavishly follows its instructions until some human happens to intervene.

\(^{11}\) To take only one example: when speaking of the uncertain condition in which homosexual couples find themselves while completing their taxes, Infanti finds it “quite ironic that, even as the Roman Catholic Church moves toward abandoning the notion of limbo, it still manages to persist in the federal tax laws.” Infanti, *supra* note 7, at 28. This “irony” exists only if one seeks to blend imagery from traditions that have nothing to do with one another. Although the term “limbo” colloquially denotes a place of imprisonment or where things are cast aside, this is not a theological interpretation. Compare *Oxford English Dictionary* XXX (“Any unfavourable place or condition, likened to Limbo; esp. a condition of neglect or oblivion to which persons or things are consigned when regarded as outworn, useless, or absurd.”) with *The Catholic Encyclopedia*, entry on “Limbo,” available at [http://www.newadvent.org/cathen/09256a.htm](http://www.newadvent.org/cathen/09256a.htm). Rather, Limbo represents either a waiting stage for souls unredeemed by Christ prior to his incarnation (the *Limbo Patrum*) or a place for the souls of children burden only by original, but not personal, sin (the *Limbo Infantum*). *Id.* Neither concept is particularly uncertain or even gloomy. Indeed, if anything is ironic, it is Infanti’s comparison of the common concept of limbo—a place of things discarded—with the teachings of the Church, which has at least found it possible that Limbo’s inhabitants experience, if not the bliss of beatific vision, then at the very least happiness. If Infanti believes that homosexual couples inhabit a “tax limbo,” such a state has nothing to do with the Limbo of the Church.

\(^{12}\) See Infanti, *supra* note 7, at 53.

\(^{13}\) *Id.*

\(^{14}\) *Id.* at 54.
If confronted with thousands of non-compliant tax forms, the Service need merely send back the filings—along with an accounting for penalties—and ask that the taxpayer comply with the letter of the law. The service need do little more than develop a form letter. The IRS has a considerable history of dealing with tax protestors, and there is no reason to believe that an influx of deliberately misfiled tax forms would present a novel, insolvable, or even more than ephemeral problem.  

Infanti’s proposed insurgency suffers from a lack of heavy weaponry, but an article by Theodore P. Seto suggests that an arsenal lies readily available. Seto focuses upon the disjunction between the Defense of Marriage Act, which denies recognition to same-sex couples, and the provisions of the Code that use marital status as a proxy for parties who are likely to collude to avoid paying taxes. Seto posits that the entire tax code functions upon an assumption of selfishness, in that most code provisions assume that a taxpayer will not give $100 of income to an unrelated third party merely to avoid $30 worth of tax. The Code needs provisions that address transactions between related parties, however, because one cannot expect such collectives—husbands and wives, 

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15 The Service may impose a civil penalty of up to $5,000 when a taxpayer files a self-assessment that “contains information that on its face indicates that the self-assessment is substantially incorrect” and “reflects a desire to delay or impede the administration of Federal tax laws.” I.R.C. § 6702. Taxpayers who, for example, strike or otherwise modify the jurat on a tax form are subject to such penalties, and the Service has prosecuted even quite wealthy malefactors. See Rev. Rul. 2005-18, 2005-1 C.B. 817 (2005); see, e.g., David Cay Johnson, Wesley Snipes is Charged With Tax Fraud, N.Y. TIMES, Oct. 18, 2006, at E3. Because Infanti would have homosexual couples include a cover letter directly challenging a same-sex couple’s inability to file jointly, such guerilla warriors risk a $5,000 fine after the Service returns their filings. The Service already deals with a plethora of frivolous filings every year. See I.R.S. Notice 2007-61, 2007 IRB LEXIS 201 (Apr. 2, 2007). There is no reason to suspect that a new scheme would throw any additional sand into the gears.

parents and children—to behave as selfish individuals with respect to one another.\footnote{id}{Id. at 4-5.} They are likely to work together to retain more for themselves at the expense of the public.

Seto, however, focuses more upon the tax challenges facing homosexual couples than any particular form of “guerrilla” activism. These challenges are real: homosexual couples lose out not only on the “secular ritual” of joint filing, but also upon concrete tax advantages enjoyed by their heterosexual counterparts.\footnote{18} Yet a clever and prepared homosexual couple might exploit several provisions of the Code and their time in “tax limbo” to avoid income tax. To list only a few of Seto’s examples, a gay couple might be able to: sell appreciated personal real estate while deferring capital gains upon that property;\footnote{19} avoid the recognition of capital gains by generating “losses” on sales between spouses;\footnote{20} deduct expenses incurred in adopting a spouses’ child;\footnote{21} and take “unjustified”

\footnote{17}{Id. at 4-5.}
\footnote{18}{To cite only a few examples: one party in a same-sex couple cannot exclude from his income health benefits provided to his spouse by an employer; same-sex couples who adopt a child will in many scenarios be more likely to lose tax credits aimed at the child’s higher education; and same-sex partners may not deduct each other’s medical expenses unless the ill partner may be considered a dependent. \textit{See} Knauer, \textit{supra} note , at 162-171, 179-185; William A. Kratzke, \textit{The Defense of Marriage Act is Bad Income Tax Policy}, 35 U. MEM. L. REV. 399, 427-436 (2005).}
\footnote{19}{If Kent A and Kent B live in a house that has appreciated in value, Seto suggests that Kent A may transfer the property to Kent B in exchange for a 20 year note for the fair value purchase price, while Kent B then sells the property at market. Under the installment sale rules of Section 453, Kent A will not have to recognize gain until the note is paid, while Kent B sells the house with a higher basis. Were they to attempt it, a heterosexual married couple attempting such a transaction would fall afoul of Section 1041, which treats all transfers between spouses as non-recognition events, and Section 453(e)(1), which forbids this kind of abusive transaction when carried out between “related persons.” Seto, \textit{supra} note 14, at 28-29.}
\footnote{20}{If Kent A and Kent B both have diversified portfolios, Kent A can sell loss positions at market value to Kent B in order to offset any unavoidable gains. Assuming that the Kents spend much of their income for their joint benefit, the only loser is the tax man. Again, heterosexual married couples fall afoul of Sections 1041 and 267(a)(2). \textit{Id.} at 29-30.}
advantage of the earned income tax credit. Best of all, Seto concludes that, short of rejecting DOMA or otherwise providing some sort of status to same sex couples that can be invoked by anti-abuse rules, there is no easy way for Congress to patch these loopholes.

This article matches Infanti’s goals with Seto’s tools. Infanti counsels civil disobedience and a conscious defiance of the Defense of Marriage Act. Seto highlights the tensions between that statute’s non-recognition of collaborating individuals and the Code’s general need to identify parties with the potential to work together to cheat the taxman. This essay suggests that DOMA may best be defeated not by *defying* the Act, but by strictly and conspicuously *complying* with it, and insisting that the IRS—and any administration that supports the DOMA—comply with it as well. In the process, this article suggests that the Defense of Marriage Act has resurrected a tax-planning device and tax-shelter strategy rendered largely obsolete in 1989. Such a device might be used by homosexual couples that wish to prove futile the federal government’s refusal to recognize that homosexual couples are capable of long-term, loving, and selfishly collusive behavior. Such planning at least arguably remains within the limits of the

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21 Heterosexual married couples are prohibited by Section 23 from taking a credit for adoption expenses if they adopt the child of their spouse. *Id.* at 27.
22 *Id.* at 23-24.
23 *Id.* at 36-37.
law. If Infanti calls for “guerrilla” activists to violate the law, I propose a “gonzo” approach of steadfastly insisting upon its application.25

Although a few papers, including Seto’s, have briefly touched upon the use of same-sex status to exploit anti-abuse rules,26 academic discussion has generally relegated the idea to footnotes, briefly dismissing purported tax advantages with the suggestion that anti-shelter doctrines such as economic substance or business purpose would render them ineffective. This Article challenges such assumptions, considering in detail how a homosexual couple might at least escape penalties, and at best prevail, in their challenge to the IRS. Nor is it clear that defeat in Tax Court would foreclose victory against the Defense of Marriage Act. Even a “worst case” scenario, in which a couple pays both interest and penalties on a tax insufficiency, will involve a dangerous precedent for

25 Although the term “gonzo” often refers to a style of non-objective journalism mostly closely associated with Hunter S. Thompson, its use has long-since expanded to other disciplines and activities. See, e.g. CHRISTOPHER LOCKE, GONZO MARKETING: WINNING THROUGH WORST PRACTICES (2002); NILES ELLIOT GOLDSTEIN, GONZO JUDAISM: A BOLD PATH FOR RENEWING AN ANCIENT FAITH (2006). One common thread in “gonzo” activities is their tendency to turn mainstream “rules” on their head. Gonzo journalism largely rejects the ability of journalists to be objective in their reporting, while Christopher Locke’s Gonzo Marketing turns its back on a mass-media approach to attracting customers.

In the same way, gonzo tax-planning inverts the standard assumptions of most academic tax practitioners and homosexual rights activists. Gonzo tax plans, along the lines of those described in this essay, do not find it necessary to presume that any group is endowed with a fundamental right of access to a government institution recognizing their relationships. The gonzo tax planner focuses not upon a system’s rights, but its unworkability. Second, the gonzo tax planner does not share the common distrust of textualism or originalism common among many academic tax theorists. See Brian Galle, Interpretative Theory and Tax Shelter Regulation, VIR. TAX REV (Fall 2006). Make no mistake: the tax planning described in this essay draws inspiration from the same source that brings us corporate and individual tax shelters. A gonzo tax planner realizes that a tax shelter cannot exist without a poorly conceived law. The faulty rule need not always be a tax law, however.

26 See Seto, supra note 14, at 32-33.
DOMA proponents, as these penalties will rest upon some form of recognition from Tax Court of the related status of the partners.

Though gonzo tax plans might come in many varieties, in this essay I focus upon only one. Part I sets out a simple tax planning device based upon older split-interest tax shelters rendered largely obsolete in the late 1980s and early 1990s by case law and the passage of I.R.C. § 167. Part II revisits our friends at the cocktail bar—the Kents, the activist, and Ms. Stone the tax planner—to demonstrate how they can work together to craft a similar tax device based upon the Kents’ “non-related” status. Part III addresses the legal and political gains available through gonzo tax planning, as well as some reasons why activists reluctant to proceed in federal court might nonetheless consider this strategy.

PART I: THE RISE AND FALL OF SPLIT-INTEREST TAX SHELTERS:

KORNFIELD, GORDON, AND RICHARD HANSEN

An individual’s tax status alters due to marital status so often in the tax code that there are possibly dozens, if not hundreds, of opportunities for the Kents to defer or shelter income from taxation.27 To fully consider any given strategy, however, requires consideration not only of the text of Code provisions, but also how they have been treated historically by courts and Congress. This essay evaluates a structure based upon “split-interest” tax shelters, a form chosen for three particular reasons. First, a reasonable amount of case law exists to provide guidance as to the regulation of split-interest

personal tax shelters. Second, such shelters became almost entirely unworkable, at least on a personal basis, after Congress addressed the issue of split-interest transactions with I.R.C. § 167(e). That section uses the concept of “related parties”—including married couples—to limit allowances for depreciation, and thus provides a good test of whether homosexual couples can use the Defense of Marriage Act to avoid statutory solutions to tax shelters. Third, split interest transactions may be designed such that they may be easily replicated on a large scale, an important consideration if Seto’s concept of individual tax avoidance is to be converted to a tool of social policy.

A. The basic split-interest transaction

Bonds probably present the easiest context in which to explain split interest transactions, although many forms of property may be used. When a taxpayer purchases a bond, the price of the security generally cannot be depreciated or amortized over its lifetime.28 Instead, the bond’s cash basis may be applied to the value of the bond when it matures or is sold, and taxes must be paid on any interest received (unless the bond is tax-exempt). However, any simple bond can be conceived of as a combination of two component parts: an income stream lasting for a term of years and a non-interest bearing (or “zero-coupon”) bond. If these two interests can be separated, the tax consequences change markedly. The zero-coupon bond remains non-depreciable with a cost-basis, but

28 An exception to the rule is the amortizable bond premium depreciable under I.R.C. § 171, and even this is not allowed if the bond is tax-exempt. See I.R.C. § 171(a)(2). For simplicity’s sake, it can be assumed that, unless otherwise stated, no bonds in this essay have any amortizable bond premium.
the income stream may now be considered a “term interest” in property. 29 Such an interest may normally be depreciated over the period of its ownership. 30

Bonds are far from the only property in which interests may be split. A fee simple interest in real property, for instance, may not normally be depreciated, but if the fee simple interest is instead divided into a life estate and a remainder interest, the value of the life estate (being a wasting asset qualifying as a term of years) may, generally speaking, be depreciated. In this sense, the splitting of interests theoretically allows two taxpayers to defer taxes the taxes of one by converting non-depreciable property into depreciable term interests.

The ability to alter the taxable nature of property by dividing present and future interests is, in many cases, not only allowable but desirable. Assume, for instance, that two parties wish to invest in property, but that one desires to shield income through depreciation, while the other wants to invest in property but does not want immediate taxable income streams. By purchasing, respectively, a life estate in income-producing property and the remainder interest, the first party may take advantage of an allowance for depreciation, while the remaining party’s investment generates no taxable income until the disposition of his predecessor’s property. 31

29 I.R.C. § 1001(e)(2) defines a “term interest in property” as either a life interest in property, and interest in property for a term of years, or an income interest in a trust. As the income stream from the bond by definition lasts for a term of years, it will generally count as a term interest in property.

30 As property held for production of income, the term interest in the bond qualifies for depreciation under I.R.C. § 167(a)(2).

31 See Paul Youngs, The Taxation of Split Interests: How Are They Treated? How Should They Be?, 76 U. DET. MERCY L. REV 165, 169-70, from which I have taken this example.
eventually takes possession of the property at a lower price, while the holder of the life estate may defer tax on income.  

The ability to split interests poses particular problems, however, where the holder of the term interest and the life estate are related parties. The tax court has long recognized that the holder of an entire interest in property may not create a depreciable asset by dividing that asset into component parts and holding both pieces. Allowing the creation of such depreciable interests creates a threat to the public fisc: why would any taxpayer retain an entire interest in property if she might hold instead a life estate and remainder while taking a deduction on depreciation for the former? The next logical leap is obvious: a taxpayer should not be able to create depreciable assets by splitting interests between herself and closely-related parties, especially her spouse. Congress addressed this issue with the passage of I.R.C. § 167(3) in 1989:

No depreciation deduction shall be allowed under this section (and no depreciation or amortization deduction shall be allowed under any other provision of this subtitle) to the taxpayer for any term interest in property for any period during which the remainder interest in such property is held (directly or indirectly) by a related person.

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32 See id.
33 See, e.g. United States v. Georgia Railraid & Banking Co., 348 F.2d 278, 286-89 (5th Cir. 1965); Lomas Santa Fe, Inc. v. Commissioner, 74 T.C. 662, 681-684 (1980), aff’d 693 F.2d 71 (9th Cir 1982).
The same section used to disallow losses for transfers of property between related parties, IRC § 267, is used to determine who qualifies as a related person. The section primarily describes familial, partnership and trust relationships. Familial relationships are specifically limited:

The family of an individual shall include only his brothers and sisters

(whether by the whole or half blood), spouse, ancestors, and lineal descendants. . . .

The potential for abuse by same-sex parties becomes immediately apparent: § 167(e) prevents the holding of remainder interests by related persons, defined in relevant part as “spouses” By its terms, the Defense of Marriage Act blinds the Code to the existence of homosexual spouses, whether they be recognized by Massachusetts or any other state.

Yet compliance with the simple text of the Code will not be enough for the Kents. Attempts to abuse related party transactions in order to defer taxes had been common long before 1989. Even without statutory guidance, courts struck down transactions found to be too artificial when they were found to be performed without a business purpose and for the intent of avoiding taxes. On the other hand, courts found that transactions did not lack business purpose simply because they avoided taxation, and at least one taxpayer secured a depreciation deduction over the objections of the Service.

To take advantage of the statutory tension between Code and DOMA, it is first necessary

35 I.R.C. § 267. I.R.C. § 167(e)(5) specifies that § 267 is to be used to define “related person.”
36 I.R.C. § 267(c)(4) (emphasis added).
to see why some taxpayers failed, and others succeeded, in extracting depreciation
deductions from non-depreciable property.

B. Gordon, Richard Hansen and Kornfeld

Three cases set down the basic rules for personal, split-interest tax planning prior
to the enactment of § 167(e). Two Tax Court cases, Gordon v. Commissioner,\footnote{85 T.C. 309 (1985).} and
Richard Hansen Land, Inc. v. Commissioner,\footnote{T.C. Memo 1993-248 (1993).} both decided by Judge Tannenwald, chart
the narrow path between unacceptable tax avoidance and prudent tax planning. The Fifth
Circuit not only confirmed the Tax Court’s reasoning in Kornfeld v. Commissioner,\footnote{137 F.3d 1231 (1998).} but
showed that courts may deny tax treatment to related parties other than those listed in
§ 267. Careful examination of each case and its reasoning provides a map by which one
may navigate the narrow shoals left by the courts.\footnote{These cases are summarized and evaluated in more detail in Youngs, \textit{ supra} note 28.}

1. Gordon v. Commissioner

Dr. Gordon purchased the income interest in several bonds, while the remainders
were simultaneously purchased by a family trust. Dr. Gordon’s wife acted as trustee for
the benefit of their children.\footnote{Gordon, 85 T.C. At 325.} In disallowing Dr. Gordon from amortizing the purchase
price of his income interests, the Court employed an early version of the step-transaction
doctrine, and determined that, in fact, Dr. Gordon had merely purchased an entire bond
and subsequently divided the interests. The Court noted three factors critical to its decision. First, the transaction involved the joint acquisition of term and remainder interests from a third party “not in any way concerned” with the relationship between the joint acquirers. Second, the joint-acquirers, Dr. Gordon and the irrevocable trust run by his wife, were related parties. Finally, the court found that Dr. Gordon and his wife, in executing the joint purchases, used the family trust as a “mere stopping place” for funds: “[T]he family trust was intended to be used as a vehicle for implementing Dr. Gordon’s investment strategy only to the extent that it was provided with sufficient cash funds by petitioners or other related entities.” The Court emphasized that despite her nominal role as trustee, Ms. Gordon did not formulate an investment strategy or independently decide to purchase the bonds.

2. *Richard Hansen Land, Inc. v. Commissioner*

Eight years later, Judge Tannenwald again confronted a taxpayer who converted normally non-depreciable property through the use of interest-splitting, but this time he provided no comfort to the Commissioner. Richard Hansen, his wife, and his wholly-owned corporation, Richard Hansen Land, together purchased a parcel of land, with the corporation accepting a thirty-year estate and the Hansens jointly purchasing the

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42 *Id.*
43 *Id.*
44 *Id.*
45 *Id.* at 328.
46 *Id.* at 330.
remainder interest. As the corporation now owned a wasting asset, it claimed
depreciation deductions for its life estate.\textsuperscript{47}

In determining that the deduction was appropriate, Judge Tannenwald specifically
distinguished his prior ruling in \textit{Gordon v. Commissioner}. The simultaneous purchase of
a term and remainder interest in property, even by related parties from an indifferent third
party, did not make the transaction \textit{per se} unallowable: “The fact that the remainder
interests were acquired simultaneously by [the corporation’s] shareholders while suspect,
is insufficient, standing alone, to disregard the form of the transactions at issue.”\textsuperscript{48}

Rather, Tannenwald followed a money trail to determine whether the joint-
purchase transactions could be stepped together. Unlike the taxpayer in \textit{Gordon}, the
corporation did not use Hansen as a “mere stopping place” for funds, or vice-versa.\textsuperscript{49} The
separate existence of Hansen and his corporation was not questioned by the Service.
Given this, Judge Tannenwald rejected the Commissioner’s argument that the transaction
had no valid business purpose:

\begin{quote}
We are not impressed with respondent’s search for a business purpose to
justify the form of the transaction. It is obvious that respondent’s attack is
not directed at the fact that petitioners ended up with an estate for years.
Rather, respondent is saying that however valid the reasons for acquiring
an estate for years may be, one must have a reason other than a tax reason
for the form used. The effect of such a position is to suggest that if tax
\end{quote}

\begin{footnotes}
\textsuperscript{48} \textit{Id.} at 22-23.
\textsuperscript{49} \textit{Id.} at 18-22. In \textit{Hansen}, the corporation transferred funds, in the form of wages on which taxes
were paid, to Mr. Hansen. The wage payment preceded the land purchase by six months.
\end{footnotes}
advantages are the motivating force, one must choose a structure for the transaction which will minimize and even eliminate those advantages, at least where related parties are involved. Under this thesis, the fact that the transaction has substance would be irrelevant. We were not prepared to go this far in *Gordon v. Commissioner*. . . and we are not prepared to extend our holding in that case to a situation such as is involved herein. 50

Critically, Hansen and his company executed this transaction before Congress passed § 167(e). Under that provision, the two purchasers would be considered related parties, and no depreciation deduction would be allowed. 51 For our purposes, however, *Hansen* stands for two important propositions. First, simultaneous acquisition of split interests by related parties does not *per se* eliminate the possibility of depreciating otherwise non-depreciable property, at least where § 167(e) is inapplicable. Second, a critical factor in determining the acceptability of such transactions is whether the purchasing entities are considered by the Court to have independent existences. In *Gordon*, the court found it easy to trace, and subsequently disregard, the flow of money between Dr. Gordon and the family trust. Although funds also flowed between Hansen and his corporation, these funds were not gifts: the Commissioner chose to challenge a transfer of *wages*, a standard and non-controversial payments between a corporation and employee.

50 *Id.* at 20-21.
51 See I.R.C. § 267(b)(2).
Hansen’s application to a DOMA-based tax avoidance strategy becomes immediately apparent. Any couple married in Massachusetts may have their own separate sources of funds with which they may execute joint purchases of term and remainder interests. Hansen allows such purchases. In the normal course of events, § 167(e) would prevent any claim of depreciation, but as explained in Part II, DOMA arguably exempts married homosexuals from its scope. In order to apply any substance-over-form argument to married homosexuals, the Service would have to find some justification, other than marriage, to consider the partners to be “related.”

3. Kornfeld v. Commissioner

The Service might hope to find some solace in Kornfeld v. Commissioner, a 10th Circuit case involving transactions similar to those in Gordon. Kornfeld, himself a tax attorney, first created a revocable trust with his two daughters. He then executed joint-purchase agreements with his daughters in which they purchased remainder interests in tax-free bonds while his trust purchased a life estate in the same. Immediately before purchasing the bonds, Kornfeld would send checks to his daughters for the value of the remainder interests. (Taking a cue from Tannenwald’s criticism of Dr. Gordon, Kornfeld would later file gift-tax returns in an attempt to bolster the legitimacy of the transactions.52) He then attempted to depreciate the value of his life estates.

Some of Kornfeld’s transactions took place after 1989, so he was forced to modify this structure in later years. Kornfeld provided funds to both his daughter and his

52 Kornfeld, 137 F.3d at 1233.
secretary, Patsy Parmenter, with which the daughter then purchased a second life estate effective after Kornfeld’s death, and Parmenter purchased the final remainder interest.53

Taken in the most literal terms, this would avoid the strictures of § 167(e), for Parmenter (the holder of the remainder interest) did not qualify as a related person.54

It may be for this reason that the 10th Circuit did not employ § 167 in their decision. Instead, the court specifically approved Gordon v. Commissioner (and distinguished Hansen), and proceeded to use the substance-over-form doctrine to determine that Kornfeld had actually purchased the bonds and proceeded to split his interests in property already owned.55 Although much of the analysis parallels that of Gordon, the 10th Circuit made a few novel observations. First, the court focused upon the fact that Kornfeld and his daughters determined the price of their interests based upon IRS estate and gift tax tables, not market prices:

Here, however, one hundred percent ownership of the bonds was acquired from or through Prudential Bache in a market transaction; but taxpayer presented no evidence that any brokerage firm would sell only a life estate in the bonds.56

Second, the court emphasized that for the steps of a transaction to be combined, any of three tests could be used: the binding commitment, end-result, or interdependence

53 Id. at 1233.
54 This potential weakness in § 167(e) has long been recognized. See Youngs, supra note 31, at 186 (proposing that judicial examination of business purpose is more likely to prevent abuse than statutory rules on related parties).
55 Kornfeld, 137 F.3d at 1234-36.
56 Id. at 1234.
tests. Kornfeld attempted to rely upon the binding commitment test, arguing that his daughters were not obligated to purchase remainder interests with the money given them. The court dismissed that rather formal argument and explicitly stated that transactions satisfying any test might be stepped-together.

For purposes of considering the tax status of same-sex taxpayers, however, the court’s treatment of Ms. Parmenter provides the most guidance. Kornfeld emphasizes that courts should treat with skepticism transactions wherein related parties participate in the joint acquisition of split interests. Importantly, however, the court did not limit itself to the definition of related parties found in § 167(e):

Although Permenter [Kornfeld’s secretary] is not a natural object of taxpayer’s bounty in the same sense as his daughters, she is his long time secretary, cotrustee of his revocable trust, and taxpayer made contemporaneous gifts to her to enable the purchases of her remainder interests. In such circumstances it is not inappropriate to treat her in the same category as a related party.

If Hansen stands for the proposition that related parties are not always precluded from splitting interests (at least in the absence of § 167(e)), Kornfeld suggests that “related persons” are not construed as narrowly for purposes of judicial skepticism of transactions

57 Id. at 1235. Cite to American Wholesale in order to define the three tests.
58 Id.
59 Id.
60 Id. at 1235 n.4.
as the Code itself might suggest. \textsuperscript{61} The 10\textsuperscript{th} Circuit’s footnote seems curiously superfluous: if Parmenter was co-trustee of Kornfeld’s trust, then the two were already related-parties under § 267(b)(4). \textsuperscript{62} Yet even if pure dicta, Kornfeld warns that mere compliance with the text of the Code may not be enough to create tax-advantaged investments for same-sex partners. More care may be required.

\textbf{PART II: CONSTRUCTING A SPLIT INTEREST TAX STRUCTURE FOR HOMOSEXUAL COUPLES}

These precedents provide guidance for Ms. Douglas, Mr. Stone, and Mr. and Mr. Kent as they begin their planning. Before describing in detail how they might go forward, however, their goals deserve particular consideration. Unlike most tax planning (or tax sheltering), their goal is primarily political, not financial. Victory thus lies not so much in preserving income, but through forcing the federal government to recognize the marital status of homosexual couples. As a practical matter, this means that homosexual couples may be willing to accept the risk that the IRS will find against them, provided that such risk does not involve extreme financial or criminal penalties. On the other hand, a gonzo tax planner cannot take advantage of the audit lottery, the most powerful weapon in the arsenal of tax avoidance. \textsuperscript{63} The political nature of this tax planning requires that the taxpayers challenge the Service publicly. Such openness has its

\textsuperscript{61} I.R.C. § 267(c)(4) explicitly limits who may be considered “family” for purposes of § 167(c): “The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants . . . .” I.R.C. § 267(c)(4) (emphasis added).

\textsuperscript{62} I.R.C. § 267(b)(4) (specifying that a grantor and fiduciary of a trust as related parties).

advantages, however: many anti-shelter regulations focus upon attempts at secrecy that will not bedevil our planners.⁶⁴

Finally, as the parties structure investment, they must bear in mind the judicial precedent that, as we have seen, goes further than the statutory prescription. To succeed, the investment vehicle must look more like Hansen than either Kornfeld or Gordon. To the greatest degree possible, transactions should be made at arm’s length in the market. The entire structure, and every element within it, should have a plausible business purpose. Most importantly, Mr. and Mr. Kent cannot, at any point, act in such a way that they might statutorily be considered “related parties” in any way other than as marriage partners. A court facing the Kents should be forced to make a choice: either allow a depreciation deduction and recognize a tax advantage possessed by same-sex parties; disallow the deduction and recognize that the Kents are married; or disallow the deduction by forcing a “constructive” relationship between the Kents using implausible, results-driven argumentation to avoid the obvious conflict with DOMA.

A. Structure

The proposed transaction involves three steps and five different parties: a company seeking to raise debt capital (Company X), an underwriter or brokerage firm to issue and sell the bonds (Underwriter Y), a human rights organization with an interest in homosexual activism (HRO), an attorney (Ms. Stone), and homosexual couples married

in Massachusetts (typified here by the Kents). Marriage in Massachusetts may not be a necessary limitation. The political effect of this structure is directly proportional to the number of homosexual couples that may participate: the more bonds sold, the greater the effect on the fisc. If the bonds could be sold in such a way as to advantage not only married (and thus Massachusetts) homosexuals, but also homosexual couples in domestic partnerships, then the potential market expands considerably. As we will see, however, the strange tax status of domestic partners means that they face considerably greater risk.

In the first step, Company X issues securities with the assistance of Underwriter Y and the HRO. For sake of illustration, assume that Company X wants to issue $100,000 worth of debt securities, and its normal cost of capital (the interest rate that it would have to pay to the market) is five percent.\(^65\) Because Company X provides health benefits to same-sex partners, it pays a higher effective rate of tax than it might otherwise.\(^66\) Obviously, Company X would like to offset this cost, and HRO would like to encourage companies to provide equivalent health benefits to same-sex partners.

To accomplish this goal, Ms. Stone suggests that Company X issue a “socially responsible bond.” The Company first agrees on a set of equality standards with HRO, covering employment discrimination, health insurance, and other employment benefits. Each year, HRO agrees to inspect the company’s records and evaluate any discrimination complaints, and then to issue a seal-of-approval if Company X is found to be in

\(^{65}\) These figures are chosen, as are most tax examples, purely for the sake of mathematical simplicity, rather than as the reflection of the actual cost of capital of any particular company.\(^{66}\) Kratze, supra note 18, at 414-15.
substantial compliance. So long as Company X is HRO-approved, the bonds will pay only 4.875% interest, but should the seal of approval ever be lost, they revert to a 5% rate. Ms. Stone, having considered the cases examined above, also insists that the bonds be designed with severability in mind. That is to say, from the date of their issue Underwriter Y expects and is specifically allowed to separate the coupons from the underlying bond and sell the interests to different parties. In our example, again choosing numbers for the sake of simplicity, assume that the bonds mature in five years.

When the bonds are issued, Company X will now have two different types of bonds circulating in the market: their standard bonds that pay 5% interest, and their socially-responsible bonds that pay 4.875%. Some altruistic investors may, in fact, be

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67 Ian Ayres and Jennifer Gerarda Brown have already proposed a rough outline for a “fair employment mark” that could be granted to companies that provide equal opportunities to same-sex employees. See IAN AYRES AND JENNIFER GERARDA BROWN, STRAIGHTFORWARD: HOW TO MOBILIZE HETEROSEXUAL SUPPORT FOR GAY RIGHTS 79-94 (2005).

68 As a technical matter, Ms. Stone will have to make certain that the bond is not subject to the tax regime for “contingent debt.” See 26 C.F.R. § 1.1275-4. She should have no problem, however, given that remote or incidental contingencies do not qualify for special treatment. See 26 C.F.R. § 1.1275-4(a)(5) (providing remote or incidental contingencies as an exception to rules of § 1.1275-4); § 1.1275-2(h) (defining remote contingencies). Ideally, the Company should manifest its commitment to maintaining equal treatment for same-sex employees through public announcements or even SEC filings in order to establish that the likelihood of the penalty rate becoming relevant is truly remote. Indeed, the minimize the likelihood of the debt being found to be contingent, the ideal company is one that already offers benefits, and fully intends to continue. The fact that a company already offers benefits to employees in same-sex partnerships does not render a contract with a human rights organization illusory, however. The consideration for the lower rate of interest comes from the commitment of the Company to maintain same-sex benefits in the event of conceptually remote occurrences. For instance, prior to its merger in 2000, Mobil Corp. “was on the forefront of companies that offered benefits to gay and lesbian workers equal to those offered by married employees.” After merging with Exxon, however, the new entity announced that it would not extend these benefits to any same-sex employee. See Amy Joyce, MAJORITY OF LARGE FIRMS OFFER EMPLOYEES DOMESTIC PARTNER BENEFITS, WASHINGTON POST, June 30, 2006, at D3.
willing to sacrifice part of their return in order to ensure social responsibility.\textsuperscript{69} However, one group of investors will be able to achieve a higher after-tax rate of return on the socially-responsible bonds than their more expensive cousins: married homosexual couples.

To illustrate this, assume that Mr. and Mr. Kent each earn income in excess of $100,000 per year, have a cost of capital of 4\%, and are subject to a 35\% marginal tax rate.\textsuperscript{70} If either partner were to purchase $100,000 worth of the “standard” bonds, that partner would earn $5,000 per year, on which he would pay $1,750 in income tax, for an after-tax return of $3,250. Assume, however, that the Kents work together to purchase $100,000 worth of the socially responsible bonds. The first Mr. Kent purchases the coupons, which under a simple net-present value calculation are worth $21,273.21, and the second Mr. Kent purchases the bond itself, worth the remaining $78,726.79.

Were the Kents a heterosexual couple, this transaction would provide them with little profit other than the satisfaction of supporting a socially-responsible firm. Each


\textsuperscript{70} Again, the tax rate is chosen for simplicity of calculation. It is worthwhile noting, however, that under present tax rules, the Kents already benefit from a marriage bonus: two married heterosexuals each with a taxable income of $100,000 per year after deductions and exemptions would be subject to a marriage penalty. In this scenario, assuming that the Kents act in a solely economically rational fashion, they have little incentive to pursue gonzo tax planning at all.

Two obvious responses are in order. First, even if the couple described in this article would not benefit from gonzo tax planning, other homosexual couples might. If Kent A makes $200,000 per year, and Kent B has enough in residual assets to acquire the coupons, then they may engage in the transaction secure in the knowledge that if they ever get married, they will enjoy a marriage bonus. Second, homosexual couples are no more likely to be drawn from the stock of \textit{homo economicus} than anyone else: even assuming that the Kents would suffer a tax penalty from a recognition of their relationship, they may be willing to pay it.
year the Kents would receive $4,875 in interest payments, on which they would pay $1,706.25 per year in tax, for an annual after-tax return of $3,168.75, or $125 less than they would earn with the standard bonds. By purchasing the split interests, however, the first Mr. Kent may attempt to amortize the purchase value of his wasting asset. Assuming that he paid $21,273.21, an amortization deduction would be worth $4,235.87 per year. Over the five years of his investment, the first Mr. Kent thus pays tax upon a gain of only $693.13 per year ($4,875 - $4,235.87), approximately $223.70. The second Mr. Kent, on the other hand, pays no taxes for the first four years of the bond, but must pay $7,412.76 in year five when the bond matures. The taxes paid under both scenarios are illustrated in Table 1.

**Table 1: Tax Paid by Kents Over Life of Bond**

<table>
<thead>
<tr>
<th>Year</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax without splitting of interests</td>
<td>$1,706</td>
<td>$1,706</td>
<td>$1,706</td>
<td>$1,706</td>
<td>$1,706</td>
<td>$8,532</td>
</tr>
<tr>
<td>Tax after interests split</td>
<td>$224</td>
<td>$224</td>
<td>$224</td>
<td>$224</td>
<td>$7,636</td>
<td>$8,532</td>
</tr>
</tbody>
</table>

71 Under *Lomas Santa Fe*, a party is not allowed to split an interest he already owns without providing additional investment. *Lomas Sant Fe, Inc. v. Commissioner*, 74. T.C. 662, 682 (1980). In order to secure the transaction against a later judicial attempt to apply the step-transaction doctrine, it may be worth asking the Kents to pay slightly more than the net present value of each portion of the bond. This additional investment might qualify as an amortizable debt premium subject to additional tax deductions. See I.R.C. § 171. I have not considered these values in the calculations above, however, again for the sake of simplicity.

72 The second Mr. Kent receives $100,000 when the bond matures, against which he may deduct his basis of $78,820.67. This leaves him with income of $21,179.33, which at a 35% tax rate yields $7,412.76 in taxes.
Splitting the interests does not actually reduce the Kents’ taxes over five years, but it does allow them to defer the vast majority of taxes paid on the investment until year five. The tax deferral is worth more to the Kents than the purchase of the standard bonds, a fact most easily illustrated by comparing the net present value of the after-tax income streams available under both investments. (Table 2)

**Table 2: Net Present Value $100,000 invested by Kents in Standard and Socially Responsible Bonds (Assuming 4.0% cost of Capital)**

<table>
<thead>
<tr>
<th>Year</th>
<th>Standard bond</th>
<th>Socially-responsible bond (depreciated)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$3,250$73</td>
<td>$4,651$73</td>
</tr>
<tr>
<td>2</td>
<td>$3,250</td>
<td>$4,651</td>
</tr>
<tr>
<td>3</td>
<td>$3,250</td>
<td>$4,651</td>
</tr>
<tr>
<td>4</td>
<td>$3,250</td>
<td>$4,651</td>
</tr>
<tr>
<td>5</td>
<td>$103,250$74</td>
<td>$97,239$76</td>
</tr>
<tr>
<td></td>
<td>$103,250$74</td>
<td>$97,239$76</td>
</tr>
<tr>
<td>NPV</td>
<td>$96,661</td>
<td>$96,807</td>
</tr>
</tbody>
</table>

The socially responsible bond represents a victory for every party except the IRS. Company X performs its debt financing at 12.5 basis points less than its market cost of capital, allowing it to (slightly) offset the cost of providing employment benefits to same-sex partners. Married homosexual couples provide a market for the bonds, at least so long as an amortization allowance is sustained by the Courts, because the lower interest rate is offset by their tax deferral. In reality, the socially responsible bonds are nothing more than an arbitrage structure: HRO is selling Company X a tax advantage $73 $5,000 interest payment - $1,750 in taxes. $74 $3,250 interest payment + $100,000 bond maturation. The bond maturation is untaxed as a return of capital. $75 $4,875 interest payment - $224 in taxes. $76 $100,000 bond maturation + $4,651 post-tax interest payment - $7,413 tax on bond maturation.
theoretically possessed by homosexual couples in exchange for an assurance that other homosexuals will receive equal treatment in the workplace. 77

B. Surviving Challenge by the Service

In order for this arbitrage to work, of course, at least one of the Kents must be able to claim a depreciation deduction despite § 167(c). Ms. Stone will have two ways of presenting such a challenge. First, she could request a letter opinion from the IRS, asking how the Service would treat the transaction. Such letters are non-binding on either the Revenue or the courts, but the Kents could seek such a ruling with a minimum of risk. On the other hand, if they received an unfavorable opinion, they would be unable to challenge it in the courts without executing the transaction, paying the non-depreciated rate of tax in the first year, and then suing the IRS for a refund.

The parties might choose instead to execute the transaction, claim a depreciation allowance, and then wait for the IRS to challenge them. Although nothing forces the Service to prosecute the action, sufficient publicity—public buzz about a “gay tax shelter”—is almost certain to force the bureaucratic hand into motion. This strategy

77 Nothing requires the Kents to sell their tax advantage through arbitrage, of course. Just as many heterosexual couples care more about their own fiscal health than any political ramifications of tax planning, so some homosexual couples—particularly upon reading this essay—may immediately wonder, “Why not simply buy the 5% bond, split the interests, and pocket the cash? Marriage, for tax purposes, anyway, probably involves a marriage penalty. Why not be “married” for state law purposes and abuse the system?” This concern is probably overstated. First, as Seto has shown, there are more straightforward ways for homosexual couples to take advantage of DOMA than through split-interests. See generally Seto, supra note 16. More importantly, the benefits of social recognition will, for many couples, outweigh the loss of tax sheltering opportunities. To the extent, however, that gonzo tax planners seek to differentiate themselves from unscrupulous taxpayers who happen to be homosexual, they should not find it too difficult. Gonzo tax planners seek publicity, while tax cheats will seek to avail themselves of the audit lottery.
poses little risk for Company X. After all, it has merely sold bonds into an open market, and those bonds may not all have been bought by homosexual married couples in Massachusetts. They have traded something of value—a promise to engage in homosexual-friendly employee policies—for a lower cost of capital. On the other hand, the risks for any given homosexual couple are themselves relatively small: in the example above, whichever Kent purchased the right to receive interest payments faces interest and penalties on only $1,483 of deferred taxes in the first year, or less than 2 percent of the value of the couple’s joint investment. Further, so long as Ms. Stone is able to write an opinion letter stating that it is “more likely than not” that the Service—or eventually the courts—will treat his investment favorably, the Kents can avoid the imposition of penalties. In that case, Mr. Kent’s liability is limited indeed, so long as he can achieve a return greater than the statutory rate of interest on the $1,483 worth of taxes deferred in year one. Happily, Ms. Stone should find it easy to conclude that this structure is “more likely than not” to pass muster.

1. Application of Kornfeld, Gordon, and Hansen

Supposing that the Service challenges Mr. Kent in the Tax Court using Gordon and Kornfeld as precedent, the first stumbling block would be in attempting to find the

78 See I.R.C. § 6664(c)(1) (protecting taxpayer from imposition of penalties for underpayment of income tax arising from fraud or negligence where taxpayer has “reasonable cause” and has acted “in good faith.”) Taxpayers normally satisfy I.R.C. §6664(c)(1) by seeking an opinion letter from a tax attorney. The provision of such letters is strictly regulated by, among other regulations, Circular 230, 31 C.F.R. § 10.35(b)(10) (2006).

79 By comparison, it will be relatively easy for the Service to penalize a couple who, as per Infanti’s suggestion, insist upon filing jointly in the face of clear regulatory guidance to the contrary.

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“mere stopping place” used by Mr. Kent to split his interests. So long as both Mr. Kents earn sufficient income on their own that they can each purchase their share of the bond, neither party needs to treat the other as an intermediary. Although in reality both Kents, being married, are likely to make significant financial contributions to each other’s welfare, this contribution is not recognized for federal tax purposes: they are required to file as separate parties. More importantly, as Massachusetts is not a community property state, each partner retains the right to use their own income as they see fit. 80

The requirement that both partners purchase their own share necessarily limits the availability of this tax shelter to marriages in which both partners generate sufficient income to be able to afford their own investments. Because the political impact of same-sex-favored tax shelters will be greater if more families may participate, finding a way around this restriction would increase the political power of the strategy dramatically. Ironically, a recent IRS ruling may have considerably expanded the number of couples who could join the Kents in investing in socially responsible bonds.

Although California has recognized same-sex domestic partnerships as roughly equivalent to marriage since 2000, it was only in 2005 that the state extended its community property laws to domestic partners.81 The application of community property laws has long caused conflict in the tax courts, leading not only to such seminal cases as

81 California Domestic Partners Rights and Responsibilities Act of 2003, Assembly Bill 205 (altering California Family Code § 297.5(m) to include domestic partners within community property laws, and allowing existing domestic partners until June 30, 2005 to enter into agreements avoiding the application of community property).
Poe v. Seaborn, but also eventually to the very process of joint filing. For heterosexual couples, the rule of Poe v. Seaborn is simple: married couples filing separately in community property states may pool their income collectively and file separate returns for half of the amount.

After California applied community property to same-sex domestic partnerships, the service was confronted with the question of how such partners should report their individual incomes on federal tax returns. The IRS initially reacted by limiting the ruling of Poe v. Seaborn to married couples and announcing that domestic partners should report their own earned income irrespective of the application of community property. As a result, California domestic partners have the right to spend half of each other’s earned income (through community property) but are not required to identify each other to the IRS.

The operation of community property law thus provides an escape from the “mere stopping place” restriction, at least for California couples. Assume for the moment that Mr. Kent A earns $200,000 per year, and his partner (a stay-at-home father) earns nothing. To participate in the shelter above, Kent A would have to transfer money to

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82 282 U.S. 101 (1930) (holding husbands and wives filing separately in community property states may each declare half of their joint income); see also United States v. Malcolm, 282 U.S. 792 (1931) (applying Poe v. Seaborn to California’s community property law); Commissioner v. Harmon, 323 U.S. 44 (1944) (refusing to apply Poe v. Seaborn to Oklahoma community property status because such status was elective).

83 For an enlightening history of the assignment of income doctrine, including the background to the seminal cases of Lucas v. Earl and Poe v. Seaborn, see Patricia A. Cain, The Story of Earl: How Echoes (and Metaphors) from the Past Continue to Shape the Assignment of Income Doctrine, in Paul Caron, ed., TAX STORIES 275—312 (2003).

84 218 U.S. 101 (1930).

Kent B to purchase a remainder interest, thus making the transaction factually similar to *Kornfeld*. Were they partnered in California, however, Kent B could purchase the remainder interest out of funds to which he has a legitimate right. The tax advantages to the Kents become even more dramatic: Kent A will be able to depreciate the income interest against income taxed at the highest marginal rate, while Kent B may pay much lower total tax on the remainder. Although the tax advantage would almost certainly not offset the increased tax burden placed upon the Kents by the inability to file jointly, it might at least mitigate the inequity.

Two caveats with respect to California domestic partners are in order, however. First, domestic partners may be less able to protect themselves from the “constructive” imposition of § 167(e).\(^{86}\) Second, this tension between federal tax law and state family law creates a number of absurd, but potentially tragic, tax consequences for same-sex domestic partners.\(^{87}\) At the moment, these consequences are more academic than real, in

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\(^{86}\) *See infra* Part III.C.2.

\(^{87}\) An ABA discussion paper highlights the risk that California domestic partners may face severe, if unintended, tax consequences:

Suppose A entered into a domestic partnership with B in 2005. A earns $100 per year and is in a 45% blended state and federal income tax bracket. B earns nothing. Does this mean that A pays $45 in taxes and is left with $5 and that B keeps $50 free of tax? Or will California law required [sic] B to reimburse A for one-half of the taxes? Will failure to demand reimbursement be another gift? On top of that, A may have to file a gift tax return, and pay a 45% gift tax on the $50 transferred to B ($22.50). B will have earned $50 tax-free and A will actually be out of pocket $17.60!

that the Service has not made much noise to enforce the Code with draconic consistency.
It may be unwise, however, for California domestic partners to poke at this particular sleeping tiger.

So long as the Court finds no “mere stopping place,” the remainder of the case law favors the Kents. Neither Kornfeld nor any later tax opinion has overturned the fundamental rule of Gregory v. Helvering:

The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. . . . But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended.\(^8\)

Nor did Kornfeld overrule Hansen, which still stands for the proposition that split-interest deductions between even related-parties are not per se invalid, at least in the absence of a statutory proscription, but only subject to closer scrutiny.

The author then mentions a further frustration in reconciling federal and state law based upon the inartful drafting of the CA domestic partnership statute, which allows domestic partnerships among same sex couples “unrelated by blood in such a way that would prevent them from marrying.” The limitation on such incestuous marriages is at least partially gender specific: “Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous.” Domestic partnerships between uncles and nephews or nieces and aunts are not seemingly barred from domestic partnership. Id.

If the IRS or Congress wished to avoid the problem of California’s community property law by ignoring the transfer of wealth between such partners, it would have to create an exception to the exception to account for niece/aunt or uncle/nephew partnerships, or risk providing an incentive for such unions in order to escape gift and inheritance taxes. As more states develop alternative “marriage-style” relationships, each bringing with them their own peculiar statutory and common law heritages, one can imagine the complexity of the relevant Code sections and the opportunity for arbitrage or abuse expanding enormously.

Other than the close relationship between the parties—a relationship not recognized by federal law—the Kents’ proposed transaction is closer to *Hansen* than *Kornfeld*. Indeed, in many ways this same-sex tax planning is less bothersome than even the land-purchase in *Hansen*. The Kents purchase their interests at arms-length from a third-party at market rates, possibly for additional investment. Unlike in *Hansen*, the property being sold is designed explicitly to allow the splitting of interests.\(^{89}\) Nor can the entire transaction be considered bereft of business purpose: the lower interest rate on the bonds provides consideration for the guarantee of homosexual-friendly employment policies.

Finally, a court cannot conveniently “step-together” the transactions between Company X, the brokerage, the HRO and the Kents, because no combination of steps will result in a different outcome. If a Court ignored all intervening steps between Company X and the Kents and merely determined that they had purchased split-interests directly, one Kent would still be entitled to a depreciation deduction. The critical purchases that must be stepped together—obvious in *Gordon* and *Kornfeld*—are the transfers that track the purchase money back to an individual, or at least to related entities. The last “link” to be stepped together—Kent A’s provision to Kent B of funds to purchase a remainder interest—simply does not exist. Denial of the deduction thus relies upon establishing, in the face of DOMA, that the Kents are related entities.

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\(^{89}\) Compare *Kornfeld*, 137 F.3d 1231, at 1234 (“Here, however, one hundred percent ownership of the bonds was acquired from or through Prudential-Bache in a market transaction; but taxpayer presented no evidence that any brokerage firm would sell only a life estate in the bonds.”)
2. *Can same-sex couples be considered “related parties” for tax purposes?*

Given the Defense of Marriage Act, it is unlikely that a Tax Court will be able to declare the Kents to be related parties, though it might attempt to do so either by statute, applying the language of § 167(e) and § 267(c), or through some kind of creative or “constructive” description as to their relationship. Any conclusion that the Kents are related in some way other than marriage requires leaps of logic that would either set uncomfortable precedents for future tax cases.

The Kents cannot be considered “members of a family” under § 267, because such members are limited only to brothers, sisters, spouses, ancestors and lineal descendants, and DOMA defines “spouse” as a member of the opposite sex. 90 Strictly speaking, then, § 267(b) itself cannot apply. 91

On the other hand, a suitably creative judge might find a way around the text of § 167(e). While that section denies depreciation between related parties, it does not make that denial exclusive: it describes the universe of deductions not allowed, but does not imply that all others must be. Further § 167(e)(6) specifically instructs the Secretary to prescribe regulations that will prevent avoidance through such means as cross-ownership. Were a judge to determine that the purposes of the Code (and the Defense of Marriage Act) were ill-served by allowing same-sex partners to act as unrelated parties, he might be tempted to create some form of “constructive” relationship to be applied. 92

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91 Section 267(b) defines other relationships as well, but as the transaction does not involve a trust or corporation in which the Kents have ownership, this subsection is of no particular relevance.
92 There is no reason to suspect that any legislator who debated DOMA ever intended for it to be used by homosexual couples to escape tax burdens. Indeed, proponents of DOMA, to the extent
Such “constructive marriage” would be simplest to contrive between couples in
the several states that allow civil unions but not “marriage.” Relying upon the dicta in
Kornfeld relating to Ms. Permenter, a judge might determine that a domestic partnership
is marriage-like enough to justify treating the Kents as a single unit. This conclusion is
not explicitly barred by any later statute. After all, DOMA defines nothing more than the
gender status of partners in some entity arbitrarily described as “marriage.” It does not
address civil unions, domestic partnerships or any other state-sanctioned union of
individuals.

Could a judge extend such logic to encompass couples actually married in the
state of Massachusetts, or any other state that legislatively and judicially decides to
abolish the semantic divide between homosexual and heterosexual partnerships?
Ironically, the same judicial flexibility in the construction of language that allows for
arguably rights-expanding rulings like Goodridge or Lawrence, may rescue a Tax Court
judge searching for an acceptable relationship between the Kents. Longstanding
Massachusetts precedents, after all, recognize that the institution of marriage creates a

that they addressed tax consequences at all, concentrated upon the potential costs to the federal
government of recognizing homosexual marriages. See, e.g., 142 CONG. REC. 10100, 10111
(1996) (statement of Sen. Byrd) (“How much is it going to cost the Federal Government if the
definition of "spouse" is changed? . . . I do not think, though, that it is inconceivable that the costs
associated with such a change could amount to hundreds of millions of dollars, if not billions--if
not billions--of Federal taxpayer dollars.”); Id. at 10121 (statement of Sen. Ashcroft) (arguing that
recognition of marriage would allow same-sex couples special benefits and tax deductions at
expense to the public); 142 Cong. Rec. H 7480, *H7488 (statement of Cong. Barr) (“[I]f
you do not believe it is fiscally responsible to throw open the doors of the U.S. Treasury to be
raided by the homosexual movement, then the choice is very clear, oppose [amendment
substantially limiting DOMA]”).

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“marital partnership.” It takes only a short linguistic stretch to determine that a homosexual couple, while they might not have a marital partnership, nevertheless have some partnership for purposes of Massachusetts, and thus federal, law. With a little twisting of logic, the Kents’ ownership interests might fit within the ambit of § 267(e), which regards certain partnerships and individuals who own an interest in them as related parties.

PART III: THE ADVANTAGES OF GONZO TAX PLANNING FOR HOMOSEXUAL RIGHTS ACTIVISTS

Would a ruling that the Kents were related actually constitute a loss? Remember that the investment vehicle above serves both an economic and a political purpose. The Kents may lose the lawsuit and have to pay interest on unpaid taxes or perhaps even

93 See, e.g., Heins v. Ledis, 422 Mass. 477, 480 (Mass. 1996) (“[T]he Legislature adopted the gender-neutral principle that marriage is a partnership, and that spouses have a mutual obligation to support the children of the marriage as well as the other spouse.”); Hay v. Cloutier, 389 Mass. 248, 254 (Mass. 1983) (describing marriage as partnership in which both parties contribute). The concept of marriage as partnership most commonly arises in the context of dissolution of a marriage, for purposes of interpreting alimony requirements under G.L.C. 208, § 34.

94 Needless to say, any court following this path would have to construct some justification for not treating heterosexual married couples as members of a partnership, as federal tax law distinguishes between married couples and business partnerships in important ways. See, e.g., United States v. Craft, 535 U.S. 274, 286 (2002) (distinguishing between property owned in entireties by married couples and property owned by a partnership).

A judicial determination that same-sex couples constitute business partners adds complexity to the already confusing relationship between same-sex marriage, tax policy and the DOMA. If same-sex couples are considered business partners for purposes of tax avoidance, why not apply the same consideration for purposes of income reporting? In other words, would later taxpayers be able to use judicial precedent to suggest that married homosexuals, although they may not file jointly, each receive property distributions from their “non-marital” partnership exactly equal to half of the joint income of the partners?

Even more confusing would be the impact such a decision would have upon couples, heterosexual or homosexual, who live together but do not choose to formalize their relationship. At what stage would such couples form a partnership for tax purposes?
penalties. But such damages are a small price to pay for legal precedent achieving a long-held goal of the gay rights movement: some official recognition of a relationship between same-sex couples. In the context of DOMA, “don't ask don't tell,” and other acts of federal institutional blindness towards same-sex relationships, even recognition for the sake of punishment might be a step forward. Gonzo tax planning attempts to make a liar of the Congressional Budget Office, which reported in 1996 that “enacting H.R. 3396 would result in no cost to the federal government.”

Part III outlines the potential political benefits of gonzo tax planning to homosexual couples and the gay rights movement. These benefits constitute a “heads, you lose; tails, I win” strategy, in which recognition of same-sex couples undermines the legislative case for DOMA, at least for purposes of taxation, while non-recognition results in loss of tax receipts to the federal government (and considerable flexibility in the tax planning options of married homosexuals).

Finally, this Part suggests that gonzo tax planning presents homosexual rights activists with particular strategic advantages. Many homosexual rights activists express concern with respect to pursuing homosexual rights in federal courts for fear of legislative backlash. Gonzo tax planning mitigates this concern by focusing not upon “unfairness” in comparison to some contested ideal of equality, but upon the inherent contradictions of the law as it is. At least on its surface, a gonzo strategy does not tell DOMA proponents that their beliefs are wrong. Instead, it challenges them to face the costs inherent in ignoring the fact of homosexual love.

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A. Heads, You Lose: Political Advantages of a Judicial Loss

Any attempt to carve some “third-way” between the Defense of Marriage Act and
utter non-recognition under DOMA merely creates new problems for those who would
deny same-sex marriage. Even limited recognition suggests that changes must be made
around the edges of the code. If same-sex couples in Massachusetts can be considered to
be engaged in some constructive partnership, the existence of the partnership needs to be
communicated to the government. Having recognized that same-sex partners may use
§ 167(e) for avoidance purposes, presumably the Secretary is now required, under
§ 167(e)(6), to establish some regulation preventing such avoidance. Any reasonably
workable scheme will require the Kents to inform the IRS of their relationship. If
married partners in Massachusetts must somehow be recognized in order for the IRS to
prevent tax avoidance, does it make sense to exclude them from the most cost-effective
reporting method: joint-filing?

Nor would a decision finding against the Kents eliminate opportunities for further
gonzo tax shelters and subsequent lawsuits. The boundaries of the assumption of
selfishness vary considerably depending upon the precise section of the tax code, and
each comes with a slightly different judicial gloss. A reasonably persistent set of tax
lawyers might spend years devising investment structures that advantage homosexual

96 The Kents, because they desire a test case, actively wish to communicate their transaction to
the government, but once the test case is over, nothing prevents homosexual couples from joining
the audit lottery. Indeed, after a judicial loss, homosexual couples might wish to take advantage
of more abusive but difficult to detect strategies.
97 See Seto, supra note 16, at 1-2; Bridget J. Crawford, The Profits and Penalties of Kinship:
Conflicting Meanings of Family in Estate Tax Law, 3 Pitt. Tax Rev 1, 2 n.7 (2006).
couples—excluded from each and every current definition of “family”—and proceeding with patient challenges to make an ever greater muddle of the tax jurisprudence.98

Finally, a loss in the Tax Courts may itself lend considerable political capital to the campaign to recognize same-sex marriage. Limited to its facts, a loss for the Kents is not likely to translate into recognition of their union for any purpose other than avoidance of “abusive” tax shelters. Such a ruling places defenders of DOMA—often themselves proponents of “original meaning” in legislation—in an uncomfortable position. A consistent traditionalist might believe that marriage excludes homosexuals from the benefits and penalties that the tax code places on marriage, just as a consistent liberal may believe they should be included. But only a true Humpty-Dumpty of a politician could argue that homosexuals should be married when it hurts them and unrelated when it would provide them relief.99 Every court decision finding that a homosexual couple is “abusing” their unmarried status makes the case for DOMA a little harder to put forward with a straight face.

98 For the problems of redefining “family” to include other forms of domestic partnership, see infra note 104 and text accompanying.
99 This is not to say, of course, that some politicians won’t attempt to mimic Lewis Carroll’s arrogant egg in attempting to make marriage mean so many different things:

`When I use a word,’ Humpty Dumpty said, in rather a scornful tone, `it means just what I choose it to mean -- neither more nor less.'
`The question is,’ said Alice, `whether you can make words mean so many different things.'
`The question is,’ said Humpty Dumpty, `which is to be master -- that's all.'
LEWIS CARROLL, THROUGH THE LOOKING GLASS, Chapter VI. Not all American voters, however, are capable of believing seven impossible things before breakfast, and at the very least gonzo tax planning provides a method by which such Humpty Dumpties may be easily mocked.
B. Tails, I Win: Legislative Attempts to Fix the Code While Preserving DOMA

Alternatively, a Tax Court might conclude that DOMA prevents it from considering the Kents to be a married couple or any other form of related party. Such a decision presents the gay rights movement with a political, as well as a financial, victory. Precedent confirming that married gay couples cannot be considered “related” for purposes of federal income taxation opens a host of possibilities for avoidance available only to same-sex couples. Gonzo tax planning then plays a dual political role. First, it may help married homosexual couples to defray the additional burdens they face from federal non-recognition of their relationships. Second, each additional act of tax planning makes a congressional response slightly more likely. The reliance our tax system places upon marriage as a tool for identifying potentially collaborative behavior limits options available to Congress to close this “loophole” without recognizing, in some manner, the validity of relationships between same-sex couples. Thus, the use of gonzo tax planning invites Congress to revisit—and potentially repeal—DOMA’s delegitimization of same-sex relationships.

As I have already stressed, related-party rules serve to prevent many different types of abusive transaction. A favorable ruling in the Kents’ case may open the floodgates: related party rules work to prevent married couples from selling personal property without recognizing sale on gains, deferring income largely indefinitely, or

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100 For couples who would be subject to a marriage penalty were their relationship to be recognized, gonzo tax planning offers a way to further capitalize upon their tax advantage.
claiming twice the benefits otherwise allowed under certain government programs.\footnote{101}{See Seto, supra note 16, at 28—32.}

Once a judge eviscerates § 267 for one homosexual couple, other transactions cannot be far behind. DOMA becomes, in effect, a weapon for its own destruction.

Direct protest tactics focus upon convincing Congress to change a status quo adopted with vast bipartisan consensus (including the signature of a highly popular Democratic president). Gonzo strategies, on the other hand, concentrate on the fundamental and costly flaw inherent in refusing to recognize that two individuals do, in fact, love each other. Initially, the relative impact on the fisc might itself be small: the number of married homosexual couples is not large.\footnote{102}{According to the Massachusetts Registry of Vital Records and Statistics, by November 9, 2006 only 8,764 same sex couples chose to be married. See Dionne Walker, Gay Wedding Industry is Booming, L.A. TIMES, Dec. 26, 2006, available at http://www.latimes.com/business/la-fi-gayindustry26dec26,1,72629.story.}

Nevertheless, news reports of a “gay tax shelter” will make uncomfortable reading for Congressmen who initially supported DOMA in order to protect the public purse from the ravages of same-sex marriage.\footnote{103}{See supra note 92.} More importantly, homosexual couples can leverage their tax advantage to the benefit of corporations rather than themselves, ensure that the cost of an irrational tax law exceeds that which might be inflicted by private planning alone.

Congressional proponents of DOMA are thus pierced upon the horns of a dilemma. They may either allow homosexual couples a peculiar form of tax advantage, or they may attempt to adjust the code to deny such a benefit to same sex couples. There is, of course, one very easy “fix” to the problem: recognize the Kents as related parties. Without repealing DOMA, however, legislative solutions are limited. Congress might

\footnote{101}{See Seto, supra note 16, at 28—32.}
\footnote{103}{See supra note 92.}
amend DOMA to exclude any application to Title 18, thus allowing gay marriages to be recognized by the Internal Revenue Code. This itself represents an ironic victory. At least according to the legislative history, recognition of same-sex couples is a net cost to the Treasury.\footnote{Seto addresses the option of amending the Code to apply only the negative consequences of marriage to same-sex partners, while failing to provide them with any benefits. Seto, \textit{supra} note 16, at 36. As he points out, such measures would likely heighten the success of equal protection challenges, discourage homosexual couples from registering their relationships with authorities (in order to avoid detection), and is inconsistent with the concept of non-recognition of gay marriage. \textit{Id.} Additionally, it is difficult to conceive of a method by which Congress could so amend the Code, or the manner in which the IRS would enforce it. As already mentioned, the IRS will have a difficult time tracking abusive transactions without allowing same-sex couples to file jointly.}

Alternatively, § 267(c) could be amended to include “individuals part of a state-recognized same-sex domestic partnership.” Such language might eliminate California or New Jersey domestic partners from participation. Yet Massachusetts couples, as of this writing, are \textit{not} part of a same-sex domestic partnership: they are married. Moreover, creating a two-tier system of recognition for same-sex couples may incline state courts or legislatures to mandate marriage for same-sex couples rather than civil unions.

As another alternative, the Code could be amended to create a separate status—“domestic tax partnership”, for instance—that same-sex couples might opt into in

\footnote{Needless to say, amending the Code to be intentionally discriminatory against same-sex couples would prove as fiendishly complex as the idea is undoubtedly ugly, and might even pose equal protection concerns. Further, such intentional discrimination at the federal level risks setbacks in state-level litigation. Much of the reasoning of the New Jersey Supreme Court in \textit{Lewis v. Harris} rests upon the premise that, no matter the name, the legislature may provide equal access to same-sex couples without naming the relationship a “marriage.” \textit{See Lewis v. Harris}, 908 A.2d 196, 221-24 (N.J. 2006). Were the federal government to use such recognition only punitively, state supreme courts already favorable to the idea of same-sex companionship might lose their wariness to finally settle what’s in a name.}
exchange for the benefits and burdens of recognition for tax purposes. Such recognition
does not directly violate DOMA: it does not invoke the words “marriage” or “spouse.”
At the same time, however, it provides at least a partial victory for same-sex couples. For
the first time, they could choose to have their relationships recognized for federal tax
purposes.

Recognition of same sex couples, either whole or in part, is the ultimate goal and
probable outcome of gonzo tax planning. A tax court that recognizes the Kents as
“related” for purposes of split-interest transactions leaves the Service scrambling for a
way to identify potential tax abusers who are otherwise invisible to the system. Success
in the courts, on the other hand, puts immediate pressure on Congress to pursue actual
legislative change. Either way, homosexual couples are likely to gain some recognition
for their relationships at a federal level. Not only does this serve as a “foot in the door”
for later victories, but it forces Congress to readdress DOMA directly in a way that direct
protests—mass joint filing or other demonstrations—do not.

C. The Curious Novelty of Gonzo Tax Planning

Assuming that gonzo tax planning presents an opportunity to force some
recognition of same-sex partnerships upon the federal government, and thus weaken the
justification for DOMA, why do the Kents remain a wholly fictional couple? Although
entirely unsatisfying as an answer, it may simply be that the “four persons at a bar”
scenario described at the beginning of this essay has simply never occurred. The right
alignment of tax planner, homosexual couple and gay rights activist has not been
achieved.\textsuperscript{105} On the other hand, academic commentators have discussed the tension between DOMA and anti-abuse rules, if only rarely.\textsuperscript{106} Although I cannot address the issue with any certainty, two distinct possibilities present themselves. The first, for which there is considerable evidence, is that same-sex activists are strategically reluctant to bring litigation in federal courts, the only venue in which a tax challenge may be pursued. The second possibility is that academic commentators have tended first to assume that same-sex marriage (and its resultant benefits) is a right being denied to homosexual couples, and that their present unrecognized status must thus be a form of invidious discrimination. Gonzo tax planning, based not upon contestable notions of “rights” but rather upon exploiting tensions within a consciously designed system, thus runs in direct contradiction to the intellectual and ideological support for decisions such as \textit{Lawrence} or \textit{Goodridge}.

1. \textbf{Reluctance to Engage in Federal Litigation}

State courts have been used to challenge heterosexual-only marriage policies far more often their federal counterparts. The lack of federal cases is not coincidental: it reflects a conscious decision among gay rights advocates to concentrate upon courts perceived to be more friendly to the movement.\textsuperscript{107} Indeed, this strategy has extended so

\textsuperscript{105} History has shown that although a tax arbitrage idea seems obvious once pointed out, it may take considerable time for an actual transaction to be developed. See Daniel N. Shaviro, \textit{The Story of Knetsch: Judicial Doctrines Combating Tax Avoidance}, in Caron, \textit{supra} note 83, at 325.
\textsuperscript{106} See text accompany \textit{infra} notes 115-117.
\textsuperscript{107} See William C. Duncan, \textit{Avoidance Strategy: Same-Sex Litigation and the Federal Courts}, 29 \textit{CAMPBELL L. REV.} 29, 35-44 (2006) (discussing reasons homosexual rights groups avoid federal litigation); Infanti, \textit{supra} note 8 at 45-47 (describing efforts by same-sex rights groups to act as “gatekeepers” for judicial and legislative protest).
far that Lambda Legal Foundation filed a brief before the Ninth Circuit asking that the court not address constitutional objections brought by an individual plaintiff.\textsuperscript{108} This reluctance, and its applicability to tax cases, is encapsulated by a quotation from the attorney who worked upon the \textit{Goodridge} case:

"I think that what it boils down to is avoiding the federal piece" for as long as possible. "I have tried to plead with lawyers not to get overly ambitious about going into court and challenging the federal Defense of Marriage Act," she says. "I think a lot of times these cases would arise as tax cases by wealthy individuals" who pay disproportionate sums because of the unavailability of marriage. "I can't think of a less sympathetic prospect," Bonauto says. "I would like the opportunity for states to wrestle with this before we have to go into federal court."\textsuperscript{109}

The search for sympathetic courts and sympathetic plaintiffs may seem harsh, hypocritical or hopeless,\textsuperscript{110} but it is founded on significant tactical and strategic concerns. \textit{Goodridge} itself was not without backlash,\textsuperscript{111} and advocacy groups are right to worry that

\textsuperscript{108}Duncan, \textit{supra} note 107, at 41-42. The case involved is \textit{Smelt v. County of Orange}, No. 05-56040 (9th Cir. Aug. 29, 2005). Infanti notes a similar reluctance among "professional" activists in other cases in California. \textit{See} Infanti, \textit{supra} note 8, at 19 n.87.

\textsuperscript{109}Duncan, \textit{supra} note 107, at 41.

\textsuperscript{110}Infanti and Duncan both express their disgust with this state of affairs. \textit{See} Infanti, \textit{supra} note 8, at 45-46; Duncan, \textit{supra} note 107, at 42-46.

\textsuperscript{111}During the election cycle following the \textit{Goodridge} decision, thirteen states ratified marriage amendments forbidding the recognition of same-sex marriage. \textit{See} Lynn D. Wardle, \textit{State
a judicial victory at the federal level might translate into support for a more draconian legislative response. 112 The voters of Alabama or Mississippi have no legislative recourse against the Massachusetts Supreme Judicial Court, and so long as its decisions are not law in their jurisdiction, the impetus behind the Federal Marriage Amendment remains minimal. As Judge Wilkinson mentions in the state context, “The marriage amendment phenomenon then can only be viewed as a preemptive strike against what some hypothetical court in some hypothetical jurisdiction might some day say.” 113 But a federal decision could put flesh upon those hypothetical bones, inspiring a movement in support of the FMA. However depressing one may find it, the strategy of avoiding federal constitutional claims is hard to fault as an instrumental matter.

Yet gonzo tax schemes are not constitutional cases and raise no cries for equity or equality. No federal circuit, let alone a tax court, needs be asked to judicially eliminate the Defense of Marriage Act from the U.S. Code. Gonzo tax schemes instead ask courts to affirm the language of the legislature, to determine not only that the Defense of Marriage Act is perfectly constitutional, but that it actually means what it says. Indeed, a gay rights organization seeking to pursue a gonzo tax strategy should probably seek out some originalist, or even textualist, judges, the sort of Solon unafraid to declare that a

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Marriage Amendments: Developments, Precedents, Significance, 7 Fl. COASTAL L. REV 403, 403 (2005).


113 Wilkinson, supra note 112, at 569.
court will uphold the language of a statute even when enforcing its “unintended consequences.”¹¹⁴

Nor does gonzo tax planning present the same opportunity for a legislative backlash. The Defense of Marriage Act already denies homosexual couples legal recognition at a federal level. The only possible legislative response is to enact laws that recognize some form of same-sex partnership. These responses cannot be pursued without simultaneously providing sympathetic legislators an opportunity to directly challenge the legitimacy of DOMA itself.

In short, gonzo tax strategies suggest the possibility of a sort of legal jiu-jitsu, seizing for oneself an opponent's strength and power. Some activists might be uncomfortable with these strange bedfellows, but braver activists (or perhaps originalists uncomfortable with their anti-homosexual fellow-travelers) might enjoy the irony.

2. Academic criticism

The tension between anti-abuse rules and the Defense of Marriage Act has attracted occasional commentary in law reviews, but academics have tended to address the issue through one of two prisms. The first, typified by an article by Patricia Cain, focuses upon homosexual tax advantage as an issue secondary to, and less important

¹¹⁴ Ironically, the allergy of Justice Scalia (and his intellectual fellow travelers) to legislative history serves as a positive boon to gonzo tax proponents. The legislative history shows that DOMA proponents wished to protect the treasury from the depredations of homosexual couples claiming marriage benefits. Based upon the floor speeches, it would be hard to argue that Congress ever intended same sex couples to benefit from DOMA. Gonzo tax planning, ironically, is best pursued in front of judges who find such floor speeches to be irrelevant.
than, homosexual tax penalties.\textsuperscript{115} In tallying the harms faced by homosexual taxpayers, Cain admits that homosexual couples are not directly burdened by the anti-abuse rules, and that the economic substance doctrine and sham transaction rules might be avoided, but then concludes, “While in some cases it may be possible, with careful planning, to avoid the 'related party' rules and the 'sham transaction' theories, such planning adds a cost to the alleged benefit of being unrelated.”\textsuperscript{116} If one is constructing a theory of “heterosexual privilege,” nothing is to be gained by an attempt to quantify such costs and benefits, let alone minimize the costs and maximize the benefits. A grievance-based approach seeks precisely the opposite: to emphasize injustice by minimizing any advantage that a same-sex couple might possess.

Gonzo tax planning, on the other hand, relies not upon heterosexual dominance but homosexual strength. Homosexuals are far from powerless in the face of the law. Unlike African-Americans during their struggle for desegregation, homosexuals—at least after \textit{Lawrence}—do not struggle with the \textit{de jure} limitations that faced earlier proponents of civil rights. This is not to say that individual homosexuals do not face discrimination in any arena of public life, but only to recognize that they have access to education, funding, political office, powerful advocates and the corridors of power in a way that an early Martin Luther King Jr. could only dream. Homosexual activists should seize upon


\textsuperscript{116} \textit{Id.} at 487.
exclusion—in effect, invisibility to the tax man—as the double-edged sword that it is, wielding it against those who forged it in the first place.117

Gonzo tax planning also rejects another common theme of the academic literature: the stigmatic or psychic harm of positively and openly declaring one's relationship to be void. According to this school of thought, a homosexual who insists that she is not married in order to evade the anti-abuse rules inflicts injury upon herself by denying to the government the very existence of her loving relationship.118 Yet so long as the Service is subject to DOMA, any married homosexual must make this declaration anyway. The act of challenging the Service, and by extension society, to be consistent in its non-recognition of gay marriage converts the requirement to formally ignore a loving relationship into an act of defiance, and may itself ameliorate stigmatic harm.

Challenging the powerful to stand by their own law is itself in the finest of heroic traditions. It invokes the same combative spirit found in Thomas More, as portrayed in A Man for All Seasons. In the play, More keeps himself alive through the consistent

117Some scholars have addressed the tension between DOMA and tax law without downplaying the advantages granted to homosexual couples, of course. See Seto, supra note 16; Kratzke, supra note 16. In so doing, these scholars persuasively demolish any possible contention that DOMA is consistent with good tax policy. To the extent that they focus upon the usefulness of non-recognition to homosexual couples, however, it is only as a shield against personal taxation.
118See Cain, supra note 115, at 487 (“In addition, for some couples there is something unsettling about claiming to be unrelated when, in fact, the couple experiences their relationship as real.”); Infanti, supra note 8, at 28 (“Each year, when tax season comes around, I feel the legal eraser scraping against me once again as the federal government returns to ensure that it has removed all trace of my relationship.”); Nancy J Knauer, Heteronormativity and Federal Tax Policy, 101 W. VA. L. REV. 130, 216 (“Imagine the strain of trying to unscramble your affairs in order to report two completely separate lives that are in fact lived jointly. It is something that same-sex couples have to remember and keep track of throughout the year.”).
invocation of English law, despite the fact that everyone knows that his actions are inconsistent with his heart.\textsuperscript{119} Although he suffers severely from the punishments inflicted upon him by the raw ambition of the court, More uses the law as a dagger to prick the conscience of his oppressors.

\textsuperscript{119} See, e.g., ROBERT BOLT, A MAN FOR ALL SEASONS:

CROMWELL But, Gentlemen of the jury, there are many kinds of silence. . . . Suppose I were to draw a dagger from my sleeve and make to kill the prisoner with it, and suppose their lordships there, instead of crying out for me to stop or crying out for help to stop me, maintained their silence. That would betoken! It would betoken a willingness that I should do it, and under the law they would be guilty with me. So silence can, according to circumstances, speak. Consider, now, the circumstances of the prisoner's silence. The oath was put to good and faithful subjects up and down the country and they had declared His Grace's title to be just and good. And when it came to the prisoner he refused. He calls this silence. Yet is there a man in this court, is there a man in this country, who does not know Sir Thomas More's opinion of the King's title? Of course not! But how can that be? Because this silence betokened-nay, this silence was not silence at all but most eloquent denial.

MORE (With some of the academic's impatience for a shoddy line of reasoning) Not so, Master Secretary, the maxim is "qui tacet consentire." (Turns to COMMON MAN) The maxim of the law is (Very carefully) "Silence gives consent." If, therefore, you wish to construe what my silence "betokened," you must construe that I consented, not that I denied.

CROMWELL Is that what the world in fact construes from it? Do you pretend that is what you wish the world to construe from it?

MORE The world must construe according to its wits. This Court must construe according to the law.

\textit{A Man for All Seasons} is almost an originalist fairy tale, illustrating the defensive power of a legal principle, clearly stated and not subject to judicial interpretation, against invocations of raw power and authority. One can almost imagine a frustrated IRS agent (or even Senator) demanding of the Kents: "Is that you are ‘unrelated parties’ what the world in fact construes from it? Do you pretend that is what you wish the world to construe from it?"
CONCLUSION

The Defense of Marriage Act, and most other state laws that insist upon a non-recognition of same-sex couples, is inconsistent with the goals of our tax law, and this inconsistency is exploitable. This essay has presented a transaction that would allow homosexual couples to arbitrage their tax advantage with large corporations, making it a potent tool of political action. It seeks to answer Infanti's call to arms with a strategy that emphasizes homosexual power, not homosexual exclusion. Federal courts present an opportunity, not a risk, for homosexual rights activists to the extent that they focus upon non-constitutional challenges.

A gonzo tax planner does not insist that homosexuals are being denied some vague “right.” Rather, she conceives of a homosexual couple as two individuals, bound by love and commitment, who are excluded from the benefits and burdens of marriage. The gonzo tax planner does not seek to prove that such restrictions are unjust or unconstitutional, though such a position may be arguable. She seeks to prove that the law as it stands is unworkable.

In this sense, gonzo tax planning makes more humble claims than traditional homosexual rights activism. Activists who pursue, and courts that deliver, rulings such as Goodridge can hardly avoid challenging a majority morality that has survived millenia. Concluding that one's moral certainty, expressed by a judiciary, trumps

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120 As Judge Wilkinson notes:
centuries of tradition practically begs for backlash. It also prevents the homosexual rights movement from embracing some natural allies: economic conservatives, libertarians, or any others who worry that a multiplication of constitutional “rights” brings with it risks that may outweigh the harm that homosexuals suffer from exclusion. Gonzo tax planning—and any other strategy emphasizing the pragmatic unworkability of ignoring the reality of homosexual love—represents a break from this radical tradition.

The Goodridge court was so supremely sure of its own moral universe that it at best paid lip service to powerful opposing arguments, and at worst ran roughshod over them. Goodridge began by describing civil marriage as "a wholly secular institution," noting that "no religious ceremony has ever been required to validate a Massachusetts marriage." After thus draining the institution of spiritual significance, the majority proceeded to say the history of one-man, one-woman unions likewise mattered little, because "history must yield to a more fully developed understanding of the invidious quality of the discrimination." The court likewise saw no state interest in promoting civil marriage as the optimal setting for procreation, noting simply that "fertility is not a condition of marriage . . . . People who cannot stir from their deathbed may marry." Indeed so convinced was the majority of its view that it considered the opposing arguments to lack even a "rational basis." In other words, centuries of common law tradition, legislative sanction, and human experience with marriage as a bond between one man and one woman were deemed unworthy to the point of irrationality.

Wilkinson, supra note 112, at 546.