JOINT FEDERAL INCOME TAX RETURNS: IF DOMA DIES AND EVEN IF IT LIVES THE WEAK CASE FOR DISTINGUISHING BETWEEN SAME-SEX AND DIFFERENT-SEX MARRIED COUPLES

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I. Introduction

For tax purposes, legally married same-sex couples are considered married by their state government but not married by the federal government. Filing their state and federal taxes has been confusing and labor intensive to say the least. Some tax experts say same-sex couples must first fill out a fake federal return which they need to use as a basis to file their state tax return. They then fill out their federal tax returns as if they are single but taking into account state property laws in which their assets may be considered shared marital property. And there is another complication that must be considered—what if the Supreme Court tells Congress that they can’t treat same-sex married couples differently from different-sex married couples for federal purposes? That “marriage” for federal purposes cannot be in fact limited to as between one man and one woman? Will same-sex married couples then be able to file joint federal income tax returns? Tax scholar, Patricia Cain has “advised anyone who would benefit from joint filing to file an amended return as a protective claim for refund if they are married (no matter where they live) or in a marriage equivalent status.”

The topic of same-sex marriage has been politically controversial and at the evolutionary frontier of the law in many areas. State legislators, courts and voters have come out very differently on the issue of what types of relationships should qualify for marriage or marriage-like statuses under state law. Nine states, the District of Columbia and two Native American tribes have legalized same-sex marriage. California’s back and forth with same-sex marriage

2 Id.
recognition is complicated to say the least.\textsuperscript{5} Twelve states recognize marriage-like statuses such as civil unions, domestic partnerships and/or reciprocal beneficiary relationships, which depending on the particular state may grant persons in such statuses certain rights and/or responsibilities of married persons.\textsuperscript{6} However, eleven states have prohibited same-sex marriage by statute\textsuperscript{7} and thirty-one states have prohibited same-sex marriage in their constitutions.\textsuperscript{8}

\textsuperscript{5} In February 2012, the Ninth Circuit Court of Appeals upheld a 2010 U.S. District Court decision that declared Proposition 8, a voter initiative which passed in November 2008 banning same-sex marriage in California, invalid. This decision reinstates the right of same-sex couples to marry unless reversed by a higher court. The right of same-sex couples to marry in California dates back to May 2008 when the California Supreme Court so ruled. Same-sex marriages were performed for a short period of time before Proposition 8 was certified and therefore California recognizes same-sex marriages from before November 5, 2008. The U.S. Supreme Court will review the Proposition 8 ruling with a decision likely summer 2013 (Hollingsworth v. Perry). See, Same-Sex Marriage Laws, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-laws.aspx (last visited March 9, 2013).

\textsuperscript{6} Delaware, Hawaii, Illinois, New Jersey and Rhode Island recognize civil unions. In Delaware, the legislature approved the law in April 2011 and it was signed by the governor in May 2011. The law provides essentially the same rights and responsibilities of married persons under Delaware law and was effective January 1, 2012. In Hawaii, the legislature approved a bill that gives same-sex couples the same rights as married couples under Hawaiian law, effective January 1, 2012. In Illinois, the General Assembly approved the law in December 2010 and the governor signed it in January 2011. The law gives those in civil unions some of the benefits of married persons under Illinois law. In New Jersey, civil unions were effective February 2007 and gave persons some of the rights and responsibilities of married persons under New Jersey law. Notably, persons in such unions would not be granted federal protections such as Social Security survivor benefits. In Rhode Island the General Assembly passed legislation allowing civil unions in June 2011 and it was signed by the governor in July 2011. Persons in such unions have the same benefits as married couples in Rhode Island. Note that Connecticut, Vermont and New Hampshire also allowed civil unions prior to their recognition same-sex marriage. In Connecticut and New Hampshire, previously entered into civil unions were converted into marriages by October 2010 and January 2011 respectively. In Vermont, civil unions entered into before September 1, 2009 remains valid. California, Oregon, Washington, Maine, Hawaii, Nevada and Wisconsin allow domestic partnerships, as does the District of Columbia. California has a domestic partner registry which grants certain state level rights and responsibilities to domestic partners, with the latest extension of right effective January 1, 2005. Oregon did so as of January 1, 2008 and extends the same rights, benefits, and responsibilities as marriage under state law. See, Oregon Family Fairness Act, Pub. L. No. 99 (2007), H.B. 2007, 74\textsuperscript{th} Leg. Assem., Reg. Sess. (Or. 2007). Notably, this does not include federal protections such as Social Security survivor benefits. Washington provides domestic partner benefits under a law that originally passed in 2007. See Wash. Rev. Code §26.60 (2007). Maine allows registered domestic partners limited rights mainly dealing with death, organ donation and protection. See Maine Revised Statutes, Title 22, Chapter 701, Section 2710. Hawaii allows a reciprocal beneficiary relationship enacted July 8, 1997. Its law, the Hawaii Reciprocal Beneficiaries Act, “represents a commitment to provide substantially similar government rights to those couples who are barred by law from marriage.” These rights include certain property rights, health care decisions, visitation rights, certain inheritance rights, and protections under domestic violence laws. Notably, this is not limited to same-sex couples and can be used as a contract among two parties such as a brother and sister. Hawaii’s reciprocal beneficiary status is recognized by other jurisdictions as being notably weaker than other same-sex union laws. The state of New Jersey, for example, recognizes reciprocal beneficiary status as equivalent only to domestic partnerships, not civil unions in New Jersey. Reciprocal Beneficiary Relationships in Hawaii, http://en.wikipedia.org/wiki/Reciprocal_beneficiary_relationships_in_Hawaii (last visited March 9, 2013). Nevada, too, has a statewide registry for domestic partners. It compares to married persons but does not include state mandated health care coverage by employers of domestic partners. S.B. 283, 2009 Leg., 75\textsuperscript{th} Sess. (Nv. 2009). Wisconsin passed a law establishing a domestic partnership registry in June 2009 and its partners have some of the benefits of marriage such as family and medical leave, medical decision and hospital visitation rights, exemptions from certain transfer fees and inheritance and survivor protections. 2009 Wisconsin Act 28, A.B. 75 §74.
 Constitutional amendments that ban same sex marriage, civil unions, domestic partnerships or other similar same sex relationships are widespread across the United States of America. These amendments limit the definition of marriage to include marriage between a man and a woman. The District of Columbia has had a domestic partner registry since 1992 but in 2009 the DC council passed a resolution allowing same-sex marriage. Its domestic partner benefits include rights upon death, sick leave and wrongful death claims. D.C. Code §1-307.68; §1-612.31, 32(b); §3-413; §16-1001; §5-113.31, 33; §21-2210; §32-501, 701, 704, 705(a), 705(b), 705(c), 705(d), 706; §42-1102, 3404.02(b)(c), 3651.05(c)(3); §47-858.03; §47-902; §50-1501.02(e)(4) and various other sections of the D.C. Code. See, Same Sex Marriage Laws, http://www.ncsl.org/issues-research/human-services/same-sex-marriage-laws.aspx (last visited March 9, 2013).


Alaska, Nevada, Mississippi, Missouri, Montana, Oregon, Colorado, Tennessee, Arizona, and California have enacted constitutional amendments that define marriage as between a man and a woman. See, ALASKA CONST. art. I, §25 (enacted by Ballot Measure 2, H.R.J. Res. 42, Alaska 1998); NV. CONST. art. I, §21, limitation on recognition of marriage (enacted by Nevada Question No. 2, 2002); MISS. CONST. art. XIV, §263a (enacted by Amend. 1 of 2004, a public referendum); MO. CONST., art. 1 (Bill of Rights), §33 (enacted by Const. Amend. 2 of 2004, a public referendum); MONT. CONST. art. XIII, §7 (enacted by Initiative 96 of 2004, a public referendum); OR. CONST. art. XV §5a (enacted by the Oregon Ballot of 2004); COLO. CONST. art. amend. II, §2 (enacted by Colorado Amendment 43, 2006); TENN. CONST. art. XI, §18 (enacted by Tennessee Amendment 1, 2006); ARIZ. CONST. art. XXX, §1 (enacted by Arizona Proposition 102, 2008); CAL. CONST. art. 1, §7.5 (enacted by California Proposition 8, 2008). Note that in many of these states the constitutionality of these amendments has been/is being challenged. Nebraska, Arkansas, Georgia, Kentucky, Louisiana, North Dakota, Ohio, Oklahoma, Utah, Kansas, Texas, Alabama, Idaho, South Carolina, South Dakota, Wisconsin, and Florida and North Carolina ban same-sex marriage and other marriage-like statuses in their constitutions. See, NEB. CONST. art. I, §29 (enacted by Initiative Measure 416, 2000, banning same sex marriage, civil unions, domestic partnerships or other similar same-sex relationships); ARK. CONST. amend. 83, §§1-3 (enacted by Constitutional Amendment 3, 2004, banning same-sex marriage and legal status identical or substantially similar to that of marriage); GA. CONST. art. I, §4 (enacted by Constitutional Amendment 1, 2004, banning same sex marriage and same sex unions); KY CONST. §233A (enacted by Constitutional Amendment 1, 2004, banning same sex marriage and legal status identical or substantially similar to that of marriage); LA. CONST. art. XII, §15 (enacted by Constitutional Amendment 1, 2004 banning same-sex marriage, unions and a legal status identical or substantially similar to that of marriage); N.D. CONST. art. XI, §28 (enacted by North Dakota Constitutional Measure 1, 2004, banning same-sex marriage and other domestic unions, however denominated); OHIO CONST. art. XV, §11 (enacted by State Issue 1, 2004, banning same-sex marriage and other domestic unions, however denominated); OKLA. CONST., art. II, §35 (enacted by State Question 711, 2004, banning same-sex marriage and marital status or legal incidents thereof of unmarital couples or groups); UTAH CONST. art. 1, §29 (enacted by Constitutional Amendment 3, 2004, banning same-sex marriage and other domestic unions, however denominated); KAN. CONST. art. XV, §16 (enacted by Proposed Amendment 1, 2005, banning same sex marriage and all other relationships other than marriage that entitle the parties to the rights or incidents of marriage); TEX. CONST. art. I, §32 (enacted by Proposition 2, 2005, banning same-sex marriage and any legal status identical or similar to marriage); Ala. CONST. art. I, §36.03 (enacted by the Sanctity of Marriage Amendment, Amendment 774, 2006, banning same-sex marriage and unions replicating marriage); IDAHO CONST. art. III, §28 (enacted by Idaho Amendment 2, 2006, stating that a marriage between a man and a woman is the only domestic legal union recognized); S.C. CONST. art. XVII, §15 (enacted by South Carolina Amendment 1, 2006, banning same-sex marriage and any other domestic union, however denominated); S.D. CONST. art. XLI, §9 (enacted by South Dakota Amendment C, 2006, banning same sex marriage, civil unions, domestic partnership, or other quasi-marital relationship); Wis. Const. art. XIII, §13 (enacted by Wisconsin Referendum 1, 2006, banning same-sex marriage, and legal status identical or substantially similar to that of marriage); FLA. CONST. art. I, §27 (enacted by Florida Amendment 1, 2008, banning same-sex marriage and other legal unions treated as marriage or the substantial equivalent thereof); N.C. CONST. art. XIV, §6 (enacted by North Carolina Amendment 1, 2012, stating that marriage between one man and one woman is the only domestic legal union recognized and also specifically stating that contracts between private parties are not banned). Michigan and Virginia have constitutional amendments that ban same-sex marriage, marriage-like statuses and private contracts. See, MICH.
State recognition of same-sex marriages and marriage-like statuses raised the question of whether these relationships would be respected for federal purposes. In 1996, the Defense of Marriage Act (“DOMA”) answered the question with a definitive “no.” Section 3 of DOMA defines “marriage” for federal purposes as “a legal union between one man and one woman.” Prior to 1996, for purposes of the Internal Revenue Code, Congress and the Internal Revenue Service (the “IRS”) relied on states determination of what constituted marriage. However, while DOMA is valid, it is DOMA’s definition that applies to the Code. This means that currently provisions based on marriage in the Code only apply to couples that are married under state law and that are between one man and one woman per DOMA, irrespective of whether same-sex couples are considered married or in a marriage-like status under their own states law.

DOMA’s definition of marriage has been found unconstitutional in eight federal courts. In fact in 2011, at the instruction of President Obama, Attorney General Eric H. Holder Jr.

9 State recognition of same-sex marriages and marriage-like statuses also raised the question of whether these relationships would be respected both by other states.

10 With respect to recognition of same-sex marriages and marriage-like statuses by other states, the full Article IV, Section 1 of the U.S. Constitution arguably requires states to give “full faith and credit” to the laws of other states, including same-sex marriages entered into in other states. Although it should be noted that many scholars have argued that the full faith and credit clause would not require one state to recognize the same sex marriage of another concluding Section 2 of DOMA to be unnecessary. See Patricia Cain, DOMA and the Internal Revenue Code, 84 Chicago-Kent Law Rev. 481 (2009). http://www.americanbar.org/content/dam/aba/events/taxation/taxiq-11may-181.authcheckdam.pdf (last seen March 14, 2013). When the Hawaii Supreme Court ruled that same-sex marriage would be recognized under Hawaiian law in 1993, Congress, in part responded to that, with Section 2 of DOMA which granted states the right to deny legal standing to same-sex couples with marriages legally recognized in other states. Baehr v. Lewin, 74 Haw. 530 (soon after Baehler, Hawaii state legislature amended the Hawaiian constitution to allow the banning of same-sex marriage). It should be noted that challenging DOMA on Section 2 was difficult because of the issue of standing and showing sufficient injury. (See Smelt v. County of Orange, 447 F. 3d 673, (9th Circuit).


12 Hereinafter, the “Code.”

13 See e.g., Rev. Rul. 58-66 1958-1 C.B. 60 (deference to state law with regard to common law marriage)

14 Supra note 10 at Sec. 3.

15 IRS publication 17, “Your Federal Income Tax – For Individuals” for use in preparing 2013 returns stated that “[i]n general, your filing status depends on whether you are considered unmarried or married. For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife.”

announced that the Justice Department, will no longer defend the constitutionality of section 3 of DOMA in two of the cases that were then making their way through lower federal courts in the second circuit, Pedersen v. Office of Personnel Management\(^\text{17}\) and Windsor v. United States.\(^\text{18}\) Requests for the Supreme Court to hear appeals on the constitutionality of the definition have been filed in five cases.\(^\text{19}\) The Supreme Court has granted certiorari for Windsor v. U.S., a US Court of Appeals case in the Second Circuit which held DOMA’s definition of marriage to be unconstitutional. Oral arguments in the case begin March 27, 2013 with a decision projected for June 2013. While certiorari has not been granted in the other 4 other cases, presumably no action has been taken because these determinations are dependent on the result of Windsor v. U.S.

The federal tax positions of legally married same-sex couples are already quite complicated.\(^\text{20}\) If DOMA’s definition of marriage is held unconstitutional by the U.S. Supreme

\(^{17}\) Pedersen v. Office of Personnel Management, No. 10-CV-1750 (D. Conn.)


\(^{20}\) Linn, supra note 1.
Court, how should certain sections of the Code that hinge on the concept of marriage be applied? Will legally married same-sex couples and couples in state recognized marriage-like statuses such as civil unions, domestic partnerships and/or reciprocal beneficial relationships be subject to the various rights and responsibilities of legally married heterosexual couples under the Code? Initially this is a complex question of interpretation of the Code as it is written now (and perhaps ultimately it is a question of tax policy for Congress). Although this inquiry will be relevant to many provisions of the Code this article looks solely at one provision, Code Section 6013 which permits the filing of joint tax returns. It asks the preliminary questions of if DOMA’s definition of marriage is held unconstitutional by the U.S. Supreme Court, whether, Code Section 6013 would apply by its own terms (i) to legally married same-sex couples; and (ii) to state recognized marriage-like statuses.

But it is important to remember that Code Section 6013 authorized the filing of joint returns before the demographics of marriage were so openly malleable and before the evolutionary legal and societal journey of state recognized same-sex marriages and marriage-like statuses. Therefore perhaps the more important questions, and certainly the more difficult ones, are the normative questions of whether Code Section 6013 should apply to legally married same-sex couples and/or state recognized marriage-like statuses based both on the tax policy considerations that prompted the enactment of joint returns in the first place and on the evolution of those tax policy considerations.

II. If DOMA’s definition of marriage is ruled unconstitutional, will IRC Section 6013, permitting the filing of joint returns, apply by its own terms to legally married same sex couples and/or state recognized marriage-like statuses?

A. Same-Sex Couples legally married under state law.

Code Section 6013 provides that “[a] husband and wife may make a single return jointly of income taxes …” The US Oxford dictionary defines the term “husband” as a “married man considered in related to his wife” and the term “wife” as “a married woman considered in relation to her husband.” Given the gender specificity of the terms “husband” and “wife” in common usage, the argument has been made that Code Section 6013 does not by its own terms permit same sex couples to file joint tax returns.

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22 I.R.C. §6013.


25 BLAG’s argument in Pederson (BLAG’s argued that plaintiffs who claim that Section 3 prohibited them from filing federal income tax returns as married joint filers lack Article III standing because the statute governing married joint filers, 26 U.S.C. 6013, does not extend by its own terms to married same-sex couples. (from Pederson cert).
This argument fails to account for the fact that these terms are interpreted as gender neutral for purposes of the Code. U.S.C. Title 1, Section 1 states that “when determining the meaning of any Act of Congress, unless the context indicates otherwise … [the] words importing the masculine gender include the feminine as well.” General definitions Section 7701 of the Code, references this, providing that the masculine shall include the feminine. In fact, the Pederson v. Office of Personnel, et al court explained that when used in the Code the terms “husband” and “wife” are “presumptively gender neutral” -- i.e. spouses.

Therefore, what has prevented legally married same-sex couples from filing joint tax returns has not been the application Code Section 6013. It has been DOMA. Section 3 of DOMA defines “marriage” for purposes of any act of Congress as “a legal union between one man and one woman.” The Internal Revenue Service (the “IRS”) has consistently stated that DOMA is the reason that same-sex couples cannot file joint tax returns. This further supports the argument that Code Section 6013 does not by its own terms prevent legally married same-sex couples from filing joint federal income tax returns. In addition, the 1996 through 2012, post-DOMA, versions of IRS publication 17, “Your Federal Income Tax – For Individuals” stated that “[i]n general, your filing status depends on whether you are considered unmarried or married. For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife.” The 1995 version and earlier versions of IRS publication 17, pre-DOMA, stated that “[y]our filing status is a category that identifies you based on your marital and family situation. State law governs whether you are married, divorced, or legally separated under a decree of divorce or separate maintenance.” This means that prior to the enactment of DOMA in 1996, the IRS deferred to state law to determine marital status. Not only did the IRS defer to

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27 I.R.C. §§ 7701(p)(1)(3), §1
29 See IRS information letter dated December 31, 2001, stating that “[b]ecause parties to a Vermont civil union must be of the same-sex, a Vermont civil union cannot, under DOMA, be a marriage for purposes of the Internal Revenue Code. Therefore, parties to a Vermont civil union cannot be considered married for purposes of §1 or as husband and wife for purposes of §6013.” In addition, the 2012 version of IRS publication 17, “Your Federal Income Tax – For Individuals” for use in preparing 2013 returns stated that “[i]n general, your filing status depends on whether you are considered unmarried or married. For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife.”
30 See also Boyter v. Comm’r, 668 F.2d 1382, 1385 (4th Cir. 1981) (“[U]nder the Internal Revenue Code a federal court is bound by state law rather than federal law when attempting to construe marital status.”). See also Rev. Rul. 58-66 (stating “[t]he marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws. Therefore, if applicable state law recognizes common-law marriages, the status of individuals living in such relationship that the state would treat them as husband and wife is, for Federal income tax purposes, that of husband and wife. The foregoing position of the Internal Revenue Service with respect to a common-law marriage is equally applicable in the case of taxpayers who enter into a
state law but the general rule is that, in applying federal law, federal courts will turn to state law whenever federal law is silent about a relevant topic.\textsuperscript{31}

Therefore, based on the application of Code Section 6013’s gender neutral terms and federal statute and practice of deference to states as to the status marriage, if DOMA’s definition of marriage is found to be unconstitutional by the Supreme Court, it seems clear that same-sex couples legally married under state law will be able to file joint federal tax returns. As described above, as this article is being written, DOMA’s definition of marriage has been found unconstitutional in eight federal courts including the First and Second Circuit Courts of Appeals.\textsuperscript{32} Requests for the Supreme Court to hear appeals on the constitutionality of Section 3 of DOMA have been filed in five cases and certiorari had been granted to one case, Windsor v. U.S.\textsuperscript{33}

B. Same-Sex Couples within marriage-like statuses under state law.

If DOMA’s definition of marriage is held unconstitutional by the U.S. Supreme Court, would Code Section 6013, permitting the filing of joint federal income tax returns, apply by its own terms to marriage-like statuses such as civil unions, registered domestic partnerships and reciprocal beneficial relationships?\textsuperscript{34} Twelve states recognize such marriage-like statuses which depending on the particular state may grant persons in such statuses certain rights and/or responsibilities of married persons.\textsuperscript{35} Perhaps applying the literal language of Code Section 28 U.S.C. § 1652 (2001) provides ”[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.”

\textsuperscript{31} Supra note 15.
\textsuperscript{32} Supra note 16.
\textsuperscript{33} It is important to note that it is not clear that DOMA’s definition of marriage applies to marriage-like statuses. See Patricia Cain, \textit{Federal Tax Consequences of Civil Unions}, 30 Cap. U. L. Rev. 387, 388 (2002) (raising the issue and citing Greg Johnson, Vermont Civil Unions: The New Language of Marriage, 25 VT. L. Rev. 15, 55(2000) (pointing out that narrowly construed, DOMA would not apply to civil unions) and William N. Eskridge, Jr., Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions, 64 ALB. L. REV. 853, 861 (2001) (arguing that federal agencies could construe DOMA to deny marital benefits to civil union couples).

\textsuperscript{34} Delaware, Hawaii, Illinois, New Jersey and Rhode Island recognize civil unions. In Delaware, the legislature approved the law in April 2011 and it was signed by the governor in May 2011. The law provides essentially the same rights and responsibilities of married persons under Delaware law and was effective January 1, 2012. In Hawaii, the legislature approved a bill that gives same-sex couples the same rights as married couples under Hawaiian law, effective January 1, 2012. In Illinois, the General Assembly approved the law in December 2010 and the governor signed it in January 2011. The law gives those in civil unions some of the benefits of married persons under Illinois law. In New Jersey, civil unions were effective February 2007 and gave persons some of the rights and responsibilities of married persons under New Jersey law. Notably, persons in such unions would not be granted federal protections such as Social Security Survivor benefits. In Rhode Island the General Assembly passed legislation allowing civil unions in June 2011 and it was signed by the governor in July 2011. Persons in such unions have the same benefits as married couples in Rhode Island. Note that Connecticut, Vermont and New Hampshire
6013, “husband and wife,” marriage-like statuses are not technically “marriages” and thus persons in such relationships may not be “spouses” for purposes of this provision. Interestingly, the IRS Office of Chief Counsel has stated in a letter responding to a taxpayers inquiry that a different-sex couple in an Illinois Civil Union is considered married for purposes of filing a federal tax return. The Illinois Religious Freedom Protection and Civil Union Act provides that "[A] party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognizes by the law of Illinois to spouses . . ." The Chief Counsel letter states that if Illinois treats different sex persons in a civil union as “husband and wife, they are considered ‘husband and wife’ for purposes of Section 6013 of the Internal Revenue Code, and are not precluded from filing jointly, unless prohibited by other exceptions under the Code.” Notably, the letter does not address same-sex couples in civil unions but this may be because DOMA, currently and at the time of the letter bars same-sex couples from being considered married under federal law.

also allowed civil unions prior to their recognition same sex marriage. In Connecticut and New Hampshire, previously entered into civil unions were converted in marriages by October 2010 and January 2011 respectively. In Vermont, civil unions entered into before September 1, 2009 remain valid. California, Oregon, Washington, Maine, Hawaii, Nevada and Wisconsin allow domestic partnerships, as does the District of Columbia. California has a domestic partner registry which grants certain state level rights and responsibilities to domestic partners, with the latest extension of right effective January 1, 2005. Oregon did so as of January 1, 2008 and extends the same rights, benefits and responsibilities as marriage under state law. Oregon Family Fairness Act P.L. No. 99, Oregon HB 2007. Notably this does not include federal protections such as Social Security Survivor benefits The law however has not taken effect due to a federal court decision. Washington provides domestic partner benefits under a law that originally passed in 2007. Chapter 26.60 RCW. Maine allows registered domestic partners limited rights mainly dealing with death, organ donation and protection Chapter 701, Title 22, Section 2710. Hawaii allows a reciprocal beneficiary relationship enacted July 8, 1997. Its law, the Hawaii Reciprocal Beneficiaries law "represents a commitment to provide substantially similar government rights to those couples who are barred by law from marriage." These rights include certain property rights, health care decision and visitation rights, certain inheritance and protections under domestic violence laws. Notably this is not limited to same-sex couples and can be used as a contract among two parties such as brother and sister. Hawaii Reciprocal Beneficiaries law. Nevada too has a statewide registry for domestic partners. The benefits are comparable to married persons but does not include state mandated health care coverage by employers of domestic partners. Senate Bill No. 283 Wisconsin passed a law establishing a domestic partnership registry in June 2009 and its partners have some of the benefits of marriage such as family and medical leave, medical decision and hospital visitation rights, exemptions from certain transfer fees and inheritance and survivor protections.2009 Wisconsin Act 28, Assembly Bill 75, Section 774 The District of Columbia has had a domestic partner registry since 1992 but in 2009 the DC council passed a resolution allowing same-sex marriage. It’s domestic partner benefits include rights upon death, sick leave and wrongful death claims. D.C. Code §§307.68; 1-612.31, 32(b); §3-413; §16-1001; §5-113.31, 33; §21-2210; §32-501, 701, 704, 705(a), 705(b), 705(c), 705(d), 706; §42-1102, 3404.02(b)(c), 3651.05(c)(3); §47-858.03; §47-902; §50-1501.02(e)(4) and various other sections of the D.C. Code. See http://www.ncsl.org/issues-research/human-services/same-sex-marriage-laws.aspx (last seen March 14, 2013).

36 I.R.C. § 6013 and Cain, supra note 33 at 390.
37 2011 Chief Counsel Letter
39 Id.
40 Supra note 10 at Sec. 3.
This line of reasoning, that if persons are treated like husband and wife under state law, they are treated as husband and wife under the Code unless another exception applies, may serve as an argument that Code Section 6013 applies by its own terms to certain marriage-like statuses if DOMA’s definition of marriage is held to be unconstitutional by the U.S. Supreme Court. Tax scholar Patricia Cain has said in her blog that “if the conclusion [of the letter (that a status that is the equivalent of marriage should be treated as marriage for federal tax law purposes)] holds, then that would mean that once DOMA falls, RDPs and civil union partners will also be treated as ‘husbands and wives’ under federal tax law.”\textsuperscript{41} Cain has further “advised anyone who would benefit from joint filing to file an amended return as a protective claim for refund if they are married (no matter where they live) \textit{or in a marriage equivalent status.}\textsuperscript{42} 

Other things to consider with respect to this argument though include that certain marriage-like statuses only grant some of the rights and responsibilities of marriage but not all rights and responsibilities of marriage. Perhaps the crux of the issue would become what is “equivalent” to marriage. Under Illinois law grants those in civil unions to “the same legal obligations, responsibilities, protections, and benefits as are afforded or recognizes by the law of Illinois to spouses . .” but how would this line of reasoning apply to marriage-like statuses that provide less than the state rights under marriage, such as Maine’s domestic partnership registry which provides limited rights mainly aimed at emergency situations? For marriage-like statuses that provide anything less than identical rights to marriage, at what point are these states treating people like husband and wife? In addition, it should be noted that the Chief Counsel’s interpretation is not the law or legal precedent (although the reasoning may still apply nonetheless). Finally, another counter to this reasoning is that if state legislators or votes really wanted to treat persons like husband and wife for state law purposes, they would have enacted same-sex marriage not marriage-like statuses of civil unions, domestic partnerships or beneficial reciprocal relationships.

In addition, some authors also argue that federal tax law should recognize and honor rights and responsibilities derived from those state law marriage-like statuses based on constitutionality grounds not based statutory interpretation of the Code.\textsuperscript{43} For example, Patricia Cain makes the constitutional argument that persons in Vermont civil unions can argue that “every time a taxing statute extends a benefit (or a burden) to a spouse, that benefit (or burden) ought to be extended to taxpayers in a committed civil union” on equal protection grounds because they are “similarly situated.”\textsuperscript{44} This article does not address these constitutional arguments and these arguments, do not help answer the question of whether Code Section 6013 would apply to marriage-like statuses, \textit{by its own terms} absent further legislative or judicial action, if DOMA’s definition of marriage falls. These arguments may however, help answer the

\textsuperscript{41} Carrns, \textit{supra} note 3. 
\textsuperscript{42} Id. 
\textsuperscript{43} Cain, \textit{supra} note 33 at 406. 
\textsuperscript{44} Id.
normative question of whether or not Code Section 6013 should apply to certain marriage-like statuses if DOMA’s definition falls. This will be discussed in more depth in Section III(B) below.

III. Even if DOMA’s definition of marriage is not ruled unconstitutional, are there reasons for distinguishing between legally married same-sex couples and legally married different-sex couples based on tax policy considerations or even DOMA objectives?

Meaningful optional joint federal tax returns were adopted in 1948 and based on the concept of marriage. If you were married, you could file a joint federal income tax return with your spouse. The determination of whether or not you were married rested on whether or not you were married under state law. In 1993, the Hawaii Supreme Court ruled that same-sex marriage would be recognized under Hawaiian law. Congress, in part responded to that, with Section 2 of DOMA which granted states the right to deny legal standing to same-sex couples with marriages legally recognized in other states and with Section 3 of DOMA which defined marriage for federal purposes as between one man and one woman. In other words, Congress said, we will no longer defer to state law to determine whether or not a couple is married. They did so for protection of traditional marriage, protection of traditional notions of morality and conservation of federal resources.\(^{45}\) It is very possible that the U.S. Supreme Court will rule this year that Congress can’t make that distinction between different sex married couples and same-sex married couples because that distinction does not provide persons with equal protection of the laws. If it does so, the determination of marital status for purposes of the Code will revert back to applicable state law which would mean that legally married same sex couples could file joint federal income tax returns (See Section II(A) above).

Even if DOMA’s definition of marriage is not held unconstitutional are there tax policy reasons for the distinction? DOMA’s definition of marriage was enacted with no official participation by any of the tax writing committees in Congress\(^ {46}\) and without tax expert consultants.\(^ {47}\) The joint return regime was enacted before this issue arose and therefore not considered. With DOMA’s definition of “marriage” being called into question on constitutional grounds, the time is ripe to ask the question of whether there are tax policy reasons to distinguish between same-sex married couples and different sex married couples with respect to filing joint tax returns. If DOMA is upheld for DOMA objectives we should know how that intersects with the underlying tax policy justifications for joint federal income tax returns. If DOMA is struck

\(^{46}\) Id.
\(^{47}\) Id.
down and state law once again determines who is considered married for federal income tax purposes, we should consider whether there are any tax policy reasons to either deviate from, assuming that doing so could be done constitutionally, or respect states determination of marriage of same-sex couples for purposes of filing joint federal income tax returns.

A. Are there tax policy reasons for distinguishing between same-sex and different sex-married couples for purposes of filing federal joint tax returns?

In order to determine potential tax policy reasons for distinguishing between same-sex and different-sex married couples for purposes of filing federal joint tax returns, it is useful to look at the history of why we adopted a regime of joint federal income tax returns initially. This is discussed in Section A(i) below. In addition, because the enactment of real joint returns is generally seen as a historical accident, it will also be helpful to look at subsequent tax policy justifications for continuing to maintain that regime. This is discussed in Section A(ii) below. Finally this article will discuss in Section A(iii) below whether any of the rationales in Section A(i) and A(ii) provide reasons for distinguishing between legally married same-sex couples and legally married different-sex married couples.

i. The historical perfect storm: why did we enact the optional joint tax return legislation of 1948?

Many tax scholars say the that optional joint tax return adoption in 1948 was not enacted as a result of tax policy analysis but was more of a historical accident. In order to understand this “historical accident,” I will discuss the historical circumstances prior to 1948. Although early theorists often wrote about taxing “family income,” the concept of the individual as the unit of taxation historically stems back to very origins of income taxation in the U.S. Even before the ratification of the 16th Amendment in 1913, which granted Congress the power to levy an income tax without apportionment among the states taxes, the taxable unit was the individual. The taxing statutes of 1861, 1862, 1894, 1913, 1916 and 1917 all taxed the income of “every person” or “every individual.”

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48 For example, such as perhaps changing the unit of taxation from married persons.
50 The 16th Amendment to the U.S. Constitution allows Congress to levy an income tax without apportioning it amount he states or basing it on census results. The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.
51 Revenue Act of 1861, Act of August 5, 1861, Chap. XLV, 12 Stat. 292 (imposed an income tax “levied, collected, and paid, upon the annual income of every person residing in the United States”), Revenue Act of 1862, Act of July 1, 1862, ch. 119, §90, 12 Stat. 473 (“There shall be levied...upon the annual...income of every person residing...”), Revenue Act of 1894, Act of Aug. 27, 1894, ch. 349, §27, 28, Stat. 553(“[A tax] shall be assessed upon the gains,
In the early 1900s there was some confusion in practice with respect to both whether separate or joint returns could be filed and whether, if husbands and wives both had income, that income should apply to the rate structure in the aggregate or separately irrespective of the type of return filed. Before the Revenue Act of 1918 a joint return was not specifically provided for by law.\(^{52}\) While joint returns were not specifically provided for by law in practice some joint returns were filed. The instructions to Form 1040 from 1917 stated that "Husband and wife should make separate returns if either is subject to surtax." The option of filing a joint federal income tax return first appeared explicitly in the Revenue Act of 1918.\(^{53}\) Confusingly, the instructions to Form 1040 in 1919 and 1920 read "In the case of husband and wife whose combined net income exceeds $5,000, separate returns must be made on Form 1040, showing the respective amounts of income." Since joint returns were allowed in the Revenue Act of 1918 this perhaps this just meant that if you made a separate return it must be made on Form 1040. Finally in 1921 and after, the instructions to Form 1040 reflected that if husband and wife had combined income of the amount covered by the filing requirements, all such income must be reported either on a joint return or on separate returns.

Irrespective of whether a joint or separate return was filed, determining tax liability under these early acts before 1918 raised the question of whether the income of husbands and wives should be treated as one income or two for purpose of applying the tax rate structure. In this early period, there seems to have been no clear cut answer in that aggregate income was sometimes used even if separate returns were filed and in some instances separate income was used even if a joint return was filed.\(^ {54}\) This seems to have been cleared up during the period of

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\(^{52}\) For example, regulations 33 under the 1913 Act (Article 10) stated that: "If a wife has a separate estate managed by herself as her own separate property and receives an income of $3,000 or over, she may make return of her own income. The instructions to Form 1040 from 1917 stated that "Husband and wife should make separate returns if either is subject to surtax." In 1918, the instructions stated that "If your wife (or husband) had any separate income she should make a separate return." An optional provision to file joint returns appears for the first time in Section 223 of the Revenue Act of 1918.

\(^{53}\) Revenue Act of 1918 \(\text{Id.}\)

\(^{54}\) For example, Regulations 33 under the 1913 Act (Article 10) seemed to imply that in the event of a separate return by the wife the tax would be imposed upon the aggregate income in excess of the combined personal exemption, since they state: "The tax in such case, however, will be imposed only upon so much of the aggregate income of both as shall exceed $4,000." Regulations 33 under the 1916 and 1917 Revenue Acts stated that “Unless the wife has a separate estate which requires her to file a separate return of income, or to Join with her husband in a return which shall set forth her income separately, her husband should include in his return the income accruing to the wife from services rendered by her, or the sale of product of her labor.” In addition, Mr. Blake, present Assistant Head of the Practice and Procedure Division of the Income Tax Unit, says that under the 1916 Act and earlier the Bureau began to aggregate separate returns for purposes of surtax computation, but this practice was discontinued by Mr. Spear, Assistant Deputy Commissioner and the tax was computed on the separate incomes.
1918-1920 with the practice of computing tax on separate income for separate returns and aggregate income on joint returns. In 1921 this confusion was cleared up by statute. A corresponding House Report stated that the intent was "to clear up the doubt now existing as to the right of husband and wife in all cases to make a joint return and have the tax computed on the combined income;" and the Senate Report stated that it also made clear that husband-wife may make a joint return even though one or both have large enough to be subject to surtaxes. Therefore, even though joint returns were explicitly allowed under the Revenue Act of 1918, the same progressive tax rate structure applied to the aggregate income on a joint return that applied to an individual’s separate income on a separate return. This meant filing a joint return would usually result in a higher tax liability than if the couple filed separate returns.

With separate returns and thus separate income, income shifting between husband and wife to lower the marginal tax rate on income became an issue. In *Lucas v. Earl*, a husband and wife attempted to minimize their tax liability by reporting half of husband’s personal service income on the wife’s tax return. The Supreme Court ruled that salaries were taxed those who earn them, in this case the husband. The decision, according to the court, was one of statutory interpretation and congressional intent. Justice Holmes said that the fruits, the personal service income, were not attributable to different tree, the wife, than on which they grew, the husband, and talked about the Congressional intent to avoid income shifting “anticipatory arrangements and contracts.” The precedent with respect to investment income evolved differently than that of earned income in *Lucas*. With investment income the tree, so to speak, was held to be the underlying property itself. In other words a husband could transfer the income stream to a wife if he also transferred ownership or even partial ownership of the underlying property. This meant that there was a disparity between earned and investment income with respect to husbands and wives being able to split such income on their separate returns. The *Lucas* decision became seen as guardian of progressive rate structure for earned income.

Also further complicating matters were state property laws. In common law property states, married couples with equal incomes tax varied greatly on whether investment income was split and with respect to earned income how much each spouse made. In community property states there was tax equality of equal income married couples rules because in 1930 the Supreme Court said in *Poe v. Seaborn* that each spouse was taxable on one half the community income. In other words, couples could each claim half of the aggregate couples income, both earned and

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55 Solicitor’s Opinion 90 (January 17, 1921) held that under the Revenue Act of 1918 a joint return “is treated as the return of a taxable unit and the net income disclosed by the return is subject to both normal and surtax as though the return were that of a single individual.”
57 Although it should be noted that in rare circumstances filing a joint return may have been advantageous. For example, perhaps couples Adjusted Gross Income would be higher in the aggregate which could possibly result in fewer deductions being phased out and less tax liability overall.
59 Id.
60 Id.
63 *Poe v. Seaborn* 282 U.S. 101 (1930)
investment income. So marriage usually reduced a couple’s income taxes in community property states and divorce increased it but were neutral events in common law states (who had to report own income anyway).

In order to eliminate the geographical disparity between community property states and common law states, in 1941 the House Committee recommended a mandatory joint return with the imposition of same tax on a married couple’s consolidated income as on a single person. Critics said this was “tax on morality” because if you were married you would then pay more tax in both community and common law states since aggregate couple’s income would be higher with progressive rates. Critics said not only would it increase divorce rates but that the mandatory nature would result in some states enacting community property laws that would entitle its married residents to split their income on their separate returns. States fashioned their laws to qualify for income splitting so for example the laws were not elective in that a had to opt in.64

Congress struggled with how to deal with this geographic disparity between community property and common law property states. Mandatory joint returns taxed at singles rates were in the past publicly criticized as a “tax on morality” because of the extent of the marriage penalty.65 Congress could have said community income would be taxed to the person who earned it (in other words taking away legislatively the judicial holding in Poe that couples in community property states could income split). This was unpopular with those already in community property states and would still leave the problem of the disparity between the treatment of investment and earned income.66 Congress could leave the disparity alone and allow more and more states to be incentivized to become community property states for federal tax reasons and not state property law reasons. The solution it adopted was the optional joint return in the Revenue Act of 1948 which authorized all couples to aggregate their income and deductions on a joint return and to pay tax on twice what a single would pay on half the income.67 Allowing all married persons to file joint returns and determining tax liability at essentially twice the single rates meant allowing income splitting despite whether or not state legislatures enacted

65 House Chairman Millikin state about mandatory joint returns: “[W]e tried it several times. The only ....[difficulty] with it is that you cannot get the votes to make a law out of it.” Hearings before Committee on Finance on H. R. 4790, 80th Cong., 2d Sess. 20-46 (1948); 94 Cong. Rec. 3493-97 (March 24, 1948); 94 Cong. Rec. 4136-37 (April 2, 1948).
66 House Chairman Millikin stated: “The difficulty is that it is not a novel thought. It has been tossed in the hopper around here a number of times. But legislatively it has not been possible to do it.” Hearings before Committee on Finance on H. R. 4790, 80th Cong., 2d Sess. 20-46 (1948); 94 Cong. Rec. 3493-97 (March 24, 1948); 94 Cong. Rec. 4136-37 (April 2, 1948) at 282. Senator Johnson said: “How can you take it away from the 12 [community property states]? You cannot take it away from the 12; we have tried that.” Id. at 404. Senator George remarked: “we had no chance ... of doing away with the community property as a basis of taxation simply by saying that for Federal tax purposes all of it should be considered as being earned by the earner whoever he was .... we lost that fight.” Hearings before Committee on Finance on H. R. 4790, 80th Cong., 2d Sess. 20-46 (1948); 94 Cong. Rec. 3493-97 (March 24, 1948); 94 Cong. Rec. 4136-37 (April 2, 1948) at 407.
67 Revenue Act of 1948, Title III, pt. 1
community property laws and despite whether the income was earned income or investment income.

The official explanation for this enactment in the Senate Report was to “produce substantial geographical equalization” and reduce “the impetuous enactment of community-property legislation by States that have long used the common law.” In other words, states own remedy for the geographic discrepancy in tax treatment should not be a conversion to new complicated property relationships.68 The Senate Report goes on to say the legislation reduces “the incentive for married couples in common-law States to attempt the reduction of their taxes by the division of their income through such devices as trusts, joint tenancies, and family partnerships.” The report also stated that administrative difficulties stemming from such tax planning would be reduced and there will be less need for legislation regarding trusts and family partnerships.69

Tax scholars point out these reasons have nothing to do with the tax policy reasons later advanced to justify joint returns, such as that the marital couple pools its income and acts as a single economic unit and therefore should be taxed as a unit. Most scholars conclude that the 1948 regime was a result of a historical accident or the perfect storm or *Lucas* and *Poe*—in response to the geographical discrepancies and the discrepancies between earned and investment income splitting planning. The idea of married persons acting as a single economic unit is not even mentioned in the Senate Report. Zelenak says perhaps “geographic uniformity” can be seen as a couples neutrality concern as between community property and common law property states but he points out that couples neutrality justifications would concern couples neutrality under different property regimes but also under the same property regime but as between couples with different income splits.70 Zelenak says that the concern expressed in the Senate Report is really that husbands (rather than couples) with equal income pay equal tax, regardless of their state of residence.71

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68 Stanley Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 Harv. L. Rev. 1097 (1948). (Highlighting as one of the four main factors leading to the legislation that “four states, Oregon, Nebraska, Michigan, and Pennsylvania, emulated Oklahoma in adopting the community property system solely to reduce taxes for their residents. Other states were willing to follow if the step became necessary.” (citing PRESIDENT OF THE NEW YORK STATE TAX COMM’N, REPORT ON THE ADVISABILITY OF ADOPTING A COMMUNITY PROPERTY LAW IN NEW YORK STATE (1947).) Further stating that the Senate Finance Committee stressed that “It was recognized that such resort overnight to unfamiliar and complicated property relationships should not be forced upon the states as the remedy for a defect in the federal tax structure.” (citing SEN. REP. No. 1013, pt. 1 at 23-24).
70 Zelenak, *supra* note 49.
71 Id.
Other scholars state that other factors for the enactment of legislation included that the Treasury department indicated the legislation was an acceptable solution,72 married taxpayers wanting the tax reduction that could be defended as tax reform,73 and congress persons considering the legislation politically a win against the President.74 Surrey says this did not add to the complexity of the system since there was already a voluntary joint return regime before. But the difference of course was that the individual tax rate didn’t just apply to the aggregate joint income, the aggregate joint net income and credits were divided in half before the rate schedule was applied with the result being multiplied by two.75 In other words the married couple is looked at as two single persons each with one half the combined income.

ii. Other Tax Policy Reasons Used to Defend The Historical Accident.

Other than the historical perfect storm there are other tax policy justifications for allowing joint returns that aggregate income. The crux of the matter is what is the proper taxable unit—the individual, the married couple or the family. If the proper taxable unit in the individual then we should look to the individual’s income only to determine tax liability. However, if it is not the individual but the family because income is shared or pooled within the family this changes what is considered equitable. If the family is the proper taxable unit we would want families with the same aggregate income to be taxed equally. But if the individual is the proper taxable unit, then we would want individuals with the same income to be taxed the same, irrespective of whether they are married or not.

Tax scholars have put forth a few justifications of using the marital unit as the proper taxable unit. The first and most widely put forth is the idea of economic unity or pooling of resources.76 The argument would be that since the married couple acts as a single economic unit, it should be taxed as one. Zelenak points out that if you buy that married couples are the proper taxable unit that will decide which is more important couples neutrality or marriage neutrality, which in a progressive system are in conflict. Couples neutrality refers to taxing couples with equal income equally. Marriage neutrality refers to taxing individuals with the same income the

73 Id. (Surrey says lowering tax rates would cost just as much revenue but the inequitable discrimination among the families in the system (community property v. common law property states and earned v. investment income splitting) would have remained.)
74 Id (citing See, e.g., 94 Cong. Rec. 3491-92, 3497-98, 3503-05 (March 24, 1948); 94 Cong. Rec. 4138 (April 2, 1948).)
75 Id. (citing I.R.C.§ 12(d)
same, irrespective of whether or not they are married. So if couples are the proper taxable unit then couples neutrality trumps marriage neutrality. This is the current state of affairs with our joint return system. Zelenak states, looking to Kornhauser, that shared marital consumption does seem to happen although he states there is little evidence for this. Criticisms of this rationale include the fact that people other than married couples pool income, whether that pooling in fact actually exists, and that this view focuses on consumption of resources instead of control of the accessions to wealth. Zelenak argues that if you look at consumption of resources then joint returns are “appropriate” but that if you look at control then separate returns work better. He states that the proper inquiry is whether consumption or control is a better measure of ability to pay because determining the taxable unit only matters in a progressive system and progressivity is based on the idea that ability pay increases proportionately with income.78

Another justification for treating a married couple as a taxable unit is that married spouses have a legal obligation of support. Finally, some justify treating the married couple as the taxable unit because of the efficiencies or economies of scale from living together in determining joint ability to pay and tax liability. As Kornhauser points out criticisms of this include others having support obligations such as parents for minor children, people other than married people living together, and this concept of economies of scale being difficult to measure in this context.

Theodore Seto offers another justification for joint returns.81 Seto points out that the Code is based on “the assumption that taxpayers are self-interested, unaffiliated individuals—the atomistic rationalists of the classic economic model.” He calls this the “assumption of selfishness.” Joint return filing then, he states, is really just an anti-abuse rule because there will be a “failure of the assumption of selfishness in marriage.” He says the early days of income splitting technique were done because of a failure of the assumption of selfishness, and it was in response to these income splitting that Congress enacted joint returns.82

77 Anthony Infanti says why couldn’t you define economically interdependent relationships in such a way as to not privilege certain relationships? After all, economic interdependence is part of joint returns legislative history—income shifting. Anthony Infanti, Decentralizing Family: An Inclusive Proposal For Individual Tax Filing in the United States 3 Utah L. Rev. 605 (Fall 2010).
78 Zelenak, supra note 49.
79 Kornhauser, supra note 76.
80 Michelle Lyon Drumbl, Decoupling Taxes and Marriage: Beyond Innocence and Income Splitting, 4 Colum. J. Tax. L. 94 (2012) Drumbl, for examples, says marital status should not be used as a proxy for household composition because this does not match the reality: citing the rise of divorced individuals and single-parent households; the rise in the number of two-earner households; the significant increase in the number of couples who live together in a household but do not wed; and the unavailability of this filing status for individuals in same-sex partnerships or marriage. She brings up an unmarried couple living together, sharing household expenses, or any number of nontraditional household units? Demographically, the number of those households may have been statistically less significant in 1969, but today this is not the case. The rate of cohabitation in the United States is fourteen times higher in 2010 than it was in 1970, and approximately twenty-four percent of children are born to cohabiting couples.
81 Note also that Seto states that with respect to parts of the Code that deal with related parties, the approach of identifying the proper taxable unit is not a broadly productive way of looking at it. Seto, supra note 20 at 1534.
82 Id.
iii. Do tax policy and historical rationales in (A)(i) and/or (A)(ii) for joint federal income tax returns supply reasons for distinguishing between same-sex and different-sex married couples for purposes of filing joint federal income tax returns?

As for the history of the perfect storm of political conditions— are there reasons to distinguish between same-sex and different sex married couples tax return filings based on the reasons for the original enactment of joint federal tax returns? If the perfect storm of historical conditions was the geographic discrepancy in state property laws and the odd results of income splitting between earned and investment income, these reasons do not seem to advance a justification for distinguishing between same-sex and different sex married couples. In fact, minimizing the geographic discrepancy in state property laws and minimizing the tax planning between couples that was dependent on their mix of earned and investment income may be seen as a nod toward the concept of couple’s neutrality.

Couples in community property states could income split on joint or separate returns after \textit{Poe v. Seaborn}. They could therefore income split both earned and investment income. Couples in common law property states could not income split earned income because of \textit{Lucas} and the principal that income is taxed to the own who earns it. They could potentially income split investment income based on \textit{Helvering v. Horst} and the principal that income from property is taxed to the one who owns the underlying property if they were able to arrange ownership rights as such.\textsuperscript{83} If you think that these different results as between couples are not appropriate because married couples with equal income should be taxed equally, the concept of couples neutrality, then same-sex married couples and different-sex married couples should be taxed equally under that same principal. Perhaps a criticism of this couples neutrality argument is that couples neutrality should only be applied to different-sex couples based on the DOMA objectives of protecting the traditional institution of marriage between a man and a woman. This is not a tax policy argument. I will attempt to discuss whether distinguishing between same-sex and different-sex married couples actually meets certain DOMA objectives such as protecting the traditional institution of marriage in Section III(B) below.

Are there reasons to distinguish between same-sex and different-sex married couples based on the economic pooling of income justification for joint federal income tax returns? The argument is that since married couples act as a single economic unit, it should be taxed as one single economic unit. While there are criticisms of this rationale in general, if you buy this reasoning for different-sex married couples it would seem equally applicable to same-sex married couples. We would need more data to determine whether same-sex married couples engage in the same marital consumption as different-sex married couples but as Zelenak states there is little evidence for shared marital consumption even for different-sex married couples. It would seem unlikely then that this could serve as a justification for distinguishing between same-sex married couples and different-sex married couples with respect to joint filing. Granted these

\textsuperscript{83} Helvering v. Horst, \textit{supra} note 61.
rational may also apply to others such as roommates and children but the difference is same-
sex married couples already fall within the bright line rule we have set, marital status and this
status is easily verified.

Also some justify joint federal income tax returns based on the marital legal obligation of
support. Married same-sex couples have the same responsibilities under state law of support and
thus this justification for joint federal income tax returns does not seem to support a distinction.
Also some justify joint returns because of the efficiencies or economies of scale from living
together. The idea is because of these economies of scale, a couple as a unit will have a higher
joint ability to pay. Same-sex married couples presumably enjoy the same efficiencies or
economies of scale as different-sex married couples. Once again these rationales may also apply
to others such as roommates and children but the difference again is same-sex married couples
already fall within the bright line rule we have set, marital status and this status is easily verified.
Thus we should have a reason to exclude them from the group we have set instead of needing a
reason to include them.

What about this “failure of the assumption of selfishness” that Theodore Seto describes?
The idea is that essentially that married taxpayers are not self-interested, unaffiliated individuals
and so they will tax plan as unit. This failure of the assumption of selfishness seems to apply just
as much to same-sex couples as it does to different-sex ones.

Thus, based on the historical reasons for enacting the joint returns and on the tax policy
reasons in general that are used to justify joint returns, there does not appear to be tax policy
reasons for distinguishing between same-sex married couples and different-sex married couples
for purposes of joint filing. If that is the case, then if DOMA is held unconstitutional it makes
sense to defer to the states to determine what constitutes marriage. If DOMA is held to be
constitutional, it may make sense to further explore as defined in DOMA’s limited way, is
appropriate taxable unit in the first place. There is much tax literature on this topic and this is
generally outside the scope of this article. But one suggestion has been, for example, that
perhaps the proper taxable unit should be “economically interdependent persons” which tax
scholar Anthony Infanti proposes and defines to include persons bound by a support obligation
that actually provide at least a specified fraction (e.g., one-quarter or one-third) of the support of
the other.

B. Does distinguishing between same-sex and different sex-married couples for purposes
   of filing federal joint tax returns meet DOMA objectives?

Part III(A) above discussed whether there are tax policy reasons for making a distinction
between same-sex and different-sex married couples with respect to filing joint returns. This
part will discuss whether the policy reasons for enacting DOMA justify making a distinction
same-sex and different-sex married couples with respect to filing joint returns. The legislative history of DOMA generally puts forth the following reasons for the enactment of DOMA: (i) the protection of the institution of marriage; (ii) the conservation of federal resources; (iii) protection of federal sovereignty and geographic uniformity; and (iv) protection of state sovereignty.

i. Protection of the Institution of marriage.

The full title of Public Law 104-199 is the “Defense of Marriage Act: An act to define and protect the institution of marriage.” The House summary and analysis of the bill states that Section 3, the definition of marriage “amends the U.S. Code to make explicit what has been understood under federal law for over 200 years; that a marriage is the legal union of a man and a woman as husband and wife, and a spouse is a husband or wife of the opposite sex.” Does making the distinction between same-sex and different-sex married couples for purposes of filing joint federal income tax returns actually protect the institution of marriage, one of the stated purposes of DOMA? What does it mean to protect the institution of marriage? DOMA’s definition of marriage is in accordance with the institution historically but can that be what is meant by protect the institution—keep it as it has always been? If by protect the institution of marriage, that is code for, provide federal benefits only to traditional different-sex married couples, then maintaining the same-sex/different-sex distinction for purposes of filing joint federal income tax returns does not further this objective. Filing a joint federal tax return is not necessarily advantageous in terms of tax liability owed. Theodore Seto states that many provisions in the Code based on marriage, “including joint return filing---are in fact in fact anti-abuse rules, required because we anticipate a failure of the assumption of selfishness in marriage.” In other words characterizing same-sex couples married under state law as married

84 See text of P.L., 110 Stat. 2419, September 21, 1996 (Defense of Marriage Act). Please note that another position advanced is that DOMA protects morality. I will not be addressing that argument since public morality since the Supreme Court in Lawrence v. Texas held that moral disapproval is not a legitimate state interest in and of itself under the Equal Protection Clause 539 U.S. 558 (2003) ("...[W]hether under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not. Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause. See, e.g., Department of Agriculture v. Moreno, supra, at 534; Romer v. Evans, 517 U. S., at 634-635. Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons. Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be "drawn for the purpose of disadvantaging the group burdened by the law." Id., at 633). Michael Dorf has stated that “The real reason for DOMA's enactment was hostility to recognizing the full rights of LGBT Americans (or what amounts to the same thing--a willingness of politicians to cater to such hostility in their constituents)"...but that DOMA supports can’t state that “Congress could choose to enact legislation treating LGBT Americans as immoral, disgusting or second-class citizens.” Michael Dorf, Halo or Taint in the BLAG DOMA Brief, February 4, 2013 http://www.dorfonlaw.org/2013/02/ halo-or-taint-in-blag-doma-brief.html
85 See Congressional Record, Sept. 10, 1996 at S10111.
88 Seto, supra note 20 at 1538.
for purposes of the Code, and for purposes of joint federal tax returns specifically, is not necessarily a grant of federal tax reduction since these couples will no longer be able to tax plan as unrelated, arm’s length individuals.

James Kratzke and Theodore Seto both point out that the application of DOMA’s definition of marriage to the Code across the board produces “unintended” consequences. One example that Patricia Cain and James Kratzke discuss is the adoption tax credit. This is a $10,000 credit for adoption expenses for a taxpayer whose adjusted gross income (AGI) is not over $150,000. Since same-sex couples are treated as single taxpayers, with separate AGI’s, they can deduct $10,000 each but a different-sex married couple is limited to $10,000 total. Cain points out that “if adoption costs for [the] same-sex couple totaled $20,000 and each partner's income was $150,000, they would be entitled to a total tax credit of $20,000 between them. A married couple in such a situation would be entitled to no credit whatsoever because their combined AGI is far in excess of $150,000.” Cain concludes that it “seems unlikely that Congress intended this perverse result, one that privileges same-sex adopting couples over married heterosexual couples.” I am unclear as to how these odd results with respect to filing joint tax returns “protect the institution of marriage.”

ii. Conservation of federal resources.

Does making the distinction between married same-sex couples and married different-sex couples for purposes of filing federal income tax returns result in tax revenue loss? Both federal and some state governments have justified their same-sex marriage ban based on revenue consequences but does this apply specifically to the filing of joint federal income tax returns? Usually for tax legislation, the Congressional Budget Office estimates the benefit or costs of legislation. This was not done for DOMA. Perhaps because DOMA applies to all federal statutes and regulations. As Senator Byrd stated in his testimony in 1996, there were over 800 references to marriage in federal statutes and regulations and over 3100 references to spouses at the time. With respect to joint filing, even the conservative estimates of the budgetary impact of allowing same-sex couples to file jointly finds that there would be increased revenue. Adam Stevenson devoted a National Tax Journal paper to the issue and, even “under the most pessimistic set of assumptions presented,” concluded that there would be a tax revenue

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89 William Kratzke, The Defense of Marriage Act (DOMA) is Bad Income Tax Policy, 35 Memphis L. Rev. 399 (2004-2005), Seto, supra note 20 at 1580.
90 Cain, supra note 45 at 13 and Kratzke, supra note 89.
91 I.R.C. §23.
92 Cain, supra note 45 at 13.
94 Congressional Record, Sept. 10, 1996 at S10111.
increase. Stevenson even took into account the possible “responsiveness of labor supply and marital choice.” Policy studies conducted by states have yielded similar results finding allowing married same-sex couples to file jointly at the state level actually increases, not decreases state tax revenue. In Maine for example, a study found that “some of these couples will end up paying more or less in income tax when they file as married. Overall, our simulations suggest that extending marriage to same-sex couples in Maine will increase state income tax revenues.”

iii. Protection of federal sovereignty and geographic uniformity.

Another DOMA objective that appears in the legislative history is that Congress did not want to be forced to apply many federal laws based on marriage in a way that it did not intend. Does this rationale apply to the filing of joint federal income tax returns? Well, certainly Congress did not contemplate the issues of state recognized same-sex marriage in 1948. But that said, it also enacted joint returns being silent on the issue of what constituted “marriage” for purposes of filing joint federal income tax returns. Where Congress was silent at the federal level, state law applied. So perhaps in fact this silence on the definition of “marriage” for purposes of joint federal income tax return filing is not in fact silence but deference to state law on this intimate issue of family law. Changing this deference to states definition of marriage for purposes of filing joint federal income tax returns without the participation of tax writing committees, tax experts or a CBO budget analysis seems odd to say the least.

In addition, another objective of DOMA that was put forth was geographic uniformity with respect to only some states legalizing same-sex marriage for federal purposes. This is akin to the community property/common law property distinction discussed earlier in that states enacted different property regimes which resulted in different federal tax results. In fact, part of the reason for the joint federal income tax regime’s enactment was to reduce this geographic discrepancy (and perhaps consequential lack of couples neutrality).

Federal law being dependent on state law outcomes has been an integral part of a federal system. Let’s take a small example of finding a treasure trove. You find a wad of cash in a piano, when do you have gross income for federal income tax purposes? You have gross income whenever it is reduced to your undisputed possession which in turn depends on state law’s determination of when that cash is yours. Perhaps there is a finder’s law in certain states that says

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96 Id.
the cash is not legally yours until you try to find the owner by publicizing it etc. My point is that this is a common occurrence in the intersection between federal and state law, even in tax. Should Congress enact uniform finder’s law to prevent these disparate results? Seems that federal law would have to subsume everything to prevent these results. Why does the government need uniformity with respect to same-sex marriages but not with respect to different-sex marriages? Should Congress pass a statute regulating requirements to be married for federal purposes (licenses etc.)? Does geographic uniformity justify the distinction between same-sex and different-sex married couples for purposes of joint federal income tax filing? It seems to me that the answer is not necessarily. This is common in our federal system. Since the states have determined marital status before DOMA, there have been geographic discrepancies in state requirements to be married etc. For example, twenty-five states currently prohibit marriages between first cousins. Six states allow first cousin marriage under certain circumstances, and North Carolina allows first cousin marriage but prohibits double-cousin marriage. This means that with respect to marrying cousins, there is also a large geographic discrepancy in how federal law contingent upon the classification of “marriage” plays out. Also there is oftentimes a persuasive rationale for deferring to states for federal purposes, such as whether or not cousins can marry. The states are on the front lines. State law is more likely to change in “real time” if you will in that there are the options of ballot referenda etc.

iv. Protection of state sovereignty.

Much of the legislative history of the act focuses on Section 2 and the full faith and credit clause instead of the definition of marriage in Section 3. The state sovereignty arguments mostly deal with Section 2 allowing states to not recognize other states same-sex marriages. As Patricia Cain points out, state sovereignty “seems unrelated to Section 3 since that provision actually rejects state recognition of same-sex marriages.”

IV. Conclusion.

98 Dorf, supra note 84 (Dorf makes this point).
100 Arizona (if both are 65 or older, or one is unable to reproduce), Illinois (if both are 50 or older, or one is unable to reproduce), Indiana (if both are at least 65), Maine (if couple obtains a physician's certificate of genetic counseling), Utah (if both are 65 or older, or if both are 55 or older and one is unable to reproduce) and Wisconsin (if the woman is 55 or older, or one is unable to reproduce). Id.
101 Id.
103 Cain, supra note 45 at 9.
Based on the application of Code Section 6013’s gender neutral terms and federal statute and practice of deference to states as to the status marriage, if DOMA’s definition of marriage is found to be unconstitutional by the Supreme Court, it seems clear that same-sex couples legally married under state law will be able to file joint federal tax returns. It is less clear as to whether Code Section 6013 would apply by its own terms to marriage-like statuses such as civil unions or domestic partnerships. Perhaps there is an argument filing a joint federal income tax return would be a reasonable position if persons are treated like husband and wife under state law.

Even if DOMA’s definition of marriage is not ruled unconstitutional, are there reasons for distinguishing between legally married same-sex couples and legally married different-sex couples with respect to filing joint federal income tax returns based either on tax policy considerations or even DOMA objectives? It seems to that in looking at the tax policy justifications for enacting the joint federal return regime and justifications put forth to maintain that regime, those justifications for joint returns in general do not provide a reason to distinguish between same-sex and different-sex married couples in joint federal filing. In addition, the stated DOMA objectives of protecting the institution of marriage, conservation of federal resources, federal sovereignty and protecting state sovereignty do not seem to be advanced by distinguishing between same-sex and different-sex married couples in filing joint federal income tax returns. The DOMA objective of geographic uniformity with respect to joint federal filing for same-sex married couples may be advanced but it is a weak argument because there is no geographic uniformity with different-sex married couples (for example with state marriage requirements like waiting periods, blood testing, and marrying cousins). In addition, there is no geographic uniformity in many federal laws that ultimately turn on state law that is the nature of our federal system.