DOES THE DEFENSE OF MARRIAGE ACT PREVENT THE INTERNAL REVENUE SERVICE FROM TREATING ALL "MARRIED" COUPLES EQUALLY?

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Key words: Same-sex Marriage, Defense of Marriage Act, Marriage and Taxation, DOMA, Equal Protection

JEL Codes: K34, K36, M49, Z19

ABSTRACT

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "no state shall ... deny to any person within its jurisdiction the equal protection of the laws." Nevertheless, when Congress enacted the Defense of Marriage Act in 1996, it resulted in the Internal Revenue Service treating same-sex married couples differently than heterosexual married couples. The different treatment with a regard to a range of tax issues from filing status to wealth transfers to exclusion from gain on sales of personal residences has raised many Equal Protection challenges. The United States Supreme Court will actually examine the issue in its current session. In the meantime, this article attempts to outline the legal and tax issues that have given rise to these challenges.

INTRODUCTION

Almost every citizen of the United States of America is familiar with that inevitable, annual tradition of filling out 1040 individual tax forms and submitting them in to the IRS. While most people will spend hours sweating and stressing over the content of his or her return, its accuracy, and completeness, most people don't think twice about the final, most simple part of filling of the return: signing that little line under which it says "Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete."

In 2010, roughly 130,000 married couples did not take the signing of this document very lightly.[1] Same sex couples who have, in recent years, been granted the legal right of marriage in certain states[2] are being required to file as "Single" on their federal tax returns because their marriages are recognized at the state level but not at the federal level.

Many of these married couples have had difficulty doing this; how can they, in good conscience, say that everything presented on their return is true and correct if they are, in fact, legally married? The "Refuse to Lie"[3] campaign is a movement recently launched in response to this filing dilemma. The "Refuse to Lie" movement urges same sex married couples to challenge the discrepancies in the laws and to take a stand against denying their spouses and to fight against marriage inequality. Filing status is merely the first of many differences in tax treatments between

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[1] United State Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples*, (Sep.27, 2011), http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html

[2] As of 2013, same-sex marriages are currently legal in Connecticut, the District of Columbia, Iowa, Maine, Maryland Massachusetts, New Hampshire, New York, Vermont and Washington.

[3] Refuse to Lie, *IRS Tells Married Couples to File As Single*, (2011), http://refusetolie.org/

heterosexual married couples and same sex married couples. These differences will be discussed in this paper.

SAME SEX MARRIED COUPLES AND FEDERAL TAXES

Filing Status

The primary issue presented to homosexual married couples is the question of filing status. It is important to point out, first of all, that there are no boxes on the federal form 1040 that inquire about the gender of the applicants.[4]

It is possible that same-sex married couples could file a federal return as married without ever being questioned and receive all the benefits in question; many couples have successfully done this. However, for the purposes of this paper it is assumed that most couples feel obligated to comply with the federal mandates of DOMA and file state and federal tax returns in the manner that the laws advise them to do.

If a same-sex married couple lives in Connecticut, the District of Columbia, Iowa, Maine, Maryland Massachusetts, New Hampshire, New York, Vermont or Washington, where same-sex marriage is legally permitted, the couple can file their ***state*** tax returns as married. If the same-sex married couples do not live in one of these states they have to file both their state and federal returns as single.

Because the same-sex marriage is recognized on the state level, filing a joint state return presents no legal problems or contradictions, as opposed to filing a federal return. A same-sex married couple may ***never*** file a federal tax return with the filing status "married filing jointly" regardless of whether they live in a state that legally recognizes same sex marriage or not.

Even if a couple lives in a state where they can file as married for their state return, doing that is not as simple as it may sound. There are several places on a state income tax return that

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[4] Berall, Frank S, "Estate Planning for Same-Sex Couples," *NAEPC*, Connecticut Bar Associate Estates and Probate Section, http://www.naepc.org/journal/issue01a.pdf , October 11, 2006.

require a couple to plug in numbers from their federal return; this could cause some problems for same-sex married couples. Same-sex married couples in this situation are often advised to fill out a "dummy" federal return as they would if they were allowed to file as married filing jointly, get the numbers from that theoretical return, and then plug them in to their state return.

After this process the couple would then need to disregard the "dummy" return and then fill out their respective federal returns as single.[5] Similarly, the federal return would require numbers from the state returns as if they were filled out as single. Therefore, the couple would need to fill out "dummy" versions of their state returns as well.[6] This can prove to be a lengthy and costly burden for same-sex married couples.

Tax Rates

Beyond the additional time, money and headaches it takes to file a married state return, several benefits are lost when having to file separate federal returns. When filing a return as "married filing jointly" a couple combines all of their income, exemptions, credits, and deductions onto one tax return.

Even when ignoring specific credits and exemptions given to married couples, filing status alone can change the amount of tax liability owed or tax refund granted when taking taxable income and applying the appropriate marginal tax rates, all other factors staying equal.

For example, using tables and rates found in the IRS 2011 Form1040 Instruction Booklet, if Taxpayer 1 (TP1), a single taxpayer, has a taxable income of $200,000 in 2011, TP1's tax liability would be calculated as $50,897. If Taxpayer 2 (TP2),

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[5] Hertz, Frederick, "Tax Issues for Same-Sex Couples." *NOLO: Law for All*, NOLO, November 10, 2011. (http://www.nolo.com/legal-encyclopedia/tax-issues-same-sex-gay-couples-32290.html)

[6] Goldberg, Naomi, "Tax Implications for Same-Sex Couples." *Williams Institute.*, April 2009. (http://williamsinstitute.law.ucla.edu/research/economic-impact-reports/tax-implications-for-same-sex-couples/)

another single taxpayer, has taxable income in 2011 of $30,000, TP2's tax liability would be $4,075.

Requiring these taxpayers to file as "single" means their combined tax liability in 2011 will be $54,972. Now, assume that TP1 and TP2 were married in 2011 and they filed a joint tax return. The two TP's combined income would come to $230,000. Consequently, due to preferential tax rates awarded to married couples over single individuals, using 2011 married filing jointly tax rate schedules, the couple's tax liability would come to $53,354.50; this is a tax savings of $1,617.50.

When considering only basic tax liability before including any other possible taxes, credits or prepayments, which could possibly increase this difference, there is already over $1,500 in savings realized by the two taxpayers for the simple act of being able to file as a married couple rather than filing as two separate, single individuals.

Deductions and Credits

There are several deductions and credits reserved for persons filing their 1040 forms as "married filing jointly." According to Internal Revenue Code §63, taxable income is defined as "gross income minus the deductions allowed by this chapter."[7] Once gross income is calculated, there are a number of expenses that the Internal Revenue code allows taxpayers to subtract from that income as deductions before determining their "taxable income." The tax rates are applied to the taxable income to determine the amount of tax a person owes after subtracting the allowable deductions.

The filing status of a person determines the amount of the "standard deduction" that is allowable to that person(s). If a person does not have enough itemized deductions, they are allowed to deduct a certain set amount from their taxable income that is

[7] Internal Revenue Code §63(a)

referred to as the "standard deduction."[8] In 2012, the standard deduction for a couple filing as married filing jointly is $11,900 as opposed to a $5,950 standard deduction for a single return. If a person has over his/her standard deduction amount in other allowable deductions,[9] he/she can elect to deduct those expenses from their taxable income instead; this is called itemizing deductions.

Credits, however, are taken out directly from the calculated tax liability. After calculating taxable income, applying the applicable tax rates, and computing the tax liability, credits are then applied; the credit amounts a subtracted directly from tax owed. For this reason, they are considered to be more valuable than deductions. There are, however, far fewer credits available to individual income tax payers than there are deductions. Here is where credits available to ordinary taxpayers can become a minefield for same-sex couples.

Assume a same-sex married couple has two children. Spouse A is the breadwinning spouse, and Spouse B is the spouse who is the biological parent of the couple's two children. Both Spouse A and Spouse B consider themselves the parents of the children although Spouse A has never legally adopted the children. Because Spouse A is not biologically related to the children and has not adopted them, he/she cannot claim them as dependents, cannot claim any child tax credits for the children, cannot claim dependent care credits for daycare for the children, cannot take education credits for the children, etc. These limits apply despite the fact that children live with Spouse A and Spouse 12 months of the year, and Spouse A provides their full support.[10]

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[8] Internal Revenue Code §63(b)

[9] Itemized deductions might include home mortgage interest expenses, property taxes paid, charitable deductions, unreimbursed employee expenses, etc.

[10] See IRC §§ 21, 25A, 32, and 152.

Exclusion of Gain on Sale of Personal Residence

Internal Revenue Code §121(a) states that taxable "[g]ross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer's principal residence for periods aggregating 2 years or more." IRC §121(b) limits this exclusion of gain, however, to $250,000 for a single person, and $500,000 for spouses when either spouse meets the residency requirement. When a same-sex married couple sells a personal residence they have owned together, one of them can exclude up to $250,000 of gain. If, however, they have more than $250,000 of gain on the sale of the home, they do not qualify for the full $500,000 of gain exclusion under IRC §121.

For example, examine the case of a heterosexual married couple who have been married and living in one particular place of residence together for 10 years. They live in a house in an upscale neighborhood that one partner owns outright and the house has been the primary residence of both members of the married couple for more than ten years. In 2012, the couple decides to sell their house to make money from the property's appreciation in value and buy a smaller house in a more modest neighborhood. They sell the house for $400,000 more than the original cost basis in the home.

Since the couple was married and shared the home as a primary place of residence for more than two of the past five years, they are eligible for up to the maximum $500,000 exclusion on the sale of their home. This means that the couple can realize up to $500,000 worth of gain on the sale tax-free. Even though only one partner owned the house, the marriage entitles them to the joint $500,000 exclusion.[11]

However, in a situation where all circumstances were the same, the only exception being the married couple consisted of two men, the couple would not be entitled to this same benefit. Both

[11] Internal Revenue Code § 121

parties would be forced to file single tax returns and the exclusion limit would be reduced to $250,000. Therefore, the partner who owned the house would be subject to pay tax on $150,000 of long-term capital gain property, resulting in a $22,500 tax liability. In times of financial struggle, this is a large sacrifice that not everyone may be able to make.

Wealth Transfers

Another, often more substantial struggle, comes up when dealing with transfers of property and assets. During the life of a taxpayer, any gift given by the taxpayer is considered taxable to the taxpayer. However, each year, each taxpayer is given a gift exclusion. In other words, every taxpayer is permitted to give up to a certain amount to any given person without having to pay tax on that gift.

In 2011 and 2012, this annual exclusion amount was $13,000 per individual.[12] Therefore, in 2011, TP1 could give up to $13,000 to Recipient 1 and also give up to $13,000 to Recipient 2 and to Recipient 3 and so on and still not have a tax liability on these gifts. However, if TP1 gave $20,000 to Recipient 1, TP1 would be liable for the tax on $7,000 of that gift because it is over the $13,000 annual exclusion to one individual (assuming TP1 had already used all of his/her lifetime exclusion amount from federal gift tax.)[13]. If an individual is married he/she has the opportunity to elect gift-splitting with a spouse.

This means that a taxpayer can split the value of the gifts he gives with his spouse, so that married taxpayers can theoretically give up to $26,000 worth of gifts to a single individual.[14] Since same-sex married couples are not recognized as legally "married" under federal law, then the IRC §2513 gift-splitting option is not

[12] Internal Revenue Code §2503(b)

[13] Internal Revenue Code §2010

[14] Internal Revenue Code §2513

available to maximize use of the annual exclusion for these couples.

Another denial of marital benefits under the Internal Revenue Code occurs with the unlimited marital exclusion. Gifts given to one's spouse are never considered to be taxable gifts because of this unlimited marital exclusion (assuming the basic qualifications for the exclusions are met).[15] Again, because same-sex couples cannot be recognized as legally "married" under federal law, then these couples cannot transfer property to each other – during life or at death – subject to the unlimited marital deduction. The absence of this benefit in a marriage between same-sex couples can prove to be extremely burdensome in some cases; many things can be considered gifts that would not be gifts in a traditional, federally recognized marriage.

For example, if a same-sex married couple purchases a house in both partners' names, but one partner actually pays for the house out of her own, individual income, then one half of the total value of the house can be considered a taxable gift to the second spouse. This logic can be applied to many aspects of life in a marriage in which, like many marriages, one spouse provides a majority of the support for the couple as a family unit. The gift taxes triggered in these situations can become quite onerous.

In the event of the death of one spouse, federal estate returns are required to be filed in some cases.[16] The consequences of being unable to be legally recognized as a married couple can sometimes prove to be much greater when dealing with federal gross estates. In cases of heterosexual married couples, when one spouse (the decedent) passes away, she is able to leave an unlimited amount of her assets to the second spouse (the surviving

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[15] Internal Revenue Code §1041

[16] If current law remains unchanged, after 2012, virtually any estate in which the assets even come close to having or exceeding a fair market value of $1 million will have to file a federal estate tax return. For many decedents, dying possessed of a home, a retirement plan, and some insurance policies can get a gross estate to $1 million rather quickly.

spouse) because testamentary transfers to the surviving spouse are subtracted from the gross estate via the unlimited marital deduction.[17] Depending on the size of the decedent's estate, being married can make a big difference in tax liability when leaving assets to another person after death.

Thanks to the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, taxpayers/decedents who made gifts or died in 2011 could take advantage of lifetime exclusion from federal estate and gift taxes of $5 million, and those who make gifts in or die in 2012 can exclude up to $5,120,000.[18] Thanks to the American Taxpayer Relief Act of 2012 (enacted on January 2, 2013), the lifetime exclusion from gift and estate taxes is permanently set at $5 million, indexed for inflation.

Nevertheless, if the decedent has a large federal gross estate (larger than any remaining lifetime exclusion), there could end up being a significant tax liability, a liability that could have been zero if the decedent were a married person passing her entire taxable estate to her spouse, after transferring the portion of the estate subject to the lifetime exclusion to other heirs. Such an estate planning technique is not an option for same sex married couples, however, since such marriages are not recognized under federal law.

Consequently, one spouse's death could very well place an undue tax burden on the surviving spouse in addition to all the costs and strains that come with dealing with a spouse's death in the first place.

Portability of the Lifetime Exclusion from Transfer Taxes

In December 2010, President Obama signed the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010 into law. Among other things, this legislation increased the applicable exclusion from gift and estate tax for 2011 to $5 million

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[17] Internal Revenue Code §2056

[18] Public Law 111-312 (2010)

and to $5,120,000 for 2012.[19] In addition, Section 303 of this law made it permissible for the unused portion of a decedent's applicable exclusion to be used by the surviving spouse, which makes it a fantastic estate planning tool for heterosexual couples. This extraordinary wealth transfer planning tool, which is only available to married taxpayers, is completely unavailable to same-sex married taxpayers.

Divorce and Alimony

Lost federal benefits in relation to marriage can also lead to more federal inconsistencies when dealing with divorce. While the process of divorce can be a struggle in and of itself, these hardships are only compounded when dealing with the inconsistent and often unclear rules of same sex divorces in different states. One may not realize it, but there are certain benefits under the tax code that arise in divorce cases that same-sex married couples will lose out on when trying to end their unions.

In the case of a heterosexual couple's divorce, if there is a pension in question that the judge ordered to be split, the couple would be able to do so without having to pay any early withdrawal penalties; divorcing same-sex couples would not be able to be exempt from this penalty.[20]

Further, if there is a property settlement between divorcing spouses, and one spouse ends up with more of the marital property than the other spouse pursuant to the divorce agreement, in a heterosexual divorce, there are no transfer tax ramifications of the unequal property settlement pursuant to Internal Revenue Code §2516.

When same-sex couples divorce, however, this Code section is not applicable, so if Spouse A were to receive more property in a property settlement pursuant to a divorce than Spouse B, the IRS would view the excess values of the property that

[19] Public Law 111-312 (2010)

[20] Internal Revenue Code § 72 (m)(10)

Spouse A received as a gift, and any amount of that settlement that exceeded that annual exclusion amount for that year ($13,000 for 2012, for example) would be a taxable gift on which Spouse B would have to pay a gift tax. Consequently, not only would Spouse B be giving Spouse A more property in the property settlement, but Spouse B, but would also then have to pay gift tax on that excess property settlement.

With regard to tax benefit, when a heterosexual divorced person makes alimony payments, he/she is able to recognize that amount as an above-the-line deduction on his/her individual tax return.[21] Conversely, if an individual in a heterosexual divorce receives alimony payments, he/ she is required to include that amount in his/her reported gross income on his/her individual income tax return.[22]

Depending on which side of the alimony payment the heterosexual divorced partner is on, having the payment legally defined as "alimony" could turn out to be a benefit or a detriment. The person on the paying end would get a benefit because he/she would get to deduct the payment, but then the recipient has to recognize it as income and pay income tax on it. The argument, however, has been that a recipient spouse would rather pay tax on the alimony than run the risk that the payor spouse might not pay it at all if he or she were not able to deduct it on the tax return.

For same-sex couples who divorce, however, the payor spouse cannot deduct the alimony payments, so there might be some risk that he or she might have less incentive to actually make the required alimony payments. In addition, since the IRS does not recognize same-sex marriage, if the payor does make the payments, the payments will be treated as gifts by the IRS subject to the annual exclusion.[23] So a spouse exiting a same-sex marriage who is paying alimony might also end up paying gift tax. On a bright

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[21] Internal Revenue Code §215

[22] Internal Revenue Code §71

[23] Internal Revenue Code §2501, 2503

note, however, the recipient spouse in a same-sex divorce would not have to recognize the alimony payments in income since those payments would merely be considered gifts.

THE HISTORY OF MARRIAGE IN THE UNITED STATES

There have generally been three basic genres of marriage in the United States: the practical genre, the romantic genre, and the sacramental genre. The practical genre has evolved over the centuries, but the purpose behind this model of marriage is for the marriage partners in choosing each other is fidelity, not love, but also ability to help each other in common interests. In earlier centuries, partners might have been chosen to help work a farm or run a family business. In current times, partners may choose each other because of similar hobbies, careers and education levels.[24]

In the romantic genre, people marry because they are drawn together by love. While those who advocate the practical genre of marriage might argue that the romantic genre is risky or irresponsible, the trend for many couples in the United States has been to marry because of romantic love.[25]

The sacramental genre is one in which people marry because they believe marriage is a gift from God, and it should be used to produce children to honor God and perpetuate the human race. Hence, the belief that, largely based on Jewish and Christian religious doctrine, marriage must be comprised of one man and one woman.[26]

THE DEFENSE OF MARRIAGE ACT

On September 21st, 1996, President William Clinton signed the Defense of Marriage Act (DOMA), a piece of legislation designed to "define and protect the institution of marriage." This

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[24] Coontz, Stephanie, Marriage, A History: How Love Conquered Marriage (Viking, February 28, 2006)

[25] *Ibid.*

[26] Martinson, Floyd, *Marriage and the American Ideal* (Mead and Company, 1960)

act serves two primary purposes, the first of which is to allow each state the freedom to reserve the power to put forth its own laws surrounding the institution of marriage and protect each state from the infringement of other state's laws regarding this issue. Section 2 of DOMA states that

> *No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship*[27].

While this gives each state the freedom to choose its own policy regarding marriage, it also frees each state from recognizing any other state's policy.

It might seem that Section 2 of DOMA undermines the "Full Faith and Credit Clause." However, several district courts have found otherwise. Article IV, Section 1 of the United States Constitution, The Full Faith and Credit Clause, states, "Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[28]

This Clause ensures that laws and rulings made in one state should be recognized in all other states. The purpose of the Full Faith and Credit Clause is to grant some consistency throughout the states while still permitting autonomy. Further, it ensures that people who are found guilty and charged with crimes in State X

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[27] Defense of Marriage Act, 199, 104th Congress (1996).

[28] United States Constitution, Article IV, § 1.

cannot flee State X and avoid punishment by fleeing to State Y. Consequently, if someone is found guilty of a crime in one state, that person is effectively recognized as guilty of that crime in every state.

Therefore, while some people might argue that under the logic of the Full Faith and Credit Clause of the U.S. Constitution, a couple who is recognized as married in one state should be given all the rights and privileges of a couple who is married no matter what State they are in, DOMA's Section 2 clause prevents this scenario from holding true.

The Federal District Court for the Middle District of Florida, however, found that "Congress's adoption of DOMA was an appropriate exercise of its power under the Full Faith and Credit Clause to regulate conflicts between the laws of different states concerning the validity of same-sex marriages."[29] This case, *Wilson v. Ake,* involved two lesbians from Florida who married in a legal ceremony in Massachusetts and then sought legal recognition of their same-sex marriage in their home state of Florida. The Clerk of the Circuit Court in their home county refused to accept their marriage certificate because "according to Federal and Florida law, the Clerk is not allowed to recognize, for marriage purposes, the Massachusetts marriage license, because Federal and Florida law prohibit such recognition."[30]

The couple sued, and the Federal District Court dismissed their Equal Protection Clause complaint, opining that marriage is not a fundamental right, homosexuals are not a suspect class, and since only rational basis scrutiny[31] was necessary in this case, then

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[29] *Wilson v. Ake*, 354 F.Supp.2d 1298 (January 19, 2005) {On page 1303 of this case, the District Court went on to say that if every state had to recognize every law of every other state under the Full Faith and Credit Clause, then one state could effectively create national policy by passing a single new law.}

[30] *Wilson v. Ake* @ 1301.

[31] The Fourteenth Amendment to the U.S. Constitution declares that "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." The U.S. Supreme Court has ruled

the burden of the law only had to be measured against public policy interests.[32] This balancing resulted in dismissal of the plaintiffs' complaint because "Florida is not required to recognize or apply Massachusetts' same-sex marriage law because it clearly conflicts with Florida's legitimate public policy of opposing same-sex marriage."[33] One state does not have the right to make a national public policy with respect to same-sex marriage; each state has the right to make its own public policy laws independently of one another. The U.S. Constitution gives the federal government the right to regulate conflicts between states, and the federal government exercises this power through Section 2 of DOMA.

The provision of the Defense of Marriage Act for which it most well-known is articulated in Section 3. Section 3 of DOMA serves to define the terms "marriage" and "spouse," the former being only "a legal union between one man and one woman as husband a wife," and the latter meaning "a person of the opposite sex who is a husband or wife." This very specific, black and white language ensures that even if a state permits the legal union of two men or two women under the distinction of marriage, that union is not recognized as such on a federal level.

POST-DOMA CASE LAW

In 2008, after the creation of DOMA, several cases arose in California, referred to as *In re Marriage Cases*. The *In re*

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that the Due Process Clause of both the Fifth and Fourteenth Amendments ensure that the Equal Protection Clause not only applies to the states, but also to the federal government. That said, there are three levels of scrutiny that apply in Equal Protection challenges – strict scrutiny, intermediate scrutiny, and rational basis scrutiny. Two types of classifications are subject to strict scrutiny: (1) *Suspect Classifications* like race, national origin, religion and alienage; and (2) *Classifications Burdening Fundamental Rights* like denial or dilution of right to vote, interstate migration, access to courts, or other rights recognizes as fundamental. Court rulings have recognized the right to marry as a fundamental right, thus subject to strict scrutiny under Equal Protection challenges.

[32] *Wilson v. Ake* @ 1307-1308.

[33] *Wilson v. Ake @ 1303-1304.*

Marriage Cases consists of six consolidated appeals that all challenged California's marriage statutes. The case first determined that gay and lesbian individuals are a part of a suspect classification.[34] As discussed in a previous footnote, a suspect classification is subject to the strict scrutiny test.[35] The strict scrutiny test is used to "govern all challenges under the Equal Protection Clause."[36] Typically, Equal Protection cases involving gender are subject to intermediate scrutiny and suspect classifications are reserved for racial discrimination issues. However, in the *In re Marriage Cases*, the Supreme Court of California held that the Constitution of California held cases involving gender issues to a higher standard:

> *Public policy in California strongly supports eradication of discrimination based on sex. Indeed, gender discrimination is one area in which the California Constitution has been constructed to provide more protection than the United States Constitution. Classifications based on gender are therefore considered suspect in equal protection analyses under the California Constitution, and laws that discriminate based on sex are subject to strict scrutiny.*[37]

In order to pass the strict scrutiny test, two things need to be proven: (1) the government needs to prove that it has a "compelling interest" in "infringing on a fundamental right;" and

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34 *In re Marriage Cases*, 183 P.3d 384 (May 15, 2008)

35 The earlier footnote also mentioned that classifications that burden fundamental rights are also subject to strict scrutiny, and many courts have identified marriage as a fundamental right.

36 Varol, Ozan, "The Origins and Limits of Originalism: A Comparative Study," *Vanderbilt Journal of Transnational Law*, 44 Vand. J. Transnat'l L. 1239 (November 2011).

37 *In re Marriage Cases* @ 440-441.

(2) that it used "narrowly tailored means" to arrive at the compelling interest. If both of these tests are not met the government action in question is deemed unconstitutional.[38]

Homosexual couples were found to be a suspect class because of their history of being treated with prejudice and belittlement, paired with the fact that society recognizes that "the characteristic in question generally had no relationship to the ability to perform or contribute to society."[39] In other words, the characteristic that has historically caused people to be discriminated against (homosexuality) in no way impairs an individual to act as a fully contributing member of society.

The California Supreme Court found that designating between opposite-sex and same-sex couples when dealing with marriage was, in fact, not a compelling state interest. Sections 300 and 308.5 of the California State Constitution were found to be unconstitutional because they drew a distinction between homosexual and heterosexual couples and used that line to determine who would be allowed to marry. Furthermore, "[t]he statutes posed a serious risk of denying the official family relationship of same-sex couples equal dignity and respect, a core element of the fundamental right to marry."[40]

Today, the Defense of Marriage Act is being used to ensure that there is a distinction between same-sex and heterosexual married couples. DOMA does not disallow states from giving same-sex couples the right to marry, nor does it prohibit them from giving them privileges related to that distinction, it merely prohibits them from federal protections of law. So, it does not "protect" marriage to the extent that it reserves marriage for heterosexual couples, but DOMA merely "protects" marriage in the sense that it allows the federal government to separate the married

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[38] Varol @ 1246.

[39] *In re Marriage Cases* @ 443.

[40] *In re Marriage Cases* @ 434-435.

class of citizens into two groups and treat the two groups differently.[41]

The reason these post-DOMA cases matter with regard to Federal tax law is that right now the IRS is required to "classify" married couples as either heterosexual married couples or same-sex married couples. The aforementioned opinions and related cases illustrate the confusion that appears to exist at both the state and federal level with respect to what level of Equal Protection scrutiny is applicable when challenges are brought against these classifications as a result of DOMA.

While the IRS is merely abiding by the current federal law (DOMA) when it enforces these classifications, the fact that the different Federal District Courts and Appellate Courts have issued conflicting rulings as to whether DOMA is even constitutional raises questions about whether the IRS classifications of married couples is constitutional.

DOMA AND THE IRS

Since some states have granted same-sex couples the right to marry starting with Massachusetts in 2005, followed by Connecticut, the District of Columbia, Iowa, Maine, Maryland, New Hampshire, New York, Vermont and Washington, the focus has shifted from whether denying marriage to same-sex couples is constitutional to whether the Defense of Marriage Act itself is constitutional.

A deeper issue has arisen when examining couples who are already married rather than those seeking marriage. The Internal Revenue Service (IRS), as a federal agency, is bound by DOMA in its treatment of same-sex married couples and cannot treat these "married" couples as married; they are treated as single individuals. This dichotomy causes more issues to arise than one might imagine. It is important to understand the benefits and

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41 Strasser, Mark "Life After DOMA," 17 *Duke Journal of Gender Law & Policy* 399-424 (May 2010).

restrictions that are imposed on married couples versus single individuals.

In 2004 the United States General Accounting Office (GAO) issued a statement declaring that as of December 31st, 2003, there were 1,138 identifiable "federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges."[42] The report that was issued previous to this by the GAO on the same subject matter was in 1997. The 1997 report took into account all of the laws in place prior to September 21, 1996, the date that DOMA was enacted. Since that date, 120 additional provisions were found that affected married couples.

This letter points out 13 different categories in which statutes that benefit or affect married couples exist including: Social Security and related programs, housing, and food stamps, veterans' benefits, taxation, federal civilian and military service benefits, employment benefits and related statutory provisions, immigration, naturalization and aliens, Indians, trade, commerce, and intellectual property, financial disclosure and conflict of interest, crimes and family violence, loans, guarantees, and payments in agriculture, federal natural resources and related statutory provisions, and miscellaneous statutory provisions.[43] Even though these are all areas that affect the federal treatment of same-sex married couples, our primary focus has been on those that laws that have to do with the IRS treatment of married couples: taxation. These laws are estimated to affect 131,729 same-sex married households as of September 27, 2011.[44]

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42 United States General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, 2004, http://www.gao.gov/new.items/d04353r.pdf

43 United States General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, 2004, http://www.gao.gov/new.items/d04353r.pdf

44 U.S. Census Bureau, *Census Bureau Releases Estimates of Same-Sex Married Couples*, September 27, 2011, http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html

Since DOMA prevents the federal government from recognizing same-sex marriage, some observers expected there would be a constitutional challenge to DOMA. The first case to directly challenge DOMA was in *Gill v The Office of Personnel Management*.[45] In this case, the legal and constitutional compliances not only come into play, but also specific ways in which certain married couples' lives have been affected negatively by not having their marriage recognized on a federal level are recognized.

Seven same-sex married couples and two survivors of same-sex married spouses are involved in *Gill*. Each of the couples sought some kind of marriage benefit or protection and each couple had their claim(s) denied citing the Defense of Marriage Act. For example, Nancy Gill, who works for the United States Postal Service, wished to have her spouse, Marcelle Letourneau, added as a beneficiary under her existing Federal Employee Health Benefit Plan (FEHBP), her Federal Employee Dental and Vision Insurance Plan, and to use her flexible spending account to pay for Marcelle's medical expenses.

According to the Office of Personnel Management (OPM), which sets the standards for eligibility in FEHBPs, an employee who benefits from this plan and is enrolled in a "self and family" plan, which Gill already was, can have all eligible family members covered under the plan. By the OPM's terms, a "member of family" is "the spouse of an employee or annuitant [or] an unmarried dependent child under 22 years of age."

The FEDVIP is a similar plan with identical qualification standards that benefit health and vision. The Flexible Spending Arrangement (FSA) is slightly different. It is a program that provides employees with the opportunity to "set aside a portion of their earnings for certain types of out-of-pocket health care expenses," the benefit of which is that the money in these plans is

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45 *Gill v. Office of Personnel Management*, 699 F.Supp.2d 374 (July 8, 2010)

not subject to income taxes. All three of these plans are administered and regulated by the OPM.[46]

While each couple involved in *Gill* had a particular type of issue and relief they were seeking, from retirement benefits to social security benefits to being able to file their federal income tax returns as "married filing jointly," they were nearly all united in seeking a certain privilege: recognition by the federal government as being married even though they are same-sex couples and not heterosexual couples.

It was determined, once again, in the district court case of *Gill* that DOMA needs to be subject to the strict scrutiny test.[47] To pass the strict scrutiny test a law needs to satisfy two qualifications: (1) it must show a "compelling interest in drawing a suspect classification or infringing on a fundamental right;" and it also must (2) prove that "narrowly tailored means" were adopted to support the "compelling interest" in question. If the law fails either of these tests, it does not hold up to strict scrutiny and is considered unconstitutional.[48]

Not only did the court determine that DOMA did not pass the strict scrutiny test, but it also claimed that "this court need not address [the plaintiff's arguments]…because DOMA fails to pass constitutional muster even under the highly deferential rational basis test," a less strict constitutionality test. The court did not find any "legitimate government objectives" in DOMA and that it "violates constitutional principles of equal protection."[49]

In the Federal District Court's eyes, DOMA could not even get to the level of the strict scrutiny test that it should be held accountable to because it does not meet qualifications of lesser constitutionality tests. The Federal District Court declared "there exists no fairly conceivable set of facts that could ground a rational

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[46] *Gill v. Office of Personnel Management* @ 380-382

[47] *Gill v. Office of Personnel Management* @ 387

[48] Varol @ 1246

[49] *Gill v. Office of Personnel Management* @ 386-387

relationship" between DOMA and a legitimate government objective. DOMA, therefore, violates core constitutional principles of equal protection."[50]

Overall, the Federal District Court concluded that The Defense of Marriage Act violates the "equal protection principles" that are found in the Fourteenth Amendment of the United States Constitution because the document makes a discriminatory distinction amongst people of an equal class, married individuals, and based on a distinction of sexual orientation. The Federal District Court:

> *…can conceive in no way in which such a difference might be relevant to the provision of the benefits at issue. By premising eligibility for these benefits on marital status in the first instance, the federal government signals to this court that the relevant distinction to be drawn is between married individuals and unmarried individuals. To further divide the class of married individuals into those with spouses of the same sex and those with spouses of the opposite sex is to create a distinction without meaning.*[51]

Gill was brought to the First Circuit Court of Appeals in May of 2012 and the Federal District Court decision was affirmed in *Massachusetts v. United States HHS*.[52] Legal observers say review of this case by the United States Supreme Court is "highly likely."[53]

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50 *Gill v. Office of Personnel Management* @ 387, quoting *Medeiros v. Vincent*, 431 F.3d 25, 29 (1st Cir. 2005)

51 *Gill v. Office of Personnel Management* @ 396

52 *Massachusetts v. United States HHS*, 682 F.3d 1 (May 31, 2012)

53 http://www.metroweekly.com/poliglot/2012/07/breaking-doj-asks-supreme-court-to-take-two-doma-c.html

Besides being one of the first cases to challenge DOMA, *Gill* is significant because the District Court's ruling acknowledged that a federal court (at least the Federal District Court for the District of Massachusetts) opined that same-sex married couples have a fundamental right to marry and should be permitted to file federal tax returns as "married filing jointly." While one ruling from one Federal District Court cannot and should not become the rule of law for the nation, it has contributed to the confusion over the constitutionality of DOMA and what federal tax issues same-sex married couples face.

The confusion over the constitutionality of DOMA and the federal tax questions for same-sex married couples has led to other interesting cases. One such case arose with Edith Windsor. In June of 2012, the Federal District Court for the Southern District of New York granted Edith Windsor a refund of the tax paid on her same-sex spouse's estate. Windsor was married to her partner, Thea Spyer, in Canada in 2007 after they had been registered domestic partners in New York City since 1993. When Speyer died in February 2009 she left her entire estate to Windsor.[54]

According to 26 U.S.C. § 2056(a), the taxable value of the estate is determined by "deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate."[55] This means that nothing that passes to the surviving spouse from the decedent is considered a taxable part of the estate.

When Spyer died it was determined that Internal Revenue Code §2056(a) was not applicable; Windsor was not considered the surviving spouse since the federal government does not recognize same sex marriage. Consequently, Windsor ended up paying

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[54] *Windsor v. U.S.*, 833 F.Supp.2d 394, 396-397 (June 6, 2012)

[55] 26 U.S.C. Section 2056(a) permits property transferring to a spouse upon death to be deducted from the gross estate for estate tax purposes, but same-sex spouses cannot take advantage of the unlimited marital deduction.

$363,053 in federal estate taxes after Spyer's death.[56] Had they been a heterosexual married couple, since all of Spyer's property passed to Windsor, that property would have been subject to the unlimited marital deduction, and there would have been no federal estate tax due. Instead, there was a significant federal estate tax due simply because these legally married people were of the same sex.

On November 9, 2010, Edith Windsor filed a suit claiming that her rights under the Equal Protection clause of the Fourteenth Amendment had been violated. Further, Windsor also claimed that the Defense of Marriage Act has no rational basis. The defense for the constitutionality of DOMA in this case was taken up by The Bipartisan Legal Advisory Group of the House of Representatives (Henceforth referred to as BLAG). The main questions that the Federal District Court addressed in this case were: 1) Should Windsor and Spyer's union be treated as a legal marriage under Federal law? 2) If so, is DOMA subject to strict scrutiny? 3) And Is DOMA constitutional as applied in this situation?[57]

First, the legitimacy of Windsor's case needs to be determined. The couple was never legally married in the United States, only in Canada. However, "in 2009, all three statewide elected executive officials-the Governor, the Attorney General, and the Comptroller-had endorsed the recognition of Windsor's marriage."[58] The Federal District Court in the *Windsor* case cited the decision in *Dickerson v. Thompson*[59] when it noted that "New York law presumptively requires that parties to such [same-sex] unions must be treated as spouses for purposes of New York law."[60]

Additionally, in the past, the New York appellate court has held that same-sex Canadian marriages are recognized in New

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[56] *Windsor v. U.S* @ 397
[57] *Windsor v. U.S* @ 396
[58] *Windsor v. U.S.*@ 398
[59] 73 A.D.3d 52, 54-55 (2010)
[60] *Windsor v. U.S* @ 398

York State.[61] As a result of these precedent-setting decisions, Windsor and Spyer's union was ruled by the Federal District Court to be a valid and legal marriage under New York law.[62]

Officially, the United States Supreme Court has not given homosexuals the distinction of "suspect class," but it has recognized that classifications that burden a fundamental right are subject to strict scrutiny. Even if the Federal Courts were to deny that there is a fundamental right to marriage, as discussed before, in order for laws to result in different advantage or disadvantages between persons or groups of people, it must be "rationally related to a legitimate state interest" and pass the "rational basis test." If any rational or legitimate government interest can be found in a law, it is considered to be constitutional.

In the *Windsor* case, Edith Windsor argues that homosexuals should be considered a "suspect class" and therefore their cases should be reviewed with "greater scrutiny." The Federal District Court notes in pertinent part,

> *Windsor now argues that DOMA should be subject to strict (or at least intermediate) scrutiny because homosexuals as a class present the traditional indicia that characterize a suspect class: a history of discrimination, an immutable characteristic upon which the classification is drawn, political powerlessness, and a lack of any relationship between the characteristic in question and the class' ability to perform in or contribute to society*.[63]

The point that Windsor is trying to make is that homosexuals are a group of people who are both historically and

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[61] *See* In re Estate of Ranftle, 81 A.D.3d 566 (N.Y.App.Div.2011); Lewis v. N.Y. State Dep't of Civil Serv., 60 A.D.3d 216 (N.Y.Ap.Div. 2009).

[62] *Windsor v. U.S* @ 399

[63] *Windsor v. U.S* @ 401

currently discriminated against in today's society. Windsor's argument appears to be consistent with the view of the District Court in the *Gill* case discussed earlier when she asserts just because they are homosexual does not in any way impede on their ability to behave as a fully functioning member of society and contribute in ways that any other heterosexual American could.

Therefore, Windsor argues, homosexuals should not be denied any rights that are given to every other heterosexual American due to this characteristic; they are still of sound mind and body unless impaired by some unrelated disability. Windsor's articulation of homosexual's desire for equality points to the possibility that DOMA may "harm a politically unpopular group."[64]

The Court now looks to see if by denying the legal benefits that accompany marriage to same-sex couples, there is there a "compelling governmental interest" served. If not, this classification "violates equal protection." BLAG points out that the Defense of Marriage Act clearly states that one of its purposes is to "protect the institution of marriage."[65] The District Court believes that "precisely because the decision of whether same-sex couples can marry is left to the state, DOMA does not, strictly speaking, 'preserve' the institution of marriage as one between a man and a woman."[66]

It is a contradiction within itself. The document permits states to define marriage, which leaves the possibility of states choosing to recognize and allow same-sex marriages; DOMA is allowing the very thing that it is "protecting" against to exist. BLAG also points out that Congress has shown an interest in promoting "responsible procreation," and DOMA helps to advance this objective.[67] Simply limiting the rights of same-sex married

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[64] *Windsor v. U.S* @ 402

[65] Defense of Marriage Act, 199, 104th Congress (1996)

[66] *Windsor v. U.S* @ 403

[67] H.R. Rep. no. 104-664, at 12-13

couples does not promote action or incentivize any type of behavior in heterosexual couples because DOMA has little to no effect on heterosexual couples. In light of this reasoning "the Court cannot see a link between DOMA and childrearing."[68]

Next, BLAG tries to make the point that DOMA was enacted to ensure that people in different states could not receive unequal federal benefits, depending on what state they were living in; full federal economic benefits cannot be granted to same-sex couples in some states because they are married and not to others in states where they cannot get married. However, the fact that federal benefits were uniform was based on the fact that married happened to be universally defined; the federal government did not necessarily promote it. The federal government recognized any marriage that was valid in whichever state. This included civil unions and common law marriages, marriage distinctions that also exist in varying states.

Finally, the court points out that BLAG cannot justify an economic interest in disallowing same-sex married couples' federal financial benefits. You cannot arbitrarily exclude groups of people from benefitting from a federal plan to save money.[69] If this were allowed by this logic in this case, it could theoretically be done to any government program; it would just be blatant discrimination.

In light of the facts presented above, DOMA was found to be unconstitutional as applied in this situation. Windsor was awarded the $353,053 she had previously paid on her partner's estate plus interest. The case is pending, however, in the Second Circuit Court of Appeals as well as the United States Supreme Court.

CONCLUSION

The law is evolving when it comes to how we as a nation define marriage. The law is unclear as to whether Equal Protection

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[68] *Windsor v. U.S* @ 404

[69] *Windsor v. U.S* @ 406

Clause challenges to same-sex marriage discrimination laws should receive strict scrutiny because homosexuals are a "suspect class" or because marriage should be a considered a fundamental human right. Public discussion of same-sex marriage and reviews of social media feedback on the issue indicate that American citizens are still somewhat polarized on the issue.[70] Moreover, the United States Supreme Court is expected to hear oral arguments in March 2013 the *Windsor v. United States.* Other DOMA cases are also expected to reach the Supreme Court during this term – *Department of Health and Human Services v. Massachusetts* and *Office of Personnel Management v. Golinski.*[71]

While some Americans may be some distance away from accepting the notion of same-sex marriage, the inequality as evidenced in the federal tax law is just one area that, some argue, begs for more equality in how our nation treats persons who have been legally recognized as married under state law. The likelihood is that the number of same-sex marriages will continue to increase, and with that increase the number of same-sex divorces is also likely to increase. It will be interesting to see how the United States Supreme Court addresses the upcoming DOMA cases and what affect, if any, their rulings have on the Federal Tax Code.

Regardless of the future standing of the Defense of Marriage Act, a lack of guidance and legislation on this issue presents an ethical dilemma for tax preparers. When signing a married couple's tax returns as two single people, this is a material misrepresentation of fact, but it is evidenced that filing one married return for the couple would be misguided as well. This substantive inconsistency needs to be addressed and formal, coherent guidance needs to be issued on the ethical way to approach this issue until possible future legislative changes are enacted.

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[70] Parisella, John, "Is There a Consensus on Gay Marriage in North America?" May 11, 2012 http://www.americasquarterly.org/node/3626

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[71] http://www.cnn.com/interactive/2012/10/politics/scotus.cases/?hpt=po_c2

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