FEDERAL DISCRIMINATION OF MARRIED SAME-SEX COUPLES

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Abstract

As the discussion and debate in the political arena intensifies concerning the social aspects of same-sex marriage, there are also adverse economic and legal effects on same-sex couples due to the Defense of Marriage Act (DOMA). In order to sample the effect of DOMA, we examined the tax consequences of the inability of such couples to file a tax return based on "married filing jointly" status by surveying same-sex couples who were married in Massachusetts. After comparing their current tax liability versus their theoretical tax liability using the "married filing jointly" status, we found that sixty-eight percent of those couples suffered an average tax penalty in 2008 of $2,495. Based on this actual adverse impact, we examined a legal remedy based on the failure to accord deference to the States with respect to matters specifically

involving marriage in violation of the 10th amendment to the United States Constitution.

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Dr. Elise Berlan, in her study on bullying, found that those who are perceived to be different from the social norm, including lesbian and gay youth, can be targeted for intimidation (Bryner, 2010). Unfortunately, this dynamic carries over into adult life for same-sex couples in the way they are treated and regarded by the federal government. In his documentary film *Outrage*, Kirby Dick likens the behavior of certain hypocritical government legislators who remain in the closet while establishing long voting patterns discriminating against lesbians and gays to bullying behavior on the playground, where they become not only bullies themselves, but ally themselves with likeminded legislators in order to divert attention away from their own vulnerabilities (Morris, 2009).

Indeed, the relationship between the federal government and married, same-sex couples could be described as abusive. In 1996, the federal government enacted the Defense of Marriage Act (DOMA) which superseded what was once an issue reserved for the individual states by excluding same-sex marriage from the definition of marriage. Over the past two decades, the U.S. federal legislation has stated goals of simplification and equity for the individual. However, with the federal government taking on the role of defining marriage, the complexity of our retirement, taxation and legal systems has increased. The Governmental Accounting Office found 1,138 rights and protections conferred to married couples under federal law which are denied to same-sex couples ("Defense of marriage act: Update to prior report," 2004).

Accordingly, in order to gauge the extent of the increased complexity and burdens resulting from this federal intrusion, we will examine the history of joint tax filing and the resulting

increased tax burden imposed by DOMA upon married couples at both a federal and state level. Our examination includes a specific study of the federal tax burden on a group of same-sex couples who were married in Massachusetts. We surveyed more than 900 same-sex couples who were legally married in the State of Massachusetts in 2008, the most recent year for which marital records were available at the time we conducted the research. We also examined the avenues of relief from these burdens with a focus on the possibilities of judicial relief.

Such relief would be based on the recognition of the unconstitutionality of DOMA due to its intrusion on the well accepted right of the States to define marriage in accordance with the 10th Amendment to the U.S. Constitution (U.S. Const., amend. X) and its interference with the functioning of the "full faith and credit" clause of Article IV of the U.S. Constitution (U.S. Const., article IV, § 1). Based on our examination of the data, an analysis of the various burdens on same-sex couples, and the options for relief from such burdens, we have concluded that the refusal to recognize same-sex marriage has created an unconstitutional and undue burden on these couples that can only be relieved by a judicial determination that DOMA is unconstitutional.

Defense of Marriage Act

In 1996, Congress and President Clinton enacted the Defense of Marriage Act (1996) (DOMA). DOMA limits the definition of marriage to opposite-sex couples under federal law and sanctions the refusal of an individual state to recognize same-sex marriages performed in another state. DOMA does not preclude the individual state legislatures from defining marriage with respect to their own states, but with respect to the determination of marriage, as it impacts federal law, it does usurp an area traditionally governed by state law (*Labine, Tutrix v. Vincent, Administrator*, 1971). Section 3 of DOMA states:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the

> various administrative bureaus and agencies of the United States, the word "marriage" means only the legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is husband or wife (Defense of Marriage Act, 1996).

In addition, in Section 2, it attempts to interfere with the "full faith and credit" clause of the U.S. Constitution by preventing gay couples from marrying in states where such marriage is legal and then returning to a different state to live and be recognized as married couples.

> 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 (Defense of Marriage Act, 1996).

Background on and the Current Status of the Applicable Laws

Presently, ten countries have legalized gay marriage (See Appendix A) and various states have allowed civil unions or domestic partnership agreements. Civil unions are similar to marriage, however, domestic partnerships tend to be not as well defined and can vary from state to state where they have been adopted ("Civil unions &," 2012).

As of November 30, 2012, nine states and the District of Columbia have legalized same-sex marriages (See Appendix B). The states vary with respect to the vehicle by which the law has been changed. In some states, the changes have been made by the legislature and in others the courts have ordered the changes. As of

November 30, 2012, 37 states have limited marriage to a man and a woman (See Appendix B).

The present status of the law has evolved from a series of judicial, legislative and constitutional activities starting with a decision by the Hawaii Supreme Court in 1993. In one of the first judicial decisions establishing same-sex marriage, the Hawaii Supreme Court applied the strict scrutiny standard to laws limiting marriage to opposite-sex couples (*Baehr v. Lewin*, 1993). Under that standard, if there is not a compelling state interest to limit marriage and the law is not narrowly tailored to achieve that interest, then the law violates the Fourteenth Amendment of the U.S. Constitution (*Baehr v. Lewin*, 1993). In December of 1996, a trial court in Hawaii, upon remand, found that the law banning same-sex marriage violated the state's constitution and ruled that same-sex couples should be allowed to marry (*Baehr v. Miike*, 1996).[1]

However, in 1998 the constitution of Hawaii was amended allowing the Legislature to limit marriage to opposite-sex couples. (Haw. Const., art 1 § 23) This amendment prevented the high court from affirming the lowers court's decision allowing same-sex marriage, however, the original decision by the Hawaii Supreme Court was one of the motivations for DOMA (H.R. Rep. No. 104-664, 1996) Interestingly, as of January 1, 2012, Hawaii now recognizes same-sex civil unions (See Appendix B).

In California, the State Supreme Court ruled on May 15, 2008 that California law violated the rights of same-sex couples to marry (*In re Marriage Cases*, 2008). Between June 17, 2008 and election day in November of that year, more than 18,000 same-sex marriages were legally performed in California (McKinley, 2009). However in November of that year, the California voters approved Proposition 8 which added a ban on same-sex marriage to the state constitution ("California bill to," 2009). However, the marriages that were conducted during its legalization are still valid ("California bill to," 2009). Moreover, California enacted legislation recognizing out-of-state same-sex marriages which were

performed during the June to November 2008 legalization period in California ("California bill to," 2009).

In response to a challenge to Proposition 8, the Supreme Court of California ruled that the Proposition was constitutional on May 15, 2009 (*Strauss v. Horton*, 2009). However, on August 4, 2010, U.S. District Judge Vaughn Walker overturned Proposition 8 (*Perry, et. al. v. Schwarzenegger, et. al.*, 2010). The U.S. Court of Appeals for the 9th Circuit in a somewhat narrow decision upheld Judge Walker's decision by focusing on Proposition 8 and avoiding general issues concerning the right of same-sex couples to marry (*Perry v. Brown*, 2012).

In Massachusetts, the highest state court ruled that the state's ban on same-sex marriage was unconstitutional on November 18, 2003 (*Goodridge v. Mass Department of Public Health*, 2003). One year after Massachusetts started issuing marriage licenses, more than eighty percent of the voters stated that their quality of life had not been impacted and that it had had a positive effect on life in the state (Belge, 2005).

In connection with the Massachusetts decision, The Gay & Lesbian Defenders filed a separate case challenging DOMA Section 3 on the basis that it denies equal protection guarantees in the areas of taxation, social security and federal employment benefits (*Gill v. Office of Personnel Management*, 2010). Massachusetts also challenged the federal constitutionality of DOMA in federal court by asserting that same-sex marriage is a states' rights issue (*Commonwealth of Massachusetts v. United States Department of Health and Human Services, et. al.*, 2010).

Judge Joseph Tauro, a Nixon appointee sitting on the United States District Court in Massachusetts, ruled in favor of the same-sex couples in the two separate challenges to DOMA, agreeing that the law encroached on the state's right to define marriage and that the act violated the Equal Protection Clause of the U. S. Constitution (*Gill v. Office of Personnel Management*, 2010; *Commonwealth of Massachusetts v. United States Department of Health and Human Services, et. al.*, 2010).

Tauro stated, "Importantly, the passage of DOMA marks the first time that the federal government has ever attempted to legislatively mandate a uniform federal definition of marriage – or any other core concept of domestic relations...." (*Gill v. Office of Personnel Management*, 2010, p. 392). "Indeed, Congress undertook this classification for the one purpose that lies entirely outside of legislative bounds, to disadvantage a group of which it disapproves. And such a classification, the Constitution clearly will not permit." (*Gill v. Office of Personnel Management*, 2010, p. 396).

In *Massachusetts v. United States Department of Health and Human Services* (2012), the U.S. Court of Appeals for the 1st Circuit found DOMA to be unconstitutional. This decision was based on the violation of the Equal Protection Clause of the Constitution. It was not due to a finding of a suspect classification, but rather, due to "the case-specific nature of the discrepant treatment, the burden imposed, and the infirmities of the justifications offered." (*Massachusetts v. United States Department of Health and Human Services*, 2012, p. 17). It is evident from the decision that burdens imposed, such as discriminating tax consequences, are a significant factor in making such a determination.

Connecticut was authorized to issue same-sex marriage licenses beginning on October 28, 2008 (McFadden, 2008). This policy was a result of the Connecticut Supreme Court's ruling that same-sex couples were denied equal protection guaranteed by Connecticut's constitution (*Kerrigan v Commissioner of Public Health*, 2008). The court concluded that a civil union is not equal to a marriage.

Iowa's Supreme Court also cited the equal protection issue in an April 3, 2009 decision where the court unanimously ruled that a state ban on gay marriage violated Iowa's constitution (*Varnum v. Brien*, 2009). The Court said: "If gay and lesbian people must submit to different treatment without an exceedingly persuasive justification, they are deprived of the benefits of the

principle of equal protection upon which the rule of law is founded." (*Varnum v. Brien*, 2009, p. 906).

From the legislative side, the first state to legislate same-sex marriage, over its governor's veto, was Vermont ("Same-sex marriage," 2009). In May of 2009, Maine's legislature passed a measure legalizing same-sex marriage, but before being enacted, this measure was defeated by referendum in November of the same year (Dwyer, 2009). The District of Columbia's law allowing same-sex couples to marry went into effect on March 3, 2010 (Alexander, 2010).

Opponents of the District of Columbia marriage law had tried to block it until a city-wide referendum could be held but Chief Justice Roberts, agreeing with the lower courts, said he "…saw no reason for the Supreme Court to step into such a local matter involving the referendum process." (Crawford, 2010). On January 1, 2010, New Hampshire's law allowing same-sex marriage went into effect and an attempt to repeal the law failed on March 21, 2012 (Krasny, 2012).

The judicial and the legislative status of same-sex marriage is fluid and lacks stability. In November the voters approved such marriages in Maryland, Maine and the State of Washington ("Voters in third," 2012). This lack of stability puts the persons who are impacted by these laws at a severe disadvantage in that they are unable to plan for the future. However, on December 7, 2012, the United States Supreme Court agreed to review a case that found DOMA to be unconstitutional and a second case finding California's Proposition 8 unconstitutional (Bravin, 2012). The United States Supreme Court heard oral arguments with respect to these cases in March 2013. (Delong, 2013). Especially in the case of DOMA, perhaps a decision by the highest court will provide some stability.

Impact on the Federal Estate Tax and on Federal Benefits

The federal estate tax expired in January of 2010 for one year. Before its expiration, married opposite-sex couples could

transfer an unlimited amount of property to their spouse without any estate tax liability (Goldberg, 2009). The estate tax was reinstituted in 2011 with an exclusion amount of five million dollars for anyone dying in 2011 and five million, one hundred thousand dollars in 2012 ("Introduction to estate," 2011). However, without action by Congress in 2013, the estate tax is expected to revert to the old rules with an exclusion amount of one million and a ten percent increase in the 2009 rate to fifty-five percent (Garber, 2012).

Before the 2011 estate tax was changed, it was estimated that a reversion in 2011 to the old rules would disadvantage hundreds of same-sex couples an average of $1.1 million dollars in estate taxes compared to their opposite-sex counterparts (Goldberg, 2009). You can only assume that such a reversion in 2013 would have similar effects.

Preferential treatment is also granted to opposite-sex spouses in the use of retirement savings, and pension plans must give opposite-sex spouses certain protections (Self-Employed Individuals Tax Retirement Act of 1962). For example, if a pension plan's benefits are used as collateral for a loan, the opposite-sex spouse must give their consent (Self-Employed Individuals Tax Retirement Act of 1962).

The Consolidated Omnibus Budget Reconciliation Act of 1985 allows spouses of opposite-sex terminated employees to continue medical insurance coverage for eighteen months, at the group rate, if they pay the premiums (Employee Retirement Income Security Act of 1974). The same social security benefits available to opposite-sex married couples are not available to same-sex married couples. Opposite–sex spouses can receive half of their spouse's benefits if it is more than their own benefits but this benefit is not available for same-sex spouses (Social Security Act, 2004). In addition, when one spouse in an opposite-sex marriage dies, the surviving spouse may receive the monthly benefit of the decedent if it is higher (Social Security Act, 2004) and is entitled to

a one-time lump-sum death benefit (Social Security Act, 2004). Again, these benefits are denied to same-sex married couples.

Under federal law, opposite-sex married couples cannot be compelled to testify against their spouse in federal court (Trammel v United States, 1980) and either spouse can assert the confidential communication privilege (Blau v. United States, 1951). The Family and Medical Leave Act allows for a twelve-week unpaid absence from work in order to care for a spouse, but only if that spouse is of the opposite sex (The Family and Medical Leave Act of 1993).

A married person may obtain conditional permanent residency for their opposite-sex spouse while waiting for naturalization (Immigration and Nationality Act, 2000). An author's surviving spouse may exercise the right to terminate or renew a copyright (Copyright Act, 2002). Once again, DOMA limits the application of these laws to a spouse being of the opposite sex.

Impact on Federal Income Taxes

Karen M. Yeager said: "Every society makes choices as to the tax system that not only raises the necessary revenues to support government expenditures, but within that choice are inherent reflections of societal values." (Willis, 2010). Every income earner in the United States is directly affected by both the federal and state taxation systems. In 1913 the federal income tax was established and in 1948 the unit of taxation changed from the individual to the family (Whittington, 2010). Filing status began to determine the rates that levels of income (brackets) are taxed and the amount of the standard deduction for non-itemizers. There are four filing statuses for determination of one's tax liability - single, married filing jointly, married filing separately, and head of household. The same amount of income does not result in the same amount of tax liability because of the difference in the tax brackets, which depends on filing status. Because of DOMA, married same-sex couples are not allowed to choose the "married

filing jointly" or "married filing separate" status but must file as single. Because of the federal "progressive taxing system" of income, filing jointly can result in a "marriage bonus" (paying less tax) or a "marriage penalty" (paying more tax) given the level of income of the taxpayers. For example:

> The following amounts of tax are computed using the 2012 Tax Rate Schedule for a Taxpayer (or taxpayers in the case of a joint return) with $60,000 of taxable income…)

Filing Status	Amount of Tax
Single	$ 11,030
Married, filing joint return	$ 8,130
Married, filing separate return	$ 11,030
Head of household	$ 9,645

(Hoffman, 2012)

The reason for the different filing rates for married couples, when conceived, was that one spouse worked and the other stayed home or had very low income. Thus, these couples benefited from this difference in filing status. As times changed, more married couples became two-wage earner families and were penalized by having to file as married and pay more taxes because of the bunching of income. The issue of the marriage penalty has been addressed by Congress many times in order to equalize the tax burden between single and married taxpayers. The Jobs and Growth Tax Relief Reconciliation Act of 2003 increased the amount of income at the fifteen percent bracket for married filers

and equalized the standard dedication to be proportional with single filers ("What is the," 2010). For families in the lower tax bracket, the Working Families Tax Relief Act of 2004, in essence, did away with the marriage penalty for lower income couples. Given the present rates of unemployment because of the financial collapse of 2008, more same-sex married couples could be one-income households and denied the tax marriage bonus of filing jointly.

Results of the Research on Massachusetts Marriages

In order to verify the federal income tax impact that DOMA has had on same-sex couples, we recently conducted a survey of the 917 same-sex couples who were married in Massachusetts in 2008. Massachusetts was the first state to allow gay marriage, beginning in 2004, which is still in force at the present time. As noted, the Supreme Court of Hawaii's 1993 decision was nullified by the voters. Since Massachusetts requires public filing of the marriage record, we chose to use Massachusetts to conduct our research.

As expected, a large number of our mailed surveys were returned with incorrect addresses. Given that 2008 was the most recent year for which data was available when we conducted our data-gathering in late 2010 and 2011, we expected that a fair number of the surveys would not reach the intended targets. We are aware of this because those surveys came back to us. Of those that did reach their intended targets, many chose not to respond. However, we did receive 105 usable surveys back to examine in more detail.

In our analysis of the 2008 Massachusetts records, we were able to determine that of the 917 marriages recorded, 906 of the records had the occupation of at least one of the couple listed. Of these 906, 897 of them had something listed in the field for occupation for both persons, even though sometimes it said "unemployed," "retired," or "disabled." Focusing on the 897 that listed something in the occupation field for both spouses, 28 listed

both spouses as "retired," 1 couple listed both spouses as "unemployed," 3 couples listed both spouses as "at home," and 4 listed both spouses as "disabled." Additionally, another 9 listed both spouses as students. Assuming that the income in these various categories isn't too significant (obviously, in the "retired" category, that may not be the case), this still leaves 852 couples where at least one, if not both spouses are actively engaged in a career or job. Some individuals listed the name of the firm they are employed by, for example "GM," instead of listing their actual occupation.

But in many cases, we are able to see the actual occupation of the spouses, and we are able to confirm that these issues are affecting a large number of couples who would otherwise be able to benefit from the tax code, much as their opposite-sex married counterparts are able to do. Of the remaining couples we have listed, in 15 of the marriages, both are physicians, attorneys, psychologists, or some mix of those occupations, and that doesn't begin to touch on the many other director, engineer, consultant, professor, and other prestigious career titles that many of the couples list as their occupations.

So it is safe to assume that there would be some tax savings for at least some of these couples. In addition to wider taxable income brackets, opposite-sex married couples are allowed an additional Individual Retirement Arrangement (Spousal IRA) contribution that could result in an additional deduction of $5,000 to the couple's adjusted gross income (Tax Reform Act of 1976). This arrangement is permitted when one of the spouses is employed for pay but the other spouse is not employed for pay. This describes 115 (or 13.5%) of the couples in our same-sex sample.

Opposite-sex married couples can combine their deductions which allows for the possibility that the itemization will result in an amount greater than their allowable standard deduction (Internal Revenue Code, 1977). Same-sex married couples do not have this option on their federal return. We do have tax data for 41 such

couples, but since we had to write to them to ask that they send this information to us confidentially, we do not have the same volume of information we can report on this topic area. From the tax data collected, we were able to compare their 2008 tax liability based on filing "single" or as "head of household" with their tax liability if allowed to file "married filing jointly".

Based on our calculations, we determined that approximately half of those couples suffer a tax penalty from the inability to file "married filing jointly" with sixty-eight percent of those couples suffering an average tax penalty, in 2008, of $2,495 (Appendix C). In addition, unlike with opposite-sex spouses, employer provided health insurance for same-sex spouses is taxable to the employee (Internal Revenue Code, 2010) resulting in an estimated $235 million in additional taxes (Goldberg, 2009).[2]

The choice available for married same-sex couples' state income tax returns can prove to be a vexing problem. The taxpayers must ascertain if the state recognizes same-sex marriage and if the state's income tax is tied to the federal return. Many states "piggy-back" with the federal income tax return (i.e., the state's income tax calculation may start with the federal's filing status and/or exemptions and/or adjusted gross income, etc.). If the state allows joint filing for same-sex couples and the return is piggy-backed in some form, three federal returns may have to be filed: Two single filings for federal income tax purposes and one federal "jointly pro-forma" income tax return for their state. Even if the state does allow same-sex couples to file jointly, DOMA requires that married same-sex taxpayers file two single federal tax returns.

The St. Louis Post-Dispatch, in discussing the new law in the State of Illinois, cited the burden to same sex couples of having to create two federal tax returns (Gallagher, 2012). The Internal Revenue Service has estimated that filing one Form 1040 takes thirty-three hours with an average cost of $264 per return ("1040 instructions," 2008). Of those in our sample, nearly 400 couples were not Massachusetts residents at the time that they married in

Massachusetts, so again, the tax preparation needed would be up to the state in which they resided. Thirty-seven different States, aside from Massachusetts, had residents wed in Massachusetts in 2008.

Public Opinion

As recently as 2006, only 36% percent believed that same-sex marriage should be recognized by the law (Langer, 2011). However, the opinions of Americans are starting to come in line with the courts in granting equality to same-sex couples. A series of Gallup polls evidence a definite trend of acceptance of same-sex marriage ("Gay and lesbian," 2012). In an April 2009 ABC/Post poll, 49% of those polled supported same-sex marriage, with only 43% percent opposing it. More significantly, 53% felt that a same-sex marriage legally performed in one state should be recognized in any other state in which the couple resides ("Changing views on," 2009).

The same poll indicates that the most rapid gains in support have, counter-intuitively, been among those who identify themselves as conservative. Conservatives' support for same-sex marriage has gone from 10% support in 2004 to 30% support in 2009 ("Changing views on," 2009). Former Vice-President Richard Cheney stated that same-sex marriage was a States' Rights issue during the 2004 election, but in 2009 endorsed the right of gays to marry. Cheney does have a personal stake in this matter, as his daughter is an openly gay woman, whom he has publicly supported (Eggen, 2009).

In a Wall Street Journal article concerning President Obama's endorsement of same-sex marriage, a recent 2012 Gallup survey was cited where 50% approved of same-sex marriage and 48% opposed. It is noted that polls consistently show rising support (Lee, 2012). Despite all of this press, a legislative solution is unlikely in the immediate future. President Obama has promised to repeal DOMA, but the legislation is currently stalled in Congress. It is clear that the application of DOMA has resulted in burden on same-sex couples that, at the present time, will unlikely

be lifted by federal legislation. Therefore, the most likely source of relief will be with the courts.

The Constitutionality of DOMA

There are several different approaches that can be taken in challenging the constitutionality of DOMA. A challenge on Equal Protection or Substantive Due Process grounds based on the 5th amendment of the Constitution is a possibility (U.S. Const., amend. V). However, the Supreme Court has not recognized a suspect classification that would include same-sex issues and to obtain a majority on the court that would expand same-sex rights to that extent is not impossible but could be difficult. Just note the reaction of the public in some states to the prospect of same-sex legislation and the controversy with respect to this issue. Though the courts are independent, it is unrealistic to believe that the courts are totally immune to public opinion.

We believe that a conservative but more promising approach would be to challenge DOMA based on its intrusion on the long-held right of the states to determine what constitutes a marriage and how a marriage can be dissolved by the courts in violation of the 10th Amendment of the Constitution (U.S. Const., amend. X). Such an approach would take a strict constructionist approach which has the promise of perhaps attracting a majority of the justices. In addition, DOMA's interference with the "full faith and credit" clause could also be challenged (U.S. Const., article IV, § 1). However, a challenge on a "full faith and credit" basis could be problematic.

In the U.S. Supreme Court decision of *Labine, Tutrix v. Vincent, Administrator* (1971), the Court upheld the Louisiana state laws which barred an illegitimate child from inheriting from the father despite the father's public acknowledgement of the child. In the opinion, the Court rejected an Equal Protection challenge to the Louisiana laws in upholding the state's right to enforce these laws as related to illegitimate children. Justice Black in the opinion for the court stated that "(t)he Federal Constitution does

not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules." *(Labine, Tutrix v. Vincent, Administrator,* 1971, p.537)

In *Sosna v. Iowa, et al.* (1975), the Supreme Court rejected a challenge to Iowa's residency requirement for a divorce. In the opinion, the Court recognized the right of the state "to prescribe the conditions upon which the marriage relation between its own citizens shall be created… in citing (*Pennoyer v. Neff*, 1878, pp. 734, 735). In *Thompson v. Thompson* (1988), the Court affirmed the dismissal of an attempt to create a federal private cause of action with respect to a child custody dispute. The statute that was in question only reinforced the obligation of state courts to honor decrees from sister states in accordance with "full faith and credit."

In *United States v. Lopez* (1995), the U.S. Supreme Court invalidated a federal statute that made it a federal crime to possess a firearm within a school zone. The opinion was based on the attempt by the Congress to overreach its power using the Commerce Clause. However, there were several references to the division of power between the states and the federal government. In the concurrence it was stated that "(t)he statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise… "(*United States v. Lopez,* 1995, p. 583).

Deference to the States with respect to matters specifically involving marriage and the tax code was upheld in *Estate of Steffke, et al. v. Commissioner of Internal Revenue* (1976) and *Boyter and Boyter v. Commissioner of Internal Revenue* (1980). The 10th amendment to the Constitution states that "(t)he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" (U.S. Const., amend. X). The power to define marriage is not granted to the Federal government in the Constitution and should be reserved to the States. The States have

traditionally defined marriage until DOMA overturned this long tradition.

The other aspect of DOMA, which limits the full faith and credit clause of the Constitution, is also subject to attack. The Supreme Court has recognized that "full faith and credit" is "exacting with respect to judgments by a court but is less so with respect to a determination of what law to enforce (*Franchise Tax Board of California v. Hyatt*, 2003). However, courts have recognized common law marriages on a full faith and credit basis (*Bollinger v. Bollinger, et. al.*, 1984); (*Clark Sand Co. v. Kelly*, 2011).

In addition, a recent decision by the Massachusetts Supreme Judicial Court recognized a Vermont civil union for the purpose of voiding a marriage entered into in Massachusetts by one of the parties to the civil union (*Elia-Warnken v. Elia*, 2012). The Massachusetts court pointed to the "uncertainty and chaos" that would result from the failure to recognize marriages or civil union granted in other states (*Elia-Warnken v. Elia*, 2012, p. 21).

Conclusion

The federal government's usurpation of the state's traditional role of defining marriage, through DOMA, has turned the tax laws into a confusing maze that gay couples have to negotiate, and once they have successfully done so, can result in tax burdens that are inequitable, irrational, and ultimately inexcusable. Respect for other states' laws balanced with equal protection for all individuals is a reflection of the societal values explicitly stated in the U.S. Constitution, and while Congress's attempts to equalize the tax burden on married couples to reduce or eliminate marriage penalties are admirable, they give no relief or equity to same-sex married couples.

The effect of DOMA is to bully legally married same-sex couples by denying those rights and protections granted others because Congress seemingly disapproves of this class of people. Until this injustice is remedied, same-sex married couples will

continue to pay more than their fair share, and receive far fewer benefits than their straight counterparts. The federal government, which is not empowered by the Constitution to issue marriage licenses, should leave the definition of marriage to the States in accordance with the 10th Amendment to the Constitution and not interfere with the functioning of the Article IV "full faith and credit" clause with respect to the recognition of same-sex marriage.

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Footnotes

[1]Please note that the State Director of Health Lawrence H. Miike was substituted for Lewin as defendant.

[2]This was not an item we surveyed our sample on, due to the number of other items we were asking them, and our desire to keep the survey to a manageable length for those responding.

Appendix A

Nations Where Same-Sex Marriage is Legal

	Country	Year
1.	The Netherlands	2000
2.	Spain	2005
3.	Canada	2005
4.	Belgium	2006
5.	South Africa	2006
6.	Norway	2008
7.	Sweden	2009
8.	Portugal	2010
9.	Iceland	2010
10.	Argentina	2010
11.	Denmark	2012
12.	New Zealand	2013

(“Same-sex marriage around, “2013); (Perry, 2013)

Appendix B

State law and/or constitutional provision limits marriage to relationships between a man and a women:

Alabama, Alaska, Arizona, Arkansas, California*, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming

*California voters adopted a constitutional amendment limiting marriage to relationships between a man and a woman. However, challenges to this amendment are currently under review by the U.S. Supreme Court.

States issues marriage licenses to same-sex couples:

Connecticut, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, Washington and the District of Columbia

States allows civil unions, providing state-level spousal rights to same-sex couples:

Colorado, Delaware, Hawaii, Illinois, New Jersey, Rhode Island (Colorado, Delaware, Hawaii, Illinois also have statutes or constitutional provisions limiting marriage to relationships between a man and a woman.)

Note: In Connecticut, Vermont and New Hampshire, same-sex marriage has replaced civil unions.

States grant nearly all state-level spousal rights to unmarried couples (domestic partnerships):

California, Nevada, Oregon, Washington**

**Effective June 30, 2014 domestic partnerships in Washington will be limited to couples who are 62 years of age or older

States grant some state-level spousal rights to unmarried couples (domestic partnerships):

Hawaii, Maine, Wisconsin and the District of Columbia

("Defining marriage," 2013)

Appendix C

Persons Surveyed Suffering a Tax Penalty over $400

S#	AGI Spouse 1	Tax Paid Spouse 1	AGI Spouse 2	Tax Paid Spouse 2	Tax Paid Married	Tax Difference
1	$107,164	$ 18,781	$93,866	$16,344	$33,404	$1,721
2	$99,100	$ 14,000	$0	$0	$9,469	$4,531
3	$87,100	$ 13,500	$0	$0	$8,969	$4,531
4	$48,569	$ 5,841	$32,397	$3,075	$8,374	$542
5	$52,834	$ 6,497	$27,757	$2,634	$8,329	$802
6	$23,990	$0	$34,383	$3,158	$2,756	$402
7	$ 21,600	$1,500	$0	$0	$373	$1,127
8	$74,512	$10,413	$15,550	$663	$9,769	$1,307
9	$63,014	$8,855	$ 27,450	$2,378	$10,831	$402
10	$77,338	$9,788	$0	$0	$6,739	$3,049
11	$17,400	$868	$114,725	$17,250	$16,944	$1,174
12	$0	$0	$227,856	$48,274	$40,635	$7,639
13	$0	$0	$100,260	$13,830	$9,306	$4,524
14	$0	$0	$74,312	$9,029	$6,289	$2,740
15	$60,084	$7,675	$9,750	$81	$6,934	$822
16	$0	$0	$94,150	$16,361	$11,756	$4,605

Average Penalty	$2,495
Max Penalty	$7,639

All Persons Surveyed

S#	AGI Spouse 1	Tax Paid Spouse 1	AGI Spouse 2	Tax Paid Spouse 2	Tax Paid Married	Tax Difference
1	$74,455	$11,575	$62,613	$9,300	$20,863	$13
2	$107,164	$ 18,781	$93,866	$16,344	$33,404	$1,721
3	$100,659	$14,400	$107,963	$15,750	$30,688	-$538
4	$ 99,100	$ 14,000	$0	$0	$ 9,469	$4,531
5	$88,759	$14,418	$31,650	$3,005	$17,800	-$377
6	$106,100	$12,000	$38,300	$4,000	$17,044	-$1,044
7	$62,300	$9,400	$69,100	$11,200	$20,588	$13
8	$118,212	$20,652	$47,500	$5,988	$27,734	-$1,094
9	$45,973	$4,528	$29,750	$2,720	$7,871	-$623
10	$131,238	$27,757	$39,950	$4,250	$31,665	$342
11	$33,500	$1,400	$11,350	$240	$2,179	-$539

12	$ 87,100	$13,500	$0	$0	$8,969	$4,531
13	$ 48,569	$5,841	$32,397	$3,075	$8,374	$542
14	$52,834	$6,497	$ 27,757	$2,634	$8,329	$802
15	$23,990	$0	$34,383	$3,158	$2,756	$402
16	$ 21,600	$1,500	$0	$0	$373	$1,127
17	$74,512	$10,413	$15,550	$663	$9,769	$1,307
18	$63,014	$8,855	$ 27,450	$ 2,378	$10,831	$402
19	$113,836	$13,021	$83,877	$10,319	$23,338	$2
20	$77,338	$9,788	$0	$0	$6,739	$3,049
21	$52,000	$7,113	$45,450	$5,464	$12,581	-$4
22	$191,473	$42,645	$40,050	$4,265	$47,647	-$737
23	$62,800	$9,813	$79,622	$9,913	$21,075	-$1,349
24	$36,600	$3,748	$94,427	$8,150	$12,769	-$871
25	$124,898	$22,490	$85,450	$15,475	$40,202	-$2,237
26	$56,650	$8,263	$47,550	$6,000	$14,269	-$6
27	$150,181	$20,870	$108,076	$12,800	$34,158	-$488
28	$17,400	$868	$114,725	$17,250	$16,944	$1,174
29	$45,600	$5,513	$102,562	$10,976	$17,850	-$1,361
30	$0	$0	$227,856	$48,274	$40,635	$7,639
31	$374,601	$96,998	$140,051	$24,938	$128,673	-$6,737
32	$163,371	$32,481	$106,186	$20,219	$59,479	-$6,779
33	$0	$0	$100,260	$13,830	$9,306	$4,524
34	$38,608	$3,763	$37,030	$3,440	$7,204	-$1
35	$0	$0	$74,312	$9,029	$6,289	$2,740
36	$54,963	$7,675	$70,319	$11,275	$18,938	$13
37	$15,400	$647	$9,275	$33	$678	$2
38	$46,040	$4,802	$41,150	$4,433	$10,006	-$771
39	$60,084	$7,675	$9,750	$81	$6,934	$822
40	$17,050	$816	$25,500	$2,083	$2,899	$0
41	$0	$0	$94,150	$16,361	$11,756	$4,605

All Persons Surveyed

Average Penalty	$ 360
Median	$ 2
Max Penalty	$7,639