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Same-Sex Marriage and Taxes

Stephen T. Black[*]

I. Introduction

"Ann, I've examined your last three years' tax returns . . . will you marry me?"

"Oh, Andy, I thought you'd never ask! I'm so looking forward to the tax benefits we will enjoy together."

"Yes, and when we have children we have even more deductions. We should marry as soon as possible!"

Our tax system, while frequently criticized for its complexity, has the flexibility to encourage or influence behavior. It is used to try to influence people's spending habits to "jump-start" the economy or encourage businesses to buy more fixed assets.

Tax law may even help to channel marital and family decisions. Frequently the proponents of same-sex marriage cite the difference in tax treatment as one of the reasons that same-sex couples receive discriminatory treatment.[1]

> Marriage can affect a person's eligibility for federal benefits such as Social Security. Married couples may incur higher or lower federal tax liabilities than they would as single individuals. In all, the General Accounting Office has counted 1,138 statutory provisions—ranging from the obvious cases just mentioned to the obscure (landowners'

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1. *E.g.,* Goodridge v. Mass. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (stating that the majority of governments around the world, including the United States, have not given homosexual couples the same rights as traditional relationships in dealing with income and inheritance tax benefits. This inequality has created a second class status of same-sex relationships.); HOPE LOZANO-BIELAT & DAVID MASCI, SAME-SEX MARRIAGE: REDEFINING MARRIAGE AROUND THE WORLD (2007), http://pewforum.org/docs/?DocID=235 (last visited July 11, 2007); NAT'L ORG. FOR WOMEN, SAME-SEX MARRIAGE IS A FEMINIST ISSUE (2004), http://www.now.org/issues/lgbi/marr-rep.html (last visited Jan. 30, 2008); .

> eligibility to negotiate a surface-mine lease with the Secretary of Labor)—in which marital status is a factor in determining or receiving "benefits, rights, and privileges."[2]

The tax code contains provisions that benefit only married individuals and families. These benefits provide hundreds to thousands of dollars in tax relief to individuals, but only if those individuals fall into prescribed categories.

Part II of this article will explore those categories, and the extent to which the preference for married couples with children furthers one of the goals of society, which is to perpetuate itself. The range of benefits points to an interesting focus: the tax law actively encourages marriage, and especially marriage between opposite gender individuals who appear capable of having children. In fact, one of the largest benefits of the tax system is only available to those couples with children.[3]

Part III examines the treatment a same-sex couple receives under current tax law. The effect is discriminatory and real: same-sex couples are treated as unrelated third parties to each other, and all transactions between the couple are potentially taxable. When contrasted with the same transactions between a married couple, the difference can be stark.

Part IV addresses the issue of functionally equivalent families—that is, non-traditional, family-like arrangements that perform similar functions to traditional families. This part will explore whether other types of "family" arrangements should qualify for the same tax benefits as traditional families. It will analyze the purpose behind the family tax benefits and whether there is really a functional equivalent to a traditional family.

The Defense of Marriage Act (DOMA) prevents same-sex couples from claiming family tax benefits. Part V examines what would happen if the Act were repealed or found to be unconstitutional. Without the Act, the federal tax would depend on each state's definition of marriage. There have been previous instances where federal tax consequences were predicated on state law. The resulting disparity between similarly situated persons residing in different states required Congressional action, and it seems likely that the absence of DOMA would require the same.

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2. CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (2004), *available at* http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf (quoting General Accounting Office, *Defense of Marriage Act: Update to Prior Report*, GAO-04-353R (Jan. 23, 2004)).

3. The child tax credit is scored at over $42 trillion for 2007. OFFICE OF MGMT. AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT 296 (2007) (Tax Expenditures).

Part VI answers the question, “Isn’t this unlawful discrimination?,” in the negative. A long history of cases claiming equal protection violations teaches that the courts are reluctant to second-guess the legislatures in matters of taxation. In fact, tax discrimination is accorded rational-basis scrutiny, so that it is only necessary for a tax rule to have some rational goal to be upheld. Given the purpose of society to perpetuate itself, it seems that constitutional challenges to the traditional family bias of the tax code are doomed to fail.

II. THE TAX LAW PREFERS HETEROSEXUAL FAMILIES

A. Tax Benefits

1. Marriage penalties and bonuses

Consider the tale of Ann and Andy, Betty and Bob, and Clyde.[4] Ann and Andy are married; Betty and Bob are not, but live together; Clyde is a single individual. Ann and Andy make $60,000 and are entitled to a $10,700 standard deduction and two dependency exemptions of $3,400 each for taxable income of $42,500 ($60,000 - $10,700 - $6,800). Their tax is $1,565 + .15($42,500 - $15,650) = $5,593 (rounded up). Although Betty and Bob live together, they are not married, thus each is considered single. Betty will be entitled to a standard deduction of $5,350 and a personal exemption of $3,400 for taxable income of $36,250 ($45,000 - $5,350 - $3,400). Her tax will be $4,386.25 + .25($36,250 - $31,850) = $5,486. Notice some of Betty’s income is taxed at a 25% bracket whereas Ann and Andy’s income is taxed at a maximum of 15%. Bob will also be entitled to a standard deduction of $5,350 and a personal exemption of $3,400 for taxable income of $6,250 ($15,000 - $5,350 - $3,400). His tax will be $625 (all taxed at 10%). Clyde will be entitled to a standard deduction of $5,350 and a personal exemption of $3,400 for taxable income of $51,250 ($60,000 - $5,350 - $3,400). His tax will be $4,386.25 + .25($51,250 - $31,850) = $9,236. Clyde will have $19,400 of his income taxed at 25%. Betty had only $4,400 of her income taxed at 25% and none of Ann and Andy’s income was taxed at 25%. These differences are a function of the “tax brackets” and the filing status (married or not) of the parties. Their incomes and tax liability are set forth below:

4. All tax calculations were done using preliminary 2007 tables.

Taxpayer	**Income**	**Tax**
Ann	$0	$0
Andy	$60,000	$5,593
Betty	$45,000	$5,486
Bob	$15,000	+ $ 625
		= $6,111
Clyde	$60,000	$9,236

Ann and Andy pay the lowest amount of tax. This is due, in part, to the fact that married couples who file jointly are allowed to split their income for tax purposes. This *income splitting* allows Ann and Andy to take advantage of the progressive rate structure of the Code—as a taxpayer makes more money, the tax rate goes up. Income splitting "pretends" that each party earned one-half of the income. Because each earns one-half, neither makes enough to get into a higher tax bracket.

The tax rate increase is not continual; rather, the increase is stepped in brackets. By taking advantage of income splitting, Ann and Andy have effectively moved some of Andy's income from a high tax bracket into Ann's lower (and unused) tax bracket.

This can be readily seen by comparing Betty and Bob's tax liability. While the couple also has $60,000 of income, their tax is slightly higher by $518 ($6,111 - $5,593). Since Betty and Bob are not married, they cannot take advantage of income splitting. As a result, Betty's income crosses into the 25% bracket, and the couple's combined tax is higher than if they were married.[5] This result is called a *marriage bonus*. Were Betty and Bob to get married, they would save $518 on their taxes.

Finally, consider Clyde's tax liability. He makes the same amount as does Andy, or the joint incomes of Betty and Bob, yet Clyde pays the most tax. If Clyde were to find a willing woman and get married, his marriage bonus would be $3,643 (assuming that his wife had $0 income).

Now consider two more couples. Dara and Dan are married, but Emma and Ed are not:

5. If Betty and Bob were each to make $30,000, there would be no bonus—they would pay the same amount as Ann and Andy.

Taxpayer	**Income**	**Tax**
Dara	$0	
Dan	$160,000	$28,893
Emma	$80,000	$14,236
Ed	$80,000	+ $14,236
		= $28,472

If Emma and Ed were to marry, their tax liability would increase. The $421 difference is called a *marriage penalty*.

Dara and Dan compute their income as follows: $160,000 – $10,700 (standard deduction) – $6,800 (2 personal exemptions of $3,400 each) = $142,500. The tax is $24,972 + $3,920 (.28($142,500 – 128,500)). They have $14,000 taxed at the 28% bracket. Emma and Ed each compute their income as follows: $80,000 - $5,350 (standard deduction) - $3,400 (personal exemption) = $71,250. The tax for each is $4,386 + $9,850 (.25($71,250 - $31,850)) = $14,236. Since there are two of them, the combined tax would be $14,236 x 2 = $28,472. Notice they have no income taxed at the 28% bracket. Thus, Dara and Dan will pay $421 more. This extra money is from the $14,000 that was taxed at 3% more (28% vs. 25%).

2. Why bonuses or penalties?

The tax code has long been viewed as a vehicle for social change.[6] In 1975, Professor Bittker stated, "[a] persistent problem in the theory of income taxation is whether natural persons should be taxed as isolated individuals, or as social beings whose family ties to other taxpayers affect their taxpaying capacity."[7] Prior to 1938, the answer was that each spouse was their own tax individual.

> The original income tax laws, however, made no provision for joint filing, so that husbands and wives completed their own tax returns on their individual earnings. The story took a markedly different turn with the escalation of progressive marginal rates during World War I.

6. *See, e.g.,* Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 39 (2006) ("However, policymakers have also increasingly relied on the tax code rather than direct government expenditures to subsidize households and influence their behavior as a result of perceived or real incentives within the tax legislative process . . . .").

7. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1391 (1975).

> Because such rates rise with income, it is better to have two persons each earning $30,000 than one person earning $60,000. Spouses in the typical unequal-earning marriage first tried to acquire this benefit by private contractual agreement (e.g., the husband would sign a document ceding half of his income to his wife), but were thwarted by a Supreme Court opinion holding that income must be taxed to "the man who earned it." But under a later Court ruling in the same year, *Poe v. Seaborn*, spouses in community property states were automatically able to get this "income-splitting" benefit.[8]

Taxes usually should play no appreciable part in family planning.[9] However, Congress also thought it would be fair to have progressive rates so that as income increased, so did an individual's tax burden. These two ideas clashed, but if a state had community property laws, its citizens were better off. Pre-1948 there was no joint filing. This meant that working wives (during and following WWII) were taxed at the family's marginal rate. Each dollar they earned was added on top of any other income the family earned, while an unmarried woman's earnings were taxed beginning at the lowest rates.

> A remarkable bit of social history followed. Because community property rules now generated a tax benefit, a flurry of states reformed their laws, generally by giving wives the minimal rights needed to satisfy the Supreme Court's standards. Congress sought to level the playing field between community property and other states by overruling Seaborn. Congress first moved to equalize matters, however, during World War II, when the revenue needs led to a proposal to tax all married couples as if they were a single unmarried person. This, of course, would make it a tax burden to be married anywhere, as long as both spouses had some personal income, because one spouse's income would simply be added on top of the other's, with no offsetting benefit in the rate structure. This proposal was met by a storm of protests, labeling the possibility of mandatory joint filing "un-American" and "antiwomen."
>
> Seven years later, in 1948, another proposal was made for mandatory joint filing, this time at rates set equal to twice what a single person earning half the total familial income would pay; the community property regime would be adopted, in essence, for federal tax purposes

8. Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 989 (1993) (citation omitted).

9. Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 725-27 (2007).

> (i.e., all income was to be split between spouses). This change was widely praised, and soon after its enactment, the nouveau community property states all reverted to their former equitable interest laws. States were willing to change their nontax laws to get tax benefits for traditional, single-earning families. The quick repeal of these property laws after 1948 demonstrate that the new-found thinking regarding property rights was tax driven.[10]

The history of joint filing also shows that how society feels about "the family" can largely influence the tax policy. Over the years, Americans have had to balance the progressivity of the Code with the impact it has had on families.

3. Specific benefits

a. Head of household. Congress created the "head of household" category for tax purposes in 1951.[11] Most single taxpayers maintaining a home for the benefit of a dependent are providing benefits to society in terms of raising children and, therefore, should receive some of the benefits of tax reduction that married couples obtain through income splitting.

> Essentially, the definition of a "head of household" is an unmarried individual, including one who is legally separated, who maintains a household for the entire year for a dependent. Single taxpayers having no dependents are not in a comparable position. The difference in income tax rates is not related to customary household expenditure. It is, rather, recognition of the extra costs incurred in maintaining children or other dependents.[12]

Returning to our couple Ann and Andy, assume that they have had two children. Compare their tax liability with Francine, a single parent of two children:

10. *Id.* at 989–90.
11. Pub. L. No. 183, 82d Cong., 1st Session (1951).
12. U.S. Dep't of Treas., FAQs: Filing Statutes for Federal Income Taxes, http://www.treas.gov/education/faq/taxes/filing-status.shtml (last visited Jan. 31, 2008).

Taxpayer	Income	Tax	Tax w/o Children
Ann	$0		
Andy	$60,000	$2,573	$5,593
Betty	$45,000	$1,483	
Bob	$15,000	+ $ 625	
		= $2,108	$6111
Francine	$60,000	$3,733	$9,236

Notice that compared to their liability before having children, Ann and Andy have to pay $3,020 less. Also note that compared to Clyde (the single taxpayer), Francine's tax is $5,503 lower.[13] The calculations are the same as in the first example, except the family has two additional dependency exemptions in the amount of $3,400 each, and two $1,000 child tax credits which reduce their tax liability dollar for dollar. Also note that an assumption was made to give both dependency exemptions and child tax credits to Betty rather than Bob, since they would not have been effective if given to Bob. Notice that compared to their liability before having children, Ann and Andy have to pay $3,020 less ($5,563 - $2,000 child tax credits – .15($3,400 x 2) dependency exemptions). Also note that compared to Clyde (the single taxpayer), Francine's tax is $5,503 lower ($2,000 in child tax credits, $1,904 ($6,800 x .28) for dependency exemptions, $700 (.28($7,850 - $5,350)) difference between the standard deduction for a head of household as opposed to a single person, and $899 due to expanded brackets which tax more income at a lesser rate).[14] The tax law implicitly promotes traditional marriage. While Francine is much better off for taxation purposes than Clyde, she pays $1,160 more than do Ann and Andy, who have the same amount of income. Stated another way, if Francine were to find a willing man (with $0 income), the U.S. government would subsidize her with $1,160 in lower taxes every year.[15]

Consider the case of Betty and Bob. Compared with life before children, they pay $4,003 less. We made the assumption that Betty got to claim both children. Notice that Betty's tax has dropped from $5,486 to $1,483 ($2,000 in child tax credits, $1,460 (.25($4,400) + .15($2,400)),

13. Like death, childbearing is not a suggested tool for tax-planning.

14. Like death, childbearing is not a suggested tool for tax-planning.

15. It can be argued that this is simply in recognition of having an extra person in the family. However, note that the personal exemption for 2007 is $3,400, and the tax savings from that exemption is only $510. Therefore, the extra $650 is beyond the amount Congress intended to exempt for extra family members.

$375 (.15($7,850 - $5,350)) increase in the standard deduction from a single person to a head of household, and $168 in change of bracket size reducing the amount of income taxed at a lower rate; thus, all of the decrease is due to Betty's tax change).

This drop in Betty's tax will negate the principal reason for the marriage bonus they would have seen as a childless couple.[16] Now that they have children, the marriage bonus changes to a $465 marriage penalty. However, this change does not contradict the fact that the tax law contains a preference for traditional families, as much as it shows that the law contains a generous bonus for those having children over those who do not.

Betty and Bob are not similarly situated to Ann and Andy. While the two couples nominally make the same amount of money, Ann and Andy are free to transfer their funds between the two of them without tax cost. When the couple buys a home, there is no imputed gift from one to the other. When the non-earner spouse takes money from the checking account to buy food or pay rent, there is no imputed compensation.

Nevertheless, for Betty and Bob, the same is not true.[17] If Bob pays $400 per month to Betty to help defray the grocery bill, for example, the tax law treats that as a payment between two unrelated persons. What is the nature of that payment? Was it a gift? Was it compensation for services? Was it a sale?

Rent paid by Bob to Betty would be includable in her income, and subject to the rules for renting a home, Betty should have deductions.[18] However, does the arrangement contemplate room *and* board? If so, is Bob paying for the provision and storage of food (a service) or for the food itself (inventory)? Does Betty have $4800 more income, and Bob no deduction?[19] This transaction alone could increase Betty and Bob's combined income to $64,800, and every time the couple shares chores, cash, or an apartment, the potential income increases.[20]

As a result, Betty and Bob are really not in the same position as Ann and Andy. In fact, because of that one transaction alone, Betty and Bob's tax would be as follows:

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16. Their marriage bonus (or the fact that they paid higher taxes than a similar married couple) was due to the fact that they could not engage in income splitting, and Betty's income pushed her into a higher tax bracket. With the advent of children, her income is now taxed in that lower bracket once again.

17. *See infra* Part III.B.

18. I.R.C. § 280A (Lexis 2008).

19. Resulting in "double" taxation of the $4800.

20. *See* Treas. Reg. § 1.61-2(d)(1) (as amended in 2003).

Betty	$49,800	$2,203
Bob	$15,000	+ $ 625
		= $2,828
Tax Before		– ($2,108)
Increase		= $ 720

Compared with Ann and Andy, they are worse off by $255 (Betty and Bob's new tax of $2,828—Ann and Andy's tax of $2,573). This is due to the marriage "perk" of being treated as a single economic unit, and not having to compute imputed income due to transfers or exchanges of services between the couple. This "perk" has been embedded in the tax law at least since 1928, and demonstrates the strong bias the tax code has for married couples.[21]

b. Qualifying child. The filing status changes to the tax rates are not the only benefits to taxpayers with children. A "qualifying child" may enable a taxpayer to claim other tax benefits, such as the exemption for a dependent, the child tax credit, the child and dependent care credit, and the earned income tax credit. Prior to 2005, each of these items may have defined "qualifying child" differently, but in 2005, the definition of qualifying child was consolidated to a single definition.[22] To qualify, a child must satisfy four tests:

- Relationship—the taxpayer's child or stepchild (whether by blood or adoption), foster child, sibling or stepsibling, or a descendant of one of these.
- Residence—has the same principal residence as the taxpayer for more than half the tax year. Exceptions apply, in certain cases, for children of divorced or separated parents, kidnapped children, temporary absences, and children who were born or died during the year.
- Age—must be under the age of nineteen at the end of the tax year, or under the age of twenty-four if a full-time student for at least five months of the year, or be permanently and totally disabled at any time during the year.
- Support—did not provide more than one-half of his/her own support for the year.[23]

21. When you consider the added effect parent-child exchanges would have, an even stronger bias towards married couples with children is seen.
22. I.R.C. § 152 (Lexis 2008).
23. *Id.* § 152(c).

For federal tax purposes, only the birth or adoptive parent(s) and their spouses will be able to have a "qualifying child." This means that for purposes of

- head of household status,[24]
- the exemption for a dependent,[25]
- the child tax credit,[26]
- the child and dependent care credit,[27]
- the earned income tax credit,[28]
- the HOPE and lifetime learning credits,[29] and
- the credit for adoption expenses,[30]

only those with children may claim these benefits.

c. Transfers. As mentioned earlier, a married couple, in addition to being able to income split, may also exclude all transfers within the marriage unit.[31] With non-spouses, the tax code treats transfers between individuals as compensation, gifts, loans, etc. In other words, for a married couple, intraspousal transfers are non-tax events.[32] For any other couple, transfers are viewed as if the parties are strangers to each other.[33]

d. Estate and gift tax benefits. A married couple also enjoys several estate and gift tax benefits, including the spousal gift deduction and gift splitting.[34] These mechanisms allow spouses to act as one taxpayer with double the benefits. The spousal gift deduction under I.R.C. § 2523 allows spouses to transfer an unlimited amount of property or cash to one another without recognizing a tax. Same-sex couples cannot take advantage of this statute, and therefore all their intra-relationship transfers may be subject to gift tax.

Gift splitting under I.R.C. § 2513 gives married couples the advantage of allowing them to split any gift given by one spouse as if it was given by both. Therefore if Andy gave a $19,000 gift to a friend, then he would be able to split the gift, utilizing both Andy's and Ann's

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24. *Id.* § 2(b).
25. *Id.* § 152(a).
26. *Id.* § 24(c).
27. *Id.* § 21(b).
28. *Id.* § 32(c).
29. *Id.* § 25A(f).
30. *Id.* § 32.
31. *Id.* § 1041.
32. This is true even in divorce. *See, e.g.*, Katherine D. Podris & Gary J. Podris, *Internal Revenue Code Section 1041 Is Not a Model of Tax Reform Legislation*, TAXES—THE TAX MAGAZINE, June 1991.
33. *See infra* Part III.B.
34. I.R.C. § 2523 (Lexis 2008).

annual exclusion of $12,000, so he could exclude the entire $19,000 gift. If Andy was not married then he would only be able to exclude $12,000 and $7,000 would be subject to a gift tax. This would be the case in relationships that are not viewed as marriage by the federal government.

B. Policy Behind the Tax Benefits

The presence of a marriage penalty or a marriage bonus has troubled tax scholars for decades. The problem lies in balancing three competing goals. As Professor Bittker has written, "[i]n short, we cannot simultaneously have (a) progression, (b) equal taxes on equal-income married couples, and (c) a marriage-neutral tax burden."[35] If we have a marriage-neutral system, then a couple would pay the same tax whether they were married or not. That would favor the two-earner couple but harm the single-earner couple, since for the same amount of income, the two-earner couple has spread that income over two individuals' brackets.

Favoring equality we dismiss neutrality, since we treat the married couple as a unit; we must then accept marriage penalties or bonuses. We could have both equality and neutrality, but we would have to toss our progressive rate scheme out the window.

Tax scholars straddling other fields have made numerous suggestions about how best to balance these goals. Some scholars have proposed doing away with joint filing,[36] while others have suggested that perhaps it is not the married couple, but rather an "economic unit" that should have income splitting.[37]

In view of these suggestions, or maybe despite them, it may well be that we have gotten ahead of ourselves. Having an ideal tax system, or even a tax system that addresses similarly situated taxpayers in an equal manner, is a worthy goal. However, having the tax system drive, or perhaps even motivate, social behavior may be beyond its ability. As Professor Alstott has said, speaking with regard to feminist tax advocates:

> Despite proponents' claims, it is extremely difficult to use tax law rules to change the division of family labor within the household, to improve women's economic well-being, or to increase women's financial power

35. Bittker, *supra* note 7.

36. *See, e.g.*, Pamela Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); McCaffery, *supra* note 8; Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV 339 (1994).

37. Shari Motro, *A New I Do: Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006).

> within the family. This constraint is not unique to tax law, but instead reflects the limited capacity of legal rules governing financial entitlements to change deeply entrenched social norms about gender roles.[38]

If the tax law does not drive societal norms, then what is the purpose?

> Instinct in each of these first three functions of family law [protection, organization, and facilitation] lies a relatively commonplace idea: There are people (particularly children) the law is widely expected to protect, contracts it is widely expected to facilitate, and disputes it is widely expected to arbitrate. However, the last two functions of family law are less self-evident and more controversial. The first of these is the expressive function. . . .
>
> Finally, in the channelling function the law creates or (more often) supports social institutions which are thought to serve desirable ends. . . . Generally, the channelling function does not specifically require people to use these social institutions, although it may offer incentives and disincentives for their use. Primarily, rather, it is their very presence, the social currency they have, and the governmental support they receive which combine to make it seem reasonable and even natural for people to use them. Thus people can be said to be channelled into them.[39]

We can look at the current filing status regime with this lens: Since 1938 we have had joint liability for spouses, and since 1948 we have had joint filing. Whatever the current mix of marriage penalties and bonuses, the tax law has mirrored society's preference for marriage, and not for just any marriage.

Since there is generally a marriage penalty for two-earner couples (which is most pronounced when both spouses earn about the same amount), we can say that current law favors the single-earner couple. Coupled with the other provisions of the code dealing with families and children,[40] we see that the favored status is that of a single-earner couple with *children*.

38. Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2005 (1996).

39. Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497–98 (1992).

40. *See* discussion *infra* Part II.B.

1. Who benefits?

Marriage is a particular arrangement belonging to three parties—the husband, the wife, and the state.[41] Society agrees to view the marriage as one legal entity created by a three-way contract involving the wife, husband, and society. The tax code still takes that approach today with joint filing of married couples. Blackstone did not ascribe this as a natural state of affairs, but rather a creation of society for the benefit of society.[42] "Establishment of marriage in all civilized states is built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation."[43]

Blackstone tells us that the reason for creating a single-family unit in the eyes of society is to provide for children. In fact, one key goal of society is to provide for having children.[44]

> First, the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.[45]

41. *In re* Lindgren, 43 N.Y.S.2d 154, 170 (Sup. Ct. 1943) ("There are three parties to every marriage contract—the two spouses and the state."), *aff'd*, 46 N.Y.S.2d 224 (App. Div. 1943), *aff'd*, 55 N.E.2d 849 (N.Y. 1944); Gant v. Gant, 329 S.E.2d 106, 114 (W. Va. 1985) ("[T]he state is a third party to any marriage contract.").

42. WILLIAM BLACKSTONE, 1 COMMENTARIES *447.

43. *Id.*

44. *See* Jonathan Head, *Japan Sounds Alarm on Birth Rate*, B.B.C. NEWS, Dec. 3, 2004, *available at* http://news.bbc.co.uk/2/hi/asia-pacific/4065647.stm ("The decline in Japan's birth rate is so severe they have invented a word for it—'shoshika,' meaning a society without children. Unless women here start having more babies, the population in Japan is expected to shrink more than 20% by the middle of this century. Nearly half would be elderly, placing impossible burdens on the health and pension systems.").

45. Hernandez v. Robles, 855 N.E.2d 1, 359 (N.Y. 2006).

Our tax code assists the married unit by giving benefits, such as tax credits, to a family unit. The tax benefit given is because of the child and the purpose of this benefit is to directly help the child.[46]

2. *Conclusion*

There may be a marriage bonus, as seen above by comparing the tax liability of Ann and Andy with that of Clyde. That marriage bonus is greater if one spouse does not work.[47] The rationale behind this: the tax law gives the greatest benefit to those marriages best designed to be traditional families. In fact, we could sum up this channeling purpose as follows: *the marriage benefits belong to families with children.*

III. TAXATION OF SAME-SEX COUPLES

Unlike traditional married couples, same-sex couples have no inherent tax advantages. Instead, they face a number of disadvantages natural to any unmarried couple living together, and a number of hidden problems brought on by recent changes in state law.

A. DOMA

In 1996, Congress passed the Defense of Marriage Act, which provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.[48]

Its stated purpose reflects congressional concern that legalizing same-sex “marriage” would lead to problems with interstate relations, federal laws,

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46. *See* Leah Ward Sears, *The “Marriage Gap”: A Case for Strengthening Marriage in the 21st Century*, 82 N.Y.U. L. REV. 1243, 1244 (2007) (“Thus, we should explore how the law can preserve and expand the protections and benefits marriage promises to our children and communities.”).

47. That is not to say that the law subsidizes the stay at home parent. Should Betty (the spouse in the second case) quit her job, the couple would find itself $30,000 less rich. However, the tax law would then equate Betty and Bob with couples that make $30,000 a year, and compared to them, Betty and Bob get a large marriage bonus.

48. Defense of Marriage Act, Pub. L. No. 104-199, § 1105, 100 Stat. 2419 (1996).

the institution of marriage, traditional notions of morality, and state sovereignty.[49] Although DOMA produced a body of law reviews on its own,[50] it has not been successfully challenged in court.[51] DOMA effectively ends the argument about same-sex marriage with respect to federal law and federal tax benefits.

B. Income Tax

If, for federal tax purposes, a same-sex couple is not married, then what is their status? Generally speaking, the "couple" is two single taxpayers. No election to file jointly is available. No income splitting is available.

The impact of this limitation can be illustrated with a simple example. Stacey and Tina live together. While each maintains her own checking account and pays her own bills, Stacey is a chef-in-training and Tina runs a landscape design business; therefore, they agree that Stacey will do the cooking and Tina will care for the yard. How does the tax law view this arrangement?

If a married couple that elected to file jointly were to engage in the same transaction, the law would not care about the tax consequences. This, strangely enough, has less to do with tax law than it does reliance upon the legal autonomy of family relations. The earliest examples of this involve two cases heard by the Board of Tax Appeals. In *Burkhart v. Commissioner*, the husband attempted to pay his wife for her duties as a housewife.[52] In *Appeal of Robinson*, the wife attempted to pay her husband for giving up his seafaring life.[53] In both cases, the court ignored the payments. In both cases, the court assumed that there could be no income realized by the transferee, and the *Robinson* court made this conclusion about the attempted transfer:

> It is also argued that, in case the entire amount of the trust income is determined to be income to the taxpayer [wife], the part thereof going

49. H.R. Rep. No. 104-664 at 1–18 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905–23.

50. *See, e.g.,* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1247 n.49 (3d ed. 2000); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); *see also* Mark Strasser, *Marriage, Transsexuals, and the Meaning of Sex: on DOMA, Full Faith and Credit, and Statutory Interpretation*, 3 HOUS. J. HEALTH L. & POL'Y 301 (2003).

51. *See* Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006); Wilson v. Ake, 2004 WL 3142528 (M.D. Fla. 2004); *In re* Kandu, 315 B.R. 123 (Bankr. W.D. Wash. 2004); Bishop v. Oklahoma *ex rel.* Edmondson, 447 F. Supp. 2d 1239 (N.D. Okla. 2006).

52. Burkhart v. Comm'r, 11 B.T.A. 275 (1928).

53. Appeal of Robinson, 4 B.T.A. 504 (1926).

> to the husband was under the contract a business expense to the taxpayer. We think it plain enough without discussion that this agreement between them was purely a family arrangement arising out of the marital relation, and that it was not entered into by the taxpayer for pecuniary profit.[54]

While this comment was directed at the attempted deduction, it has been assumed that intramarital services do not produce income.

At least one commentator has suggested that the same rationale might not apply to same-sex couples.[55] That is certainly a reasonable inference, although not strictly statutory, since the exclusion for imputed domestic income is not statutory, but instead has a rather sketchy history.[56] What this means generally is that same-sex couples may have imputed income from each non-gift transfer of property and from every exchange of services.

C. Transfers

Transfers between unmarried persons can also lead to both gift and estate tax problems.

> Under current tax rules, the creation of a joint tenancy usually constitutes a taxable gift if the tenants' contributions to the purchase or improvement of the property are unequal. For example, if Anna makes a $30,000 down payment to enable Anna and Beth to purchase a home as joint tenants, Anna will be viewed as making a $15,000 gift to Beth. . . . The creation of the joint tenancy is viewed as a completed gift of half the value of the property because, in most cases, the donee tenant can sever the joint tenancy unilaterally. The severance would convert the joint tenancy into a tenancy in common, whereby Beth would own an undivided one-half interest in the property. The IRS maintains the position, as reflected in the Treasury Regulations, that

54. *Id.* at 506.

55. Patricia Cain, *Taxing Women: Thoughts on a Gendered Economy, Symposium: The Income Tax: Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471, 477–78 (1997); Shari Motro, *supra* note 37, at 1537–38.

56. Smith v. C.I.R., 40 B.T.A. 1038, 1039 (1939) ("There results no taxable income from the performance of [a wife's] service and the correlative expenditure is personal and not susceptible of deduction."); Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV. 1573, 1608 (1977) (noting that benefits from household services and home ownership are tax free); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1577–78 (1996). *But cf.* Bruce Wolk, *Federal Tax Consequences of Wealth Transfers Between Unmarried Cohabitants*, 27 UCLA L. REV. 1240, 1248–49 (1980) (stating that cohabitants must pay tax on exchanged services).

> because Beth has the unilateral power to vest half the property in herself, Beth must be viewed as owning half the property outright from the time the joint tenancy was created.
>
> While creation of the joint tenancy is considered a completed transfer for gift tax purposes, it is not viewed as a completed transfer for estate tax purposes. Under section 2040 of the Code, if the home is still owned by Anna and Beth as joint tenants at Anna's death, the transfer will be viewed as though it occurred at the death of Anna rather than at the time of the inter vivos transfer. The specific rule of section 2040 establishes a rebuttable presumption that the first joint tenant to die contributed 100% of the purchase price to acquire the property. Unless the presumption is rebutted, 100% of the value of the property will be included in Anna's estate at her death.[57]

That same transaction, where one spouse alone pays the $30,000 down payment on property to be held in joint tenancy, has no gift or estate tax consequences for married couples.[58]

D. Estate and Gift Tax

Same-sex couples enjoy no benefits under the estate and gift tax. They do not get the benefit of the spousal gift deduction. This means that under current law, each gift in excess of $11,000 is taxable as a gift to the donor, and is counted against the donor's applicable exclusion amount. When the donor's applicable exclusion amount is used up, the gift and estate tax will kick in.

E. Number of Tax Returns Filed

Quiz #1: Same-sex couples who both have income and who married in Massachusetts will prepare how many tax returns this April?[59]

a. 0
b. 2
c. 3
d. 4
e. 5

57. Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 476-78 (2000).

58. I.R.C. §§ 2040, 2523 (Lexis 2008).

59. Example taken from Eva Rosenberg, *Giant Tax Headaches for Gay Couples*, http://articles.moneycentral.msn.com/Taxes/PreparationTips/GiantTaxHeadachesForGayCouples.aspx?page=all (last visited Feb. 1, 2008).

Since May 16, 2004, Massachusetts law has permitted same-sex couples to marry.[60] Massachusetts same-sex couples must file state taxes as married (joint or separate).[61] However, for federal tax purposes, the couple is not married. For federal purposes, each spouse must file as a single individual. That is three returns so far.

Massachusetts law does not have its own definition of income: "Massachusetts gross income shall mean the federal gross income . . . ."[62] Therefore, to arrive at Massachusetts gross (joint) income, the couple would need federal gross (joint) income.

The correct answer is "d." The couple would prepare two federal returns (to be filed), a dummy federal joint return (to get the numbers for the Massachusetts return), and a Massachusetts joint return.

Quiz #2: Assume the federal government repeals DOMA and changes its definition of marriage. If that same couple were to move to Utah, how many returns would they need?

a. 0
b. 2
c. 3
d. 4
e. 5

The correct answer is now "e." The couple would be able to file a joint return for federal purposes, but Utah prohibits same-sex marriages.[63] Since Utah, like Massachusetts, has no independent state definition of income,[64] two dummy federal returns would have to be prepared from which to pull the state numbers and then two actual state returns would have to be filed. That makes five total returns. The complexity has only begun.

What if a couple moves from a state which allows same-sex unions to a state which does not? What if they have income from multiple states and need to file in each of those states? The following chart shows states that recognize same-sex unions or marriages:

60. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

61. Mass. Dept. of Revenue, TIR 04-17: Massachusetts Tax Issues Associated with Same-Sex Marriages, http://www.mass.gov (search for "TIR 04-17 and follow link) (last visited Apr. 29, 2008).

62. MASS. GEN. LAWS ch. 62, § 2(a) (West 2008).

63. UTAH CONST. art. I, § 29.

64. UTAH CODE ANN. § 59-10-103(1)(y) (2007).

State	Effective date	Type of union	Joint tax return	Highest tax rate; income level at which it applies
CA	Jan. 1, 2007	Domestic partner	Yes	9.3%; greater than $43,467
CT	April 20, 2005	Civil unions	Yes	5%; greater than $10,000
DC	June 24, 1995	Domestic partner	Yes	9%; greater than $30,000
HI	July 8, 1997	Reciprocal beneficiary	No	8.25%; greater than $40,000
ME	July 30, 2004	Domestic partner	Yes	8.5%; greater than $18,250
MA	May 16, 2004	Marriage	Yes	5.3%; flat rate
NJ	Feb. 19, 2007	Civil unions /RDP	Yes	8.97%; greater than $500,000
VT	Dec. 20, 1999	Civil unions	Yes	9.5%; greater than $336,500
NH	Jan. 1, 2008	Civil unions	No?	No state income tax

It is not clear how couples in these states will file. For one example of the complexity, Connecticut's civil union law initially specified that parties to a civil union would be able to file jointly,[65] but Connecticut's income tax statute based the tax on the federal filing status.[66] Connecticut rectified this oversight with the passage of Public Act 05-03, § 58 (July 2005).

In each state which uses some form of the federal income as a base, it is common for adjustments to be made. If the federal and state tax systems are not aligned (as will happen when a couple is married for state purposes, but not for federal purposes), those adjustments can cause confusion as well.[67] A continued push for same-sex recognition will only mean more confusion when dealing with the tax laws. For some couples, it will in fact mean increased costs, both direct (in terms of more tax liability) and indirect (for example, more returns needing to be prepared).[68]

65. CONN. GEN. STAT. § 46b-38pp (2007).

66. *Id.* § 12-700 (2007).

67. To name just a few areas of confusion: Will capital gains and losses for the couple be treated individually or netted? Will the couple be able to combine the exclusion for the gains from a principal residence? Which adjusted gross income figure will they use?

68. Moreover, you can forget using TurboTax. The popular tax software doesn't even touch this.

IV. FUNCTIONALLY EQUIVALENT FAMILIES

Section II.B noted that benefits were given to couples who had children, and that those benefits were to assist the family in raising children. If a non-traditional family-like unit, which is not a nuclear family consisting of father, mother, and children, performs the same functions of child rearing, shouldn't they get the same benefits under the tax code?

The argument is appealing.[69] There is a certain horizontal equity-ness to it, until you realize that what we are trying to compute is an income tax. That means that all income is includable, but only those deductions specifically given by Congress are deductible. So, generally speaking, only deductions that specifically relate to the production of income (business deductions, certain types of losses, deductions attributable to the production of income, etc.) are allowed.

However, Congress has allowed for other types of deductions as well. These generally fit into two categories. They are either (1) totally capricious, have nothing to do with a rational computation of income tax and exist only because there was a lobbyist pushing for them, or (2) deductions offered for some non-governmental benefit to society, in a quid pro quo manner. True, there are a number of the former, but far more of the latter.

Examples of deductions that are quid pro quo beneficial would include the deduction for charitable donations, the medical expense deduction, and the deduction for retirement contributions. None of these are necessary for the computation of an income tax. Each, however, serves to benefit society in a way that seems advisable to Congress. The charitable donations advance work that might be more efficiently done by organizations other than government.[70] Medical expense deductions recognize that a taxpayer with truly extraordinary medical costs does not have the same ability to pay that other taxpayers do.[71] Retirement contribution deductions encourage taxpayers to save, which in turn supports the economy.[72]

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69. *See, e.g.,* Linda Newstrom, Note, *The Horizon of Rights: Lessons from South Africa for the Post-Goodridge Analysis of Same-sex Marriage*, 40 CORNELL INT'L L.J. 781, 791 (2007).

70. Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1399 n.19 and accompanying text (1988).

71. Thomas D. Griffith, *Theories of Personal Deductions in the Income Tax*, 40 HASTINGS L.J. 343 (1989); William Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972).

72. "Granting a deduction to employers and employees when they contribute to a retirement account for the employee's benefit is consistent with the national policy of providing for the care and support for the elderly without draining the resources of the working market economy." Darryll K. Jones, *The Neglected Role of International Altruistic Investment in the Chinese Transition Economy*,

Deductions relating to the family and children also fall into this category of societally bargained-for deductions. Moreover, what is the quid pro quo for these deductions? The Supreme Court in *Skinner v. Oklahoma* said, "Marriage and procreation are fundamental to the very existence and survival of the race."[73] A society without children will soon die out. It therefore is a legitimate, if not vital, goal of society to encourage its own perpetuation through marriage and childbearing.[74]

The justification for marital and child rearing tax benefits really mean nothing if there are no children involved. However, how do we know which marriages will produce children? What proof is required? How do we know that a non-nuclear family is performing an equivalent service to society?

We do not require proof of intimacy to extend marriage benefits. We do require a child to be present for the additional child-rearing benefits to apply, but we certainly do not have a child rearing test (bring in your dirty diapers to get a credit!). So why not extend tax benefits to every couple? We allow elderly and infertile couples to marry and obtain tax benefits. Why not same-sex couples?

The answer is found in the only question that could be asked in a tax system. For charitable donations, proof of the donation is required. The same is true for medical expenses and retirement savings. In fact, it is true for many of the child deductions as well: payment of the necessary expenses on behalf of a qualifying child will allow the deduction. However, the greatest number of benefits—the full range of tax dispensation—is reserved for those who can (1) produce and (2) rear a child or children. How do you substantiate that?

It is the combination of these two roles for which society offers the marital tax benefits. Furthermore, in deference to personal privacy, society cannot ask a couple what efforts they are expending to fulfill the bargain. So instead, Congress adopts a bright line test: those couples who fit into the class of persons who could provide both roles get the benefits. It is that simple. Is it exact? No.[75] The test is both over-inclusive and

36 GEO. WASH. INT'L L. REV. 71, 92 (2004).

73. Skinner v. Oklahoma *ex rel* Williamson, 316 U.S. 535, 541 (1942).

74. *See* Steven Ozment, *Diminishing Europe: The Good Life in Germany Does Not Include Children*, THE WEEKLY STANDARD, Oct. 8, 2007, *available at* http://www.weeklystandard.com /Content/Public/Articles/000/000/014/168gqjij.asp?pg=1 ("A society without children is a society without a future.").

75. *See* Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 868 (8th Cir. 2006) ("But under rational-basis review, 'Even if the classification . . . is to some extent both underinclusive and overinclusive, and hence the line drawn . . . imperfect, it is nevertheless the rule that . . . perfection is by no means required.' Legislatures are permitted to use generalizations so long as 'the question is at least debatable.' The package of government benefits and restrictions that accompany the institution of formal marriage serve a variety of other purposes. The legislature-or the people through the

discriminatory. It is over-inclusive in that some opposite-gender married couples will never have children, but yet will qualify for some of the tax benefits. It is discriminatory because some family arrangements that care for and raise children do not qualify for all the tax benefits, although they are given some of the benefits aimed at helping the children. Then again, what other test could there be, that would not throw wide open the door of possibility of tax gamesmanship?

V. IS DOMA SEPARABLE FROM THE TAX CODE?

Policy reasons aside, the practical reason that tax benefits do not flow to same-sex couples currently is that DOMA removes the definition of marriage from state control. If DOMA were to be repealed or held unconstitutional, would tax benefits be available to same-sex married couples?

The answer to that question is complex. Under our constitutional system, we would prefer to have state family law control the definition of a marriage. However, we have to compute a federal income tax, and we have two precedents in this regard where states, in their exercise of their sovereignty, have created confusion in the tax system.

A. Joint Filing

The first precedent that has created tax problems is found in the history of joint filing. In the early part of the twentieth century, a relatively new income tax system was trying to come to grips with fairly taxing the nation. Complicating matters was the fact that some states used a common law property system, where each spouse's earnings belonged to them, while other states employed a community property system, which treated marital earnings as shared. A bill requiring mandatory joint filing was floated for a few years, but ultimately died in 1941. In the meantime, two states, Oklahoma and Oregon, attempted to secure for their citizens the advantages of community property income sharing by enacting elective community property systems in 1939 and 1943, respectively.

The Supreme Court, however, struck down these attempts in *Commissioner v. Harmon*,[76] reasoning that since the community property

initiative process-may rationally choose not to expand in wholesale fashion the groups entitled to those benefits. 'We accept such imperfection because it is in turn rationally related to the secondary objective of legislative convenience.'") (citations omitted).

76. Comm'r. v. Harmon, 323 U.S. 44 (1944).

arrangement was elective, it was no more effective than the assignment of income, which the Court invalidated in *Lucas v. Earl*.[77] Oklahoma and Oregon got the message, and made their community property systems mandatory. The IRS approved these two states as having valid community property systems, and soon Hawaii, Nebraska, Michigan, and Pennsylvania changed their property systems as well. Other states, including Massachusetts and New York, apparently feeling left out, began to consider a change to community property.

In 1948, faced with a growing tax disparity between married couples in different states, Congress faced a choice. It could revisit the mandatory joint filing proposal, but would now face more states committed to defeating it. It could legislate that income would be taxed to the earner, despite the state classification of community property (also politically unpopular). It could do nothing, which in effect would result in a nationwide adoption of community property laws.

Instead, Congress passed an elective joint filing bill. This had the double benefit of not being a direct attack on state sovereignty, but at the same time, stole all the thunder from a state contemplating a change in its property laws for tax benefits alone. Soon after, many of the new community property states reverted to their old property laws.[78]

B. Limited Liability Companies

The second example of a bad precedent for tax law occurred in the 70s and 80s with the advent of limited liability companies (LLCs). Wyoming started this by asking the question—not unlike the question of legalizing same-sex marriage—what happens if we change the definition of a corporation? You see, we inherited corporations from the British, who may have stolen the idea from some other source.[79] The corporate form was seen as rigid, but granted limited liability to the owners. Partnerships, on the other hand, were seen as flexible but lacking liability protection.

In 1977, Wyoming became the first American state to enact a true LLC, which combined corporate limited liability with partnership attributes. The problem was again uniformity among the states, this time in terms of tax classification.

77. Lucas v. Earl, 281 U.S. 111 (1930).

78. Susan Kalinka, *Federal Taxation of Community Income: A Simpler and More Equitable Approach*, 1990 Wis. L. Rev. 633, 634 n.3; Calvin G. C. Pang, *Slow Baked, Flash-Fried, Not to Be Devoured: Development of the Partnership Model of Property Division in Hawai'i and Beyond*, 20 U. HAW. L. REV. 1, 27 n.105 (1998).

79. New Internationalist, A Short History of Corporations, July 2002, http://www.newint.org/features/2002/07/01/history-of-corporations/ (last visited Apr. 8, 2008).

Prior to Wyoming's experiment, federal taxation of business enterprises was primarily grouped into two categories: corporations and partnerships. Deciding into which category a business would fall involved a multi-factor test.[80] In the years following 1977, many other states started to experiment with adjusting the line between corporations and partnerships, until the various differences in state business entities made interstate business planning a nightmare. It was next to impossible to tell whether an LLC formed in one state would in fact be treated as a partnership (as was usually the goal) for federal purposes, and how that entity would be treated in the other states where it did business.

As the complexity started by the LLC experiment grew, so did the cost of doing business because tax attorneys had to be consulted for opinion letters with each new business formation.[81] To fix this, the U.S. Treasury issued proposed check-the-box regulations on May 9, 1996.[82] These regulations provided a series of yes/no questions, which, when answered, would provide a clear classification of the type of business entity. The check-the-box regulations, like the elective joint return in 1948, ended the need for states to experiment, since it provided for easier qualification of non-corporate entities.

C. A Post-DOMA Tax Code

In a post-DOMA world, states would be free to fashion their own definition of marriage, to which federal tax benefits would attach. Like the examples of community property in the 1940s and the LLC in the 1980s, it is likely that a serious disparity between the states would soon develop. In fact, it would be probable that at least one state would attempt to define marriage in such a way that non-cohabiting, non-family pairs[83] of any description could elect "marriage" simply to gain tax benefits.

In such a world, Congress would again have to act to restore rationality. The choices facing Congress would be (1) do nothing, and allow all states to define marriage as broadly as they will, (2) define

80. *See* Morrissey v. Comm'r., 296 U.S. 344 (1935); United States v. Kintner, 216 F.2d 418, 421–24 (9th Cir. 1954).

81. New York State Bar Association Tax Section, *NYSBA Tax Section Strongly Endorses Check-The-Box Entity Classification Proposal*, 95 Tax Notes Int'l (TA) 172-13 (Sept. 6, 1995) ("[T]he 'check-the-box' system would dramatically reduce interpretative and compliance burdens for taxpayers and the government without changing the classification outcome in very many cases. The Committee has therefore concluded that the Treasury does have the authority to issue regulations implementing the 'check-the-box' system for domestic unincorporated entities.").

82. Prop. Treas. Reg. § 301.7701, 61 Fed. Reg. 21990 (May 13, 1996).

83. Or groups—why would the number of spouses need to be limited to two?

marriage for federal purposes in a way to withstand Fifth Amendment scrutiny,[84] or (3) define marriage broadly itself.

There are two arguments suggesting that Congress would choose the second option. The first is that either of the two other options entails a great deal of work. There are dozens if not hundreds of tax provisions implicated by the definition of marriage. Congress would either have to repeal all benefits for marriage or engage in a major "marriage overhaul" of the tax code. Failure to do so would mean inconsistency and years of uncertainty litigating marriage benefit issues.

The second argument is similar. A change in the tax definition of marriage would invite the questions "Who qualifies and why?" The current tax benefits are tied to a societal goal. Expanding the class that gets those benefits begs the question of whether the benefits still advance the goal. That in turn, could lead to the suggestion that tax benefits for marriage and children be removed from the code altogether.

While stranger results have occurred, it seems that faced with a post-DOMA tax code, Congress would act to replace the definition of marriage, for tax purposes, as between a couple capable of both producing and rearing children.

VI. TAX LAW AND EQUAL PROTECTION

Is the definition of marriage as between a man and a woman for tax purposes, with or without DOMA, a violation of equal protection? The answer is found in the curious jurisprudence surrounding taxation.

A. Fourteenth Amendment Equal Protection

In *Dane v. Johnson*, in response to the suit by a citizen of Massachusetts, the Supreme Court said:

> [I]t may plainly be derived from the cases cited that since the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class paying a given tax, it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the states for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the state Legislatures; and that where, as here, conflict

84. That is, in a manner rationally related to the purpose of the deduction.

> with federal power is not involved, a state tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing.'

Then, quoting Chief Justice Marshall, the Court continued:

> 'This vital power [of taxation] may be abused, but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally.'[85]

"It appears that Equal Protection does not generally apply to economic disparities."[86] True, a tax that discriminates based on some suspect classification should be subject to equal protection claims.[87]

> [H]owever, the Internal Revenue Code clearly affects some apparently equally-situated taxpayers differently. While two taxpayers may have the same income, the Code treats differently the taxpayer who is chronically ill and incurs medical expenses, the taxpayer who suffers a substantial casualty loss, and the taxpayer whose income is derived from investments rather than labor. Those who recoup damages for non-physical injuries are treated differently from those who suffer physical injuries. Married women are treated differently than unmarried women by having their income taxed at a higher marginal rate owing to their husband's relatively high income. Such disparities seem not to have troubled the Court.[88]

For example, in *Kahn v. Shevin*, Florida provided a $500 tax exemption to widows, but not to widowers. The state's purpose in doing so was the

85. Dane v. Jackson, 256 U.S. 589, 598–99 (1921) (citation omitted).

86. Leo P. Martinez, *The Trouble with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413, 434 (2004).

87. *But see* Mfr's Hanover Trust Co. v. United States, 775 F.2d 459, 461 (2d Cir. 1985) ("Although the challenged IRS practice did distinguish between males and females, the gender classification was substantially related to the important governmental objective of promoting equity and fairness in estate taxes by accurately valuing reversionary interests.").

88. Martinez, *supra* note 86, at 434–35.

reduction of "the disparity between the economic capabilities of a man and a woman." Upholding the state statute, the Supreme Court said, "[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperiled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation."[89]

In 1940, the Supreme Court said, "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification."[90] This sentiment actually dates back to the year the Sixteenth Amendment was ratified: "The power of exemption would seem to imply the power of discrimination, and in taxation, as in other matters of legislation, classification is within the competency of the legislature."[91]

> Tax legislation, then, quite plainly is unique. The extreme reluctance to second-guess the taxing authorities reveals the Court's implicit support for the proposition that taxes play a vital role in the existence and functioning of the government. . . .
>
> Notwithstanding the notion that fairness or equity limits the power to tax, the deference to legislative power is thematic, and carries through the Court's opinions on all tax matters. What we are left with, whether satisfactory or not, is that 'the Constitution grants legislators, not courts, broad authority (within the bounds of rationality) to decide whom they wish to help with their tax laws and how much help those laws ought to provide.' Accordingly, "[t]he 'task of classifying persons for . . . benefits . . . inevitably requires that some persons who have almost equally strong claim to favored treatment be placed on different sides of the line,' and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration."[92]

B. Fifth Amendment Equal Protection and Due Process

The preceding cases dealt with the Fourteenth Amendment's application to state tax laws. By its terms, the clause restrains only state governments. However, the Fifth Amendment's due process guarantee, beginning with *Bolling v. Sharpe*,[93] has been interpreted as imposing the same restrictions on the federal government. "Congress and not the

89. Kahn v. Shevin, 416 U.S. 351, 355 (1974).
90. Madden v. Commonwealth, 309 U.S. 83, 88 (1940).
91. Citizens' Tel. Co. v. Fuller, 229 U.S. 322, 329 (1913).
92. Martinez, *supra* note 86, at 437–38.
93. Bolling v. Sharpe, 347 U.S. 497 (1954).

courts has the right to select the measure and objects of taxation and such taxes are valid unless constitutional provisions are violated."[94]

In 1996, Congress changed the rules regarding exclusion of tort recoveries. In upholding the change, the Court stated,

> Because the statutory provision in question does not "interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race," the distinction that it creates is constitutional as long it bears a rational relationship to a legitimate government purpose. The legislature has particularly broad discretion in creating distinctions in tax statutes, and "is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it." "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."[95]

This leaves us with two conclusions. First, although an argument may be made for inclusion of "functionally equivalent" families in the tax benefits provided to traditional families, the legislature may, nonetheless, draw the line at families who are capable of producing children. Such a distinction, while discriminatory, is not sufficient to implicate equal protection concerns.[96]

The second is related to the first. Same-sex couples, whether with children or without, are not similarly situated to opposite-sex couples in the eyes of the tax law. As a result, given the unique position of tax law with respect to judicial deference, no challenge to the classification of traditional families as preferential would prevail.

94. Flint v. Stone Tracy Co., 220 U.S. 107, 167 (1911).

95. Young v. United States, 332 F.3d 893, 895–96 (6th Cir. 2003) (citations omitted).

96. *See* Collins Music Co. v. United States, 21 F.3d 1330, 1337 n.12 (4th Cir. 1994) ("It is well settled that Congress has much latitude in formulating prerequisites to deductions and that, frequently, only some subset of a group of substantially similarly-situated taxpayers will be entitled to a deduction because only the members of that subset fit the precise statutory requirements delineated by Congress for the deduction.") (citing Wisely v. United States, 893 F.2d 660, 666 (4th Cir. 1990) ("Deductions are a matter of legislative grace, and the taxpayer seeking the benefit of a deduction must show that every condition which Congress has seen fit to impose has been fully satisfied.")).

VII. CONCLUSION

Tax law prefers traditional married couples with children. The range of benefits runs from cradle[97] to grave,[98] including child tax credits, adoption credits, dependent care credits, education credits, and spousal transfer deductions. Some benefits that are specifically designed to help the child are available equally to single parents or same-sex couples. However, the full range of tax benefits—including tax-free spousal transfers—is available only to opposite-sex married couples.

The tax law encourages individuals to marry and have children, not because it is an essential component of the tax, but because it is an essential part of society. Other types of couples or individuals may choose to have children, and some may choose to raise children born to others. Some opposite-sex married couples may not choose to have children at all, and some may be lousy parents. However, the tax law does not involve itself in interviewing prospective parents regarding their plans to have children or their child-rearing skills. Instead, the tax law implements society's desire to provide an incentive for that institution which seems best suited to perpetuate society—the traditional family.

Within the traditional family, the combination of the potential for a stable relationship, the ability to procreate, and the environment to rear children has resulted in a package of tax benefits. Even though individual benefits may be claimed by others due to imitation of some of the roles filled by the traditional family, only the traditional family justifies this tax accommodation.

A same-sex couple may not have a child without involving a third party, which is not the same for an opposite-sex couple. The same-sex couple also lacks a parent of one gender. An unmarried opposite-sex couple is also different from a married couple, for while they may have children without the involvement of a third party, there is a risk that one party may leave the relationship without notice. Risks do exist in every parenting relationship, but the tax law does not require mathematical precision to extend benefits. In guessing which types of couples will most likely produce the desired continuation of society, Congress need only act rationally.

Courts and legislatures looking at other areas of the law have concluded that disallowing same-sex couples to be married is discriminatory. However, changing the definition of marriage is a sweeping change and implicates a host of issues, not the least of which

97. *E.g.,* I.R.C. § 24 (Lexis 2008); I.R.C. § 23 (Lexis 2008).
98. *E.g.,* I.R.C. § 2056 (Lexis 2008).

involves federal tax benefits. Despite what may happen in other areas of the law, the justification to change the tax law is not present. Same-sex couples may qualify for some child benefits that are available to single parents, but the full range of incentives are not now, nor are they likely to be in the future, available to same-sex couples.