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## DEALING WITH DOMA: FEDERAL NON-RECOGNITION COMPLICATES STATE INCOME TAXATION OF SAME-SEX RELATIONSHIPS

CARLTON SMITH\* AND EDWARD STEIN†

### *Abstract*

*Various states now recognize relationships between people of the same sex, but due to the Defense of Marriage Act, the federal government does not. In the context of income taxes, this combination of state recognition and federal non-recognition of same-sex relationships produces a significant problem for many same-sex couples and some state taxing authorities. Most states have income tax and, typically, state income tax laws "piggyback" on federal income tax laws. Depending on the state, same-sex couples in legally-recognized relationships must file their state income tax returns as married (either "filing jointly" or "filing separately"), as domestic partners, or as parties to a civil union. Such same-sex couples cannot, however, file their federal income tax returns as a couple. For same-sex couples, this situation creates uncertainty and complications and probably increases the risk of audit. It is also an unfair affront to the dignity of lesbians, gay men, and bisexuals. The Article examines this problem by surveying the guidance from thirteen states and the District of Columbia with respect to the taxation of same-sex relationships and by considering each jurisdiction's actual income tax practices. The Article also recommends best practices for state taxing authorities, including: (1) amending state tax laws to specifically allow joint filing by same-sex couples; (2) issuing more guidance to same-sex couples on specific relevant issues; (3) adding boxes to state tax returns to indicate that these returns will involve nonconformity with federal filing status; and (4) not requiring same-sex couples who file state joint income tax returns to also complete "pro forma" federal "married" income tax returns.*

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## INTRODUCTION

Starting in 2000, some states began to legally recognize same-sex relationships.<sup>1</sup> This legal recognition sometimes takes the form of marriage and sometimes takes the form of a relationship identical to or nearly identical to marriage for purposes of state law. However, due to the Defense of Marriage Act (DOMA),<sup>2</sup> the federal government has refused to recognize these relationships in most circumstances. (Some states have enacted laws or constitutional amendments that have a similar effect in the respective states.)<sup>3</sup> This non-recognition produces a peculiar state of affairs: a same-sex couple with a legally-recognized relationship from one state will find that their relationship has no legal status in other states, a different legal status in still other states, and only a limited status in the eyes of the federal government.<sup>4</sup> This patchwork of recognition and non-recognition cuts across a variety of contexts related to family law. While this situation is not unprecedented in U.S. history (for example, until 1967, a similar patchwork of legal recognition and non-recognition existed for interracial marriages<sup>5</sup>), the situation is both peculiar and problematic.

This problematic state of affairs is made possible partly by the federalist form of government in the United States and can be analyzed generally as a conflict of laws issue. There are virtues and vices to federalism and the patchwork of state laws it can potentially produce. In this paper, rather than critique the patchwork that exists today, we take it as a given for the time being and focus on one particular locus of law affected by the varied landscape for same-sex relationships, namely income tax. Looking at state income taxes in light of the federal government's refusal to recognize legally-sanctioned same-sex relationships provides a unique lens into the patchwork of recognition and non-recognition for same-sex relationships. The existence of this patchwork has been frequently discussed

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1 VT. STAT. ANN. tit. 15, §§ 1201–1207 (2010) (passed in 2000 in response to *Baker v. State*, 744 A.2d 864 (Vt. 1999)).

2 Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (West 2005) and 28 U.S.C. § 1738C (West 2006)).

3 Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 183 (2012) (Map 2) [hereinafter *Topography*]. Since *Topography* was published, North Carolina passed a constitutional amendment banning same-sex marriages and other marriage-like relationships. N.C. CONST. art. XIV, § 6 (2012).

4 See generally ANDREW KOPPELMAN, SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES (2006); *Topography*, *supra* note 3.

5 See *Topography*, *supra* note 3, at 182. See generally MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH CENTURY SOUTH (1999); RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE (2001); PETER WALLENSTEIN, TELL THE COURT I LOVE MY WIFE (2002).

by commentators, but here we offer a detailed case study of the phenomenon in the distinctive context of state income taxes.

In a state with an income tax, when a same-sex couple marries, enters a civil union, or enters a certain type of domestic partnership, both the couple and the state taxing authority will have to deal with an assortment of distinctive tax-related issues because the federal government does not recognize same-sex relationships for tax purposes.<sup>6</sup> While not all states with an income tax have issued guidance to taxpayers in same-sex relationships about how to comply with state income tax requirements in the face of federal non-recognition, a significant body of guidance has now been created. Without such important guidance, same-sex couples in legally-recognized relationships face unclear and more complicated tax filing scenarios that result in greater hassle, greater tax-preparation expenses, and greater risk of audit. Further, the lack of good guidance exacerbates the inequality and dignitary harm that exists because of DOMA.

The project of looking at the effect of DOMA on state income tax has an additional benefit of undermining two common and mistaken ideas, one about family law and one about tax law. First, it is commonly assumed that family law is, at least primarily, state law.<sup>7</sup> Second, it is commonly assumed that tax law is primarily federal law. Both assumptions are unfounded. There is a great deal of family law that is federal law, including immigration law, social security law, citizenship law, welfare law, veteran benefits law, etc.<sup>8</sup> Furthermore, although most individuals pay more federal than state income tax, state tax law is more varied and complicated and contains most of the interesting constitutional issues under the Due Process, Commerce, Equal Protection, and Privileges and Immunities Clauses. Focusing on a topic at the intersection of family law and tax law provides an important perspective to make evident the interest and importance of both state income tax and federal family law.

More specifically, this article focuses primarily on two issues: (1) whether and how jurisdictions permit same-sex couples to file married (or equivalent to married) income tax returns (jointly or separately), and (2) what, if any, guidance those jurisdictions have

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6 As discussed below, *infra* text accompanying note 56, the federal government will recognize the community property division of marital property when a same-sex couple in a legally-recognized relationship lives in a state that takes the community-property approach to marital property.

7 See, e.g., Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004); Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 619–25 (2004).

8 See, e.g., Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007); Hasday, *supra* note 7; Stein, *supra* note 7, at 619–25.

given to same-sex couples to comply with tax and related laws dealing with marriage or other legally-recognized adult domestic relations. We survey the guidance and the actual practices of states and identify some of the more interesting issues in state income taxation of legally-recognized same-sex relationships. This article offers an up-to-date survey of different states' approaches to income tax related to same-sex relationships, thereby providing a snapshot in a fast-developing field.<sup>9</sup> This is useful for same-sex couples deciding whether or not to solemnize their relationships and where to do so. More importantly, we also make normative recommendations for the best practices that have been developed among the states. Among those best practices we recommend are: (1) amending state tax laws to specifically allow joint filing by same-sex couples, rather than having state revenue departments effectively tell taxpayers to ignore the literal language of some of their current tax laws; (2) issuing more guidance to same-sex couples on specific issues to help them comply with state laws (along the lines of guidance issued by California, Oregon, and even the Internal Revenue Service); (3) adding to the first pages of state returns boxes that can be checked to indicate to the taxing authorities that these returns will inevitably involve nonconformity with federal filing status because the filers constitute a same-sex couple; and (4) reducing taxpayer burdens and errors by not requiring same-sex couples in all cases to prepare and, even, in some cases, attach to their state joint income tax returns complete "pro forma" federal "married" income tax returns.

In Part I, we first look at the relationship between federal income tax and state income tax in computing taxable income. Next we review the different filing statuses that are available to taxpayers. And, finally, we consider the effect of DOMA on state income taxes generally. In Part II, we first survey the relevant tax and family law landscape. Then, in the remainder of Part II and in Part III, we offer a state-by-state detailed review of the approaches of states that recognize same-sex relationships, beginning with states that recognize same-sex marriages (Part II) and then turning to those states with civil unions and domestic partnerships (Part III). In Part IV, we make recommendations about the best practices for state income tax of same-sex relationships in the current context.

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9 An article published in August 2010 on a topic similar to ours reported that "[n]ine states and the District of Columbia have decided that same-sex couples are entitled either to full marriage equality or legal recognition that provides all of the rights associated with marriage." William Abbott, *How to Mitigate DOMA's Effects on State Income Tax Filing*, 57 ST. TAX NOTES 291, 291–92 (2010). After August 2010, five more states—Delaware, Hawaii, Illinois, New York, and Rhode Island (which are all states with income taxes)—were added to the list. The topic, thus, needs constant reexamination.

## **I. The Relationship of Federal and State Income Tax and the Effect of DOMA**

Before discussing in detail in Parts II and III the specific authorities on joint filing of state income tax returns in the states relevant to this article, we briefly review the structure of state income tax in the United States and the issue of federal conformity both generally and as to filing status (i.e., single, head of household, married filing jointly, and married filing separately).

### **A. Why States with Personal Income Taxes Partly Rely on Federal Income Tax Rules**

When states decided to adopt personal income taxes, they invariably decided to piggyback to a large degree on definitions of income, deductions, and credits in what, by 1939, became the Internal Revenue Code (Title 26 of the United States Code). Federal conformity at least as to some matters helps both taxpayers and the states. For taxpayers, federal conformity on income, expenses, and credits reduces bookkeeping, accounting, and tax preparation costs. A tax preparer only needs to make a few adjustments to the federally computed items to finish the state income tax returns for the same tax year. For state revenue departments, federal conformity eases the burden of time and expense relating to audits. First, federal definitions are most likely to have generated interpretations in courts and regulatory guidance specific to particular taxpayers, so state revenue departments have federal guidance on which to rely when doing their own audits of resident and nonresident personal income tax returns. This federal guidance supplements the rather scant guidance that may be available in only state income tax cases. Second, because state personal income tax rates are low, it rarely makes sense for a state to do its own auditing of returns; states thus instead leave it to the federal government to do the vast majority of auditing. High federal tax rates justify the Internal Revenue Service in taking the time to do federal audits for items that would be too costly for the states to audit. Thus, the states can, by employing conformity, piggyback off of federal audit results.<sup>10</sup>

As we will see below in this Part, DOMA severely interferes with this choice of state conformity to federal income and filing status. DOMA requires that couples in state-recognized same-sex relationships file as single or as head of household for federal income tax purposes and not be treated as married for purposes of computing any benefit or limitations in their federal taxable income. Yet, if states with recognized same-sex

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<sup>10</sup> For an article discussing in more detail the advantages and disadvantages of conforming state taxable income and credits, in most cases, to the federal Internal Revenue Code definitions and rules, see Ruth Mason, *Delegating Up*, 62 DUKE L.J. (forthcoming 2013).

relationships wish to treat such couples as “married” for state income tax purposes (and, thus, entitled to elect joint filing status), there will be inevitable nonconformity between federal and state returns, both for computing taxable income and filing status. For same-sex couples, this nonconformity will produce higher tax preparation costs, higher state audit risks (when states are confused by differences on the state and federal returns), and more expense in dealing with state inquiries concerning conforming changes after federal audit changes have been made.

Over the years, conformity of state personal income taxes to the federal income has taken many forms.<sup>11</sup> Like the federal government, most states impose their income taxes only on “taxable income.” Federally, taxable income is a listing of gross income items (defined, excluded, or limited in the Internal Revenue Code), which are then adjusted by a number of entries (such as Individual Retirement Account (IRA) contributions and moving expenses) to get to federal adjusted gross income, which is thereafter reduced by (1) a standard deduction or itemized deductions and (2) personal exemptions.

A state’s taxable income usually starts with one or more income items that are added together. Some of these income items are based on federal definitions. For example, the Iowa state income tax return (Form IA 1040) explicitly instructs taxpayers to write down the “business income/(loss) from federal schedule C or C-EZ,” thereby piggybacking on all of the federal allowable business deductions and their limitations, including, for example, the 50% federal limit on the deduction of meal and entertainment expenses at I.R.C. § 274(n).<sup>12</sup> Thereafter, Iowa allows certain adjustments of its own, such as an “Iowa capital gain deduction”<sup>13</sup> and a deduction for federal income taxes paid, combined with its own standard or itemized deduction (i.e., all federal itemized deductions shown on federal Form 1040 Schedule A except for those for state income taxes).<sup>14</sup>

The first line of other states’ income tax returns, such as the Oregon Form 40, is federal adjusted gross income,<sup>15</sup> which is then adjusted to eliminate certain items (for example, the

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11 Although no state does this anymore, early on, some states even went to the extreme of making their income taxes simply a percentage of the federal income tax. WALTER HELLERSTEIN ET AL., *STATE AND LOCAL TAXATION: CASES AND MATERIALS* 347 (9th ed. 2009).

12 Iowa law begins with federal adjusted gross income, without a federal net operating loss deduction, IOWA CODE § 422.7 (2011), but the return breaks out the items comprising federal adjusted gross income.

13 *Id.* § 422.7(12).

14 *Id.* § 422.9.

15 The state statute actually begins the determination of an Oregon resident’s “entire taxable income” at “federal taxable income.” OR. REV. STAT. § 316.048 (1999).

federally taxable portion of Social Security benefits).<sup>16</sup> States typically also make additions to federal adjusted gross income, such as interest from bonds issued by other states and out-of-state localities that are normally exempt from federal income taxes under I.R.C. § 103(a).<sup>17</sup>

Like the federal government, states give credits against their income taxes.<sup>18</sup> All states of residence give credits for income taxes paid to other states on income arising in the other states—the so-called “resident credit.”<sup>19</sup> They also sometimes give credits patterned on or computed with respect to the amount of federal credits. The federal earned income tax credit (“EITC”) at I.R.C. § 32 is such a popular anti-poverty “refundable credit” that some states give a similar credit that is simply a percentage of the federal credit allowed the taxpayer.<sup>20</sup>

To make sure that the state taxing authority gets the federal audit adjustment information, typical state income tax laws provide that the taxpayer must notify the state taxing authority of any “final federal change” within a period ranging from sixty days to a year.<sup>21</sup> State

16 *Id.* § 316.054 (1997).

17 The U.S. Supreme Court has held that the practice of states imposing income taxes on interest paid by other states and out-of-state localities on their bonds does not violate the Commerce Clause. *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 328 (2008).

18 The difference between a tax deduction and a credit in computing one’s income tax is quite significant: credits are usually far more valuable. For example, imagine a person who could choose between taking a \$100 tax deduction and a \$100 credit on her state tax return. Assume that the state tax rate is 6%. A \$100 deduction would, at most, reduce her taxable income by \$100 and thereby reduce her tax on that taxable income by \$6. By contrast, a credit of \$100 could actually save her \$100, not \$6. Thus, if her tax would otherwise have been \$800, the credit would reduce her tax to \$700. Most tax credits are “nonrefundable”—i.e., they can be used to bring the total tax down to zero, but not below. Such a nonrefundable federal credit is the I.R.C. § 21 credit for dependent care services often used by taxpayers who work and so must spend money to obtain day care services for their young children. But, other credits are “refundable,” such as the earned income tax credit of I.R.C. § 32, designed to assist low-income taxpayers. If a low-income taxpayer had computed her tax to be only \$70, then a refundable credit of \$100 would not only bring her tax down to zero, but produce a deemed overpayment of \$30, which would be refunded. I.R.C. §§ 6401(b)(1), 6402(a) (2006). In effect, a refundable credit is treated as if it had been a payment made by the taxpayer. *See Sorenson v. Sec’y of Treasury*, 475 U.S. 851, 863 (1986) (“[T]o the extent an excess earned-income credit is ‘payable’ to an individual, it is payable as if it were a refund of tax paid.”) (emphasis in original).

19 HELLERSTEIN ET AL., *supra* note 11, at 397 (“[E]very state with a broad-based personal income tax provides a credit for taxes that their residents pay to other states.”).

20 For example, the Iowa credit is 7% of the EITC, IOWA CODE § 422.12B(1), and the New York State credit is, generally, 30% of the EITC, N.Y. TAX LAW § 606(d) (McKinney 2006).

21 *See, e.g.*, CAL. REV. & TAX CODE § 18622(a) (West 2004) (six months to notify of final change); 830 MASS.



revenue departments do not rely merely on taxpayer reporting to monitor changes in federal items of income, deduction, or credit; state revenue departments also rely on the IRS to tell them. I.R.C. § 6103(a) provides a general prohibition on federal government employees disclosing tax returns and tax return information. However, I.R.C. § 6103(d)(1) provides an exception allowing returns and return information for income, estate, gift, and certain other taxes to “be open to inspection by, or disclosure to, any State agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws.” Under the exception, the IRS sends information on a daily basis to state revenue departments concerning assessments of additional federal taxes from audit adjustments (1) to which the taxpayer has agreed, (2) that the taxpayer has not contested, or (3) that have been sustained against the taxpayer in the U.S. Tax Court.<sup>22</sup> The IRS not only provides the state taxing authorities with the amount of the total tax assessed, but also the amount and source of the adjustments to gross income (e.g., \$12,000 in wages from X Co.) and the specific deductions and credits disallowed or adjusted. Upon receiving either the report of federal change from the taxpayer or the IRS, the state revenue department then recomputes the state income tax and sends a notice to the taxpayer for any amount not previously admitted by the taxpayer in the taxpayer’s report (if any was made). Because federal audit changes are often not finalized until after the normal state statutes of limitations for assessing deficiencies have passed, there are provisions allowing states to make conforming assessments based on final federal changes even where the normal statutes of limitations for auditing state returns have passed.<sup>23</sup>

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CODE REGS. 62C.30.1(3)(a) (LexisNexis 2011) (one year); N.Y. TAX LAW § 659 (McKinney 2006) (90 days to notify of final federal change). A federal change is defined by most states as any change in federal taxable income (e.g., from an increase in gross income or a disallowed deduction) or in a federal tax credit that the states allow (in whole or part) on their own income tax returns. *See, e.g.*, N.Y. TAX LAW § 659 (McKinney 2006). When such a federal change is “final” varies from state to state. The most common federal changes typically become final when the changes are embodied in a federal tax deficiency computation that has been assessed (under I.R.C. § 6203) or when the federal government has made a refund attributable to the changes. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 20, § 159.5 (2012).

22 Even before any audit changes, the IRS also reports to states the income shown on the original federal return so that states may confirm that the taxpayer has reported such income correctly to the state on the taxpayer’s original state return.

23 *See, e.g.*, CAL. REV. & TAX CODE § 19059(a) (West 2004) (if the taxpayer files a report of a federal change, the assessment may be made at any time within two years thereafter); 830 MASS. CODE REGS. 62C.30.1(4)(b)(2) (LexisNexis 2011) (assessment must be made “within one year of receiving a taxpayer’s report of federal change”); N.J. STAT. ANN. § 54A:9-4(c)(3) (1976) (providing for a two year period); N.Y. TAX LAW § 683(c)(3) (McKinney 2006) (providing for a two year period). Some states limit the time in which the state may make an assessment based on a final federal change that the state learned of only from the IRS. *See, e.g.*, CAL. REV. & TAX CODE § 19059(a) (West 2004) (if IRS notifies state within six months, then state must assess within two

Like the federal government, states may tax residents on their worldwide income,<sup>24</sup> but states may only tax nonresidents on the nonresident's income sourced in the state.<sup>25</sup> Thus, a nonresident return (whether from a married person or not) will almost always differ from a federal return, as it is likely to report only a portion of the federal income as sourced in the nonresident state. For this reason, most states' nonresident returns have a column in which federal income is reported alongside a separate column for the taxpayer's state-sourced income. This will help if there is a final federal change notification either from the taxpayer or the IRS. Some states, like Iowa, will even require a nonresident to attach a copy of the taxpayer's federal return to his or her state return.<sup>26</sup> This may make more sense in Iowa than in most states, since Iowa allows an unusual deduction in computing Iowa income taxes: an amount equal to the actual federal income taxes paid.<sup>27</sup> The federal return can be used to quickly verify this Iowa deduction when the state return is filed, rather than just being used if there is a later final federal change.

## B. State Conformity to Federal Filing Status

In 1918, Congress authorized husbands and wives to make "a single joint return" for federal income taxes.<sup>28</sup> Who is "married" under federal law has always been determined by whether the couple was married under state law or most recognized foreign laws on the last day of the taxable year.<sup>29</sup> Initially, there was only one tax rate schedule (if one

years of receiving the notice); 830 MASS. CODE REGS. 62C.30.1(4)(b)(2)(b) (LexisNexis 2011) ("within two years of receiving information from the federal government" of a final federal change).

24 *N.Y. ex rel. Cohn v. Graves*, 300 U.S. 308, 313 (1937) ("A state may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power.").

25 *Shaffer v. Carter*, 252 U.S. 37, 57 (1920) ("As to nonresidents, the jurisdiction extends only to their property owned within the state and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources.").

26 IOWA CODE § 422.13(5) (2011).

27 *Id.* § 422.9(2)(b).

28 Revenue Act of 1918, ch. 18, § 223, 40 Stat. 1057, 1074 (providing, in part, "If a husband and wife living together have an aggregate net income of \$2,000 or over, each shall make such a return unless the income of each is included in a single joint return.").

29 I.R.C. § 7703(a)(1) (West 2011) ("[T]he determination of whether an individual is married shall be made as of the close of his taxable year."); *Lee v. Comm'r*, 64 T.C. 552, 556 (1975) ("[The Tax] Court has continuously held that for purposes of . . . Code provisions the marital status, its existence and dissolution, is defined by State rather than Federal law."); *aff'd per curiam*, 550 F.2d 1201 (9th Cir. 1977); *Merrill v. Comm'r*, 98 T.C.M. (CCH) 25 (2009) (quoting *Lee* in connection with same-sex couple who could not marry in North Carolina and were thus held not to be married for purposes of the Internal Revenue Code).

combined regular taxes and surtaxes), so there was little incentive to file jointly. Further, the government took the position that in order to file jointly, both spouses had to have at least some income. As a result of this configuration, married couples had an incentive to file separate income tax returns. In most married couples at that time, the husband had the majority of the income; the husband, thus, had an incentive to try to steer some of his income to his wife so that each of them could report half of the husband's income. Each would then file separate returns and get the benefits of effectively lower tax brackets twice, or never even get to the highest tax bracket.<sup>30</sup> Through this sort of income splitting, a couple's combined income tax obligation could be reduced.

The federal courts held such "assignments of income" were impermissible. In 1930, in *Lucas v. Earl*,<sup>31</sup> a married couple entered into an agreement to split all of their income during their lives. The Supreme Court rejected this anticipatory assignment of income for purposes of income tax. Instead, the husband, a lawyer, was required to report all of the income from his law practice on his separate federal income tax return. This left open the possibility of doing the same sort of income splitting, not as part of a private contract, but rather as the product of state community property laws.

Only months after *Earl*, in *Poe v. Seaborn*,<sup>32</sup> an issue arose concerning whether a husband and wife living in the state of Washington could each report half of the income from their community property on separate federal income tax returns. In Washington (like most community property states), state law provided that property acquired during a marriage was, generally, community property, and each spouse had a vested half-interest in "the income of the community, including salaries or wages of either husband or wife, or both."<sup>33</sup> The Supreme Court held that because state law created the split in the ownership of the income, the federal government had to recognize that split. A venerable maxim in federal tax cases says that state law creates property rights, but federal law defines the consequences of those state-created rights.<sup>34</sup>

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30 It is a little inaccurate to describe taxes in the first part of the twentieth century as having brackets. Over time, between the initial federal income taxes and the 1960s, there was a flat regular tax starting after a certain level of taxable income, a surtax, and, eventually, an optional tax with graduated rates.

31 281 U.S. 111 (1930).

32 282 U.S. 101 (1930).

33 *Id.* at 111.

34 See, e.g., *U.S. v. Craft*, 535 U.S. 274, 278 (2002) (holding that a federal tax lien attaches to state-created tenancy-by-the-entirety property); *U.S. v. Bess*, 357 U.S. 51, 55 (1958) (regarding cash surrender value of life insurance policy).

Jealous states that did not have community property regimes for their married couples blanched at the result of *Poe v. Seaborn* and tried to benefit their own residents by embracing income splitting in some fashion. Oklahoma and Oregon enacted laws permitting married couples to elect community property treatment. In 1944, in *Commissioner v. Harmon*,<sup>35</sup> the Supreme Court held that such elective community property laws should not be respected for federal income tax purposes and thus could not result in the splitting of income for purposes of reporting income to the federal government.

To stop this gamesmanship and equalize the outcomes among all states, in 1948, Congress amended the law to provide elective filing of joint income tax returns, which is currently provided at I.R.C. § 6013(a): “A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions.”<sup>36</sup> At the same time, Congress amended the law to provide a differential tax rate structure for joint returns that effectively enshrined income splitting benefits. The new provision required joint filers to compute their federal income tax as two times the tax that would have been determined had the net income been divided in two.<sup>37</sup> Today, rather than doing this computation, joint filers instead follow a separate tax rate schedule at I.R.C. § 1(a) designed to approximate this same result.

In 1951, Congress amended the law again, this time to create a filing status of “head of household.” Such filers were to pay taxes on the same income about midway between those paid by single filers and those paid by married joint filers. To be a “head of household,” one

35 323 U.S. 44 (1944).

36 Revenue Act of 1948, ch. 168, § 303, 62 Stat. 110, 115. A proposal to require joint income tax returns was, at that time, rejected. The same section of the Revenue Act of 1948 also overruled the opinion of the Ninth Circuit in *Cole v. Commissioner*, 81 F.2d 485 (9th Cir. 1935), which held that spouses were not jointly and severally liable for taxes and tax deficiencies relating to joint returns, but only liable for their allocable shares of those taxes and deficiencies. The latter amendment is today located at I.R.C. § 6013(d)(3), which states: “[I]f a joint return is made, the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.” (emphasis added). In 1971, Congress enacted the first “innocent spouse” provisions at I.R.C. § 6013(e). Pub. L. 91-679, § 1, 84 Stat. 2063. The initial provision allowed an exception to joint and several liability only in cases of large omissions of reportable income. Congress has been backtracking on its decision to overrule *Cole* ever since, repeatedly providing broader relief from joint and several liability on joint returns. Today, the federal “innocent spouse” provisions are located at I.R.C. § 6015 (enacted in 1998), which replaced and expanded the relief available at former I.R.C. § 6013(e). For a more detailed history of federal joint filing than is given in this article, see Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1399–416 (1975); Daniel Milstein, Note, *Til Death Do Us File Joint Income Tax Returns (Unless We're Gay)*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 451, 456–61 (2011). For more detail on the history of federal joint and several liability and the innocent spouse provisions, see Carlton M. Smith, *How Can One Argue 'It's Not My Joint Return' in Tax Court?*, 124 TAX NOTES 1266, 1266–68 (2009).

37 Revenue Act of 1948, ch. 168, § 301, 62 Stat. 110, 114.

had to be unmarried and provide more than half of the expenses of maintaining a household where the household contained (1) a child of the taxpayer (or a descendant of such child) or (2) a person who could be claimed as a dependent of the taxpayer.<sup>38</sup>

In 1969, feeling that single taxpayers were now being relatively overtaxed, Congress created the current system at I.R.C. § 1, providing *four* rate tables starting in the 1971 taxable year. Congress decided that “married filing separate” taxpayers should have their own tax rate table providing the *least* favorable rates. The complexities of the federal rate tables as they currently exist are beyond the scope of this article. For example, provisions in the Internal Revenue Code besides the rate tables make it inaccurate to say today that married people filing joint returns pay what single people would dividing their combined incomes and paying tax on each half.

Today, all states with income taxes allow for the filing of joint income tax returns by husbands and wives. They also all mimic the federal filing statuses of single, head of household, married filing separately, and married filing jointly—piggybacking on the federal definition of each status. States do not, however, automatically make their taxpayers use the same filing statuses as those they use on their federal returns. Further, states have not designed their income taxes so that the filing statuses always produce the same effects in the state that they produce for federal taxes. For example, starting in 2011, although Rhode Island allows differing amounts of standard deductions depending on filing status, it has created a single graduated rate table for Rhode Island taxable income that applies to all four filing statuses—including a 4.75% rate starting at Rhode Island taxable income of \$55,000 for all four filing statuses.<sup>39</sup>

Because state definitions are the same as federal definitions, parallel state and federal status is, in effect, required where the taxpayers are unmarried for both federal and state purposes (i.e., when a taxpayer files as single or head of household). For married couples, states are sometimes concerned that only one spouse is a state resident. Most states thus allow spouses who file their federal taxes jointly to file either jointly or separately for state income tax purposes in certain circumstances. New Jersey law is typical:

If either husband or wife is a resident and the other is a nonresident, they shall file separate tax returns under this act on such single or separate forms as may be required . . . in which event their tax liabilities shall be separate unless both elect to determine their joint taxable income as if both

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38 Revenue Act of 1951, ch. 521, § 301, 65 Stat. 452, 480–82. Currently, the definition of a “head of household” is at I.R.C. § 2(b), and the rate table for “head of household” filers is at I.R.C. § 1(b).

39 R.I. GEN. LAWS § 44-30-2.6(c)(3)(A)(I) (LEXIS through Jan. 2011 Sess.).

were residents, in which event their liabilities shall be joint and several.<sup>40</sup>

The differing filing statuses between federal and state returns for married couples who filed jointly for federal taxes, but separately for state taxes, leads to problems in making state piggyback adjustments based on federal audit changes. Many numbers on the actual state and federal returns, such as adjusted gross income, will no longer match, and the state will need to work through how the adjustments to a federal joint return might apply to a state separate return—including figuring out which taxpayer of the couple needs his or her “married filing separately” return to be adjusted.

Some states, like New Jersey and New York, have laws that do not allow spouses who filed “married filing separately” *federal* returns to file anything but “married filing separately” *state* returns—regardless of whether either or both spouses were state residents for the taxable year.<sup>41</sup> This makes doing piggyback audit adjustments easier. Other states, like Iowa, have never had rules making married taxpayers conform their state joint or separate filing status to their federal joint or separate filing status.<sup>42</sup> In sum, while there is a preference in many states for state filing status to match federal filing status in order to make piggyback audit changes easier, no state has ever insisted on complete federal filing status conformity, even in the case of married different-sex couples.

### C. DOMA’s Effect on Federal Income Tax for Same-Sex Relationships

As previously mentioned, this article is not concerned with either the wisdom or constitutionality of DOMA—although we personally think that it is both unwise and unconstitutional. Many such articles, some focusing primarily on the federal tax implications of DOMA, have already been written.<sup>43</sup> Nor is this article an update on the various legal

40 N.J. STAT. ANN. § 54A:8-3.1(d) (West 2002); accord N.Y. TAX LAW § 651(b)(4) (McKinney 2006) (providing the identical rules).

41 N.J. STAT. ANN. § 54A:8-3.1(b) (West 2002); N.Y. TAX LAW § 651(b)(1) (McKinney 2006).

42 See IOWA DEP’T OF REVENUE, IOWA INDIVIDUAL INCOME TAX EXPANDED INSTRUCTIONS—TAX YEAR 2011 3 (2011), available at <http://www.iowa.gov/tax/forms/2011IndIncInstr.pdf> (“[M]arried taxpayers have the option of either filing jointly . . . or filing separately . . . on the Iowa return, no matter how they filed on the federal return.”).

43 On DOMA generally, see, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997); Gary J. Simson, *Beyond Interstate Recognition in the Same-sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313 (2006). On DOMA’s tax implications, see, e.g., Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2008) (challenging DOMA on Equal Protection grounds related to federal taxes); Anthony C. Infanti, *Taxing Civil Rights Gains*, 16 MICH. J. GENDER & L. 319 (2010) (arguing in part that DOMA can be considered a federal property tax on same-sex families that is

challenges to DOMA.<sup>44</sup> At present, DOMA is being enforced by the IRS. States and taxpayers thus have little choice but to deal with DOMA. In light of this situation, this Article surveys how states have thus far dealt with the effect of DOMA on state income tax, articulates best practices for states that give recognition to legally-recognized same-sex relationships, and explains the significance of adopting these best practices.

Section 3 of DOMA amended the U.S. Code as follows:

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.<sup>45</sup>

Because of DOMA, same-sex married couples are not treated as married for federal income tax purposes, as the federal income tax is part of Title 26 of the U.S. Code. Therefore, same-sex married couples may not file joint federal income tax returns. Beyond not filing jointly, a whole host of consequences befall such couples federally, some good, some bad. Among the good things that may lower the couples’ collective taxes if they are not treated as married is that one spouse can sell property at a loss to another spouse and recognize the loss for federal income tax purposes, though I.R.C. § 267(a)(1) would ordinarily disallow losses on sales between spouses.<sup>46</sup> Additionally, if one spouse files as single and the other as head of household (instead of both filing as married filing separately or jointly filing as married), their collective standard deductions allowed would be higher.<sup>47</sup>

unconstitutional as an unapportioned direct tax); William Kratzke, *The Defense of Marriage Act (DOMA) Is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399 (2005); Milstein, *supra* note 36.

44 See, e.g., *Mass. v. U.S. Dep’t of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *petitions for cert. filed sub nom. BLAG v. Gil*, No. 12-13 (June 29, 2012) and No. 12-15 (July 3, 2012); *Dragovich v. U.S. Dep’t of Treasury*, No. C 10-01564 CW, 2012 WL 1909603 (N.D. Cal. May 24, 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012), *appeal pending* Nos. 12-15388 & 12-15409 (9th Cir.), *petition for cert. filed* No. 12-16; *Windsor v. U.S.*, 2012 U.S. App. LEXIS 21785 (2d Cir. Oct 18, 2012); *Pedersen v. Office of Pers. Mgmt.*, No. 3:10-cv-1750, 2012 U.S. Dist. LEXIS 106713 (D. Conn. July 31, 2012).

45 1 U.S.C.A. § 7 (West 2005).

46 I.R.C. § 267(b)(1) provides that losses are not allowed between family members, and I.R.C. § 267(c)(4) includes “spouse” within the definition of family member.

47 For 2011, the standard deduction for a single person or a person filing “married filing separately” was \$5,800, but for a “head of household”—a status that cannot be used by a married person living with her

Among the bad things that can happen if the couple is not treated as married for federal purposes is that the employer of one who pays the health insurance premiums for the other must include in the first's taxable wages the cost of such premiums, though this amount would be excluded from taxable wages if the couple were treated as married.<sup>48</sup> Further, if the couple is treated as unmarried and the first spouse had capital gains of \$30,000, while the second had capital losses of \$30,000, the first would have to pay tax on the \$30,000 of capital gain and the second could only use \$3,000 of capital losses against the second's ordinary income.<sup>49</sup> If they had been treated as married and could file joint returns, the capital gains and losses could have been netted, and the couple would have, collectively, paid no current capital gains taxes.<sup>50</sup>

Around the time DOMA was enacted, some states began creating recognized legal relationships for same-sex couples that were either not called "marriage" or did not give enough of the rights of marriage to deserve that name. Thus, mostly in the last ten years, some states have created civil unions ("CUs") and domestic partnerships (also called registered domestic partnerships ("RDPs")). Regardless of whether these types of legal relationships would be treated as marriages for federal income tax purposes if between different-sex couples,<sup>51</sup> DOMA would preclude all same-sex couples in legally-recognized

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spouse—the standard deduction was \$8,500. And for "married filing jointly," the standard deduction was \$11,600—i.e., exactly twice the amount for single or married filing separately. See INTERNAL REVENUE SERV., FORM 1040: U.S. INDIVIDUAL INCOME TAX RETURN 2 (2011), available at <http://www.irs.gov/pub/irs-pdf/f1040.pdf>. For an article pointing out how same-sex couples who are married often pay lower federal income taxes because of DOMA, see Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008).

48 See James Angelini & Jason Peterson, *Federal and State Taxation of Domestic Partner Benefits*, 62 ST. TAX NOTES 377 (2011) (discussing the various issues involved at the intersection of employee benefits law and same-sex marriages, registered domestic partnerships, and civil unions).

49 I.R.C. § 1211(b) limits individuals to using no more than \$3,000 of net capital losses against other income.

50 In the capital gain example, we assume the typical situation that the capital gains would be taxed at the highest current capital gains tax rates. As with all examples in this area, there may be times when continuing not to file jointly can be an advantage.

51 On August 30, 2011, the IRS Chief Counsel's Office wrote a letter to a person from H&R Block in Illinois who had asked whether parties to Illinois *different-sex* civil unions may file joint federal income tax returns. To the surprise of many, the letter stated that "if Illinois treats the parties to an Illinois civil union who are of opposite sex as husband and wife [which Illinois law, practically speaking, does], they are considered 'husband and wife' for purposes of Section 6013 of the Internal Revenue Code, and are not precluded from filing jointly." *Treasury Clarifies Filing Status of Individuals in Illinois Opposite-Sex Civil Unions*, 2011 TAX NOTES TODAY 215-62 (Nov. 7, 2011). Many scholars reacted to this letter with great surprise. See Amy S. Elliott, *IRS Memo Indicates Civil Unions Are Marriages for Federal Tax Purposes*, 2011 TAX NOTES TODAY 216-5 (Nov. 8, 2011) ("Everybody I know has always said that registered domestic partnerships and civil unions are



relationships from being treated as married.

Initially, the IRS also thought that DOMA precluded it from recognizing community property law divisions of income created by state law for legally recognized same-sex couples in California. In November 2004, attorney Donald Read, with the assistance of Professor Patricia Cain, prepared and submitted a proposed Revenue Ruling on the question to the Treasury Department for its consideration. The proposed Revenue Ruling adopted the income-splitting approach in reliance on the longstanding Supreme Court precedent of *Poe v. Seaborn*.<sup>52</sup> In response, the IRS issued no Revenue Ruling, but rather issued an internal General Counsel Memorandum in early 2006 in which it held that *Poe v. Seaborn* only applied to split incomes of couples who were considered married for federal purposes, which DOMA precluded for same-sex couples. Thus, same-sex partners to a California RDP could not each report half of their incomes on “single” or “head of household” federal income tax returns.<sup>53</sup> Professor Anthony Infanti said in response: “[O]ne can only surmise that this guidance was driven more by ideology than by objective legal analysis aimed at ascertaining the correct application of the tax laws to the earned income of California registered domestic partners.”<sup>54</sup> For this and other actions of the government against gay and lesbian taxpayers, he called for resistance from both tax professionals and same-sex couples.<sup>55</sup>

In 2010, the Obama IRS reversed course and held that partners in California RDPs who filed single federal returns had to split their community income on those returns effective January 1, 2007.<sup>56</sup> The Obama IRS again cited *Poe v. Seaborn* by way of authority. It

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not marriages,’ said Patricia Cain, a professor at Santa Clara University School of Law. She added that if the IRS’s position is that parties to a civil union may be eligible for married filing jointly status, there could be significant implications for same-sex couples [if DOMA were repealed or declared unconstitutional].”). Such a letter, though, is not binding authority on the IRS, and the authors believe the IRS may reconsider the statement therein. It even appears to conflict with the questions and answers (“Q & As”) published a few weeks later on the IRS website. See *infra* note 60 and accompanying text.

52 Donald H. Read, *Attorney Offers Draft Revenue Ruling Affecting Domestic Partners*, 2004 TAX NOTES TODAY 227-31 (Nov. 24, 2004).

53 I.R.S. Chief Couns. Mem. 200608038 (Feb. 24, 2006), available at <http://www.irs.gov/pub/irs-wd/0608038.pdf>.

54 Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 TAX LAW 407, 432-33 (2008).

55 *Id.* at 440-44.

56 I.R.S. Chief Couns. Mem. 201021050 (May 5, 2010), available at <http://www.irs.gov/pub/irs-wd/1021050.pdf>. The split had to be done for the taxable year 2010, but since returns for 2007-2009 had already been filed,

attempted to explain its apparent change in position as justified by the fact that, although California law with respect to RDPs, as applied to taxable years 2005 and 2006, split the partners' community property income, state law did not allow that split to be reflected on California income tax returns. However, as of January 1, 2007, California law was amended to conform California RDP income tax reporting to the RDP property split. Commentators have criticized this distinction, pointing out that federal income tax reporting should not be governed by state income tax reporting, but rather by property law and that *Poe v. Seaborn* was all about rights created in income by state community property laws, not the state income tax treatment of those rights.<sup>57</sup>

In a June 22, 2011 letter to Senator Reid of Nevada (a community property state that created RDPs for its citizens effective October 1, 2009), the IRS, also citing *Poe v. Seaborn*, stated, "Effective October 1, 2009, a Nevada registered domestic partner must report one-half of the community income, whether received in the form of compensation for personal services or income from property, on his or her federal income tax return."<sup>58</sup> After the IRS's change in its position, California's Senator Boxer complained to the IRS of the lack of federal guidance on how federal income tax returns for 2010 should incorporate the California RDP community income split. In response, on July 27, 2011, the IRS wrote her, stating, in part:

The IRS is aware that the extension of community property laws to registered domestic partners in California has caused some taxpayers to incur increased tax return preparation fees and has raised some additional legal and compliance issues. The IRS is currently reviewing these issues and considering how best to ensure that registered domestic partners receive the information they need to timely and accurately complete their federal income tax returns.<sup>59</sup>

Thereafter, on September 16, 2011, the IRS posted to its website a series of nineteen questions and answers ("Q & As") about reporting the community income split of RDPs in California and Nevada. The Q & As also stated that identical rules applied to Washington

the IRS made compliance with its ruling for the earlier tax years voluntary.

57 Dennis J. Ventry, Jr., *Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459 (2011).

58 *IRS Addresses Requirement That Nevada Registered Domestic Partners Report Half of Community Income*, 2011 TAX NOTES TODAY 195-19 (Oct. 7, 2011).

59 *IRS Explains How Domestic Partners in California Should Report Community Income*, 2011 TAX NOTES TODAY 195-24 (Oct. 7, 2011).

State RDPs beginning June 12, 2008, the effective date of the passage of that state's RDP law. The Q & As addressed at least one basic issue of same-sex RDP partners and married couples, stating, "Registered domestic partners cannot file using a married filing separately or jointly filing status, because they are not spouses as defined by federal law. Likewise, same-sex partners who are married under state law may not file using a 'married filing separately' or joint filing status because federal law does not treat same-sex partners as spouses."<sup>60</sup> Neither Washington nor Nevada has a state net income tax, so the issues presented by the interaction of community property divisions and state income taxation of same-sex couples do not impact citizens of those states.

While it is laudable that, under Obama, the IRS has finally given some guidance to same-sex couples and has agreed to recognize community property division for such couples in computing their federal income taxes, this does very little to help same-sex couples and states deal with the state income tax problems associated with the existence of DOMA. We will discuss these state problems in the next section.

#### **D. DOMA Interferes With the State Income Tax Goal of Federal Conformity**

A state with an income tax that adopts either same-sex marriage or another legally-recognized relationship intended to give all of the attributes of marriage (but for the name)—that is, civil unions or registered domestic partnerships—must make choices among three policies that are in tension:

- (1) same-sex relationships should receive all the rights, benefits, duties, and obligations of marriage,
- (2) spouses should have the choice to elect to file "married filing jointly" returns, and
- (3) state revenue departments should piggyback as much as possible on the IRS's approach to income tax.

The first policy flows from principles of equality and fairness that are increasingly embraced by courts, legislatures, and the American public with respect to relationships

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60 Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California, INTERNAL REVENUE SERV., <http://www.irs.gov/newsroom/article/0,,id=245869,00.html> (last visited Mar. 3, 2012).

between people of the same-sex.<sup>61</sup> The second policy, although not the norm internationally,<sup>62</sup> is the preferred policy choice of Americans, who seem to accept that it is a right of legal spouses to be able to file their taxes together. A state that wants to embrace the second policy by retaining the four filing statuses of single, head of household, “married filing jointly,” and “married filing separately” and embrace the first policy by recognizing same-sex relationships will, because of DOMA, have to give up on the administrative convenience achieved by the third policy. In other words, the first two policies together entail that a state allow its taxpayers in recognized same-sex relationship to file state income taxes as “married filing jointly” (or an equivalent “filing jointly” status), while DOMA requires those same individuals file their federal income tax returns as single or head of household. Further, while the differences between the federal and state returns will cause extra complexity and expense in the administration of state income taxes, the system adopted will also likely cause additional expenses to same-sex taxpayers in attempting to comply with the state’s income tax laws—expenses that different-sex couples do not bear. Commercial tax preparers will have to spend additional time (and will no doubt end up making more mistakes)<sup>63</sup> in adjusting items between federal and state returns using different filing statuses—particularly as a result of always having nonconformity between filing statuses for these couples—federally single or head of household, while state “married filing separately” or “married filing jointly” (or the equivalent statuses for legally-recognized non-marital relationships). Further, that the federal government does not recognize legally-valid same-sex relationships for purposes of tax status is a dignitary affront to LGB people. The federal government is effectively saying to LGB people that

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61 See, e.g., *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that state constitution requires equal benefits be given to same-sex couples); 2011 N.Y. Laws 95, § 3, adding N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2012) (making same-sex marriage legal); Frank Newport, *Half of Americans Support Gay Marriage*, GALLUP.COM (May 8, 2012), <http://www.gallup.com/poll/154529/Half-Americans-Support-Legal-Gay-Marriage.aspx> (reporting on upward trend in percentage of Americans supporting gay marriage in Gallup polls over the last sixteen years).

62 See Richard C.E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317, 382–83 (1990) (“The trend among the developed nations is toward individual taxation, and away from joint or family taxation.”). For example, Canada does not allow married couples to file jointly. See Anthony Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605 (2010) (explaining the Canadian system of individual filing and calling for the U.S. to abandon “married filing jointly” status as no longer a good match for the modern American family).

63 No doubt some mistakes will benefit and others will harm same-sex couples, yet, if the mistakes are caught later, both additional state and taxpayer resources will have to be spent in fixing the errors. See generally Tara Siegel Bernard, *Is Tax Software Sophisticated Enough for Same-Sex Couples?*, N.Y. TIMES BLOG (Feb. 29, 2012, 4:28 PM), <http://bucks.blogs.nytimes.com/2012/02/29/is-tax-software-sophisticated-enough-for-same-sex-couples/?emc=eta1>.

their relationships do not deserve recognition and equal treatment. It is DOMA that causes this nonconformity for individuals in legally-recognized same-sex relationships, who, if they were in legally-recognized *different-sex* relationships, would otherwise usually be able to file their taxes using the same status for both state and federal income tax purposes. This lack of nonconformity is another manifestation of the apartheid perpetuated by DOMA.

In considering how to deal with the problems of lack of conformity, though, states should not overemphasize the additional audit complexity problems. IRS statistics show that in the fiscal year that ended September 30, 2011, of the roughly 140 million federal income tax returns filed by individuals, the IRS examined only 1.1%.<sup>64</sup> If only a little over 1% of same-sex couples are going to be audited by the IRS and the states (and given that many federal audits result in “no change” letters), then each state should consider whether any response to lack of conformity is disproportionate to the small number of examinations and piggyback adjustments that will occur, particularly in states with small populations.

Instead, states should make every effort to ease the expense of tax preparation, reduce mistakes in tax preparation, and lower the audit risk for same-sex couples by (1) choosing to give guidance on frequently-encountered issues, (2) aligning their forms and computer auditing systems to be prepared for state returns that do not conform to federal returns (instead of seeing such nonconforming returns as red flags), and (3) not asking for excessive information, documentation, and schedules from same-sex couples at the time the returns are filed. As will be seen in the next two Parts, some states have made significant strides toward achieving these goals, while others have barely made any progress.

## II. State Income Taxation of Same-Sex Marriages

### A. Which States Are Relevant? The Tax and Family Law Landscape

Thirteen states and the District of Columbia have state income taxes and their own way of entering into same-sex relationships that give rights that appear broad enough to allow for the filing of joint state income tax returns.<sup>65</sup> The thirteen states are California, Connecticut,

64 DEP'T OF TREASURY, INTERNAL REVENUE SERV. DATA BOOK 2011, at 22–24 tbl. 9a (2011), available at <http://www.irs.gov/pub/irs-soi/11databk.pdf>.

65 At present, nineteen states and the District of Columbia provide some way for their residents to enter into legally-recognized same-sex relationships. See *Topography*, *supra* note 3, at 181 (“Six states (Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont) and the District of Columbia allow same-sex couples to marry. An additional nine states have broad relationship recognition laws—either called civil unions (Delaware, Hawaii, Illinois, New Jersey, and Rhode Island) or domestic partnerships (California, Nevada, Oregon, and Washington)—that give same-sex couples all or most of the benefits associated with marriage. An additional five or six states give recognition to same-sex couples in another way, by providing some limited

Delaware, Hawaii, Illinois, Iowa, Massachusetts, New Hampshire, New Jersey, New York, Oregon, Rhode Island, and Vermont. If they have spoken on this issue, the revenue departments of these jurisdictions have announced that such same-sex couples may file joint income tax returns, despite the fact that such couples must file federal returns using “single” or “head of household” status. That these jurisdictions have taken this approach is not surprising—doing so is in accordance with the language and intent of the statutes or court decisions that created the legal statuses for same-sex couples in the respective jurisdictions and gave same-sex couples the same rights and benefits as married different-sex couples. Only three revenue departments have not yet spoken—those of Rhode Island, Delaware, and Hawaii. In Rhode Island, civil unions first became permissible on July 1, 2011. In Delaware and Hawaii, civil unions first became permissible on January 1, 2012. From Hawaii’s legislation and the opinion of Hawaii’s attorney general (discussed, *infra* Part III.F.), it seems likely that the Hawaii Department of Taxation will follow the lead of other jurisdictions. From the Delaware Division of Revenue’s discussion of making civil union joint estimated income tax declarations for 2012 (discussed, *infra* Part III.E.), we

relationship recognition (Colorado, Maine, Maryland, and Wisconsin) and/or by giving comity (Maryland, New Mexico, and maybe Wyoming) to valid same-sex marriages from other jurisdictions.”). Washington and Maryland have both recently passed laws allowing same-sex couples to marry in those states. S.B. 241, 430th Sess. Gen. Assemb. (Md. 2012) (amending, *inter alia*, MD. CODE ANN., FAM. LAW § 2-201 (West, Westlaw through 2012 Reg. Sess.) (effective Jan. 1, 2013)); S.S.B. 6239, 62d Leg., Reg. Sess. (Wash. 2012) (amending, *inter alia*, WASH. REV. CODE § 26.04.010 (1999) (effective June 7, 2012)). In both states, however, the new laws did not go into effect immediately to allow time for voter referendums that would, if passed, repeal the new marriage laws. See Sarah Breitenbach, *Md. Governor Signs Measure Legalizing Gay Marriage; Opponents Pushing Ballot Referendum*, ASSOCIATED PRESS, Mar. 1, 2012, [http://www.boston.com/news/nation/articles/2012/03/01/md\\_gay\\_marriage\\_could\\_hinge\\_on\\_black\\_churches](http://www.boston.com/news/nation/articles/2012/03/01/md_gay_marriage_could_hinge_on_black_churches); David Hill, *Same-sex Marriage Question Will Be on Maryland Ballot*, WASHINGTON TIMES, June 7, 2012, <http://www.washingtontimes.com/news/2012/jun/7/same-sex-marriage-question-will-be-md-ballot>; Kirk Johnson, *Opponents of Gay Marriage Face Tougher Test in Washington State*, N.Y. TIMES, June 6, 2012, <http://www.nytimes.com/2012/06/07/us/gay-marriage-opponents-face-tougher-test-in-washington-state.html>.

Of those nineteen states, Nevada and Washington have no general state income taxes, so are not relevant to this article. Washington has a Business and Occupation Tax, which is calculated based on gross receipts, not net income. It is paid on an excise tax return, and, while it can be paid by individual sole proprietors, there is no joint filing of such returns by spouses. See *Business & Occupation Tax*, WASH. STATE DEP’T OF REVENUE, <http://dor.wa.gov/content/FindTaxesAndRates/BAndOTax/> (last visited Mar. 2, 2012).

Further, of those nineteen states, Colorado, Maine, Maryland, and Wisconsin have state income taxes, but the provisions of their state laws allowing creation of legally-recognized same-sex relationships give only a limited number of benefits, none of which extends to its state income taxes. See *Topography*, *supra* note 3. At present, Maryland does not provide income tax benefits, but does provide some other limited tax benefits. See, e.g., MD. CODE ANN., TAX-GEN. § 7-203(l) (LexisNexis 2010) (joint interest in primary residence not subject to inheritance tax); MD. CODE ANN., TAX-PROP. § 13-403(a) (LexisNexis Supp. 2010) (property transferred between domestic partners not subject to county transfer tax). This will change if Maryland’s recently passed same-sex marriage law survives the referendum to repeal it. See Breitenbach, *supra*.

expect a similar result in that state. The Rhode Island Department of Revenue has not to date given any guidance, not even to say how Rhode Island residents in civil unions should have filed their 2011 income tax returns earlier this year.<sup>66</sup>

The balance of this Part will only discuss those states that solemnize same-sex marriages. Some of these states also still have non-marital relationships, such as civil unions and domestic partnerships. In this Part, we will discuss these marriage states in detail and include within our discussion of each state how it also treats any non-marital relationships. In Part III, we will discuss the states that recognize only non-marital relationships of same-sex couples.

We first summarize the marital states. All states that solemnize same-sex marriages (and California, which did solemnize them for a time) have state income taxes. (If Washington State begins solemnizing same-sex marriages starting in 2013, it will be the first state without an income tax to do so.) Those states have all weighed the conflicting policy issues and have all decided to allow the elective filing of married filing jointly income tax returns by same-sex married couples. Where the couples do not want to file jointly, they must file as married filing separately—not single or head of household, which is how DOMA makes them file their separate federal returns. The District of Columbia also follows these rules. There is, thus, a consensus among states that have same-sex marriage

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66 Of modest relevance to this article is the issue of comity in Maryland and New Mexico, two states with state income taxes. These states do not themselves allow the solemnizing of same-sex relationships that give the full benefits of marriage but do not have laws or constitutional provisions that deny recognition to same-sex relationships that are legally recognized in other jurisdictions. In February 2010, Maryland's attorney general issued an opinion stating that Maryland would give comity and recognize out-of-state same-sex marriages, instructing each department of the state to consider how this opinion should apply to matters under its jurisdiction. *Marriage—Whether Out-of-State Same-Sex Marriage That Is Valid in the State of Celebration May Be Recognized in Maryland*, 95 Op. Att'y Gen. 3 (2010), available at <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf>. In response, Maryland's comptroller concluded that he is constrained by other Maryland laws to interpret the Maryland tax statutes in conformity with federal laws, so out-of-state same-sex couples must file as single or head of household on their Maryland income tax forms. See *Filing Status*, COMP. OF MD., <http://individuals.marylandtaxes.com/incometax/filing.asp> (last visited Mar. 3, 2012). In a recent decision of Maryland's highest court that recognized a valid California same-sex marriage for purposes of adjudicating a divorce case, the court considered the opinion of the Attorney General and reached a result consistent with that opinion and its reasoning. *Port v. Cowan*, No. 69, 2012 WL 1758629 (Md. May 18, 2012).

While New Mexico is not one of the nineteen states that provide ways for their own citizens to become officially recognized as same-sex couples, in January 2011 New Mexico's attorney general opined that the state should recognize same-sex marriages solemnized out of state. Op. Att'y Gen. No. 11-01 (2011), available at <http://public-records.nmag.gov/opinions>. As New Mexico has a state income tax, it would seem that same-sex couples should be able to file joint New Mexico income tax returns. There is no guidance as of yet on this issue. New Mexico's income tax return form (Form PIT-1) allows spousal joint filing, but the 2011 instructions do not mention same-sex couples.

to treat same-sex couples as married for state tax purposes rather than treat those couples as unmarried for state income tax purposes in order to conform with federal law that treats them as unmarried for federal income tax purposes. Further, in Connecticut, Vermont, New Hampshire, California, and the District of Columbia, same-sex marriage was preceded by recognized same-sex relationships giving substantially the same benefits as marriage—either registered domestic partnerships or civil unions. In any of such states where the non-marital relationship still exists, members of those relationships also are allowed to file jointly or separately under the same rules applicable to married couples.

What follows is a summary of the seven relevant same-sex marriage jurisdictions and the guidance each jurisdiction has given to same-sex couples for their state and local income tax filing obligations. The order that the jurisdictions are discussed is somewhat arbitrary, but was chosen to illustrate points of difference and similarity among certain states. We discuss California last, since California has produced the most extensive guidance of any jurisdiction, and the contrast between it and its sister marriage jurisdictions becomes most obvious when the description of the sparse guidance of the other jurisdictions precedes the California discussion.<sup>67</sup>

## B. Massachusetts

Massachusetts was the first state to legalize same-sex marriage. It came as a result of a 2003 court opinion, *Goodridge v. Department of Public Health*.<sup>68</sup> Massachusetts does not require that different-sex married couples match their state and federal filing status as joint or married filing separately, so it is probably not surprising that it was not troubled by the lack of conformity that results if a same-sex married couple files as single or head of household for federal purposes (because of DOMA) and “married filing separately” or “married filing jointly” for state income tax purposes.

The Massachusetts Department of Revenue (DOR) quickly responded to its Supreme Judicial Court’s opinion with guidance that addressed income tax as well as sales tax, estate and gift tax, and employer obligations (such as that employers must exclude from Massachusetts gross income the fair market value of health insurance and other benefits provided to employees’ same-sex spouses who do not qualify as dependents under federal

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<sup>67</sup> California is an unusual case because, at present, California does not solemnize same-sex marriages, but it did recognize same-sex marriage for a few months in 2008. See, e.g., *Topography*, *supra* note 3, at 200 n.36. California continues to recognize those marriages as well as valid same-sex marriages from other jurisdictions solemnized before November 2008. CAL. FAM. CODE § 308(b) (West 2012).

<sup>68</sup> 798 N.E.2d 941 (Mass. 2003).



law).<sup>69</sup> The guidance also explained to taxpayers how to determine dependents and how to use federal forms and adjust them in the case of calculating combined itemized deductions (medical, dental, unreimbursed employee business expenses), student loan interest deductions, and passive activity loss limitations in filing, if desired, joint Massachusetts income tax returns.

Massachusetts is a state, like most states, that does not require attaching a copy of the federal return to its resident or nonresident income tax return.<sup>70</sup> Not surprisingly, therefore, although same-sex married couples may want to prepare all or part of a pro forma federal “married filing jointly” return in order to help determine what to include on a joint Massachusetts return, the Massachusetts Department of Revenue does not require that such same-sex married couples file a copy of any pro forma federal “married filing jointly” return or other similar computational schedule with their Massachusetts joint return.

### C. Iowa

Like Massachusetts, Iowa same-sex marriage came about as a result of a state supreme court decision.<sup>71</sup> Also, like Massachusetts, there is no requirement in Iowa law that state filing status match federal filing status. Shortly after the court’s opinion was issued, the Iowa Department of Revenue issued a two-page memorandum of guidance with respect to income tax, inheritance tax, taxes on vehicle transfers, and employee benefits (i.e., the non-inclusion for Iowa income tax purposes of certain employee benefits treated as taxable income for federal purposes).<sup>72</sup> In this brief guidance, all that was said about Iowa income taxes was (1) that Iowa same-sex married couples should file jointly or separately (i.e., not as single or head of household) as of the taxable year 2009, and (2) that “[s]ome parts of Iowa’s tax law are based upon federal tax law, including the starting point, adjusted gross income. There are also some state deductions that are based on similar federal deductions. Same-sex spouses may need to perform special calculations to ensure they report the

69 *Tech. Info. Release 04-17: Massachusetts Tax Issues Associated with Same-Sex Marriages*, MASS. DEP’T OF REVENUE (July 7, 2004), <http://www.mass.gov/dor/businesses/help-and-resources/legal-library/tirs/tirs-by-years/2004-releases/tir-04-17-massachusetts-tax-issues-associated.html>.

70 MASS. DEP’T OF REVENUE, 2011 FORM 1 INSTRUCTIONS 16 (2011), available at <http://www.mass.gov/dor/docs/dor/forms/inctax11/f1-nrpypdfs/form-1-instructions.pdf>; MASS. DEP’T OF REVENUE, 2011 FORM 1-NR/PY INSTRUCTIONS 19 (2011), available at <http://www.mass.gov/dor/docs/dor/forms/inctax11/f1-nrpypdfs/nrpy-instructions.pdf>.

71 *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

72 *See Iowa Tax Treatment of Same-Sex Marriages*, IOWA DEP’T OF REVENUE, <http://www.iowa.gov/tax/taxlaw/ssmarriage.pdf> (last visited Jun. 20, 2012).

correct amounts on their Iowa tax returns.”<sup>73</sup> The memorandum concluded as follows: “The Department recognizes there may be additional issues not raised in this document. These will be addressed as they arise on a case by case basis.”<sup>74</sup> No further guidance has been issued to same-sex married couples.

Unlike most states, Iowa allows a deduction in computing its state income taxes for federal income taxes paid.<sup>75</sup> So, one would expect that Iowa would be more interested in seeing a copy of the federal return than most states. While Iowa law only requires that a copy of a federal return be attached to an Iowa nonresident return,<sup>76</sup> the Iowa Department of Revenue’s 2011 Individual Income Tax Expanded Instructions also requires Iowa residents to attach to their Iowa income tax return a copy of their federal income tax return.<sup>77</sup> There are no special instructions to same-sex married couples to attach either the actual federal returns and/or a pro forma joint federal return or a schedule showing how any adjustments to federal income were made to arrive at Iowa income.

#### D. Connecticut

In 2005, the Connecticut General Assembly adopted a law authorizing same-sex civil unions having all the benefits of marriage except the name “marriage.”<sup>78</sup> This law was challenged in court, and the Supreme Court of Connecticut in 2008 ruled the then-existing law of domestic relations was unconstitutional because it did not allow same-sex couples to marry.<sup>79</sup> In 2009, the Connecticut General Assembly then passed a law authorizing same-sex marriages.<sup>80</sup> The same law also provided that Connecticut civil unions could still be solemnized through October 1, 2010, but any Connecticut civil union would convert to a same-sex marriage as of that date.<sup>81</sup> Further, the law provided that Connecticut would

73 *See id.*

74 *Id.* at 2.

75 IOWA CODE § 422.9(2)(b) (West, Westlaw through portion of 2012 Reg. Sess.).

76 *Id.* § 422.13(5).

77 *See* IOWA DEP’T OF REVENUE, IOWA INDIVIDUAL INCOME TAX EXPANDED INSTRUCTIONS—TAX YEAR 2011, at 49 (2011), available at <http://www.iowa.gov/tax/forms/2011IndIncInstr.pdf>.

78 CONN. GEN. STAT. ANN. § 46b-38aa-oo (repealed 2009).

79 *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

80 2009 Conn. Acts 13, § 3, amending CONN. GEN. STAT. § 46b-20 (West Supp. 2011) to provide that “(4) ‘Marriage’ means the legal union of two persons.”

81 2009 Conn. Acts 13, §§ 10–12.

recognize as marriages (1) same-sex marriages performed in other states or jurisdictions or (2) civil unions or registered domestic partnerships entered into in other states or jurisdictions if those relationships provided substantially the same rights, benefits, and responsibilities as marriages.<sup>82</sup>

Unlike Massachusetts and Iowa, which do not require any conformity to federal filing status, Connecticut is similar to New York and New Jersey in requiring couples filing joint federal income tax returns, in most cases, to also file Connecticut joint income tax returns.<sup>83</sup> Also like New York and New Jersey, Connecticut (though only by regulation, not law) provides, “If a husband and wife file federal income tax returns as married individuals filing separately, they shall also determine their Connecticut taxable income on separate Connecticut income tax returns as married individuals filing separately.”<sup>84</sup> Of course, this last sentence (written in 1994) arguably has no application to same-sex married couples, since, because of DOMA, they do not file federal returns as “married individuals filing separately,” but, rather, file as unmarried individuals who are “single” or “head of household.” Similarly, the sentence would seem to have no application to people in civil unions.

The Connecticut Department of Revenue Services has not issued any guidance specific to same-sex married couples’ state income taxes beyond a very few “frequently asked questions” on its web site and a few sentences in its instructions for both resident and nonresident returns. One such sentence from the instructions to the 2010 returns says, “Any reference in these instructions to a spouse also refers to a party to a civil union recognized under Connecticut law or a spouse in a marriage recognized under Public Act 2009-13.”<sup>85</sup> Apparently as a result of the legislation converting Connecticut civil unions to marriages during 2010, this sentence has been dropped from the 2011 instructions.<sup>86</sup> However, an answer to a “frequently asked question” posted in response to the 2008 ruling of the Supreme Court of Connecticut states: “The filing status for individuals who are parties to a civil union recognized under Connecticut law or a marriage recognized under *Kerrigan v. Commissioner of Public Health*, is either *filing jointly for Connecticut only* or

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82 *Id.* §§ 1, 2.

83 CONN. AGENCIES REGS. § 12-702(c)(1)-1(b)-(d) (2012).

84 *Id.* § 12-702(c)(1)-1(a).

85 CONN. DEP’T OF REVENUE SERVS., 2010 FORM CT-1040 RETURN & INSTRUCTIONS 5 (2010), available at <http://www.ct.gov/drs/lib/drs/forms/2010forms/incometax/ct-1040booklet.pdf>.

86 CONN. DEP’T OF REVENUE SERVS., 2011 FORM CT-1040 RETURN & INSTRUCTIONS 7 (2011), available at <http://www.ct.gov/drs/lib/drs/forms/2011forms/incometax/ct-1040booklet.pdf>.

*filing separately for Connecticut only.*"<sup>87</sup>

The 2011 instructions provide: "Spouses in a same sex marriage must use *filing jointly for Connecticut only* or *filing separately for Connecticut only*. They may not use single or, if applicable, head of household (although this will be their filing status for federal income tax purposes)."<sup>88</sup> There is no longer any mention of civil unions in the instructions. In any event, the Department clearly allows same-sex couples in legally-recognized relationships to file joint Connecticut income tax returns.

To facilitate the identification of legally-recognized same-sex couples, the Connecticut Form CT-1040 has a box on its first page in the filing status sections that reads "Filing jointly for Connecticut only."<sup>89</sup> Connecticut is one of the few states that have such boxes that only could apply to same-sex couples under their laws.

The only instructions specific to parties to civil unions or marriages in computing their Connecticut joint income tax liability are as follows:

**Taxpayers Filing Jointly for Connecticut Only:** Taxpayers filing jointly for Connecticut only must recalculate their federal adjusted gross income as if, for federal tax purposes, they were allowed and elected to file as married filing jointly.

Employer provided health insurance coverage for an employee's spouse in a same-sex marriage may be taxable income to the employee for federal income tax purposes. In this case, you must subtract the amount from your federal adjusted gross income and enter the result on Line 1 of your Connecticut income tax return.<sup>90</sup>

The instructions also warn that in computing the amount of Social Security benefits includible in Connecticut income—which is a figure derived, in part, from the amount included for federal purposes under I.R.C. § 86 (and which varies based on federal filing

87 *How to File When in a Civil Union or Marriage Recognized Under Kerrigan*, Taxpayer Answer Center, CONN. DEP'T OF REVENUE SERVS., available at <http://tinyurl.com/CTcivilunionguidance> (last visited Feb. 20, 2012).

88 CONN. DEP'T OF REVENUE SERVS., 2011 FORM CT-1040 RETURN & INSTRUCTIONS 17 (2011), available at <http://www.ct.gov/drs/lib/drs/forms/2011forms/incometax/ct-1040booklet.pdf>.

89 CONN. DEP'T OF REVENUE SERVS., 2011 FORM CT-1040, at 1 (2011), available at <http://www.ct.gov/drs/lib/drs/forms/2011forms/incometax/ct-1040.pdf>.

90 *Id.* at 18.

status chosen)—same-sex married couples must first recompute the federal inclusion amount as if they filed married (jointly or separately) for federal purposes.<sup>91</sup>

Connecticut is not a state that normally requires tax filers to attach to its state tax returns copies of the federal income tax returns, and similarly does not require same-sex civil union or married couples to attach any actual or pro forma federal return or schedules explaining the adjustments necessary to modify federal items for use on Connecticut income tax returns.<sup>92</sup>

### E. Vermont

In response to a 1999 decision of the Vermont Supreme Court,<sup>93</sup> in 2000, Vermont adopted the first civil union statute in the nation for same-sex couples.<sup>94</sup> That statute gave people in Vermont civil unions all the rights and responsibilities of marriage, and specifically stated that such rights included “laws relating to taxes imposed by the state.”<sup>95</sup> Effective September 1, 2009, Vermont adopted same-sex marriage.<sup>96</sup>

The Vermont Department of Taxes issued Technical Bulletin TB-55 (Oct. 7, 2010),<sup>97</sup> in which it gave the only guidance yet to taxpayers<sup>98</sup> on how legally-recognized same-sex couples are to file their Vermont income taxes. The guidance for those couples was limited to the issue of whether such couples can file jointly in Vermont, not how to treat specific items. The Bulletin emphasizes that, with minor exceptions, Vermont ordinarily requires that its taxpayers use the same filing status on their Vermont return as they do on their federal return.

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91 *Id.* at 23.

92 *Id.* at 22 (“Do *not* attach copies of your federal income tax return or federal schedules.”) (emphasis in original).

93 *Baker v. State*, 744 A.2d 864 (Vt. 1999).

94 An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 72.

95 2000 Vt. Acts & Resolves 72, 74 (codified as amended at VT. STAT. ANN. tit. 15, § 1204(a), (e)(14) (2011)).

96 An Act to Protect Religious Freedom and Recognize Equality in Marriage, 2009 Vt. Acts & Resolves 33 (amending VT. STAT. ANN. tit. 15, § 8 (2011)).

97 Tech. Bull. 55, 2010 Vt. Tax LEXIS 6 (Vt. Dep’t Taxes Oct. 7, 2010).

98 Since 2000, the Department of Taxes has informed employers not to withhold Vermont income taxes on health insurance premiums paid on behalf of their employees’ civil union partners, and in 2012, the instruction was extended to same-sex spouses. See VT. DEP’T TAXES, TECH. BULL. 23, available at <http://www.state.vt.us/tax/pdf.word.excel/legal/tb/TB23rev011312.pdf> (last revised on Jan. 13, 2012).

Vermont law provides as follows: “A husband and wife or a surviving spouse may file a joint Vermont personal income tax return for any taxable year for which the husband and wife or surviving spouse are permitted to file a joint federal income tax return under the laws of the United States.”<sup>99</sup> DOMA, though, does not permit a person in a same-sex marriage to be a party to a joint federal income tax return, so this sentence would literally preclude a same-sex married couple from filing a Vermont joint income tax return. The Bulletin makes an exception to the statute for same-sex married couples and civil union members, stating, in part:

For Vermont income tax purposes, civil union partners and same sex spouses are treated identically to traditionally defined spouses. This means that the couple must file their Vermont income tax return as Civil Union/Married Filing Jointly or as Civil Union/Married Filing Separately. Such couples do not have the option of filing a Vermont return using the Single status.

Because the federal government does not recognize same sex marriage or civil unions, a same sex couple is required to recompute their federal return *for Vermont tax purposes only* as either Married Filing Jointly or as Married Filing Separately. They should use the exemptions and deductions allowed by the IRS rules for those filing as Married Filing Separately or Married Filing Jointly. If the Married Filing Separately option is chosen, exemptions and deductions should be reasonably allocated between the civil union partners. This recomputed federal return should be attached to the Vermont return and clearly marked ***Recomputed for VT Purposes***. A copy of the returns actually filed with the IRS should also be attached. The recomputed federal return should then be used as the basis for the Vermont Civil Union/Married Filing Jointly or Civil Union/Married Filing Separately tax return.<sup>100</sup>

The Bulletin also allows different-sex spouses who filed jointly federally to file separately for Vermont purposes where only one is a resident. In such a case, the Bulletin also requires the preparation of pro forma separate federal returns and their attachment to the Vermont return, along with the actual federal joint return.<sup>101</sup> Vermont also requires nonresidents only

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99 VT. STAT. ANN. tit. 32, § 5861(c) (2012).

100 Tech. Bull. 55, 2010 Vt. Tax LEXIS 6, at \*10–11.

101 *Id.* at \*3–10.

part of whose income is from Vermont to attach the first two pages of their federal return—even if they are not using a filing status inconsistent with their federal return.<sup>102</sup> Thus, the requirement that same-sex couples prepare a pro forma federal joint return and attach it to the Vermont return, along with the actual federal return—although burdensome—is not more onerous than that imposed by the state for different-sex couples deviating from their federal filing status.

The Vermont income tax return, in addition, contains an unusual box to be checked at the top of the first page that instructs filers to “[c]heck here if using RECOMPUTED Federal Return information.”<sup>103</sup> The instructions explain the purpose of this box as follows: “Because VT and IRS routinely share information, checking the recomputed Federal return box alerts the Department to expect differences between the IRS filing and VT filing.”<sup>104</sup> Form IN-111, the personal income tax form for Vermont, also contains another unusual feature—separate filing status boxes that read: “CU Partner Filing Jointly” and “CU Filing Separately.”<sup>105</sup>

## F. New Hampshire

In 2007, New Hampshire enacted a law that treated same-sex couples in civil unions equivalently to married different-sex couples.<sup>106</sup> Effective January 1, 2010, New Hampshire adopted same-sex marriage and repealed civil unions, converting them into marriages as of January 1, 2011.<sup>107</sup> New Hampshire, unlike each of the twelve other relevant states, does not impose income tax on wages, but it does have an Interest and Dividend Tax, filed on Form DP-10. (It also has a business profits tax that can apply to individuals, but there is no joint filing of that form for married couples.)<sup>108</sup> Forms DP-10 for the Interest and Dividend

102 VT. DEP'T OF TAXES, 2011 VT. SCHEDULE IN-113, at 1 (2011), available at <http://www.state.vt.us/tax/pdf.word.excel/forms/income/2011IN-113-web.pdf>.

103 VT. DEP'T OF TAXES, 2011 VT. FORM IN-111, at 1 (2011), available at <http://www.state.vt.us/tax/pdf.word.excel/forms/income/2011IN-111-web.pdf>.

104 VT. DEP'T OF TAXES, 2011 VT. INCOME TAX RETURN BOOKLET 7 (2011), available at <http://www.state.vt.us/tax/pdf.word.excel/forms/income/2011incbk-web.pdf>.

105 2011 VT. FORM IN-111, *supra* note 103 at 1.

106 Act of June 4, 2007, 2007 N.H. Laws ch. 58 (codified as amended at N.H. REV. STAT. ANN. § 457-A:1) (repealed 2009).

107 Act of June 3, 2009, 2009 N.H. Laws ch. 59 (codified as amended at N.H. REV. STAT. ANN. § 457:1-a).

108 N.H. DEP'T OF REVENUE ADMIN., 2011 BUSINESS PROFITS TAX FORM NH-1040, at 1 (2011), available at [http://www.revenue.nh.gov/forms/2011/documents/NH1040v7\\_SF2.pdf](http://www.revenue.nh.gov/forms/2011/documents/NH1040v7_SF2.pdf) (having space for only one Social Security

Tax can be filed jointly by spouses, but there is nothing in New Hampshire law that requires federal conformity with respect to filing status.<sup>109</sup> The 2011 New Hampshire Interest and Dividends Tax Booklet contains a few sentences noting that New Hampshire civil unions are converted to marriages as of January 1, 2011, but the booklet does not say anything about filing status for people in civil unions or same-sex marriages.<sup>110</sup> Simply discussing same-sex marriages and former civil unions in the instructions, though, we think, implies that parties to same-sex marriages may file joint Interest and Dividends Tax returns.

### G. District of Columbia

The District of Columbia in 1992 created registered domestic partnerships whose partners could be of the same or different sex,<sup>111</sup> although, because of the United States Congress, which effectively controls various aspects of the governance of the District, the status of registered domestic partner had no significant effect for several years. Effective for 2010, the District allowed the solemnizing of same-sex marriages.<sup>112</sup> The District of Columbia does not require federal conformity between its income tax returns and those of the federal government as to filing status. Further, the District is like a small minority of states (such as Iowa) in allowing the filing not only of joint returns, but also, instead, combined separate returns on a single form. This combined separate return is for the purposes of not having joint liability, but still getting benefits that accrue only to a couple who filed married filing jointly federally.<sup>113</sup>

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Number); N.H. DEP'T OF REVENUE ADMIN., 2011 PROPRIETORSHIP BUSINESS PROFITS TAX RETURN INSTRUCTIONS 1 (2011), available at [http://www.revenue.nh.gov/forms/2011/documents/NH1040v7\\_SF2.pdf](http://www.revenue.nh.gov/forms/2011/documents/NH1040v7_SF2.pdf) ("Spouses may not combine net results of separately held business organizations") (emphasis in original).

109 N.H. REV. STAT. ANN. § 77:5-a (2012) (authorizing joint returns).

110 See N.H. DEP'T OF REVENUE ADMIN., 2011 INTEREST & DIVIDENDS TAX BOOKLET, FORM DP-59A 2 (2011), available at [http://www.revenue.nh.gov/forms/2011/documents/DP-59-Av9\\_SF2.pdf](http://www.revenue.nh.gov/forms/2011/documents/DP-59-Av9_SF2.pdf).

111 Health Care Benefits Expansion Act of 1992, 39 D.C. Reg. 2861 (1992) (codified as amended at D.C. CODE § 32-701 through 710 (LexisNexis 2007 & Supp. 2011)).

112 Religious Freedom and Civil Marriage Equality Amendment Act of 2009, 57 D.C. Reg. 27 (2009) (amending D.C. CODE § 46-401) (West 2012).

113 D.C. CODE § 47-1805.01(e) (LexisNexis 2009 & Supp. 2011) ("Whenever a taxpayer is required by the Internal Revenue Code of 1986 to file a joint income tax return with his or her spouse in order to qualify for a tax benefit under the Internal Revenue Code of 1986, the taxpayer and spouse shall file either a joint return or separate returns on a combined individual form prescribed by the Mayor in order to qualify for a similar benefit afforded under this chapter.").



Unlike most states that did not specifically amend their laws to mention registered domestic partners or same-sex marriages in their tax codes, in 2007, the District amended its income tax laws to say, “Domestic partners may file either a joint return or separate returns on a combined form prescribed . . . as if the federal government recognized the right of domestic partners to file jointly.”<sup>114</sup> And in 2010, as part of the adoption of same-sex marriage, the District added the following similar sentence to its income tax laws: “Married same-sex individuals may file either a joint return or separate returns on a combined form prescribed by the Mayor as if the federal government recognized the right of married same-sex individuals to file jointly.”<sup>115</sup>

The District of Columbia Office of Tax and Revenue has not issued any specific guidance to help same-sex married couples and registered domestic partners prepare District income tax returns beyond (1) making a few statements in the instructions to the Form D-40 income tax return and (2) instructing that domestic partners or other similar relationships registered in other jurisdictions and same-sex spouses who are married in other jurisdictions should file jointly or married filing separately on a combined return for tax years beginning in 2009.<sup>116</sup> On the Form D-40, there are filing status boxes that can be checked for “registered domestic partner filing jointly” (and one for filing separately on the same return) and several references to registered domestic partners next to the word “married,” such as on Schedule S used to compute taxes when a couple files separately on the same return.<sup>117</sup> Of particular interest, though, is line 12 on the Schedule I, Calculation B, which is used for subtractions from federal adjusted gross income for District purposes. That line entry reads: “Health-care insurance premiums paid by an employer for an employee’s registered domestic partner or same sex spouse.”<sup>118</sup>

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114 *Id.* § 47-1805.01(f) (LexisNexis Supp. 2011).

115 *Id.* § 47-1805.01(g) (LexisNexis Supp. 2011).

116 *OTR Tax Notice 2010-02 District of Columbia Income Tax Return Filing Obligations of Domestic Partners or Other Similar Relationships Registered in Other Jurisdictions*, D.C. OFFICE OF TAX AND REVENUE (Jan. 12, 2010), [http://otr.cfo.dc.gov/otr/frames.asp?doc=/otr/lib/otr/notices/rdps\\_other\\_jx\\_2010-02\\_2\\_.pdf](http://otr.cfo.dc.gov/otr/frames.asp?doc=/otr/lib/otr/notices/rdps_other_jx_2010-02_2_.pdf); *OTR Tax Notice 2010-03 District of Columbia Income Tax Return Filing Obligations of Same-Sex Spouses Married in Other Jurisdictions*, D.C. OFFICE OF TAX AND REVENUE (Mar. 3, 2010), [http://otr.cfo.dc.gov/otr/frames.asp?doc=/otr/lib/otr/notices/same-sex\\_filing\\_2010-03\\_3\\_.pdf](http://otr.cfo.dc.gov/otr/frames.asp?doc=/otr/lib/otr/notices/same-sex_filing_2010-03_3_.pdf).

117 D.C. OFFICE OF TAX AND REVENUE, 2011 D.C. INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS 23 (Form D-40, “personal information” section and lines 1 and 11), 28 (Schedule S, Calculation J) (2011), *available at* [http://otr.cfo.dc.gov/otr/frames.asp?doc=/otr/lib/otr/january\\_2012/2011\\_d-40\\_d-40ez\\_web\\_booklet.pdf](http://otr.cfo.dc.gov/otr/frames.asp?doc=/otr/lib/otr/january_2012/2011_d-40_d-40ez_web_booklet.pdf).

118 The instructions to line 12 state: “Any healthcare insurance premium paid by an employer for an employee’s domestic partner registered with the Vital Records Division of the DC Department of Health (see D.C. CODE § 32-701(3) and § 702) or same sex spouse is deductible, unless on your federal return the

With respect to filing status for registered domestic partners, the District takes the unusual position of allowing them to file a “joint return” (i.e., equivalent to married filing jointly), separately on the same return, or file as “single.”<sup>119</sup> No state allows “single” status for registered domestic partners or civil union members who are permitted to file a “joint return.” Same-sex married couples, on the other hand, are told by the District that they may only file either a “joint return” or file separately on the same return.<sup>120</sup> The Office of Tax and Revenue encourages both registered domestic partners and same-sex married couples “to prepare a ‘not to be filed’ (mock) joint federal return solely to calculate the benefits of filing jointly or married filing separately on the same D-40.”<sup>121</sup> There is no requirement that this mock federal return be attached to the D-40 when filed.

## H. New York

For a number of years, following a state intermediate appellate court decision, New York recognized same-sex marriages performed in other states based on the principle of comity, even though New York did not at that time itself allow same-sex couples to marry in New York.<sup>122</sup> Although in 2008, New York’s Governor David Paterson ordered state agencies to give full recognition to valid same-sex marriages from other jurisdictions unless otherwise prevented by some other provision of law,<sup>123</sup> New York’s Department of Taxation and Finance stayed silent on the issue of whether such couples could or should file their New York income tax returns as married. Part of the silence may have derived from New York Tax Law § 651(b)(1), which states: “If the federal income tax liability of husband or wife is determined on a separate federal return, their New York income tax liabilities and returns shall be separate.”<sup>124</sup> Many read this sentence as prohibiting joint

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employee’s registered domestic partner or same sex spouse is considered a dependent pursuant to IRC § 152 and a deduction from income was taken for the premium on the employee’s federal tax return.” *Id.* at 40.

119 *Id.* at 6.

120 *Id.*

121 *Id.*

122 See *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740 (App. Div. 2008) (recognizing the validity of a same-sex marriage of a couple married in Canada).

123 The Executive Directive was a Memorandum from David Nocenti, Counsel for Governor Paterson, to All Agency Counsel (May 14, 2008), available at [http://www.nyclu.org/files/Nocenti\\_Order\\_05.14.08.pdf](http://www.nyclu.org/files/Nocenti_Order_05.14.08.pdf), and is quoted, in relevant part, in *Golden v. Paterson*, 877 N.Y.S.2d 822, 825–26 (Sup. Ct., Bronx Cnty. 2008). See also Jeremy Peters, *New York to Back Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008.

124 N.Y. TAX LAW § 651(b)(1) (McKinney 2012).

filing of New York income tax returns for such same-sex married couples, simply because DOMA makes them file “on a separate federal return.” However, the New York Department of Taxation and Finance never cited Tax Law § 651(b)(1) as the reason for its silence, so this is just speculation. The authors are skeptical that this is a correct reading of the statute. One could easily also read the sentence as only applying to couples who filed a “married filing separately” return federally—whereas married same-sex couples filed “single” or “head of household” returns federally—especially since the statutory language precedes DOMA by more than thirty years.<sup>125</sup>

In any event, effective July 24, 2011, New York by statute agreed that it would solemnize same-sex marriages.<sup>126</sup> The act adopting same-sex marriage did not specifically amend Tax Law § 651(b)(1). But New York Domestic Relations Law § 10-a(2) now provides:

No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.

Further, the act adopting same-sex marriage explained the intent of the legislature in not amending every possible conflicting statute:

It is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law. The omission from this act of changes to other provisions of law shall not be construed as a legislative intent to preserve any legal distinction between same-sex couples and different-sex couples with respect to marriage. The legislature intends that all provisions of law which utilize gender-specific terms in reference to the parties to a marriage, or which in any other way may be inconsistent with this act, be construed in a gender-neutral manner or in any way necessary to effectuate the intent of this act.<sup>127</sup>

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125 Act effective April 18, 1960, 1960 N.Y. Laws 563, § 2 (codified as amended at N.Y. TAX LAW § 651(b)(1) (McKinney 2012)).

126 Act of June 24, 2011, 2011 N.Y. Laws 95, § 3 (codified as amended at N.Y. DOM. REL. LAW § 10-a (McKinney Supp. 2012)).

127 2011 N.Y. Laws 95, § 2.

On July 29, 2011, the New York Department of Taxation and Finance issued TSB-M-11(8)I, stating:

Same-sex married couples must file New York personal income tax returns as married, even though their marital status is not recognized for federal tax purposes. This means they must file their New York income tax returns using a married filing status (e.g., married filing jointly, married filing separately), even though they may have used a filing status of single or head of household on their federal returns. In addition, to compute their New York tax, they must recompute their federal income tax (e.g., their federal income, deductions, and credits) as if they were married for federal purposes.

For personal income tax purposes, the Act is effective for tax years *ending* on or after July 24, 2011. Same-sex married couples who are married as of December 31, 2011, will be considered married for the entire year. They must file their returns using a married filing status starting in tax year 2011. The Act is not retroactive. Therefore, a same-sex married couple who was legally married in another state prior to July 24, 2011, is not married for New York tax purposes until July 24, 2011, and may not use a married filing status prior to tax year 2011.<sup>128</sup>

Further instructions posted on the Department's website state, "Don't submit this *federal as if married* return to the IRS. Use it only to complete your New York return and keep it with your tax documents."<sup>129</sup>

In effect, the Department presumably considers Tax Law § 651(b)(1) no longer in effect for same-sex married couples while DOMA is in existence, but only *prospectively*. In light of the complete comity afforded by New York to out-of-state same-sex married couples in all other areas of New York law outside tax in the several years before 2011, the authors find this prospective-only ignoring of Tax Law § 651(b)(1) extremely dubious.

The only other guidance for same-sex married couples in the Bulletin relates to New York's estate taxes with respect to same-sex married couples. On the Department's

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128 N.Y.S. DEP'T OF TAXATION & FIN., TECH. MEMO., MARRIAGE EQUALITY ACT 1 (July 29, 2011), *available at* [http://www.tax.ny.gov/pdf/memos/multitax/m11\\_8c\\_8i\\_7m\\_1mctmt\\_1r\\_12s.pdf](http://www.tax.ny.gov/pdf/memos/multitax/m11_8c_8i_7m_1mctmt_1r_12s.pdf).

129 *Personal Income Tax Information for Same-Sex Married Couples*, N.Y.S. DEP'T OF TAXATION & FIN., [http://www.tax.ny.gov/pit/pit\\_mea.htm](http://www.tax.ny.gov/pit/pit_mea.htm) (last modified Dec. 8, 2011).

website, however, it has also posted brief guidance to such couples about the application of the sales tax and a commuter tax, as well as guidance to employers that provides the following instructions: “You don’t need to withhold tax for New York State, New York City, or Yonkers income tax purposes on the value of certain benefits (e.g. health benefits that are treated as domestic partner health benefits for federal tax purposes), even though it’s subject to federal withholding.”<sup>130</sup>

The New York Form IT-201 for residents contains no special entries for same-sex couples.<sup>131</sup> However, there is an Item G on the face of the return where taxpayers are instructed to indicate one or more of nine special “conditions.”<sup>132</sup> One of those “conditions” is now Code M3 (Same-Sex Married Spouses). With respect to this condition, the instructions state that you should “[e]nter this code if you are required to use a married filing status on your New York return and you could not file your federal return using a married filing status.”<sup>133</sup> Further, the instructions to the Form IT-201 warn that “[a]ny reference in these instructions (and in any supporting credit forms and other attachments to your New York return) to your *federal return*, *federal amount*, *federal credit claimed*, etc., refers to your *federal as-if-married return*.”<sup>134</sup> The instructions, however, do not explain any of the many adjustments to federal income that are necessitated by virtue of the differing filing statuses for federal and New York purposes.

## I. California

In 1999, California enacted domestic partnerships for same-sex couples who were both at least eighteen years of age and different-sex couples who were both at least sixty-two years of age. The legislation did not, however, provide for such domestic partners to have all the rights of married couples.<sup>135</sup> For example, the law enacted California Family Code § 299.5, which provided, in part:

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130 *Withholding Tax Information Regarding Same-Sex Married Employees*, N.Y.S. DEP’T OF TAXATION & FIN., [http://www.tax.ny.gov/pit/withholding\\_mea.htm](http://www.tax.ny.gov/pit/withholding_mea.htm) (last modified Sept. 8, 2011).

131 N.Y.S. DEP’T OF TAXATION & FIN., 2011 RESIDENT INCOME TAX RETURN FORM IT-201 (2011), available at [http://www.tax.ny.gov/pdf/current\\_forms/it/it201\\_fill\\_in.pdf](http://www.tax.ny.gov/pdf/current_forms/it/it201_fill_in.pdf).

132 *Id.* at 1.

133 N.Y.S. DEP’T OF TAXATION & FIN., 2011 INSTRUCTIONS FOR FORM IT-201, at 14 (2011), available at [http://www.tax.ny.gov/pdf/2011/inc/it201i\\_2011.pdf](http://www.tax.ny.gov/pdf/2011/inc/it201i_2011.pdf).

134 *Id.* at 5.

135 Act of Oct. 10, 1999, 1999 Cal. Stat. ch. 588, § 2 (codified at CAL. FAM. CODE § 297(a)) (West 2012).

(d) The filing of a Declaration of Domestic Partnership pursuant to this division shall not, in and of itself, create any interest in, or rights to, any property, real or personal, owned by one partner in the other partner, including, but not limited to, rights similar to community property or quasi-community property.

(e) Any property or interest acquired by the partners during the domestic partnership where title is shared shall be held by the partners in proportion of interest assigned to each partner at the time the property or interest was acquired unless otherwise expressly agreed in writing by both parties.<sup>136</sup>

With respect to income taxes, the then-new law, California Family Code § 299.5(f), precluded registered domestic partners from being treated as married in the following manner: “The formation of a domestic partnership under this division shall not change the individual income or estate tax liability of each domestic partner prior to and during the partnership, unless otherwise provided under another state or federal law or regulation.”<sup>137</sup> Over the following years, attempts by individuals in registered domestic partnerships—and by others not in registered domestic partnerships but living together—to be treated as married for California income tax purposes were regularly rebuffed.<sup>138</sup>

In 2001, California extended to registered domestic partners a limited tax right—treating registered domestic partners effectively as married for purposes of the employee benefits

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136 CAL. FAM. CODE § 299.5(d)–(f) (West 2012).

137 *Id.* § 299.5(f).

138 For example, it was held that a gay man who cohabited with another gay man, where the couple were neither married nor registered as domestic partners, could not claim head of household status in filing his 2006 California income tax returns, even though he could claim the other man as a dependent that year under federal and state law. Under both federal and California income tax laws, he had to file as single. Although the man argued this was the result of homophobia and antiquated laws, the California State Board of Equalization (SBE) said this was a matter that only the Legislature could fix. *In re Appeal of Granger*, 2010 Cal. Tax LEXIS 17, at \*6 (Cal. SBE 2010). *Accord In re Appeal of Nash*, 2007 Cal. Tax LEXIS 140, at \*5 (Cal. SBE 2007) (involving 2003 tax year where a couple apparently had registered for Domestic Partnership in 2003 or before). The result in *Granger* is consistent with the SBE’s decision in appeals brought by members of different-sex couples who were not in marriages or registered as domestic partners and who sought head of household status on California income tax returns. *In re Appeal of Wu*, 2010 Cal. Tax LEXIS 243, at \*2–5 (Cal. SBE 2010); *In re Appeal of May*, 2010 Cal. Tax LEXIS 168, at \*5 (Cal. SBE 2010); *In re Appeal of Hohman*, 2009 Cal. Tax LEXIS 621, at \*9–11 (Cal. SBE 2009); *see also In re Appeal of Boykins*, 2011 Cal. Tax LEXIS 50, at \*10–11 (Cal. SBE 2011) (son of woman who lived with man did not qualify as “child” of man—and thereby make the man head of household—because no evidence of a registered domestic partnership existed between man and woman).

provisions of its income taxes.<sup>139</sup> Then, in 2003 (but effective for 2005), California agreed to treat as RDPs under its own laws those RDPs or civil unions (but not marriages) validly formed in other jurisdictions that were substantially equivalent to California RDPs.<sup>140</sup> The same legislation repealed Cal. Family Code § 299.5,<sup>141</sup> and added a new Cal. Family Code § 297.5,<sup>142</sup> providing, in part:

(a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.

...

(e) To the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law.

...

(g) Notwithstanding this section, in filing their state income tax returns, domestic partners shall use the same filing status as is used on their federal income tax returns, or that would have been used had they filed federal income tax returns. Earned income may not be treated as community property for state income tax purposes.

Thus, again, although expanding the rights of registered domestic partners to be virtually the same as those of married couples—including, implicitly, community property divisions when taxes were not involved—California did not allow its registered domestic partners to file joint California income tax returns.

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139 Act of Oct. 14, 2011, 2001 Cal. Stat. ch. 893, § 56 (codified as amended at CAL. REV. & TAX. CODE § 17021.7(a)(1) (West 2012)) (“For purposes of this part, the domestic partner of the taxpayer shall be treated as the spouse of the taxpayer for purposes of applying only Sections 105(b), 106(a), 162(l), 162(n), and 213(a) of the Internal Revenue Code and for purposes of determining whether an individual is the taxpayer’s ‘dependent’ or ‘member of their family’ as these terms are used in those sections.”).

140 Act of Sept. 19, 2003, 2003 Cal. Stat. ch. 421, § 9 (codified as amended at CAL. FAM. CODE § 299.2 (West 2004)).

141 2003 Cal. Stat. ch. 421, § 11.

142 *Id.* § 4.

Effective for 2007, California amended both its Family Code and Revenue and Taxation Code to allow registered domestic partners to file joint income tax returns. California is a state that generally quite strictly requires federal conformity in the choice of state filing status. For example, California Revenue and Taxation Code § 18521(a)(1) provides: “Except as otherwise provided in this section, an individual shall use the same filing status that he or she used on his or her federal income tax return filed for the same taxable year.”<sup>143</sup> The legislation effective for 2007 both repealed California Family Code § 297.5(g)<sup>144</sup> and amended California Revenue and Taxation Code § 18521 to extensively refer to registered domestic partners wherever “spouses” were mentioned, and added the following exception at §18521(d):

Notwithstanding subdivision (a), registered domestic partners, as described in Section 297 of the Family Code, who are registered as domestic partners as of the close of the taxable year and who are prohibited under federal law from filing a joint federal income tax return, shall either file a joint state income tax return or separate state income tax returns by applying the standards applicable to spouses who file separately pursuant to Section 6013 of the Internal Revenue Code. A separate return filed by a domestic partner of a registered domestic partnership shall be subject to the same conditions and limitations applicable to the separate return of a spouse.<sup>145</sup>

It was this last change—treating RDPs effectively as spouses for all purposes of California income taxes—that the Obama IRS relied upon to rule that the IRS would recognize community property division for same-sex California RDPs and those in other states.

On May 15, 2008, the Supreme Court of California held that it was unconstitutional to not allow same-sex couples to marry.<sup>146</sup> After that decision came down and until the passage of Proposition 8 on November 5, 2008, an estimated 18,000 California same-sex couples got married. Proposition 8 ended the ability of California same-sex couples to get married, but the California Supreme Court ruled that it did not revoke marriages that happened earlier in the year.<sup>147</sup> Accordingly, even today, there are thousands of same-sex

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143 CAL. REV. & TAX. CODE § 18521(a)(1) (West 2012).

144 Act of Sept. 30, 2006, 2006 Cal. Stat. ch. 802, §2.

145 *Id.* § 4.

146 *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *superseded by constitutional amendment*, CAL. CONST. art. I, § 7.5.

147 *Strauss v. Horton*, 207 P.3d 48, 59, 120–22 (Cal. 2009).



married couples in California, and the state's income taxes must also accommodate their filings each year going forward.

Effective for 2010, California also agreed that (1) same-sex marriages entered into outside of California prior to November 5, 2008 would be treated as marriages in California and (2) any such marriages entered into on or after November 5, 2008 would be treated the same as marriages in California, but would not be called "marriages"—i.e., they would be treated as RDPs.<sup>148</sup>

California has gone far beyond the guidance of any other state in telling its residents and nonresidents how to file California income tax forms if they are in a marriage or a registered domestic partnership with a person of the same sex. In 2010, the state's Franchise Tax Board issued the seventeen-page Publication 737, "Tax Information for Registered Domestic Partners,"<sup>149</sup> and the sixteen-page Publication 776, "Tax Information for Same-Sex Married Couples."<sup>150</sup> In addition, the website of the Franchise Tax Board has pages entitled "What if I'm a domestic partner?"<sup>151</sup> and "Same-Sex Married Couples."<sup>152</sup> These and other website pages (often interlinked) answer multiple frequently asked questions. Here is an example of two frequently asked questions from the domestic partnership page:

**Can an RDP who files a California married filing joint return exclude up to \$500,000 of capital gain on the sale of a principal residence?**

Yes, if they meet the capital gain exclusion rules that apply to a married individual filing a joint return. . . .

**Can an RDP who filed a joint return apply for relief under California's innocent**

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148 2009 Cal. Stat. ch. 625, § 1 (amending CAL. FAM. CODE § 308 (West 2010)).

149 STATE OF CAL. FRANCHISE TAX BD., FTB PUBL'N 737—TAX INFORMATION FOR REGISTERED DOMESTIC PARTNERS (2010) [hereinafter FTB 737], available at [https://www.ftb.ca.gov/forms/2010/10\\_737.pdf](https://www.ftb.ca.gov/forms/2010/10_737.pdf). FTB 737 has not yet been updated.

150 STATE OF CAL. FRANCHISE TAX BD., FTB PUBL'N 776—TAX INFORMATION FOR SAME-SEX MARRIED COUPLES (2010) [hereinafter FTB 776], available at [https://www.ftb.ca.gov/forms/2010/10\\_776.pdf](https://www.ftb.ca.gov/forms/2010/10_776.pdf). FTB 776 also has not yet been updated.

151 *What If I'm a Domestic Partner?*, STATE OF CAL. FRANCHISE TAX BD., <http://www.ftb.ca.gov/individuals/faq/dompart.shtml> (last visited July 23, 2012).

152 *Same-Sex Married Couples*, STATE OF CAL. FRANCHISE TAX BD. (Apr. 13, 2010), [http://www.ftb.ca.gov/individuals/same\\_sex\\_marriage/index.shtml](http://www.ftb.ca.gov/individuals/same_sex_marriage/index.shtml).

### spouse provisions?

Yes, California innocent spouse provisions apply to anyone who files a married filing joint return.

Indeed, on the “Same-Sex Married Couples” page, there is a link to the Franchise Tax Board’s subscription service which allows a person to receive e-mail updates from the Board only relating to certain topics, one of which is same-sex marriage.<sup>153</sup>

The basic California income tax return is Form 540, which contains filing status boxes for “Married/RDP filing jointly” and “Married/RDP filing separately.”<sup>154</sup> The return essentially begins with reported federal adjusted gross income on line 13, then makes California subtractions on line 14 and California additions on line 16. On a Schedule CA (540), the California subtractions and additions are broken out by income and adjustment to income item (lines 7 through 37 on the federal return plus separate columns for additions and subtractions to get to the California number for each line). Since California same-sex married couples or registered domestic partners who wish to file jointly must start from a different federal adjusted gross income than is actually shown on their single or head of household federal returns, the Franchise Tax Board generally requires that taxpayers prepare and attach to their California Form 540 either (1) a pro forma federal joint return or (2) a “California RDP Adjustments Worksheet–Recalculated Federal Adjusted Gross Income” found in Publication 737 or a “California SSMC Adjustments Worksheet–Recalculated Federal Adjusted Gross Income” found in Publication 776.<sup>155</sup> The recomputed federal adjusted gross income, whether taken from the pro forma joint return or the appropriate worksheet, is inserted into the federal adjusted gross income on Form 540, line 13. Each worksheet lists the federal income tax return lines 7 through 37, followed by columns. The first and second columns are the actual amounts reported on the single or head of household returns of the two individuals in the same-sex couple. The third column is to highlight any necessary adjustments required to adjust for DOMA’s not treating the couple as spouses under the Internal Revenue Code, and the final column is the “Adjusted Federal Amounts (using the same rules applicable to spouses).”

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153 *See id.*

154 STATE OF CAL. FRANCHISE TAX BD., FORM 540 (2011), available at [https://www.ftb.ca.gov/forms/2011/11\\_540.pdf](https://www.ftb.ca.gov/forms/2011/11_540.pdf).

155 In the event that neither a pro forma return nor a worksheet is needed to prepare a return, neither need be attached to the Form 540. FTB 737, *supra* note 149, at 3; FTB 776, *supra* note 150, at 4.

The two Franchise Tax Board publications contain both frequently asked questions (similar to those on the website) and highlight by each line of the federal return issues likely to be of concern to same-sex couples. They also contain examples using the gender-neutral nicknames Pat and Chris as the same-sex couple. Space does not permit us to repeat here each issue covered by the publications. Suffice to say that nearly every issue covered by guidance in every other state is covered by similar or expanded guidance in the California publications, and, further, these publications give guidance on numerous issues not discussed in the guidance of other states. To give some sense of the detail of the California publications, here is a perhaps surprising passage from the domestic partner publication that is not discussed in any other state's guidance that we have yet mentioned:

### **Line 15 – IRA distributions**

An RDP will not be treated as a spouse where such treatment would result in a tax-favored account not being qualified as a tax-favored account for federal income tax purposes.

**Adjustment:** An RDP may have an adjustment to line 15 if the RDP has a California-only basis in an IRA, which is recoverable from an IRA distribution. For example, an RDP may have a California-only basis in an IRA if the RDP's partner is covered by an employer-provided retirement plan. Based on the RDPs' combined adjusted gross income, the available deduction for an IRA contribution may be reduced for California income tax purposes. The amount disallowed for an IRA contribution on this worksheet creates a California-only basis in the IRA. RDPs must keep track of their California-only basis in order to recover it tax-free from IRA distributions reported on line 15 in future years.<sup>156</sup>

Finally, here is one of several Pat and Chris examples that humanizes some of the instructions (though, unusually, one that identifies their gender):

### **Example:**

Chris, Taxpayer One, and Pat, Taxpayer Two, are RDPs. Chris made an IRA contribution of \$5,000 in 2010. Chris's federal modified AGI [adjusted gross income] is \$80,000, he is not covered by an employer-provided pension plan. On his separate federal tax return, Chris deducted his entire IRA contribution on line 32 of his Form 1040. Pat is covered

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<sup>156</sup> FTB 737, *supra* note 149, at 11.

by an employer-provided pension plan and he did not make an IRA contribution in 2010. Pat's federal modified AGI is \$150,000. Chris and Pat's combined federal modified AGI exceeds the \$177,000 limitation and they cannot deduct an IRA contribution. When they recalculate their federal modified AGI, as if married, they will make a \$5,000 filing status adjustment in column C, line 32 of this worksheet.

In sum, no jurisdiction goes anywhere near as far as California in helping same-sex couples accurately prepare their state income tax returns.

### III. State Income Taxation of Registered Domestic Partnerships and Civil Unions

There are at present six non-same-sex marriage states with state income taxes that have either civil unions or domestic partnerships that same-sex couples can enter into and that provide all the benefits of marriage. In three of those states—Rhode Island, Delaware and Hawaii—civil unions only became available recently, and the state revenue departments have not issued any guidance—though it seems pretty clear that the filing of joint income tax returns will be permitted in Hawaii and Delaware. In the three other states, the state revenue departments have agreed that same-sex couples in these relationships may file jointly, effectively treating such couples as married for purposes of state law.

#### A. New Jersey

Effective for 2004, New Jersey created domestic partnerships that provided very few benefits for (1) same-sex couples where both were at least eighteen and (2) different-sex couples where both were at least sixty-two.<sup>157</sup> The legislation did nothing to permit joint income tax filing, but did allow a domestic partner to claim a \$1,000 personal exemption for the other partner if the other partner did not file a New Jersey return “separately.”<sup>158</sup>

In a 2006 opinion, the New Jersey Supreme Court held it unconstitutional under the New Jersey Constitution for the state not to have a relationship like marriage for same-sex couples.<sup>159</sup> In response, effective for 2007, New Jersey enacted a law allowing same-sex couples to form civil unions having all the rights of marriage but without having the

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157 2003 N.J. Laws 246, § 4(b)(5).

158 2003 N.J. Laws 246, § 40 (amending N.J. STAT. ANN. § 54A:3-1(b)(1) (West 2004)).

159 *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

name “marriage.”<sup>160</sup> In particular, the benefits of a New Jersey civil union extend to “laws relating to taxes imposed by the State . . . [and] tax deductions based on marital status.”<sup>161</sup> The civil union law also allows a same-sex couple to be treated as having a civil union for New Jersey purposes if they entered into a civil union in another jurisdiction.<sup>162</sup> An opinion of the New Jersey Attorney General clarifies this latter provision as meaning that a same-sex couple will be treated as if in a New Jersey civil union if they (1) were married in other jurisdictions or (2) formed recognized relationships in other jurisdictions, but only if those relationships have substantially the same rights as marriage, such as California domestic partnerships.<sup>163</sup>

As noted previously, New Jersey is a state with a high degree of conformity to federal filing status, such that if a joint federal income tax return is filed, generally, the New Jersey tax return must also be filed jointly.<sup>164</sup> New Jersey law also provides: “If the income tax liability of husband and wife is determined on a separate return for federal income tax purposes, they shall each also file a separate return for New Jersey income tax purposes and their income tax liabilities under this act shall be separate.”<sup>165</sup> The New Jersey Department of the Treasury Division of Taxation has issued income tax guidance on its website only on the questions of civil union and domestic partnership filing status—not on particular issues faced by parties to a legally-recognized same-sex relationship filing a New Jersey Gross Income Tax Form NJ-1040. The guidance is posted on its website under separate pages headed “Civil Union Act” and “Filing Status.” The Civil Union Act page is mostly devoted to issues under New Jersey real property, transfer inheritance, and estate taxes, though it does refer to the Attorney General’s opinion as to which out-of-state same-sex couples may file like New Jersey Civil Union members.<sup>166</sup> The Filing Status page is devoted to all filing statuses by all taxpayers, so what it says about civil unions is even briefer than what is said about civil unions in the instructions to the New Jersey income tax returns.<sup>167</sup>

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160 2006 N.J. Laws 103, § 2 (adding N.J. STAT. ANN. § 37:1-28 (West 2007)).

161 N.J. STAT. ANN. § 37:1-32(n) (West Supp. 2011).

162 *Id.* § 37:1-34.

163 Formal Opinion No. 3-2007, N.J. Att’y Gen. Op. No. 3-2007 (Feb. 16, 2007), available at <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf>.

164 N.J. STAT. ANN. § 54A:8-3.1(c), (d), (h) (West 2012).

165 *Id.* § 54A:8-3.1(b).

166 *Civil Union Act*, STATE OF N.J. DEP’T OF THE TREASURY, DIV. OF TAXATION (Feb. 16, 2012), <http://www.state.nj.us/treasury/taxation/civilunionact.shtml>.

167 *N.J. Income Tax—Filing Status*, STATE OF N.J. DEP’T OF THE TREASURY, DIV. OF TAXATION (Sept. 28, 2010),

The New Jersey income tax return, Form NJ-1040, has filing status boxes that read “Married/CU Couple, filing joint return” and “Married/CU Partner, filing separate return.” It also has boxes under line 6 for “Regular” exemptions, not just for the taxpayer, but for “Spouse/CU Partner” and “Domestic Partner.” The instructions to the Form NJ-1040 provide as to filing status:

In general, you must use the same filing status on your New Jersey returns as you do for Federal income tax purposes, unless you are a partner in a civil union.

. . . Partners in a civil union recognized under New Jersey law *must file* their New Jersey income tax returns using the same filing statuses accorded spouses under New Jersey Gross Income Tax Law. Civil union partners may not use the filing status single. Any reference in this booklet to a spouse also refers to a partner in a civil union (CU) recognized under New Jersey law. . . .

**Married/Civil Union Couples.** If a married couple files a joint Federal income tax return, they must also file a joint New Jersey income tax return. If spouses file separate Federal returns, separate State returns must also be filed. However, if you are a civil union couple, your filing status for New Jersey will not match your Federal filing status for the year.<sup>168</sup>

New Jersey is a state that has an earned income tax credit calculated as a percentage of the federal credit. With respect to this credit calculation, the instructions warn:

**Civil Union Couples.** If you are filing a joint return for New Jersey purposes, and either one or both of you are eligible and file for a Federal earned income credit, you might also be able to receive a New Jersey earned income tax credit. A civil union partner filing a separate return is not eligible for a New Jersey earned income tax credit.

The only way to determine if you are eligible for a New Jersey credit is to prepare a Federal return as if you were married, filing jointly and calculate the amount of the Federal earned income credit, if any, you would have been eligible to receive on a joint Federal return. Once you have determined the amount of the Federal credit you would have received as joint filers,

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<http://www.state.nj.us/treasury/taxation/njit1.shtml>.

168 STATE OF N.J. DEP'T OF THE TREASURY, DIV. OF TAXATION, FILING INFORMATION—2011 FORM NJ-104017-18 (2011), available at <http://www.state.nj.us/treasury/taxation/pdf/current/1040i.pdf>.

you must use that amount on Worksheet G to calculate your New Jersey credit. Be sure to fill in only the second oval below Line 50 indicating you are a civil union couple. You may be asked to provide documentation to substantiate your calculation of the Federal earned income credit you would have been eligible to receive if you had filed a joint Federal return.<sup>169</sup>

Further, New Jersey does not ordinarily require that a copy of the federal return be attached to the New Jersey return, and, as is clear from the above, no pro forma joint federal return need be attached, even where an earned income tax credit is claimed by a civil union couple.<sup>170</sup>

New Jersey has an unusual alternative way to get an extension to file the state tax return: instead of requesting an extension by filing with the Division a Form NJ-630, one can attach a copy of the federal extension request to the New Jersey return when it is filed. Because there would be two federal tax returns filed by same-sex couples, the New Jersey instructions warn taxpayers in civil unions that, if they are going to use this alternative way to getting an extension for filing their New Jersey taxes, when filing a joint New Jersey return, they should “provide copies of the Federal extension application (or confirmation number) for both partners.”<sup>171</sup>

## B. Oregon

Effective for 2008, Oregon adopted same-sex domestic partnerships giving substantially the same rights as marriage.<sup>172</sup> With respect to Oregon taxes, Oregon law provides:

For purposes of administering Oregon tax laws, partners in a domestic partnership, surviving partners in a domestic partnership and the children of partners in a domestic partnership have the same privileges, immunities, rights, benefits and responsibilities as are granted to or imposed on spouses in a marriage, surviving spouses and their children.<sup>173</sup>

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169 *Id.* at 40–41.

170 *Id.* at 48.

171 *Id.* at 12.

172 2007 Or. Laws 99, §§ 3, 9 (2007) (adding OR. REV. STAT. §§ 106.310(1) (2009), 106.340 (2008)).

173 OR. REV. STAT. § 106.340(8) (2008).

The Oregon Department of Revenue has stated, “Oregon does *not* recognize civil unions, domestic partnerships, or same-sex marriages certified in other states.”<sup>174</sup>

Oregon requires extreme conformity in filing status between federal and Oregon income tax returns. Its law provides that if a married couple files a joint federal return, it “shall” file a joint Oregon return.<sup>175</sup> Further, “[i]f the federal income tax liability of either spouse is determined on a separate federal return, their income tax liabilities under this chapter shall be determined on separate returns.”<sup>176</sup> Like Iowa, Oregon is one of the few states that allows a deduction in computing its income taxes for federal income taxes accrued.<sup>177</sup> As a result, the Department of Revenue requires that all Oregon Form 40 income tax returns be accompanied by a front and back copy of the federal Form 1040.<sup>178</sup>

The Department of Revenue requires that all registered domestic partners file their Forms 40 either as “registered domestic partners filing jointly” or “registered domestic partners filing separately,”<sup>179</sup> and there are boxes on the Oregon Form 40 listing these statuses next to, but apart from, “married filing jointly” and “married filing separately.” While some guidance for Oregon registered domestic partners can be found in the instructions to the Form 40, the majority of such guidance is to be found on a Department website page entitled “Registered Domestic Partners in Oregon.”<sup>180</sup>

Since Oregon is unlike most states in requiring all of its taxpayers to attach their federal Forms 1040 (probably in part to check on the federal tax deduction), perhaps it is no surprise that registered domestic partners must attach not only their actual federal Forms 1040, but also pro forma federal married returns (whether they be joint or separate).<sup>181</sup> The instructions to Form 40 state as follows: “If you are filing as an RDP, include the federal ‘as if’ return. Write ‘RDP for Oregon Only’ in blue or black ink on the top left corner of your ‘as if’ federal return. Also include copies of the federal returns you and your RDP actually

174 *Registered Domestic Partners in Oregon*, OR. DEP’T OF REVENUE, <http://www.oregon.gov/DOR/PERTAX/RDP.shtml> (last visited Aug. 8, 2012).

175 OR. REV. STAT. § 316.367(3) (1985).

176 *Id.* § 316.367(2).

177 *Id.* § 316.680(1)(b).

178 OR. DEP’T OF REVENUE, 2011 FORM 40 AND INSTRUCTIONS 27 (2011), available at [http://www.oregon.gov/DOR/forms/personal/full-year-income-tax\\_101-043\\_2011.pdf](http://www.oregon.gov/DOR/forms/personal/full-year-income-tax_101-043_2011.pdf).

179 *Id.* at 7.

180 *Registered Domestic Partners in Oregon*, *supra* note 174.

181 *Id.*



filed.”<sup>182</sup>

After the California Franchise Tax Board, the Oregon Department of Revenue has issued the second largest amount of guidance to same-sex couples for filing state income taxes. The guidance is on its website page for registered domestic partners and covers (1) capital gains and losses, (2) the earned income tax credit, (3) the federal income tax liability subtraction, (4) IRA contributions, (5) medical and dental expenses, (6) medical insurance premiums paid by an employer to cover an employee’s registered domestic partner, (7) rental real estate passive activity loss limitations, (8) pension plans, (9) principal residence gain exclusion, (10) the special Oregon medical deduction, (11) student loan interest, and (12) the Working Family Child Care credit.<sup>183</sup>

### C. Illinois

Illinois adopted same-sex and different-sex civil unions effective June 1, 2011.<sup>184</sup> The civil union statute provides as follows: “A party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law.”<sup>185</sup> The Illinois civil union statute does not specifically mention Illinois income taxes.

Illinois had required a high degree of conformity with federal filing status up through 2009, but, starting in 2010, Illinois law provides that spouses filing a joint federal return may file their Illinois return jointly or separately, as they elect.<sup>186</sup> However, Illinois law still provides that “if the federal income tax liability of either spouse is determined on a separate federal income tax return, they shall file separate returns under this Act.”<sup>187</sup>

The Illinois Department of Revenue’s website contains a page entitled “Same-Sex Civil Unions” that states:

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182 OR. DEP’T OF REVENUE, 2011 FORM 40 AND INSTRUCTIONS 27 (2011), available at [http://www.oregon.gov/DOR/forms/personal/full-year-income-tax\\_101-043\\_2011.pdf](http://www.oregon.gov/DOR/forms/personal/full-year-income-tax_101-043_2011.pdf).

183 *Registered Domestic Partners in Oregon*, *supra* note 174.

184 2009 Ill. Laws 1513, § 10 (adding 750 ILL. COMP. STAT. ANN. 75/60 (West Supp. 2011)).

185 750 ILL. COMP. STAT. ANN. 75/20 (West 2011).

186 35 ILL. COMP. STAT. ANN. 5/502(c)(1)(A)–(B) (West 2011).

187 *Id.* 5/502(c)(1)(C).

If you were in a same-sex civil union as of December 31, 2011, you must file Form IL-1040 using either the “married filing jointly” or “married filing separately” filing status. However, since a same-sex civil union couple may not file a federal return using a married filing status,

- if you and your same-sex partner choose to file a joint Illinois return, you must complete a federal “as-if-married-filing-jointly” return, for Illinois purposes only.
- if you and your same-sex partner choose to file separate Illinois returns, you must complete federal “as-if-married filing separately” returns, for Illinois purposes only.

Complete your federal “as-if-married” return(s), including all schedules and attachments, applying all the federal rules for the married filing status you choose . . . . Enter the federal “as-if-married” return information where Illinois requires federal information. Do not file your federal “as-if-married” return(s) with the Internal Revenue Service (IRS).<sup>188</sup>

The page advises that for 2011, Form IL-1040 returns filed by same-sex civil union partners should be filed on paper, not electronically.<sup>189</sup> Additionally, the website page identifies four issues of special concern to same-sex civil union members: (1) Illinois earned income credit calculations should be based on federal pro forma returns, (2) the portion of federal wages attributable to employer-provided health insurance premiums allocable to the employee’s civil union partner should not be reported as Illinois wages, (3) capital loss carryovers, and (4) net operating loss carrybacks and carryovers.<sup>190</sup>

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188 *Same-Sex Civil Unions*, ILL. DEP’T OF REVENUE, <http://www.revenue.state.il.us/Individuals/Same-Sex-Civil-Unions.htm>.

189 *Id.*

190 *Id.* As to the last two issues, the website page states:

If you have a net capital loss this year or a net capital loss carryover to this year and offset it against your partner’s capital gain on a recomputed joint return, you may not carry your capital loss over to any other year, even if you file separately in that year or file a joint return with a different spouse. If you have a federal net operating loss this year or a federal net operating loss carryback or carryover to this year and you use that loss to offset income of your partner on a recomputed joint return, you may not carry that loss to any other year, even if you file separately in that year or file a joint return with a different spouse.

The 2011 Illinois Form IL-1040 has a box on its first page to check that reads “Check if same-sex civil union return (see instructions).” This box is in a section directly below where filing status boxes are checked. The Instructions to the form surprisingly do not mention the issues of special concern to same-sex couples in civil unions listed on the website page. The Instructions do require, however, that for such same-sex couples the “federal ‘as-if-married’ return, including all schedules and attachments” be attached to the Form IL-1040.<sup>191</sup>

#### D. Rhode Island

In 2006, Rhode Island first allowed a subtraction from the calculation of Rhode Island taxable income for the amount that was included in federal adjusted gross income as the value of insurance benefits provided to state employees for covering their dependents and domestic partners.<sup>192</sup> “Domestic partner” is a defined term under the state’s Public Officers and Employees Insurance Benefits Laws that can include same-sex couples living together in financial interdependence, if the employee certifies to the benefits director of the employee’s division of personnel the existence of a domestic partnership.<sup>193</sup>

Without changing the definition of “domestic partner,” Rhode Island adopted same-sex “civil unions” giving substantially the same rights as marriage, effective as of July 1, 2011.<sup>194</sup> Although the new civil union statute did not mention taxation, it did provide as follows: “A party to a civil union shall be included in any definition or use of any term that denotes the spousal relationship, whether or not gender specific, as those or related terms designating that relationship are used throughout the laws of the State of Rhode Island.”<sup>195</sup>

Like Oregon and Iowa, Rhode Island has a high degree of federal conformity of income tax filing status with the IRS. Generally, if a married couple files federal joint returns, it also must file Rhode Island joint returns.<sup>196</sup> Rhode Island law provides: “If the federal income tax liability of husband or wife is determined on a separate federal return, their Rhode

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191 ILL. DEP’T OF REVENUE, 2011 FORM IL-1040 INSTRUCTIONS 5 (2011), available at <http://www.revenue.state.il.us/taxforms/IncmCurrentYear/Individual/IL-1040-Instr.pdf>.

192 2006 R.I. Pub. Laws 189, § 3 (adding R.I. GEN. LAWS § 44-30-12(c)(6) (2009)).

193 R.I. GEN. LAWS § 36-12-1(3) (2011).

194 2011 R.I. Pub. Laws 198, § 1 (adding R.I. GEN. LAWS §§ 15-3.1-1(2), 15-3.1-6 (2011)).

195 R.I. GEN. LAWS § 15-3.1-7 (2011).

196 *Id.* § 44-30-51(b)(2)–(4).

Island income tax liabilities and returns shall be separate.”<sup>197</sup> Rather shockingly, the Rhode Island Department of Revenue Division of Taxation has not issued any guidance to date on how parties to a civil union should file Rhode Island income tax returns. Presumably, same-sex couples in civil unions filing in Rhode Island for the 2011 tax year should be able to file joint state income tax returns. However, the words “civil union” do not appear in the forms or instructions for 2011 tax year return.<sup>198</sup> The only thing appearing on the 2011 forms and instructions is on Schedule M, where adjustments to federal income are made: there is a line for entering the amount of insurance benefits for dependents and domestic partners included in federal adjusted gross income in the case of public employees.<sup>199</sup> *This lack of guidance with respect to parties in civil unions is an unparalleled low for any state we have surveyed.* Same-sex couples in legally recognized relationships can only guess how they should file their 2011 Rhode Island income tax.

### E. Delaware

Delaware adopted same-sex civil unions giving substantially the same rights as marriage, effective as of January 1, 2012.<sup>200</sup> The statute provides:

To the extent that provisions of the laws of this State, whether derived from statutes, administrative rules or regulations, court rules, governmental policies, common law, court decisions, or any other provisions or sources of law, including in equity, adopt, refer to, or rely upon in any manner, provisions of United States federal law that would have the effect of parties to a civil union being treated differently than married spouses, parties to a civil union shall be treated in all respects by the laws of this State as if United States federal law recognizes a civil union in the same manner as the laws of this State.<sup>201</sup>

197 *Id.* § 44-30-51(b)(1).

198 So far, the Rhode Island Division of Taxation’s only acknowledgement of the civil union law appears to be including civil union members in a regulation, effective December 31, 2011, involving corporate combined reporting—treating civil union members in related-party control group attribution rule determinations. R.I. DIV. OF TAXATION, CORP. INCOME TAX REG. CT 11-15, COMBINED REPORTING 12 (Rule 7(c)(3), (d)(1)) (2011), available at <http://www.tax.ri.gov/regulations/other/CT11-15.pdf>.

199 R.I. DIV. OF TAXATION, 2011 R.I. SCHEDULE M, line 2R (2011), available at <http://www.tax.ri.gov/forms/2011/Income/2011%20RI%20Schedule%20M%20-%20%20Modifications.pdf>; R.I. DIV. OF TAXATION, 2011 INSTRUCTIONS FOR FILING RI-1040, at I-6, available at <http://www.tax.ri.gov/forms/2011/Income/2011%20Resident%20Instructions.pdf>.

200 78 Del. Laws, ch. 22, § 1 (adding DEL. CODE ANN. tit. 13, § 212(a) (2012)).

201 DEL. CODE ANN. tit. 13, § 212(d) (2012).

Delaware's civil union law does not say anything specifically about Delaware income tax.

Delaware is like Illinois in allowing different-sex spouses who file joint federal returns to file jointly or separately in Delaware at their election.<sup>202</sup> Also like Illinois, Delaware law provides that if “[t]he federal income tax liability of spouses, either both residents of this State or both nonresidents of this State, is determined on separate federal income tax returns, then their tax liabilities under this chapter for such taxable year shall be separately determined and they shall file separate returns.”<sup>203</sup> To date, the Delaware Division of Revenue has only begun to deal with the civil union law's effects on income taxes. On its website home page as of August 5, 2012, the Division of Revenue promised: “Coming Soon! Information and FAQs for Civil Union Tax Filing.”<sup>204</sup> However, the Division of Revenue appears already to be implicitly allowing civil union joint filing for 2012 Delaware income taxes, since, in the instructions to its 2012 estimated tax payment form (Form 200-ES), the Department has a sentence stating: “No joint Declaration may be made unless the spouses are married or entered into a civil union at the time the declaration is due . . . .”

## F. Hawaii

Hawaii adopted same-sex and different-sex civil unions giving substantially the same rights as marriage, effective January 1, 2012.<sup>205</sup> At the same time, it added a new section to its income tax laws (Hawaii Revised Statutes chapter 235) stating:

All provisions of the Internal Revenue Code referred to in this chapter that apply to a husband and wife, spouses, or person in a legal marital relationship shall be deemed to apply in this chapter to partners in a civil union with the same force and effect as if they were “husband and wife,” “spouses,” or other terms that describe persons in a legal marital relationship.<sup>206</sup>

202 DEL. CODE ANN. tit. 30, § 1162(a)(2) (1997).

203 *Id.* § 1162(a)(1).

204 STATE OF DEL., DEP'T OF FINANCE—DIV. OF REVENUE, <http://revenue.delaware.gov> (last visited May 16, 2012).

205 2011 Haw. Sess. Laws 1, §§ 2, 9 (adding HAW. REV. STAT. §§ 572B-1, 572B-8 (2011)).

206 HAW. REV. STAT. § 235-93.4 (2011). The law added identical sections to chapter 231 (Administration of Taxes) and 236D (Estate and Transfer Tax). HAW. REV. STAT. §§ 231-21.5, 236D-2.3 (2011).

Hawaii is a state that has allowed married couples to file jointly or separately on their Hawaii income tax returns, regardless of whether they filed jointly or separately on their federal income tax returns.<sup>207</sup> While the Hawaii Department of Taxation has issued no guidance as yet on this issue, on October 19, 2011, the Hawaii attorney general issued an opinion that Hawaii Civil Union partners will be able to file their 2012 Hawaii income tax returns as married filing jointly or married filing separately.<sup>208</sup>

#### IV. Best Practices Recommendations

Having reviewed the guidance issued by the states, the District of Columbia, and the federal government, we have come to the conclusion that there are several best practices that the states and the District should adopt.

First, we understand the reasons why states originally enacting same-sex marriage, civil unions, and/or registered domestic partnerships often did not amend all other state laws, including their tax laws, at the times of passage. Nevertheless, many such states did make some comments on state taxation in their statutes. State tax laws are amended constantly, and we think that it would be a best practice over the near term, at least while DOMA is in effect, to explicitly amend tax laws on joint filing that may plausibly be read to preclude couples who were forced to file as single or head of household for federal purposes from filing as married filing jointly for state tax purposes.<sup>209</sup> It is unseemly for state revenue departments simply to tell same-sex couples on website pages or in form instructions to ignore the words of state law. A short statutory override or clarification, as was done at California Revenue and Taxation Code § 18521(d), would be more appropriate and would make filing easier and make same-sex couples feel more legitimate, thereby reducing the dignitary harm that comes from separate treatment.

Second, there is an appalling lack of guidance in many jurisdictions on issues that should certainly be highlighted to same-sex couples. We would urge each state revenue department and the District to go through the California, Oregon, and federal guidance—frequently asked questions, Q & As, and the instructions—to find common issues that could be easily added to already published guidance. Many states seem to have sat on

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207 HAW. REV. STAT. § 235-93(a) (1997).

208 Haw. Att’y Gen. Op. No. 11-2 (Oct. 19, 2011), available at [http://www.state.hi.us/tax/agop/2010\\_19/op11-2.pdf](http://www.state.hi.us/tax/agop/2010_19/op11-2.pdf).

209 See, e.g., N.Y. TAX LAW § 651(b)(1) (McKinney 2006) (“If the federal income tax liability of husband or wife is determined on a separate federal return, their New York income tax liabilities and returns shall be separate.”).

their hands after issuing initial guidance (such as Massachusetts, whose guidance dates to 2004) without bothering to update it. Worse still is Rhode Island, which offers no guidance to same-sex couples in legally-recognized relationships. The lack of guidance in several jurisdictions is a disservice to their citizens, makes LGB people invisible, and creates uncertainty and confusion for same-sex couples.

Third, we recommend that states and the District either issue publications, like the California Franchise Tax Board's Publications 737 and 776, and/or create web pages, like the Oregon Department of Revenue's page for registered domestic partners, that discuss the adjustments to federal income likely to affect same-sex couples in their jurisdiction. Such publications ease the burdens that come with the lack of conformity between federal and state filing status, as well as undercutting the dignitary harm involved.

Fourth, states and the District should consider creating something akin to the California worksheets to make it easier for same-sex couples to gather the information needed to generate federal adjusted gross income as if they were married. While in some states, such as Oregon, where there is a deduction for federal income tax paid, it might make sense to ask taxpayers to create a complete federal "as if" (pro forma) married filing jointly return, in other states, where only a few adjustments will be needed, the state revenue department should not insist that same-sex couples complete entire "as if" federal returns. Many of the entries on the "as if" federal returns will just be the unadjusted sum of the entries on the two separate actual returns filed. Further, many of the entries on the "as if" return—such as total federal withholding and estimated tax payments—will be of no interest or use to the states. Tax return preparers often make up their own schedules to total items or adjust them before using the final figures on the return, and preparers are used to retaining these schedules in their files. The additional costs of creating complete alternative returns is not justified when statistics show that only a little over one percent of returns will undergo federal audits,<sup>210</sup> not all of which will even result in federal audit changes. While worksheets for same-sex married couples and registered domestic partners, like those in California, may be helpful, we question whether attaching worksheets to the returns is a sensible requirement. It takes time, effort, and space for the state revenue department to input the information from the worksheet and then store it, and such information will be useless in the 99% of returns filed that are not audited federally. Worksheets are often included in instructions to tax returns that are not submitted to the revenue departments or the IRS. We agree with William Abbott who wrote in 2010<sup>211</sup> that same-sex couple worksheets for states, like New York, whose

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210 INTERNAL REVENUE SERV., INTERNAL REVENUE SERVICE DATA BOOK, 2011, at 22–24 tbl. 9a (2011), available at <http://www.irs.gov/pub/irs-soi/11databk.pdf>.

211 Abbott, *supra* note 9, at 295–96.

returns begin not with federal adjusted gross income, but with line entries repeating each income line on the face of the federal Form 1040, can be much shorter and simpler than the California worksheets for such couples.

Fifth, we recognize that long before same-sex relationships have been recognized, a small minority of states have had the practice of requiring or suggesting attachment of federal returns to the state returns, and we do not officiously want to say that their practice should be altered just when it comes to same-sex couples. Oregon, Iowa, and Vermont fall into this category. It makes sense for Oregon and Vermont to require the attachment of both the actual and pro forma federal returns for same-sex couples (including pro forma married filing separate returns in appropriate cases). So too does Iowa's practice of requiring taxpayers to attach actual federal returns. In particular, for Oregon and Iowa, this practice might make more sense because both of those states allow deductions in computing state taxes for federal income taxes paid—a number shown in the payments section of the federal returns. The only other relevant states here that require same-sex couples to attach pro forma federal returns are Illinois and California. We think it is an unnecessary burden for Illinois civil union partners to prepare and file a pro forma return when, generally, Illinois taxpayers do not attach their actual federal return to their Illinois return. California requires the attachment of a pro forma federal return only in cases where (a) there would be some alteration to just totaling up the actually-reported federal income to adjust for DOMA and (b) the taxpayers chose not to complete and attach one of the two worksheets for same-sex couples. Since we do not recommend that the worksheets be attached, we do not recommend the practice of alternatively requiring attachment of pro forma federal returns.

One consequence of seeing a pro forma federal return attached to a state return is that it alerts the state revenue department not to reflexively just add or subtract a federal audit adjustment to the taxable income shown on the state return where a taxpayer fails to file a report of final federal changes. There are, however, less burdensome ways to alert the state revenue department to the fact of nonconformity between filing status on the federal and state returns—ways that even apply in some cases to different-sex couples. This leads to our sixth suggestion: there should be a way for taxpayers to indicate upfront the nonconformity between their state and federal filing statuses. A simple and sensible way to do this is to create boxes to check on the first pages of their returns. This is a better practice for alerting states to nonconformity, especially since statistically so few of the state returns will be audited by the state or be subjected to federal audit adjustments. There are already several examples of how to create such boxes.



In Connecticut, taxpayers can check boxes that say they are filing jointly or separately for Connecticut only.<sup>212</sup> While this latter box could be used by a different-sex couple (for example, where only one was a state resident), the former box could only be used by a same-sex married couple. In both the District of Columbia and Oregon, there are filing status boxes for registered domestic partners filing jointly or separately that are not simply combined with the married status boxes.<sup>213</sup> District of Columbia registered domestic partners can be same-sex or different-sex couples.<sup>214</sup> In Oregon, where registered domestic partners can only be same-sex couples,<sup>215</sup> there is automatic nonconformity of filing status between state and federal returns when one of the registered domestic partner boxes is checked. A Vermont civil union is only available to same-sex couples,<sup>216</sup> and on the Vermont return there are separate boxes for civil union partners filing jointly and those filing separately.<sup>217</sup> Vermont even has another great idea—a separate box on the return that reads “check here if using RECOMPUTED Federal Return information.”<sup>218</sup> Illinois has a box on its return reading “check if same-sex civil union return” that is separate from the filing status box.<sup>219</sup> Finally, New York has boxes on the face of its returns for several “conditions,” one of which is “Code M3 (Same-Sex Married Spouse),”<sup>220</sup> which would always involve nonconformity between federal and state returns.

For those final federal changes not reported to the states by same-sex couples, before making an adjustment, the state could first look to see if such a box was checked that

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212 CONN. DEP’T OF REVENUE SERVS., 2011 FORM CT-1040, at 1 (2011), *available at* <http://www.ct.gov/drs/lib/drs/forms/2011forms/incometax/ct-1040.pdf>.

213 D.C. OFFICE OF TAX AND REVENUE, 2011 D.C. INDIVIDUAL INCOME TAX FORMS AND INSTRUCTIONS, FORM D-40, at 234 (2011), *available at* [http://otr.cfo.dc.gov/otr/frames.asp?doc=/otr/lib/otr/january\\_2012/2011\\_d-40\\_d-40ez\\_web\\_booklet.pdf](http://otr.cfo.dc.gov/otr/frames.asp?doc=/otr/lib/otr/january_2012/2011_d-40_d-40ez_web_booklet.pdf); OR. DEP’T OF REVENUE, 2011 FORM 40, at 1 (2011), *available at* [http://www.oregon.gov/dor/forms/personal/form-40\\_101-040\\_2011.pdf](http://www.oregon.gov/dor/forms/personal/form-40_101-040_2011.pdf).

214 D.C. CODE §§ 32-701–710 (LexisNexis 2007).

215 OR. REV. STAT. § 106.310(1) (2009).

216 VT. STAT. ANN. tit. 15, § 1202(2) (1999).

217 VT. DEP’T OF TAXES, 2011 VT. FORM IN-111, at 1 (2011), *available at* <http://www.state.vt.us/tax/pdf.word.excel/forms/income/2011IN-111-web.pdf>.

218 *Id.*

219 ILL. DEP’T OF REVENUE, 2011 FORM IL-1040, at 1 (2011), *available at* <http://www.revenue.state.il.us/TaxForms/IncMCurrentYear/Individual/IL-1040.pdf>.

220 N.Y.S. DEP’T OF TAXATION & FIN., 2011 INSTRUCTIONS FOR FORM IT-201, at 5 (2011), *available at* [http://www.tax.ny.gov/pdf/2011/inc/it201i\\_2011.pdf](http://www.tax.ny.gov/pdf/2011/inc/it201i_2011.pdf).

indicated nonconformity. If so, the state could write the taxpayers requesting information or work papers or even pro forma returns to reconcile federal adjusted gross income actually reported to the Internal Revenue Service and that amount shown on the state return. (It is not uncommon for a tax department to contact a taxpayer in this manner. For example, if the IRS cannot figure out how or whether an item of income reported to the IRS by a third party is included in the tax return, a letter is sent to the taxpayer asking for clarification.) If a taxpayer does not respond in a reasonable period of time to an inquiry related to a state return that indicated nonconformity, the state could simply go forward with its best-efforts final federal change adjustment (making all assumptions against the taxpayers), and the taxpayers would have little right to complain—though, perhaps, the states could allow the taxpayers post-assessment rights to try to correct any errors in the state's computation.

Seventh, states like Maryland and New Mexico, which seem willing to grant comity to valid same-sex marriages solemnized in other jurisdictions, should do what fairness requires and treat these same-sex marriages the same as they treat valid different-sex marriages solemnized in other jurisdictions. As both of these states allow married different-sex couples from other jurisdictions to file joint income tax returns, these states ought (1) to allow married same-sex couples to do the same and (2) issue guidance to taxpayers in this situation. Especially since Maryland's highest court has now specifically said that valid marriages from other jurisdictions between same-sex couples will be recognized under the principle of comity,<sup>221</sup> even if voters reject the recently passed law allowing same-sex couples to marry in Maryland,<sup>222</sup> same-sex marriages will continue to be recognized in Maryland, and thus, Maryland should allow same-sex couples married in other jurisdiction to file as married couples do on state income tax forms.

Finally, we also have a minor point about California. William Abbott suggested improving the worksheets in the publications for same-sex couples by combining them with California Form 540 Schedule CA—the schedule by which additions and subtractions from federal adjusted gross income are shown line-by-line corresponding to the federal Form 1040 lines. He suggested a new one-page Schedule CA-RDP to simplify the process for same-sex couples.<sup>223</sup> While we agree with him that this would simplify the process for same-sex couples, we think that such additional worksheets and pro forma returns add unnecessary burdens for same-sex couples, their accountants and the California Franchise Tax Board, given how few same-sex couple returns will ever be subjected to adjustment. If, however, worksheets for same-sex couples are going to be submitted attached to their

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221 *Port v. Cowan*, No. 69, 2012 WL 1758629 (Md. May 18, 2012).

222 Civil Marriage Protection Act, 2012 Md. Laws ch. 2. *See also* Breitenbach, *supra* note 65.

223 Abbott, *supra* note 9, at 295.

returns, we think Abbott has hit upon an improvement to the current system of having two pages of tables that do not at present easily mesh.

### CONCLUSION

The field of state income taxation of state-recognized same-sex relationships grows annually and rapidly. We hope that by shining a spotlight on what has been done in each of the various jurisdictions, and asking each jurisdiction to adopt the best practices we have seen, the field can be regularized and burdens on states and taxpayers can be minimized. Further, the adoption of these best practices will minimize the dignitary harm to LGB people that, due to DOMA, arises in the context of some states' income tax. From the perspective of simplifying and regularizing taxation of couples in same-sex recognized relationships, adoption of these best practices is the next best alternative to DOMA being repealed or declared unconstitutional.