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Taxing Civil Rights Gains

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TAXING CIVIL RIGHTS GAINS

*Anthony C. Infanti**

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INTRODUCTION

Why are certain burdens called “taxes” and others not? What consequences flow from characterizing a burden as a tax? Or, put more directly, why might you actively seek to characterize a burden as a tax on

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someone or something? Once classified as a tax, how do we determine whether a given burden is fair? Or, again to put the question more directly, should we take into account noneconomic characteristics—for example, sexual orientation—when determining the fairness of a tax? In this Article, I begin to address these separate, yet interrelated questions in the context of the burdens imposed on same-sex couples by the Defense of Marriage Act¹ (DOMA) and its state-level analogues, the so-called mini-DOMAs.² (For purposes of this Article, I will sometimes collectively refer to DOMA and the mini-DOMAs as “the DOMAs.”)

I was moved to ask and explore these questions by my work on the gay and lesbian title of Richard Delgado and Jean Stefancic’s “Everyday Law” series.³ While working on the chapters on marriage and its alternatives, medical and financial planning, and parenting, I was struck by the practical impact of the DOMAs on same-sex couples living in states that permit them to enter into marriages, civil unions, or domestic partnerships. At first glance, these couples seem to be presented with the same choice as different-sex couples when the time comes to consider whether to seek legal recognition of their relationships: They can either choose to enter into a state-sanctioned legal relationship or to create a legal framework for their relationship through private contractual arrangements. In practice, however, the DOMAs render this seeming choice a false one.

The ostensible purpose of the DOMAs is quite simple. They aim to cabin in any gains that same-sex couples make in their effort to achieve access to the rights and obligations of marriage.⁴ For example, Congress enacted the federal DOMA in 1996 out of fear that, left unchecked, a then-anticipated decision from the Hawaii Supreme Court legally recognizing same-sex relationships⁵ would spread throughout the country like some sort of contagion.⁶ Yet, as described more fully in Part I below, the DOMAs do far more than simply stave off the spread of same-sex marriage; they effectively erode the important civil rights gains attained in states such as California, Connecticut, Iowa, Massachusetts, Nevada, New Hampshire, New Jersey, Oregon, and Vermont, which either rec-

1. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified in scattered sections of 1 U.S.C. and 28 U.S.C.).

2. See *infra* Part I.A for a description of the federal DOMA and the state mini-DOMAs.

3. ANTHONY C. INFANTI, EVERYDAY LAW FOR GAYS AND LESBIANS (AND THOSE WHO CARE ABOUT THEM) (2007).

4. See H.R. REP. NO. 104-664, at 6–11 (1996).

5. In fact, the decision never materialized because, while an appeal was pending to the Hawaii Supreme Court, the state constitution was amended to empower the state legislature to limit marriage to different-sex couples. INFANTI, *supra* note 3, at 145.

6. See H.R. REP. NO. 104-664, *supra* note 4, at 2–3.

ognize same-sex marriage or a legally equivalent relationship (i.e., civil unions or domestic partnerships).⁷ The erosion of these gains occurs because same-sex couples who enter into legally recognized relationships in these states must still engage in all of the same legal planning as couples who choose not to (or simply cannot) enter into such relationships. They face a false choice between a state-sanctioned legal relationship or private ordering of their relationship because it is practically impossible for same-sex couples to avoid either (1) traveling to or interacting with persons located in states that have enacted a mini-DOMA and therefore refuse legal recognition to their relationship or (2) having dealings with the federal government that somehow implicate its DOMA, which similarly refuses legal recognition to their relationship.

When I looked at this false choice problem and the very real—and very expensive—costs that many states and the federal government impose on same-sex couples,⁸ I realized that these costs look very much like a tax designed to penalize same-sex couples for seeking recognition of their familial relationships (i.e., the relationship between the members of the couple and between the couple and their children). Indeed, I included a couple of passing references in the book to this effect, remarking on how the DOMAs significantly reduce the lesbian and gay movement's civil rights gains in the state-by-state battles for access to marriage and leave same-sex couples with only the "after-tax" gains from any victories.⁹ With the book complete and now in print, I have had more time to reflect on this question of taxing civil rights gains and its implications, and that reflection has led to the writing of this Article.

In this Article, I make the case for reconceptualizing the DOMAs as a form of tax; namely, a tax on lesbian and gay families. This reconceptualization naturally raises the question of what precisely qualifies as a "tax"—a question that I consider at some length in Part II below. But it also raises a number of ancillary questions, too. For instance, I imagine that some readers might, if they could, stop me now to ask, "why bother?" or "what's the point of calling this burden a 'tax'?"

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7. Though civil unions and domestic partnerships are the legal equivalent of marriage in these states, civil unions and domestic partnerships prove to be far from the equivalent of marriage in practice. *E.g.*, N.J. CIVIL UNION REVIEW COMM'N, THE LEGAL, MEDICAL, ECONOMIC & SOCIAL CONSEQUENCES OF NEW JERSEY'S CIVIL UNION LAW 8-15 (2008), available at <http://www.nj.gov/oag/dcr/downloads/CURC-Final-Report-.pdf>.
 8. But, of course, not on different-sex couples, whose marriages are routinely recognized from one state to another and by the federal government. See *infra* note 44 and accompanying text.
 9. See INFANTI, *supra* note 3, at 159, 223.

At one level, as I also discuss in Part II below, the point of labeling the burden imposed by the DOMAs a “tax” is purely rhetorical. Calling the DOMAs a tax may be an effective means of countering the notion that these measures are a necessary “defense” of marriage against an assault by same-sex couples. In this context, the “tax” label instead conveys the message that the DOMAs do nothing more than punish lesbian and gay families because they are different. An important part of this rhetorical move is to cast the tax as one not on same-sex couples, but rather as one on lesbian and gay *families*. This focus on families both captures the rhetoric of opponents of lesbian and gay rights and, at the same time, reflects the reality that many same-sex couples do have children living with them. By highlighting the impact of the DOMAs on the children of same-sex couples and tapping into the general public’s innate revulsion toward taxes of all types, it may be possible to successfully shift the rhetorical terrain of the debate over same-sex marriage (and, implicitly, the recognition of nontraditional family arrangements) to the advantage of lesbian and gay rights advocates.¹⁰

At another level, the importance of this inquiry lies in the additional restrictions that will be triggered if the DOMAs are classified as taxes. In other words, this exploration may open additional avenues for challenging the constitutionality of the DOMAs.¹¹ As I discuss in Part

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10. In this Article, I generally use the term “lesbian and gay rights advocates” broadly to include not only lesbian and gay rights organizations, but also individuals who are fighting to advance lesbian and gay rights. I intend the arguments here to be available to, and to be used by, both groups. As I have discussed elsewhere, I am wary of relying solely on lesbian and gay rights organizations to advance this cause. See generally Anthony C. Infanti, *Homo Sacer, Homosexual: Some Thoughts on Waging Tax Guerilla Warfare*, 2 UNBOUND: HARV. J. OF THE LEGAL LEFT 27 (2006).
 11. For a sampling of the more conventional grounds for mounting constitutional challenges to the federal DOMA, see Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998) (arguing that the Full Faith and Credit Clause and Due Process Clause prohibit Congress from enacting DOMA); Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawaii Amendment, and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227 (1998) (arguing that DOMA violates the Bill of Attainder Clause); Mark Strasser, *Loving the Romer Out for Bachr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997) (arguing that enactment of DOMA exceeds Congress’s power under the Full Faith and Credit Clause, violates the right to interstate travel, and does not meet the relevant standard for displacing state domestic relations law); Evan Wolfson & Michael F. Melcher, *The Supreme Court’s Decision in Romer v. Evans and Its Implications for the Defense of Marriage Act*, 16 QUINNIPIAC L. REV. 217 (1996) (arguing that DOMA is unconstitutional on equal protection grounds because, out of antigay animus, Congress singled out lesbians and gay men for the imposition of an inferior legal status; the same could, of course, be said for many, if not all, state mini-DOMAs).

III below, classifying the federal DOMA as a tax opens the way for a challenge under the U.S. Constitution's direct tax clauses. Because the federal DOMA operates much like a property tax on the legal rights and obligations associated with same-sex couples' marriages, civil unions, and domestic partnerships, it arguably qualifies as a "direct" tax and, as such, can only pass constitutional muster if Congress has apportioned it among the states by population (something Congress most assuredly has not done). In addition, classifying the state mini-DOMAs as taxes opens the way for challenges under the uniformity clauses found in many state constitutions. As an example of how such a challenge might be framed, I outline a potential challenge to the Arizona mini-DOMA under the uniformity clause in that state's constitution.

At yet another level, I reach perhaps the most provocative question raised by this line of inquiry; namely, whether one's sexual orientation should be taken into account when determining the fairness of a tax—here, the tax imposed by the DOMAs. This question takes on signal importance in places where the constitutional challenges described in the preceding paragraph are either unavailable or unsuccessful. In answering this question at the end of Part III, I return to my earlier discussion of the rhetorical importance of the reconceptualization of the DOMAs as a tax to argue that a robust notion of tax equity must take into account this additional tax on lesbian and gay families when assessing the justness of the distribution of the overall tax burden. Just as in that earlier discussion, this move helps to shift the rhetorical terrain in important ways. Here, the rhetorical move shifts the debate away from a focus on forcing states to recognize the right of same-sex couples to marry—a framing of the question that generates reflexive opposition among the many heterosexuals who are not yet ready to take this step¹²—and toward a discussion of whether it is fair to tax two similarly

12. Will Lester, *Gay Marriage Issue Now Less Volatile, Poll Shows*, HOUS. CHRON., Mar. 26, 2006, at A8 (51% of Americans oppose same-sex marriage); *USA Today/CNN/Gallup Poll: Where America Stands*, USA TODAY, Feb. 24, 2004, at 6D (53% of Americans oppose same-sex marriage); see Jesse McKinley, *Backers of Gay Marriage Rethink California Push*, N.Y. TIMES, July 27, 2009, at A11 (describing how opponents of California's Proposition 8, see *infra* note 16, may delay their efforts to place a new referendum on same-sex marriage on the California ballot until at least 2012 because they are "[d]iscouraged by stubborn poll numbers and pessimistic political consultants"); Cathleen Decker, *By a Small Margin: California Voters Support Same-Sex Marriage*, L.A. TIMES, Nov. 8, 2009, at A5 (indicating that "[a] small majority of California voters supports the right of same-sex couples to marry, but by a much larger margin, voters oppose efforts to place the issue back on the ballot next year"). But see *infra* note 258 and accompanying text, which indicate that most Americans do, however, favor affording at least some of the legal rights and obligations of marriage to same-sex couples.

situated families differently—a framing of the question that is of more general appeal because it is phrased in terms of the widely held belief that those who are similarly situated should receive similar treatment under the law. At the same time, this move enriches the debate over tax fairness by shunning the typically unbending focus on the economic dimension of individuals; instead, it pushes us to think about how an individual's noneconomic characteristics (here, sexual orientation) might be taken into account in assessing tax fairness.

To summarize, the remainder of this Article is divided into four parts. In Part I, I explain the nature of the levy that the DOMAs impose on same-sex couples. In Part II, I explain how this levy can be classified as a “tax.” In Part III, I discuss the federal- and state-level ramifications of classifying the levy that the DOMAs impose as a “tax.” Finally, I provide brief concluding remarks that discuss how this Article might pave the way for making similar arguments with respect to other nontraditional families and, concomitantly, how it demonstrates the transformative potential of same-sex marriage.

I. THE NATURE OF THE LEVY

Before delving into the question of what makes something a tax, it is necessary to spell out the precise nature of the levy that the federal DOMA and the state mini-DOMAs impose on same-sex couples. To this end, I will first describe the DOMAs and then use an example to illustrate their effects on same-sex couples.

A. *The DOMAs and the Pall of Uncertainty*

The federal DOMA has two operative provisions. “One addresses the treatment of same-sex marriages under federal law and the other addresses interstate recognition of same-sex marriages.”¹³ For purposes of federal law, DOMA defines “marriage” to include “only a legal union between one man and one woman as husband and wife.”¹⁴ With regard to the interstate recognition of same-sex marriages, “DOMA allows each state to refuse to give effect to the public acts, records, or judicial proceedings of ‘any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a

13. INFANTI, *supra* note 3, at 155.

14. 1 U.S.C. § 7 (2006).

right or claim arising from such relationship.”¹⁵ Succinctly put, the federal DOMA refuses legal recognition to same-sex marriages for all purposes of federal law and authorizes each state to similarly refuse legal recognition to same-sex marriages celebrated outside of that state.

As of this writing, forty-one states have adopted some form of a mini-DOMA: twelve states have a statutory prohibition against the recognition of same-sex marriages, three states have a constitutional prohibition against the recognition of same-sex marriages, and twenty-six states have both a statutory *and* a constitutional prohibition against the recognition of same-sex marriages.¹⁶ In more than half of these states, the mini-DOMA also refuses recognition to statuses that are similar to marriage (e.g., civil unions and domestic partnerships).¹⁷

The broad purpose and effect of the DOMAs is to limit the effect of any one state’s decision to extend all or a portion of the rights and obligations of marriage to same-sex couples on both the federal

15. INFANTI, *supra* note 3, at 155 (quoting 28 U.S.C. § 1738C (2007)).

16. *Id.* at 157 tbl.6.1. Since I compiled this table, the California Supreme Court struck down that state’s statutory prohibition against same-sex marriage, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), but California voters quickly replaced the statutory prohibition with a constitutional one (so-called Proposition 8), CAL. CONST. art. I, § 7.5; see Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1. The California Supreme Court turned away a constitutional challenge to Proposition 8, but held that same-sex marriages celebrated in California prior to the passage of Proposition 8 must continue to be legally recognized. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). In November 2008, both Florida and Arizona added constitutional prohibitions against same-sex marriage to their existing statutory prohibitions. McKinley & Goodstein, *supra*. The Connecticut Supreme Court, however, effectively struck down that state’s statutory prohibition against same-sex marriage when it extended the right to marry to same-sex couples. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008). The Iowa Supreme Court did likewise when it extended the right to marry to same-sex couples. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009). The legislatures of Maine, New Hampshire, and Vermont all eliminated their states’ statutory prohibitions against same-sex marriage when they approved legislation extending the right to marry to same-sex couples. Act of May 6, 2009, 2009 Me. ALS 82 (LexisNexis); Act of June 3, 2009, 2009 NH ALS 59 (LexisNexis); Act of Apr. 7, 2009, 2009 Vt. ALS 3 (LexisNexis). Same-sex marriages began to be performed in Vermont on September 1, 2009, and will begin to be performed in New Hampshire on January 1, 2010. Opponents of same-sex marriage in Maine immediately filed the necessary paperwork to put its new same-sex marriage law before the voters in a “people’s referendum.” Judy Harrison, *Anti-Gay Marriage Effort Advances*, BANGOR DAILY NEWS, May 20, 2009, at A1. On November 3, 2009, voters in Maine repealed this legislation before it ever went into effect. Abby Goodnough, *Gay Rights Rebuke May Result in a Change in Tactics*, N.Y. TIMES, Nov. 5, 2009, at A25.

17. INFANTI, *supra* note 3, at 157 tbl.6.1; see also *supra* note 16.

government and other states.¹⁸ Fifteen states and the District of Columbia have taken steps to extend all or a portion of the rights and obligations of marriage to same-sex couples. As of this writing, Connecticut, Iowa, Massachusetts, and Vermont are the only states that allow their residents to enter into same-sex marriages.¹⁹ California, New Hampshire, New Jersey, Nevada, Oregon, and Washington allow same-sex couples to enter into relationships—whether denominated “domestic partnerships” or “civil unions”—that are the legal equivalent of marriage.²⁰ Notable among these states is New Hampshire, which is set to begin allowing its residents to enter into same-sex marriages on January 1, 2010.²¹ Colorado, the District of Columbia, Hawaii, Maine, and Wisconsin all permit same-sex couples “to enter into legal relationships that fall short (in some cases, far short) of marriage.”²² Maryland similarly affords limited recognition to

18. See H.R. REP. NO. 104-664, *supra* note 4, at 2, 6–7, 10, 17–18 (describing how the federal DOMA was intended to limit the effect on both the federal government and other states of the Hawaii Supreme Court’s decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), which raised the specter of legalized same-sex marriage for the first time).
19. Act of Apr. 7, 2009, 2009 Vt. ALS 3 (LexisNexis); *Kerrigan*, 957 A.2d at 482; *Varnum*, 763 N.W.2d at 907; Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955–57 (Mass. 2003).
20. CAL. FAM. CODE §§ 297, 297.5 (2008); N.H. REV. STAT. ANN. §§ 457-A:1-6 (2008); N.J. REV. STAT. § 37:1-31 (2008); Act of May 31, 2009, 2009 Nev. ALS 393 (LexisNexis) (effective Oct. 1, 2009); Act of May 9, 2007, 2007 Ore. ALS 99 (LexisNexis), *as amended by* Act of June 25, 2009, 2009 Ore. HB 2389 (LexisNexis); Ryan Blethen, *Referendum 71 Shows Washington’s Strategy for Marriage Equality Is Working*, SEATTLE TIMES, Nov. 6, 2009, available at http://seattletimes.nwsourc.com/html/opinion/2010219375_ryan08.htm.

For a short few months, California did recognize same-sex marriage. Same-sex couples began to marry in the state following a decision of the California Supreme Court extending the right to marry to them. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). As mentioned above, *see supra* note 16, the voters of California reversed that decision in November 2008 when they approved Proposition 8 and amended the state’s constitution to ban same-sex marriage. The California Supreme Court turned away a constitutional challenge to Proposition 8, but decided that the marriages of those same-sex couples who married in the window between the court decision and the election will continue to be recognized. *See supra* note 16.

21. Act of June 3, 2009, 2009 NH ALS 59 (LexisNexis).
22. INFANTI, *supra* note 3, at 158; Stacy Forster, *Wisconsin to Offer Rights to Gay Couples*, MILWAUKEE JOURNAL SENTINEL, July 2, 2009, at B1 (indicating that “same-sex couples would be offered 43 of the more than 200 rights and benefits extended to married couples”); John Ingold, *Legislature 2009 Law Eases Estate Planning for Unwed and Gay Couples*, DENVER POST, Apr. 10, 2009, at B1 (describing a new law that “allows two people to enter into ‘designated beneficiary agreements’ for estate planning, property purchases, medical decisions and certain benefits such as life-insurance and retirement-plan disbursements”).

same-sex relationships, but it has not established a domestic partnership registry as such; rather, it has merely enacted a definition of "domestic partnership" and a list of the types of proof that domestic partners "may be required to provide" regarding the existence of their relationship.²³

The DOMAs are meant to curtail the impact of these advances and, as we will explore further below, have thus far been remarkably successful in doing so.²⁴ But even among this group of jurisdictions that legally recognize same-sex relationships, there is considerable uncertainty surrounding the portability of the various legal statuses. In many of these jurisdictions, legal recognition of same-sex relationships coexists with a statutory or constitutional mini-DOMA, giving rise to confusion. For instance, California, Hawaii, Oregon, and Washington all have adopted some form of a mini-DOMA.²⁵ Although the District of Columbia and New Jersey have not adopted either an express statutory or constitutional prohibition against same-sex marriage, their courts have interpreted their ambiguous statutes to prohibit same-sex marriage.²⁶ Nevertheless, in July 2009, legislation took effect in the District of Columbia that requires recognition of same-sex marriages celebrated elsewhere.²⁷ Among the handful of jurisdictions that neither have a mini-DOMA nor themselves sanction same-sex marriage or a legally equivalent relationship, the courts of New York and Rhode Island have interpreted their ambiguous statutes to prohibit same-sex marriage.²⁸

It is not entirely clear whether, or precisely to what extent, many of these jurisdictions will recognize same-sex marriages or legally equivalent relationships celebrated in other states. For example, under New Hampshire's new law recognizing same-sex marriages, New Hampshire will treat same-sex marriages and civil unions contracted in other states as a New Hampshire marriage, but the law makes no mention of whether it will recognize other legally equivalent same-sex relationships (e.g., domestic partnerships).²⁹ In addition, California will recognize

23. MD. CODE ANN., HEALTH-GEN. § 6-101 (LexisNexis 2009).

24. On occasion, a same-sex couple has been successful in legally dissolving their relationship in a state that otherwise refuses to legally recognize same-sex relationships; however, "there are only a few published decisions in this area, and those decisions provide evidence of only mixed success." INFANTI, *supra* note 3, at 182.

25. *Id.* at 157 tbl.6.1; *see supra* note 16.

26. INFANTI, *supra* note 3, at 157 tbl.6.1.

27. Nikita Stewart, *How Gay Marriage Recognition Works*, WASH. POST, July 7, 2009, at B2.

28. INFANTI, *supra* note 3, at 157 tbl.6.1 (citing a decision from New York); *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007) (interpreting the statute conferring jurisdiction over divorces on the state's family courts).

29. Act of June 3, 2009, 2009 NH ALS 59 (LexisNexis).

legal statuses equivalent to a California domestic partnership, but generally refuses to recognize same-sex marriages as such.³⁰ A recently enacted law does, however, require California to recognize out-of-state same-sex marriages entered into *prior* to the passage of Proposition 8, and it affords same-sex couples married out of state *on or after* the passage of Proposition 8 all of the rights and obligations of marriage—though it does not accord them the legal status of “marriage.”³¹

The New Jersey attorney general has opined that same-sex marriages, civil unions, and domestic partnerships entered into in other states will be recognized in New Jersey, either as a civil union (if it is the equivalent of a New Jersey civil union, which affords all of the rights and obligations of marriage to same-sex couples) or as a domestic partnership (if it is the equivalent of a New Jersey domestic partnership, which affords something less than all of the rights and obligations of marriage to same-sex couples).³² Yet, despite a favorable opinion from the New York attorney general, the New York courts have issued mixed decisions on this question.³³ In 2008, the governor of New York issued an order directing state agencies to recognize same-sex marriages celebrated in other jurisdictions.³⁴ However, this order has no effect on the mixed signals that have been sent by the state courts, and, even with respect to state agencies, its validity has been cast in doubt by several

30. *See supra* note 16.

31. An Act to Amend Section 308 of the Family Code, 2009 Cal. Legis. Serv. ch. 625 (S.B. 54) (West).

32. Op. Att’y Gen. No. 3-2007, 2007 N.J. AG LEXIS 2 (Feb. 16, 2007).

33. *Compare Lewis v. N.Y. Dep’t of Civil Servs.*, No. 4078-07, 2009 WL 137504 (N.Y. App. Div. Jan. 22, 2009) (rejecting a challenge to the state’s extension of health insurance benefits to the spouses of lesbian and gay state employees who are parties to a same-sex marriage entered into in another state), *and Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (App. Div. 2008) (requiring recognition of a Canadian same-sex marriage), *and C.M. v. C.C.*, 867 N.Y.S.2d 884 (Sup. Ct. 2008) (same), *and Beth R. v. Donna M.*, 853 N.Y.S.2d 501 (Sup. Ct. 2008) (same), *with Matter of Langan v. State Farm Fire & Cas.*, 849 N.Y.S.2d 105 (App. Div. 2007) (refusing recognition to a Vermont civil union), *and Langan v. St. Vincent’s Hosp.*, 802 N.Y.S.2d 476 (App. Div. 2005) (same), *and Gonzalez v. Green*, 831 N.Y.S.2d 856 (Sup. Ct. 2006) (refusing recognition to a Canadian same-sex marriage), *and Funderburke v. N.Y. State Dep’t of Civil Serv.*, 822 N.Y.S.2d 393 (Sup. Ct. 2006), *vacated*, 854 N.Y.S.2d 466 (App. Div. 2008) (same), *and Will of Alan Zwerling*, 2008 N.Y. Misc. LEXIS 5651, at *1 (Sur. Ct. Sept. 9, 2008) (recognizing a Canadian same-sex marriage for purposes of an intestacy proceeding, but joining the deceased’s parents as parties to the proceeding—even though they would not normally be so joined where there is a surviving spouse—because the state of the law on recognizing out-of-state same-sex marriages in the Second Department of the Appellate Division of the New York Supreme Court is unclear).

34. Jeremy W. Peters, *New York to Back Same-Sex Unions from Elsewhere*, N.Y. TIMES, May 29, 2008, at A1.

state legislators and the Alliance Defense Fund, who have together filed a lawsuit challenging the governor's actions on constitutional grounds.³⁵ The message from the New York courts has been sufficiently muddled that the New York Court of Appeals, the state's highest court, granted leave to appeal in two cases that concern the recognition of out-of-state same-sex marriages.³⁶ Nevertheless, the court ultimately dodged the question of whether the State of New York must recognize same-sex marriages celebrated in other jurisdictions, instead deciding the case on technical and procedural grounds.³⁷ In the same muddled vein, the Rhode Island Supreme Court contradicted the opinion of the Rhode Island attorney general when it refused to allow a same-sex couple married in Massachusetts access to the state's courts for purposes of obtaining a divorce, concluding that the word "marriage" in the jurisdictional statute for the Rhode Island family courts embraces only the marriages of different-sex couples.³⁸

Some of the states that either legally recognize same-sex relationships or do not expressly prohibit them have not yet indicated whether they will recognize legal relationships entered into in other jurisdictions. This only adds to the uncertainty and confusion surrounding the portability of same-sex marriages, civil unions, and domestic partnerships.³⁹

Due to the sheer number of states that unequivocally prohibit the recognition of same-sex marriages (and, often, legally equivalent relationships, too) and the significant uncertainty that surrounds the portability of legal status even among jurisdictions that are not unequivocally opposed to recognizing same-sex relationships, same-sex couples who enter into marriages, civil unions, or domestic partnerships "are forced to act as if the legal recognition of their relationships does not exist."⁴⁰

35. Jeremy W. Peters, *Suit Seeks to Block State Policy on Same-Sex Unions*, N.Y. TIMES, June 4, 2008, at B3. The New York Supreme Court, which is a trial-level court, dismissed the suit, but the plaintiffs immediately indicated their intent to appeal the ruling. Nicholas Confessore, *Court Backs Paterson Regarding Gay Unions*, N.Y. TIMES, Sept. 2, 2008, at B5.

36. *Godfrey v. Spano*, 906 N.E.2d 1085 (N.Y. 2009); *Lewis v. N.Y. State Dep't of Civil Serv.*, 906 N.E.2d 1086 (N.Y. 2009).

37. *Godfrey v. Spano*, No. 147, 2009 N.Y. LEXIS 4050 (Nov. 19, 2009).

38. *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007); Op. Att'y Gen. (Feb. 20, 2007), available at http://www.glad.org/News_Room/RIAttorneyGeneral_Statement.pdf.

39. See *infra* note 49 and accompanying text.

40. INFANTI, *supra* note 3, at 158.

B. *Gauging the Impact of the DOMAs and the Pall of Uncertainty*

To better understand the practical impact of the federal DOMA and state mini-DOMAs on same-sex couples, let us compare and contrast the treatment of two families: one headed by a different-sex married couple and one headed by a same-sex married couple, both couples having been married in Boston, Massachusetts. From the perspective of the State of Massachusetts, both of these couples are in identical situations. Each couple paid the same amount (i.e., fifty dollars) for its marriage license.⁴¹ Once married, both couples are subject to the same legal obligations and have the same legal rights under Massachusetts law.⁴²

Yet these two couples' legal relationships are relevant not only for purposes of Massachusetts law, but also for purposes of federal law and the laws of other states. According to the General Accounting Office, as of December 31, 2003, there were at least 1,138 federal statutory provisions "in which marital status is a factor in determining or receiving benefits, rights, and privileges."⁴³ It will, therefore, be the rare couple that is able to avoid dealings with the federal government that somehow implicate their marital status. It will also be the rare couple that never travels to (or through) another state; that never enters into a transaction with a party in another state; that never owns or rents property in another state; and that never has any other sort of dealing with a person, entity, or property located in another state that might somehow implicate their marital status. Thus, it is important to consider how both the federal government and other states will view these two couples' marriages.

From that perspective, the two couples are in radically different positions. On the one hand, the federal government, the other states, and the District of Columbia will recognize the different-sex couple's Massachusetts marriage as a matter of course.⁴⁴ In other words, the different-sex couple would not need to reapply for a marriage license anywhere, draft any special documents, or undertake any special judicial proceedings to

41. City of Boston, *Marriage Intention Instructions*, <http://www.cityofboston.gov/registry/marriage.asp> (last visited Nov. 7, 2009).

42. Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955-57 (Mass. 2003).

43. U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT, GAO-04-253R (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

44. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 283-84 (1971); cf. 1 U.S.C. § 7 (2008); 28 *id.* § 1738C (concerning the refusal to, or ability to refuse to, recognize same-sex marriages).

ensure the legal recognition of both their spousal relationship and their parental relationship with any children that they might have together.

On the other hand, the same-sex couple's Massachusetts marriage will not be so easily recognized.⁴⁵ In the other jurisdictions that legally recognize same-sex relationships and in those jurisdictions that do not have explicit statutory or constitutional prohibitions against the recognition of same-sex marriages, the same-sex couple's marriage may—or may not—be legally recognized.⁴⁶ For example, the couple's marriage will *not* be recognized in Nevada, even though Nevada recognizes other same-sex legal unions.⁴⁷ In contrast, it seems that New Jersey will recognize the couple's marriage as a civil union.⁴⁸ But the treatment of the couple's marriage in Oregon is less clear given the silence of that state's domestic partnership law on this question and the existence of a constitutional mini-DOMA in Oregon.⁴⁹ In the face of such uncertainty, an Oregon lesbian and gay rights organization has advised same-sex couples in this position that the "safest route" to legal recognition of their relationship in Oregon is to enter into a domestic partnership there—in addition to their extant marriage.⁵⁰ In contrast, the remaining states and the federal government have, through the enactment of their DOMAs, taken affirmative steps to ensure that the same-sex couple's Massachusetts marriage will not be legally recognized. Notwithstanding the seeming inflexibility of the federal DOMA and the state mini-DOMAs, however, both the federal government and these states will, under certain circumstances, tacitly recognize the same-sex couple's spousal relationship as well as their parental relationship with their children. This same tacit recognition is possible in states that do not explicitly prohibit same-sex marriage and in states that recognize some same-sex relationships but refuse recognition to others.

45. 1 U.S.C. § 7 (2008); INFANTI, *supra* note 3, at 166 nn.120–22.

46. *See supra* notes 25–38 and accompanying text.

47. Act of May 31, 2009, § 10, 2009 Nev. ALS 393 (LexisNexis) (effective Oct. 1, 2009).

48. *See supra* note 32 and accompanying text.

49. Act of May 9, 2007, 2007 Ore. ALS 99 (LexisNexis), *as amended by* Act of June 25, 2009, 2009 Ore. HB 2389 (LexisNexis).

50. BASIC RIGHTS OREGON, DOMESTIC PARTNERSHIP RESOURCE GUIDE (2008), *available at* http://www.basicrights.org/comm_doc/doc.pdf. Similarly, before the right to marry was extended to same-sex couples in Connecticut, that state's attorney general opined that Massachusetts same-sex marriages would not be recognized in Connecticut. The attorney general further indicated that, to have their relationship legally recognized, a married Massachusetts same-sex couple would have to travel to Connecticut and separately enter into a civil union there. Op. Att'y Gen. No. 2005-024, 2005 Conn. AG LEXIS 23.

That tacit recognition will, of course, not be based on the same-sex couple's marriage. Rather, to have their spousal relationship recognized, the same-sex couple will need to engage a lawyer to draft a ream of documents, including wills, living trusts, powers of attorney, hospital visitation authorizations, and a domestic partnership agreement.⁵¹ These documents attempt⁵² to ensure that both members of the couple are provided for in the event of the death of one of them, that the members of the couple can make medical and financial decisions on behalf of each other and visit each other when hospitalized, and that the parameters of their relationship (including the extent to which financial resources will be pooled, household obligations will be discharged, support payments will be made upon the dissolution of the relationship, and disputes will be resolved) have been established.⁵³ In addition, if one or both spouses changed their surnames on the marriage certificate,⁵⁴ then the federal government may not recognize that name change unless the couple also incurs the expense of going to court to obtain a judicial decree changing the surname(s) of the relevant spouse(s).⁵⁵

If the couple has children (as so many same-sex couples now do),⁵⁶ that will entail further planning. If the children are adopted by one or both parents, it would still be wise for them to have their lawyer draft a shared parenting agreement and powers of attorney in case questions arise—as they already have—about whether adoptions by same-sex cou-

51. *INFANTI*, *supra* note 3, at ch. 7. Naturally, not every couple will draft precisely the same set of documents or cover precisely the same ground in attempting to backstop the legal recognition of their relationship. This results from the couple's ability to choose from among an "à la carte" menu of the rights and obligations of marriage, civil unions, and domestic partnerships when drafting these documents. (Thanks go to Neil Buchanan both for this point and for this terminology.) This ability to choose does not, however, affect the fact of the DOMAs being a tax; it merely affects the amount of the tax that is paid. *See infra* Part II.B.

52. I would like to underscore my careful choice of the word "attempt" here. For even if a couple undertakes its best efforts to re-create the legal rights and obligations of marriage ostensibly abrogated by the DOMAs, there is no guarantee that the resulting documents will actually be respected. *See, e.g.*, *INFANTI*, *supra* note 3, at 174, 178–81 (describing how advance directives are sometimes not honored and how wills, living trusts, and even joint tenancies may be subject to attack).

53. *Id.* at ch. 7.

54. MASS. GEN. LAWS ch. 46, § 1D (2008) ("Each party to a marriage may adopt any surname, including but not limited to the present or birth-given surname of either party, may retain or resume use of a present or birth-given surname, or may adopt any hyphenated combination thereof.").

55. *See infra* notes 101–102 and accompanying text.

56. *See infra* text accompanying note 92.

ples must be recognized by other states.⁵⁷ In the case of children conceived through intrauterine insemination, lesbian couples cannot simply rely upon a statutory presumption of parentage⁵⁸ to create a legal parent-child relationship between the nonbiological mother and the child.⁵⁹ The couple may wish to have the nonbiological mother adopt the child and to draft a shared parenting agreement as a backup to that adoption.⁶⁰ In the case of children from previous relationships, adoption, shared parenting agreements, and/or powers of attorney would be necessary to have the stepparent relationship legally recognized.⁶¹

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57. INFANTI, *supra* note 3, at 222 (discussing an unsuccessful attempt by the State of Oklahoma and an ongoing attempt by the State of Louisiana to refuse recognition to adoptions by same-sex couples). The federal district court ruled in favor of the adopting parents in the Louisiana case, but the state has appealed that decision and the case is currently pending before the U.S. Court of Appeals for the Fifth Circuit. Bill Barrow, *House Votes to Restrict Revised Birth Certificates*, TIMES-PICAYUNE, May 13, 2009, at 4. Thumbing its collective nose at the federal district court's decision, the Louisiana House of Representatives passed a bill that would prohibit birth certificates from being revised to show the names of two adoptive parents who are unmarried. *Id.* That bill died in the Louisiana Senate. La. State Legislature, *Final Disposition of House Bills: 2009 Regular Legislative Session*, <http://www.legis.state.la.us/> (click on "Resumé from the 2009 Regular Legislative Session"; then click on "Final Disposition of House Bills"; reporting that House Bill 60 died on the Senate calendar) (last visited Nov. 7, 2009).
58. MASS. GEN. LAWS ch. 46, § 4B (2008) ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."); Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955–57 (Mass. 2003).
59. See, e.g., INFANTI, *supra* note 3, at 220, 222–23 (describing the possible application of presumptions of parentage to lesbian couples and the cloud of uncertainty that surrounds the question of whether these presumptions will be honored by other states); Patricia A. Cain, *Federal Tax Consequences of Civil Unions*, 30 CAP. U. L. REV. 387, 394 (2002) (indicating that same-sex couples who enter into civil unions in Vermont would "probably be advised to go through an adoption to resolve the question of whether the nonbiological parent is a parent under Vermont law [i.e., the presumption of parentage]"; in fact, in a recent case, the Vermont Supreme Court narrowly construed the state's presumption of parentage "to apply only for purposes of child support actions. Nonetheless, the court has indicated that, at least in the context of a visitation proceeding, a lesbian 'couple's legal union [i.e., civil union] at the time of the child's birth is extremely persuasive evidence of joint parentage." INFANTI, *supra* note 3, at 233 n.157 (quoting *Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 58 (2006)).
60. INFANTI, *supra* note 3, at 221–23.
61. See, e.g., MASS. GEN. LAWS ch. 201A, § 1 (2008) (for purposes of the Transfers to Minors Act, defining "members of the minor's family" to include, among others, a stepparent); see also Cain, *supra* note 59, at 396–99 (discussing the uncertainty surrounding the recognition for federal tax purposes of stepparent relationships created by Vermont's civil union law).

The bottom line here is that the federal government and the states with mini-DOMAs—as well as the handful of states that do not explicitly prohibit the recognition of same-sex marriages—will recognize the Massachusetts same-sex couple's relationship in some circumstances.⁶² But that recognition comes at a price: the cost of drafting numerous documents and undertaking various legal proceedings to duplicate legal rights and obligations that the different-sex couple takes for granted and that the same-sex couple should already have.⁶³ It is important to acknowledge here that not all same-sex couples will be able to afford to pay some or all of the price of tacit recognition of their relationship, with the result being forfeiture of the relevant legal protections when they cross state lines or deal with the federal government.

II. A TAX ON LESBIAN AND GAY FAMILIES

The question of what precisely qualifies something as a tax is not routinely asked in the tax literature. By and large, we do not ask the question because the answer appears self-evident. For example, who, aside from the stray tax protester,⁶⁴ would seriously argue that our extant federal income tax is not a tax?⁶⁵ Similarly, who would argue that a con-

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62. Again, to underscore and explain this caveat: Even the most diligent couple can never precisely duplicate all of the legal rights and obligations of marriage through the execution of legal documents and undertaking of legal proceedings. There are certain rights and obligations of marriage that only the state itself can grant (e.g., exemptions from taxation for transfers between spouses and immunity from being called to testify against a spouse).
63. It is worth noting, however, that Virginia and Montana have mini-DOMAs written so broadly as to cast doubt on whether they will recognize the validity of these documents. See MONT. CODE ANN. § 40-1-401(4) (2007) ("A contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited under subsection (1) [which includes same-sex marriage] is void as against public policy."); VA. CODE ANN. § 20-45.3 (2007) ("A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited.").
64. *Ball v. United States*, 94-1 U.S. Tax Cas. (CCH) ¶ 50,149 (C.D.Ill. 1994) ("Plaintiff, however, argues that the federal income tax is not a 'tax,' and, therefore, 26 U.S.C. § 7421(a) does not apply to bar his request for injunction."). This does not, however, appear to be an argument that tax protesters commonly make, as indicated by its noticeable absence from the Internal Revenue Service's annual publication debunking frivolous tax arguments. See INTERNAL REVENUE SERV., THE TRUTH ABOUT FRIVOLOUS TAX ARGUMENTS (2007), available at <http://www.irs.gov/taxpros/article/0,,id=159853,00.html>.
65. In *Brushaber v. Union Pacific Railroad Co.*, 240 U.S. 1 (1916), the U.S. Supreme Court addressed a whole host of attacks upon the constitutionality of the Revenue Act of 1913, ch. 16, § II, 38 Stat. 114, 166, which was the first income tax law

sumption tax (were one enacted as a replacement for, or supplement to, our current federal income tax) is not a tax?⁶⁶

The question of what is a tax only gets asked at the margins—usually when there is a question about the extent of a government’s revenue raising power. For example, there are sometimes questions at the state and local level about whether a given levy should be classified as a “tax” or a “fee,” because the nature of the classification triggers different restrictions on the government’s authority to impose the levy.⁶⁷ At the federal level, similar questions about the difference between a “tax” and a “fee” have arisen in (1) probing the boundaries of intergovernmental tax immunity,⁶⁸

enacted after the ratification of the Sixteenth Amendment. Notably, none of the numerous grounds for attack—all of which the Court rejected—in any way concerned whether the Revenue Act of 1913 levied a “tax” within the meaning of the provisions in the U.S. Constitution that grant Congress the power to impose an income tax without apportionment among the several states. See U.S. CONST. art. I, § 8, cl. 1; *id.* amend. XVI.

66. In fact, the constitutional controversy surrounding consumption taxes does not concern whether they are “taxes,” but whether they are “taxes on income” within the meaning of the Sixteenth Amendment. This is important because, as discussed more fully *infra* Part III.A, the Constitution requires all direct taxes—other than taxes on income—to be apportioned based on population. U.S. CONST. art. I, § 2, cl. 3; *id.* art. I, § 9, cl. 4. Thus, deciding whether consumption taxes that qualify as direct taxes (e.g., the Hall-Rabushka flat tax, see Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes,”* 33 ARIZ. ST. L.J. 1057, 1063 (2001) [hereinafter Jensen, *Meaning of “Incomes”*]) are “taxes on income” will likely determine their (un)constitutionality. Erik M. Jensen, *The Apportionment of “Direct Taxes”: Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2404 (1997) [hereinafter Jensen, *Are Consumption Taxes Constitutional?*]. This issue has engendered significant debate among a small group of academic commentators. Compare Jensen, *Meaning of “Incomes,” supra* (arguing that certain consumption taxes are subject to the constitutional requirement of apportionment based on population), and Jensen, *Are Consumption Taxes Constitutional?*, *supra* (same), with Lawrence Zelenak, *Radical Tax Reform, the Constitution, and the Conscientious Legislator*, 99 COLUM. L. REV. 833 (1999) (arguing that legislators could reasonably conclude that these same consumption taxes are either not direct taxes or, even if they are, that they are “taxes on income” within the meaning of the Sixteenth Amendment; in either case, they will be exempt from the constitutional requirement of apportionment based on population). See also *infra* Part III.A.
67. See, e.g., Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38 GONZ. L. REV. 335 (2002–2003); see also Joshua Michtom, Note, *Making Prisoners Pay for Their Stay: How a Popular Correctional Program Violates the Ex Post Facto Clause*, 13 B.U. PUB. INT. L.J. 187, 200 n.91 (2004) (noting that pay-to-stay prison programs created by the executive branch may be vulnerable to attack in some states as a usurpation of the legislature’s right to tax).
68. See John Michael Chamberlain, *State Regulation of Federal Dredging Projects: Sovereign Immunity and the Issue of Reasonable Fees*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 165, 173–77 (1995) (construing the federal government’s waiver of sovereign immunity with respect to the payment of “reasonable state water quality fees incurred

(2) applying the Tax Injunction Act,⁶⁹ (3) determining whether Congress has effected an unconstitutional delegation of its taxing power to a federal agency,⁷⁰ and (4) determining whether Congress has exceeded its constitutional authority by imposing a tax on exports.⁷¹

But we are not concerned here with nice differences between taxes and fees.⁷² Instead, we are concerned with the more novel question of whether legislation that does not purport to impose either a tax or a fee—and that is not even conventionally thought of as imposing any type of levy at all—can be classified as a “tax.”⁷³

in the course of dredging projects” and relying on case law making the distinction between “taxes” and “fees” to do so).

69. 28 U.S.C. § 1341 (2008); see Ronald J. Krotoszynski, *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 270–71 (2005); Robert F. Williams, *The Tax Injunction Act and Judicial Restraints: Property Tax Litigation in Federal Courts*, 12 RUTGERS L.J. 653, 676 (1981).

70. See Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 822–24 (1987). *But cf.* Krotoszynski, *supra* note 69, at 268–77 (arguing that the tax/fee distinction has become moot).

71. See Krotoszynski, *supra* note 69, at 271–72.

72. Indeed, a common refrain in articles discussing this distinction is that it is one that can be exceedingly difficult to draw. See, e.g., Chamberlain, *supra* note 68, at 173 (“Much case law has developed surrounding the distinction between a ‘fee’ and a ‘tax.’ While the question has been approached from divergent angles yielding equally divergent outcomes, some general guiding principles can be extracted.”); Spitzer, *supra* note 67, at 336 (“Unfortunately, Washington case law concerning the distinction between taxes and fees has been murky and confusing, primarily because the courts often resort to a simplistic dichotomy between taxes and regulatory fees.”).

A “classic tax” is a charge imposed by a legislative body upon a large portion of society in order to raise revenues that will benefit society at large.

By way of contrast, a “classic fee” is a charge that an administrative agency imposes upon persons or entities that are subject to its regulation. The fee may serve a direct regulatory purpose or a more indirect purpose such as raising money for a specific account to help fund the agency’s expenses.

Unfortunately, few charges fall directly into one of these categories.

Krotoszynski, *supra* note 69, at 271 (footnotes omitted); see also Richard A. Chesley, Note, *The Current Use of the Initiative and Referendum in Ohio and Other States*, 53 U. CIN. L. REV. 541, 557 (1984) (“[T]he courts in Ohio have had trouble in delineating the term ‘tax levy’ . . .”).

73. This Article is part of a larger project that seeks to question and problematize distinctions and concepts in the tax policy literature that, on their face, seem normal, natural, or incontestable. See Anthony C. Infanti, *A Tax Crit Identity Crisis? Or Tax Expenditure Analysis, Deconstruction, and the Rethinking of a Collective Identity*, 26 WHITTIER L. REV. 707 (2005) [hereinafter Infanti, *A Tax Crit Identity Crisis?*] (highlighting the artificiality of the mainstream/marginal distinction in the tax policy literature and drawing attention to the ways in which that distinction can be employed to ignore or discredit critical contributions to that literature); Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 TAX LAW. 405 (2008) [hereinafter Infanti,

So, what makes something a tax? Clearly, it cannot simply be the label that is—or is not—attached to something that makes it a tax. To allow the label to dictate the classification of something as a tax would contravene the oft-repeated maxim that tax is an area concerned with substance rather than form.⁷⁴ Indeed, the federal government itself refuses to treat a foreign levy as a tax for foreign tax credit purposes simply because the foreign country calls it a tax.⁷⁵ Accordingly, the fact that neither Congress nor any of the states refers to its respective “defense of marriage” act as a “tax” should have no effect on whether the DOMAs are actually taxes.

But, if the label does not matter, then what is it that we should be looking for when determining whether the federal DOMA and state

Deconstructing the Duty to the Tax System] (turning the conventional conceptualization of the tax lawyer’s duty to the tax system on its head by demonstrating that, in the representation of lesbian and gay clients, the duty actually unfetters—rather than constrains—the tax lawyer’s zealous advocacy on behalf of her clients); Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191 (2008) [hereinafter Infanti, *Tax Equity*] (exploring how the core tax policy concept of equity can have negative effects on the contributions of critical tax scholars to the tax policy literature).

74. See, e.g., *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 367 (1998) (“However, ‘we must regard things rather than names’ in determining whether an imposition on exports ranks as a tax. The crucial question is whether the HMT is a tax on exports in operation as well as nomenclature or whether, despite the label Congress has put on it, the exaction is instead a bona fide user fee.” (quoting *Pace v. Burgess*, 92 U.S. 372, 376 (1876)) (citation omitted)); *State v. Medeiros*, 973 P.2d 736, 741 (Haw. 1999) (“ROCCH § 6-52.2 self-characterizes its charge against convicted persons as a ‘fee.’ However, ‘the nature of the tax [or “charge”] that a law imposes is not determined by the label given to it but by its operating incidence.’” (quoting *Stewarts’ Pharmacies, Ltd. v. Fase*, 43 Haw. 131, 144 (1959) (citation omitted))); *City of Huntington v. Bacon*, 473 S.E.2d 743, 752 (W. Va. 1996) (“Though the above language employed by the legislature in W. Va. Code, 8-13-13 [1971] suggests that the legislature intended the charges imposed on the users of essential or special municipal services to be user fees rather than taxes, this Court has held ‘the character of a tax is determined not by its label but by analyzing its *operation and effect*’” (quoting *City of Fairmont v. Pitrolo Pontiac-Cadillac*, 308 S.E.2d 527 (W. Va. 1983)); cf. *Emerson Coll. v. Boston*, 462 N.E.2d 1098, 1104–05 (Mass. 1984) (“In reviewing the statute, we are bound, as was the judge, to treat with deference the classification of the charge as a fee. ‘In any doubtful case, the intention of the Legislature, as it may be expressed in part through its characterization [of the charge] . . . deserves judicial respect, and especially so where the constitutionality of the exaction depends on its proper characterization’ (footnote omitted). *Associated Indus. of Mass., Inc. v. Commissioner of Revenue*, 378 Mass. 657, 667–68 (1979) Ultimately, however, the nature of a monetary exaction ‘must be determined by its operation rather than its specially descriptive phrase.’ *Thomson Elec. Welding Co. v. Commonwealth*, 275 Mass. 426, 429 (1931).”).
75. *Treas. Reg. § 1.901-2(a)(2)(i)* (as amended in 1991) (“Therefore, the assertion by a foreign country that a levy is pursuant to the foreign country’s authority to levy taxes is not determinative that, under U.S. principles, it is pursuant thereto.”).

mini-DOMAs are taxes? In common usage, the word “tax” has two different meanings—one technical and the other figurative. In its technical sense, the noun “tax” is defined as “[a] compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions, etc. . . .”⁷⁶ In its figurative sense, the word “tax” is defined as “[s]omething compared to a tax in its incidence, obligation, or burdensomeness; an oppressive or burdensome charge, obligation, or duty; a burden, strain, heavy demand.”⁷⁷ I will address this latter sense first in order to lay the groundwork, which I will build on in the following section, for distinguishing this project somewhat (but only somewhat) from more purely rhetorical uses of the word “tax.”

A. *Figuratively Speaking*

It is not uncommon to see the additional burdens imposed on traditionally subordinated groups in our society likened to taxes. Jody Armour’s description of the “Black Tax” provides a nice example of the way that the word “tax” can be used to effectively communicate the nature and impact of such burdens on a minority group:

The Black Tax is the price Black people pay in their encounters with Whites (and some Blacks) because of Black stereotypes. The concept of a “tax” captures several key characteristics of these stereotype-laden encounters: like a tax, racial discrimination is persistent, pervasive, must be dealt with, cannot be avoided, and is not generally resisted. Taxes are commonly regarded as ineluctable facts of human existence, as in the old saw, “Nothing in life is certain, save death and taxes.” . . . And just as the state stands behind the collection of the general taxes, Blacks often have good cause to view state representatives such as police and judicial officers as IRS agents for the Black Tax.⁷⁸

76. 2 OXFORD ENGLISH DICTIONARY 3244 (compact ed. 1971). For a discussion of guidance issued by the Internal Revenue Service (Service) on the definition of the word “tax,” see *infra* note 111.

77. 2 OXFORD ENGLISH DICTIONARY 3244 (compact ed. 1971).

78. JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 13–14 (1997).

It is not difficult to come across similar references to the “gender tax” imposed on women,⁷⁹ the “ethnicity tax” imposed on Latino/as,⁸⁰ or the “gay tax” imposed on lesbians and gay men.⁸¹

These uses of the word “tax” are not just an effective means of communicating to those in the majority the nature and impact of the burdens imposed on minority groups; they are also a subtle means of persuading members of the majority of the unjustness of those burdens. As I was writing this Article, I came across an op-ed piece in the *New York Times*—on April 15 of all days—that captures the essence of what lies behind this persuasive force:

The word “tax” was never pretty. But it has lately become the ugliest word in the English language, right up there with its evil twin, “death.” Even in time of war, ostensibly patriotic politicians blithely pledge to slay any tax that rears its ghastly head. Public officials dodge work they know desperately needs doing because of the possibility that it may cause an increase in taxes.⁸²

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79. *E.g.*, CAL. CIV. CODE § 51.6(a) (West 2008) (“This section shall be known, and may be cited, as the Gender Tax Repeal Act of 1995.”); Mark Klock, *Unconscionability and Price Discrimination*, 69 TENN. L. REV. 317, 362 n.285 (2002); Katie Ervin Carlson, Note, *A Study of the Effectiveness of Mandated State Contraceptive Coverage in Iowa and Missouri and the Case for a Federal Law*, 54 DRAKE L. REV. 509, 510 (2006); Christine Vargas, Note, *The EPICC Quest for Prescription Contraceptive Insurance Coverage*, 28 AM. J. L. & MED. 455, 456 (2002); Christl Dabu, *For Canadian Women, that Haircut May Soon Get Cheaper*, CHRISTIAN SCI. MONITOR, Aug. 10, 2005, at 12; Troy Flint, *Women Get Clipped for Services*, PLAIN DEALER (Cleveland, Ohio), Mar. 26, 1999, at 1C; William C. Rhoden, *Fraternity and Liberty, Yes, but They Left out Equality at the French Open*, N.Y. TIMES, May 29, 2005, § 8, at 6.
80. Rachel F. Moran, *What if Latinos Really Mattered in the Public Policy Debate?*, 85 CAL. L. REV. 1315, 1336 & n.70 (1997).
81. Ed Bark, *Ellen Is Out—and Down*, DALLAS MORNING NEWS, Feb. 25, 1998, at 1C; Susan Blatt, Letter to the Editor, *Insult and an Extra Tax*, SUNDAY OREGONIAN, Jan. 6, 2008, at E1.
82. Richard Conniff, *Abolish All “Taxes,”* N.Y. TIMES, Apr. 15, 2008, at A23; *see* Edward J. McCaffery & Jonathan Baron, *Thinking About Tax*, 12 PSYCHOL. PUB. POL’Y & L. 106, 119 (2006) (“In sum, labels matter, and tax tends to be a negative one.”); *see also* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 4 (2005) (“Since [1994], eliminating all taxes on wealth or income from wealth has become a matter of Republican orthodoxy. Indeed, as stunning as the estate tax repeal was, it is a bellwether of a larger conflict—over the future of progressive taxation in America.”); *id.* at 266–78 (describing how estate tax repeal is just part of a larger assault on progressive taxation more generally); Sheldon D. Pollack, *Republican Antitax Policy*, 91 TAX NOTES 289 (2001) (tracing the historical roots of the Republican party’s animus toward the taxation of income and wealth

The author of this op-ed was quite right to go on to note that the negative connotations of the word “tax” find their roots in the word’s etymology.⁸³ According to the *Oxford English Dictionary*, the word “tax” is apparently adapted from the Latin word *taxāre*, which means “to censure, charge, tax with a fault; to rate, value, reckon, compute (at so much), make a valuation of.”⁸⁴ The inclusion of “censure” and “fault” in this definition conveys a sense of disapproval, unfavorable criticism, blaming, or condemning as well as the existence of some type of transgression, defect, or imperfection.⁸⁵ Tapping into these negative overtones, references to the “Black tax,” “gender tax,” “ethnicity tax,” and “gay tax” all send the signal that these outgroups have been singled out as the (unfair) targets of societal condemnation or disapproval and are being (unjustly) marked as defective or blameworthy. After all, why else would society impose a special burden on these groups, if not as a penalty for their transgression—that is, for the very fact of their being different from the dominant group, whether in terms of race, ethnicity, gender, or sexual orientation (or some combination of them)?

In characterizing the burdens imposed by the federal DOMA and the state mini-DOMAs as a tax, I do aim, in part, to tap into the power of these figurative uses of the word “tax” because labels can carry significant weight in public discourse. To put it in the terminology of cognitive psychology, labels can have a “framing” effect.⁸⁶ In other words, the same question can generate different answers depending on how it is phrased. For example, opponents’ effective relabeling of the federal estate tax as the “death tax” proved a highly successful means of changing the public’s perception of the tax and of popularizing support for the tax’s repeal.⁸⁷ This rhetorical move was successful because the la-

and exploring its more fanatical iteration during the 1990s); *id.* at 289 (describing the Republican party’s focus on “antitax policy” as an “outright obsession” and “the very *raison d’être* of the Republican party”).

83. Conniff, *supra* note 82.

84. 2 OXFORD ENGLISH DICTIONARY 3244 (compact ed. 1971).

85. 1 *id.* at 365, 970–71.

86. See McCaffery & Baron, *supra* note 82, at 108 (“*Framing* refers to the effect whereby the same question or choice set, described differently, can lead to different answers . . .”). In that article, McCaffery and Baron discuss the results of experiments testing for the effects of framing in the way that people think about tax. See generally *id.* at 113–29. In an earlier article, McCaffery explained the relevance of cognitive psychology to tax, arguing both that cognitive psychology can help to explain why our tax system looks the way it does and that cognitive biases should be factored into any general theory of tax. Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. Rev. 1861 (1994).

87. GRAETZ & SHAPIRO, *supra* note 82, at 76–85, 253–54; DAVID CAY JOHNSTON, PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE 80–81 (2003).

bel “estate tax” both conjures an image of someone very wealthy (i.e., wealthy enough to have an “estate” to worry about) and accurately conveys the impression that the tax only applies to the relative few in our society who have amassed this level of wealth. However, by calling this same tax the “death tax,” there is a complete change in imagery. Instead of conjuring images of a wealthy elite, the “death tax” brings to mind an event that we all must eventually face and that no one can avoid—no matter how hard they try—which can mislead taxpayers into thinking that they are far more likely to be liable for the tax than they actually are.⁸⁸ At the same time, the label “death tax” conjures the highly negative image of an unfeeling government sticking the deceased’s survivors with a tax bill at a time when they are grieving.

Similarly, those opposed to lesbian and gay rights have framed the issue of legally recognizing same-sex relationships in terms of the need to “protect” or “defend” so-called traditional marriage.⁸⁹ In summarizing its own thoughts on the institution, the U.S. Supreme Court succinctly explains the importance to many of defending so-called traditional marriage against attack:

[D]ecisions of this Court confirm that the right to marry is of fundamental importance for all individuals. Long ago, in *Maynard v. Hill*, the Court characterized marriage as “the most important relation in life” and as “the foundation of the family and of society, without which there would be neither civilization nor progress.” In *Meyer v. Nebraska*, the Court recognized that the right “to marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause, and in *Skinner v. Oklahoma ex rel. Williamson*,

88. See Dennis J. Ventry Jr., *Straight Talk About the Estate and Gift Tax: Politics, Economics, and Morality*, 89 TAX NOTES 1159, 1161 (2000) (“Seventeen percent of those surveyed by Gallup in June indicated that they would ‘personally benefit’ from the elimination of inheritance taxes. But less than 2 percent of all estates passing to heirs in any given year pay transfer taxes.”). With the changes in the federal estate tax in 2001, the percentage of estates subject to tax has decreased. CITIZENS FOR TAX JUSTICE, WHO PAID THE FEDERAL ESTATE TAX IN 2005?, at 1 (2007), <http://www.ctj.org/pdf/wherethemoneygoes.pdf> (indicating that the 18,431 estate tax returns filed in 2005 showing a taxable estate comprised only 0.8% of the people who died in 2004).

89. E.g., Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996); Marriage Protection Amendment, S.J. Res. 1, 109th Cong. (2005).

... marriage was described as “fundamental to the very existence and survival of the race.”⁹⁰

Framing the question in this way and against this background conjures an image of marriage as an ancient citadel that is under attack by (foreign) invaders. This rhetorical move has been successful because it puts opponents of the DOMAs in the difficult position of having to convince judges, legislators, and the electorate why they should open the gates of the citadel wide to allow in these (foreign) invaders who are bent on plundering and destroying their way of life.

Yet, through a disciplined reconceptualization of the DOMAs as a tax on lesbian and gay families, lesbian and gay rights advocates and their allies might just be able to shift the framing of this debate in the same way that opponents of the estate tax did in the 1990s.⁹¹ Of particular importance to facilitating this shift in the rhetorical terrain is the characterization of this tax not as one just on same-sex couples but as one on lesbian and gay *families*. This move not only captures the rhetoric of opponents of lesbian and gay rights, who generally paint themselves as champions of the nuclear family, but it also reflects the reality that lesbian and gay families already exist—even in the face of societal disapproval and even when they are already saddled with significant burdens. At the time of the 2000 census, approximately 22% of all households headed by male same-sex couples had children living with them and approximately 34% of all households headed by female same-sex couples had children living with them.⁹² These numbers have probably only grown during this decade.⁹³ For instance, I personally know a number of same-sex couples who have had children since 2000. Indeed, when the time came to choose the cover art for my book *Everyday Law for Gays and Lesbians (and Those Who Care About Them)*, I did not have to look far when the publisher suggested that we include a picture of a lesbian or gay family on the cover. I quickly turned to my sister and her partner, and asked them to appear on the cover with my two nieces and nephew.

90. *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (citations omitted); see Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2695 n.47 (2008) (collecting several quotes from other courts).

91. See *supra* text accompanying notes 87–88.

92. TAVIA SIMMONS & MARTIN O’CONNELL, U.S. CENSUS BUREAU, *CENSUS 2000 SPECIAL REPORTS: MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000*, at 9 tbl.4 (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf>.

93. See *Married with Children: Option for More Gay Men*, GRAND RAPIDS PRESS (Grand Rapids, MI), Aug. 10, 2008, at A4.

Even those who might applaud imposing a tax on lesbians and gay men⁹⁴ would probably be less likely to support a tax that penalizes children for their parents' sexual orientation. As I have explained in the context of discussing how to prepare for the coming legal battles over lesbian and gay parenting:

[I]n the coming legal battles, if we are to be successful, we must draw attention not to ourselves but to the best interests of our children. When the focus is on the power of lesbian and gay families to destabilize heterosexist norms, legislators and judges, frightened by the idea of change, can quite easily give free rein to their ingrained sexual prejudices. Experience teaches us, however, that it is more difficult for those in power to vent their animosity toward lesbian and gay parents when they are confronted with the reality that their decisions will also cause direct and tangible harm to innocent children by, for example, depriving those children of parents whom they know and love (or, in some cases, of any parents at all), health insurance, adequate means of support, or the right to inherit.⁹⁵

In the ongoing political debate over same-sex marriage, advocates for lesbian and gay rights seem to have recognized the power of moving the focus away from the rights of lesbians and gay men—who are too easily seen “as some disembodied and dehumanized ‘other’ that can be vilified and scapegoated for society’s problems”⁹⁶—and, instead, of placing the focus on the effect on a same-sex couple’s children of denying the couple access to the rights and obligations of marriage.⁹⁷ But, faced

94. See, e.g., *The Gay Tax*, posting of JSM to ADEQUACY: NEWS FOR GROWNUPS, <http://www.adequacy.org/stories/2001.6.27.51823.2094.html> (June 27, 2001) (arguing for the imposition of a tax on gay men because they are wasteful and “will buy almost any old crap as long as it is marketed to them as being in some way ‘camp’ or ‘ironic’”); Posting of mr Giblets to Topix, <http://www.topix.com/forum/news/weird/TBOBMV4TRABK7UTJD> (Apr. 10, 2008, #1) (“why not have a gay tax to raise revenue? . . . The extra ‘pink tax’ could be used to subsidize new roads, strip clubs, gasoline, and building roads through forests.”); Posting of ramsy to Topix, <http://www.topix.com/forum/news/weird/TBOBMV4TRABK7UTJD> (Apr. 10, 2008, #2) (responding to mr Giblets’ post, “I like where you are coming from with this! Maybe-it could help pay for decorations they like to put up-Or-possibly pay for the damaged youth caused by gay pride parades . . .”).

95. INFANTI, *supra* note 3, at 224.

96. *Id.* at 8.

97. Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 240–42 (2006); S.J. Barrett, Note, *For the Sake of the Children: A New Approach to Securing Same-Sex Marriage Rights?*, 73 BROOK. L. REV. 695, 697–709,

with effective counterarguments, advocates of lesbian and gay rights have encountered difficulty in leveraging this change in focus in a way that shifts the rhetorical terrain to their advantage.⁹⁸ For example, opponents of same-sex marriage have, with some success, argued that a family headed by a different-sex couple is the optimal milieu in which to raise children and that different-sex couples are the only ones in need of the stability provided by marriage because it is only their sexual liaisons that can inadvertently result in procreation.⁹⁹

Recharacterizing the DOMAs as a tax on lesbian and gay families might just provide the necessary leverage to overcome these counterarguments and to shift the rhetorical terrain to the advantage of lesbian and gay rights advocates. Speaking in terms of the distinct financial disadvantages that the DOMAs impose on lesbian and gay families frames the debate in a way that should strike a chord with a broad swath of people, no matter their sexual orientation. In other words, talking about taxes takes attention away from the sexual orientation of the heads of household and fixes it instead on the financial stress—and, closely following on its heels, the instability—that an onerous tax burden can place on a family. I have discussed at length elsewhere the power of telling our own stories in our own words, but have simultaneously cautioned that we must be aware that some ways of telling our stories are more powerful and effective than others.¹⁰⁰ This reframing of the debate over same-sex marriage and the DOMAs is just such an instance of recalibrating how we tell our own stories to make them as powerful and effective agents of change as possible.

We can witness the power of focusing on concrete financial burdens imposed on families by juxtaposing two actions by the Bush administration, which was clearly no friend of lesbians and gay men. In early 2007, the U.S. Department of State rejected a lesbian U.S. citizen's passport application because it included her married name, which she had changed on her Massachusetts marriage license at the time that she wed her same-sex partner.¹⁰¹ The State Department relied upon the federal

721–22 (2008); e.g., Human Rights Campaign, *Families Matter*, http://www.hrc.org/documents/Family_Matters_brochure.pdf (last visited Nov. 7, 2009).

98. Franke, *supra* note 97, at 242–44.

99. E.g., Standhardt v. Super. Ct. of the State of Ariz., 77 P.3d 451, 461–64 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15, 23–26 (Ind. Ct. App. 2005); Hernandez v. Robles, 855 N.E.2d 1, 7–8 (N.Y. 2006). *But cf. In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

100. INFANTI, *supra* note 3, at 13–19.

101. Dianne Williamson, *Gay Right Springs a Leak*, WORCESTER TEL. & GAZETTE (Worcester, Mass.), Mar. 4, 2007, at B1. And this is not an isolated instance. See James Burger, *Feds Split on Same-Sex Name Changes*, THE BAKERSFIELD CALIFOR-

DOMA in reaching this decision, asserting that “same-sex couples seeking a passport under a married name can’t do so absent additional documentation, and that the government doesn’t recognize such name changes based solely on marriage certificates, as it does for heterosexual married couples.”¹⁰² In contrast, in a memorandum made public in June 2008, the U.S. Department of Justice’s Office of Legal Counsel concluded that the child of a lesbian couple who had entered into a civil union in Vermont was eligible for child’s insurance benefits when the nonbiological mother became eligible for Social Security disability benefits.¹⁰³ Under Vermont’s civil union law, the nonbiological mother was listed as a “second parent” on the child’s birth certificate. The Office of Legal Counsel relied on Vermont’s recognition of the parent-child relationship in making its decision, even though Vermont’s recognition of that relationship stemmed directly from the couple’s civil union (a relationship that the federal government does not recognize).

The federal government did not have to legally recognize a same-sex relationship in either of these cases. In both situations, the state’s legal recognition of the same-sex relationship was merely a means to an end (i.e., an inexpensive and expeditious change of name or establishment of a parent-child relationship in the eyes of the law). The salient differences between these two factual situations that, in my opinion, explain the divergent results are the identity of the disadvantaged person(s) and the concreteness and magnitude of the harm. In the case of the rejected passport application, the only detriment was to the lesbian who changed her name when she exercised her right to marry. She ended up missing her planned vacation due to the rejection of her passport application and would have to undertake inconvenient (both in terms of hassle and expense) judicial proceedings to change her name before resubmitting that application. Applying the federal DOMA to her did no more than exact a penalty from her for being a lesbian who dared to marry her same-sex partner as permitted by state law. In the

NIAN, Aug. 3, 2008, http://www.bakersfield.com/hourly_news/story/512934.html; Megan A. Brooks, *Stick a Finger in Your Eye and Break Your Heart All over Again*, <http://www.librarygrrrl.net/2007/08/17/380/> (Aug. 17, 2007).

102. Williamson, *supra* note 101 (attributing this statement to an unnamed State Department spokesman).

103. See Editorial, *Justice for Gays: The Bush Administration Rules that Children of Same-Sex Couples Can Receive Their Social Security Benefits*, WASH. POST, July 6, 2008, at B6; Memorandum from Steven A. Engel, Deputy Assistant Attorney Gen., to the Acting Gen. Counsel, Soc. Sec. Admin. (Oct. 16, 2007), <http://www.justice.gov/olc/2007/saadomaopinion10-16-07final.pdf>. In contrast to the Department of State, the Social Security Administration appears to be willing to accept a same-sex couple’s marriage certificate as sufficient proof of a name change. See Burger, *supra* note 101; Brooks, *supra* note 101.

case of the child's Social Security benefits, however, a decision to apply the federal DOMA to the interpretation of the Social Security Act would have resulted in a significant, concrete financial disadvantage to the child, because the mother had asked for the child's insurance benefits to replace family income that was lost due to her disability. The Office of Legal Counsel's decision thus helped to relieve the family's tangible financial burdens and to make the child's family situation more stable. A contrary decision would have punished the child for the parents' sexual orientation and put the family at risk.¹⁰⁴

Speaking of the DOMAs as taxes has the potential to shift the framing of the debate over same-sex marriage in the same way; that is, away from a focus on the abstract rights of the same-sex couple and toward a focus on the concrete and significant financial stresses that the DOMAs impose on lesbian and gay families. Quite understandably, some in the lesbian, gay, bisexual, and transgender (LGBT) community have expressed "unease with what feels like the deployment of children as props that attest to our normalcy, a repudiation of our perversion."¹⁰⁵ But it cannot be denied that the DOMAs have a real impact on the children of same-sex couples. If nothing else, there are simply fewer financial resources available to support the children when their parents are forced to pay the tax imposed by the DOMAs.¹⁰⁶ I expect that few among us would like to see their children punished in this way for their own perceived misdeeds or transgressions.¹⁰⁷ Thus, especially in these

104. The Social Security Administration's apparent willingness to accept a same-sex couple's marriage certificate as proof of a name change, *see supra* note 103, might be explained in similar terms. The inability to get a Social Security card with one's correct name on it may result in significant, concrete financial disadvantage to the individual and her family, because it may prove difficult (if not impossible) for the individual to obtain work without a match between the name on her Social Security card and the name on her other documents (e.g., a driver's license). *See Safe-Harbor Procedures for Employers Who Receive a No-Match Letter*, 72 Fed. Reg. 45,611, 45,621 (Aug. 15, 2007) (discussing the possibility that an employer who receives a no-match letter from the Social Security Administration will simply fire the affected employee).

105. Franke, *supra* note 97, at 239.

106. See *infra* Part II.B.1 for a rough estimate of the amount of the tax imposed by the DOMAs.

107. In the context of considering an equal protection challenge to a statute that involved a classification based on illegitimacy, the U.S. Supreme Court stated:

The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible

days of high food and fuel prices and a severe economic downturn, a message that eschews talk of rights and that pairs antitax sentiment with the need to relieve the financial strain on families will undoubtedly better resonate with all Americans, whether gay or straight.¹⁰⁸

To summarize, this shift in the framing of the debate could prove to be an effective rhetorical means of (1) displacing the idea that the DOMAs are necessary to protect the institution of marriage from some imagined assault by same-sex couples and (2) replacing it with the idea that the DOMAs are really nothing more than an unjust penalty imposed on same-sex couples and their children because they happen to be different. Thus, by ceasing to refer to the DOMAs by their given name—which only gives credence to the idea that they are a necessary defensive or protective measure—and by constantly referring to them instead as a tax on lesbian and gay families, we may help to undermine support for these measures among those who are subject to sway.

B. *Technically Speaking*

Recasting the DOMAs as a tax on lesbian and gay families in an attempt to shift the rhetorical terrain on which this front of the “culture wars” is being waged is not all that I aim to do in this Article. As mentioned above, I addressed the figurative sense of the word “tax” first in

for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) (footnote omitted). *But see, e.g., Exodus* 20:5 (“Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.”); *Numbers* 14:18 (“The LORD is longsuffering, and of great mercy, forgiving iniquity and transgression, and by no means clearing the guilty, visiting the iniquity of the fathers upon the children unto the third and fourth generation.”). Indeed, the U.S. Supreme Court now applies a heightened, “intermediate” level of scrutiny to equal protection challenges to classifications based on illegitimacy. 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* § 18.14 (4th ed. 2008).

108. It is worth pausing here for a moment to note that, by moving the debate away from marital status and toward the treatment of families, this same rhetoric could be deployed to advocate in favor of extending legal protections to all families, regardless of the marital status of those who head the family. An exploration of this broader argument is beyond the explicit scope of this Article, which is confined to a discussion of the burdens imposed on same-sex couples who have entered into a marriage, civil union, or domestic partnership and their children. Nevertheless, in my brief concluding remarks, I do consider how this Article might pave the way for making just such arguments.

order to distinguish this project somewhat from more purely rhetorical uses of the word. My recharacterization of the burden imposed by the DOMAs as a tax on lesbian and gay families is more than purely rhetorical because the DOMAs impose a burden that is also closely analogous to a tax in the technical sense of the word.

In contrast to more purely rhetorical uses of the word—such as Jody Armour’s use of the phrase “Black tax” in the text quoted above¹⁰⁹—the burden that the DOMAs impose on same-sex couples is not the price that lesbians and gay men pay in their individual encounters with straight (and, sometimes, gay) people because of stereotypes and prejudice based on sexual orientation (although we do pay that price, too). Rather, it was our elected legislators and/or the voters who purposefully and consciously imposed these burdens on same-sex couples through the formal legal mechanisms of legislation and/or constitutional amendment. Consequently, this is not a diffuse (though no less onerous) burden imposed in interactions with others in society, but one that our state and federal governments specifically created, sanctioned, and imposed by law—just as they have imposed other, more formal taxes upon us.¹¹⁰

109. See *supra* text accompanying note 78.

110. In this way, the burden imposed by the DOMAs satisfies the definition of the word “tax” in BLACK’S LAW DICTIONARY, which pointedly speaks of “[a] monetary charge imposed by the government.” BLACK’S LAW DICTIONARY 1496 (8th ed. 2004) (emphasis added). The more purely rhetorical uses of the word cannot satisfy this requirement because the burdens to which they refer are generally not imposed by law—though the stereotypes at the root of those burdens may nonetheless affect the application of the law to individual members of the subordinated group. See, e.g., Erik Eckholm, *Reports Find Persistent Racial Gap in Drug Arrests*, N.Y. TIMES, May 6, 2008, at A21.

Raising a similar issue, Dennis Ventry suggested to me in an e-mail exchange about the topic of this Article that if the burdens imposed by the DOMAs are to be viewed as a tax on same-sex couples, then it might be argued that any legal relief from government burdens that LGBT individuals receive by reason of their sexual orientation should be treated as an exemption from tax that must be balanced against the burden of the tax that the DOMAs impose on lesbian and gay families. In particular, he suggested that the federal government’s “Don’t Ask, Don’t Tell” policy, which essentially excludes lesbians and gay men from military service, could be viewed as a sexual-orientation-based tax benefit that must be weighed against the tax burdens imposed by the DOMAs. Such an argument would, however, miss the mark for two reasons: First, as Dennis himself acknowledged, although compulsory military service might be viewed as a form of in-kind tax, see THE REPORT OF THE PRESIDENT’S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE 23–28 (1970) (discussing the “conscription tax”), available at <http://rand.org/pubs/monographs/MG265/images/webS0243.pdf>, military service in this country is currently voluntary. Thus, there is simply no tax from which the government can exempt LGBT individuals. As a result, “Don’t Ask, Don’t Tell” cannot be viewed as akin to a tax exemption for LGBT in-

Having thus distinguished more purely rhetorical uses of the word “tax,” I would now like to turn to a discussion of the technical sense of the word to show how the burdens imposed by the DOMAs fit that sense of the word as well. By demonstrating that the burdens imposed by the DOMAs are also a “tax” in the technical sense, my aim is to make available additional grounds for challenging the constitutionality of these measures and to provide lesbian and gay rights advocates with some rhetorical ammunition for fighting against these taxes when these additional constitutional challenges are either unavailable or unavailing.

As mentioned earlier, in its technical sense, the word “tax” is defined as “[a] compulsory contribution to the support of government, levied on persons, property, income, commodities, transactions, etc.”¹¹¹ This definition can be broken down into three parts. Thus, for a levy to

dividuals. Second, the fact that someone is exempt from one tax but must pay another tax should not, as a general matter, change the classification of either levy as a tax. For example, the fact that the working poor might be exempt from the federal income tax but subject to federal payroll tax does not change the character of either of these levies as a tax. In the absence of the first reason why this argument misses the mark, this second point would be relevant to the discussion *infra* Part III.C about the fairness of the distribution of the tax burden. But, given that “Don’t Ask, Don’t Tell” cannot be characterized as a tax exemption, this second point is not relevant to that discussion.

111. See *supra* note 76. This definition is similar to the ones found in Black’s Law Dictionary and the Dictionary of Political Economy. BLACK’S LAW DICTIONARY 1496 (8th ed. 2004) (“A monetary charge imposed by the government on persons, entities, transactions, or property to yield public revenue.”); 3 DICTIONARY OF POLITICAL ECONOMY 517 (Robert Harry Inglis Palgrave ed., 1910) (“A tax is a compulsory contribution of the wealth of a person or body of persons for the service of the public powers.” (quoting C.F. BASTABLE, PUBLIC FINANCE 249 (2d ed. 1895) (footnote omitted))).

Parallels can also be found in guidance from the Service. In a revenue ruling interpreting I.R.C. § 164, which allows a deduction for certain taxes, the Service states that “[a] tax is an enforced contribution, exacted pursuant to legislative authority in the exercise of taxing power, and imposed and collected for the purpose of raising revenue to be used for public or governmental purposes, and not as a payment for some special privilege granted or service rendered.” Rev. Rul. 57-345, 1957-2 C.B. 132, *revoked on its facts by* Rev. Rul. 60-366, 1960-2 C.B. 63. The Service adopts a more tautological definition in the foreign tax credit regulations when it states, “[a] foreign levy is a tax if it requires a compulsory payment pursuant to the authority of a foreign country to levy taxes.” Treas. Reg. § 1.901-2(a)(2) (as amended in 1991). Nonetheless, the Service does go on to clarify that a “penalty, fine, interest, or similar obligation is not a tax, nor is a customs duty a tax,” nor is a payment in exchange for a specific economic benefit a tax. *Id.* It is not surprising that the Service’s definitions generally track ones found in dictionaries, because, as it has noted, “[t]he word ‘taxes’ as used in the statute is nowhere defined in the Code, and, it must be ‘given its ordinary and commonly accepted meaning as established by the judicial decisions.’” Rev. Rul. 60-366, 1960-2 C.B. 63 (quoting *United Gas Improvement Co. v. Comm’r*, 25 B.T.A. 1382, 1384 (1932)).

be classified as a “tax”: (1) there must be a “contribution”; (2) the contribution must be “compulsory”; and (3) the contribution must be for the “support of government.” I will address each of these three component parts of the definition in turn.

1. “Contribution”

The first question that must be addressed is what type of “contribution” the DOMAs require same-sex couples to make. Based on the discussion above,¹¹² the contribution that the DOMAs exact from same-sex couples takes the form of the monetary costs¹¹³ that those couples

112. *See supra* Part I.B.

113. Naturally, there are other, nonmonetary costs attendant to this stigmatization. For example, there is the “feedback loop” between everyday discrimination and bias crimes. As I have described elsewhere:

Everyday discrimination against lesbians and gay men marks them as an appropriate target for inferior treatment, which contributes to the perception that they are likewise appropriate targets for violence, which, when such violence occurs, then further reinforces the notion that lesbians and gay men are appropriate targets for everyday discrimination. Some psychologists view the sexual stigma that feeds and is fed by this loop as creating an atmosphere of chronic stress for lesbians and gay men as they confront, live in fear of, or hide in the closet from the effects of everyday discrimination and bias crime victimization. This chronic stress, which is in addition to the general stresses of life and is “socially based—that is, it stems from social processes, institutions, and structures beyond the individual,” is referred to as “minority stress.” Minority stress is associated with adverse health effects (e.g., psychological distress) among lesbians and gay men.

INFANTI, *supra* note 3, at 45–46 (quoting Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 *PSYCHOL. BULL.* 674, 676 (2003)) (footnotes omitted).

Moreover, the differential legal treatment of same-sex couples with regard to family formation also takes a psychological toll on these couples:

Psychologically, the parent who second-parent adopts does not hold the same power in the family because family members perceive their status to be inferior both culturally and legally to that of the biological or first adoptive parent. This inequality can permeate not only the interactions within the family, but can also be reinforced by interactions in other social institutions. The result can be destabilizing if the parent feels like his or her parental legitimacy is being questioned, or more crucially, could be questioned if the relationship ended. This gives incredible power to one parent. While it may never be overtly used, it could have a corrosive effect on an intact family relationship in subtle ways. Emotionally, the parent with the perceived inferior position may not assert himself or herself either with the child or their partner in regard to their children for fear of how it will be

must incur (1) to hire lawyers to draft reams of legal documents and undertake legal proceedings (e.g., to change a surname or adopt a partner's child) to obtain a measure of extramarital recognition of their familial relationships, (2) to invoke the machinery of the courts to carry out those legal proceedings, and (3) to cover any ancillary services necessary to achieve the desired legal ends (e.g., the home studies and psychological evaluations that are sometimes necessary for a second-parent or stepparent adoption).

To get a sense of the size of these costs, I contacted an attorney at one of the major law firms here in Pittsburgh, where I live and teach.¹¹⁴ This firm has an established nontraditional families practice group.¹¹⁵ The attorney reported that her firm charges for these services by the hour, so the figures that she quoted (and that I have reproduced below)

received. In essence, the other family members could hold them emotionally hostage.

Geographically, the entire family is held captive when the parents are not confident they will be treated as a legitimate family regardless of where they live or travel. When families are literally undone by simply entering a state's border, it is difficult to imagine a more effective way of undermining this type of family formation. As noted above, these real and perceived barriers exact a toll on the family's ability to exist to the fullest extent. Whereas different-sex families take the right to travel for granted, same-sex families must weigh the risks against the benefits. These families are bound to the states that are willing to acknowledge them.

Deirdre M. Bowen, *The Parent Trap: Differential Familial Power in Same-Sex Families*, 15 WM. & MARY J. WOMEN & L. 1, 40–41 (2009).

Norwithstanding the significant nonmonetary costs of stigmatization, I have focused my attention here on the monetary costs that the DOMAs impose on same-sex couples because, in the United States, taxes are conventionally assessed based on monetary value (e.g., the fair market value of property, the dollar amount (or dollar-equivalent) of income, and the fair market value of an individual's total wealth or assets) and are paid in cash.

114. Many thanks go to Lisa Philipps for suggesting that I attempt to quantify these costs.
115. Given their experience with, and reputation for, legal planning for same-sex couples, I expected that they would most easily be able to quantify for me the attorney's fees that would be incurred to draft these legal documents and undertake these legal proceedings. Naturally, these figures are not meant to be representative of what every same-sex couple will pay; to be clear, I undertook no systematic survey of attorneys in Pittsburgh, or anywhere else. My aim in seeking out this information was much more modest; that is, simply to provide a sense of the magnitude of the costs that the DOMAs impose on same-sex couples in a city of modest size with a modest cost of living. See Andrew Druckenbrod, *PSO Tour Touts Pittsburgh's Assets to Europe*, *PITT. POST-GAZETTE*, Jan. 20, 2008, at E1 (citing Pittsburgh's comparatively low cost of living as a factor in a German company's decision to locate its North American headquarters here); U.S. Cities with Population over 100,000, <http://www.infoplease.com/ipa/A0108676.html> (last visited Nov. 7, 2009) (indicating that, in 2005, Pittsburgh ranked 57 among U.S. cities with a population over 100,000).

are merely estimates or ranges based on the firm's past experience.¹¹⁶ The attorney indicated that the cost of drafting wills, living wills, and powers of attorney for healthcare and finances, which are usually done together, range from \$1,000 to \$2,500. The cost of drafting trusts depends on the complexity of those trusts, and is usually \$500 or more. In the case of domestic partnership agreements, each partner in the couple has his/her own attorney. The cost to the partner represented by the firm I contacted ranges from \$1,500 to \$4,000, depending on the complexity of the agreement and the extent of negotiations with the other attorney. A shared parenting agreement typically costs about \$1,500. Second-parent adoptions cost from \$2,500 to \$5,000, depending on the amount of time spent in court appearances. In all, the total amount of charges included in the ballpark estimate provided by this attorney ranges from \$7,000 to \$13,500.¹¹⁷ It is worth noting that this estimate does not either (1) represent all of the potential costs to be incurred by the couple (e.g., even in terms of attorney's fees alone, it does not include the cost of the second counsel in negotiations over a domestic partnership agreement) or (2) account for the fact that unusual circumstances sometimes arise that result in an increase in the estimated fees.

Same-sex couples are asked to incur these significant monetary costs simply to duplicate legal protections that should already be included in the price of registering their marriage, civil union, or domestic partnership. And, once these costs are quantified in this way, it becomes

116. E-mail from Maureen Cohon, Counsel, Buchanan Ingersoll & Rooney, P.C., to Anthony C. Infanti, Assoc. Prof. of Law, University of Pittsburgh School of Law (June 11, 2008, 12:21 PM) (on file with author). All of the figures in this paragraph come from this same e-mail.

117. Some might argue that same-sex couples could avoid these costs by preparing the documents themselves. Although this may be possible with respect to certain documents (e.g., advance directives), it is not possible or advisable with respect to other documents (e.g., wills, living trusts, domestic partnership agreements, and shared parenting agreements), because preparation of those documents requires legal knowledge and an awareness of the unique legal issues faced by same-sex couples (e.g., the need to lay the groundwork to fend off family members' challenges on grounds of undue influence or coercion). See INFANTI, *supra* note 3, ch. 7. Notably, these costs cannot be avoided even where one member of the couple possesses the requisite knowledge because she is an attorney. Ethical rules prohibit a lawyer from undertaking representation if it will give rise to a concurrent conflict of interest (i.e., when the "the representation of one client will be directly adverse to another client"). MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (2002). There is always a possibility that a conflict might exist where a lawyer represents a married couple in estate planning matters; yet, it would seem almost certain that such a conflict would exist where one of the represented spouses is the lawyer herself. *Id.* cmt. Moreover, judicial proceedings to change a surname or to complete a second-parent or stepparent adoption would almost certainly require the help of a lawyer familiar with these areas.

much easier to see the significant, disparate impact of the DOMAs along class lines. Simply put, many same-sex couples will not be able to afford one-half or one-quarter (or, in some cases, any) of these costs. Same-sex couples finding themselves in this unfortunate position will have no choice but to forfeit many (and, in some cases, all) of the legal protections conferred by their marriage, civil union, or domestic partnership when they cross state lines or deal with the federal government. In these situations, the "contribution" is forcibly taken in kind rather than in cash, much like a property tax¹¹⁸ that is satisfied through foreclosure on the property subject to tax when the taxpayer does not have the means to pay the tax in cash. In contrast, different-sex married couples are not asked to incur such monetary costs (or risk a forcible taking) in order to obtain legal recognition of either their marital relationship or their parental relationship with a child of the marriage. Indeed, a portable version of this legal recognition comes automatically with the (in comparison, rather nominal) price of their marriage license (recall from the discussion above that a marriage license costs only fifty dollars in Boston, Massachusetts).¹¹⁹ Thus, the DOMAs clearly impose unique and identifiable monetary costs on same-sex couples who have entered into a marriage, civil union, or domestic partnership, if those couples are to have their relationship with each other and their children legally recognized outside of the jurisdiction of celebration of the marriage, civil union, or domestic partnership.¹²⁰ For those without the means to pay some or all of these monetary costs, the DOMAs still exact a contribution from the same-sex couple by forcibly taking in kind of what they are unable to take in cash.

118. See *infra* Part III.A.2 for further discussion of how the tax imposed by the DOMAs is akin to a property tax on the store of legal rights and obligations associated with same-sex marriages, civil unions, and domestic partnerships.

119. See *CITY OF BOSTON*, *supra* note 41 and accompanying text.

120. Some might argue that different-sex married couples also pay attorneys to draft legal documents touching on their relationship (e.g., wills) and that such costs are, therefore, not unique to same-sex couples. However, different-sex couples do not have these documents drafted in order to have their marriages recognized; rather, they have these documents drafted to alter the default legal rules that apply to them precisely because their marriages *are* legally recognized. To make the point even more starkly, I imagine that a different-sex married couple would register shock if you were to suggest that the husband should undergo the intrusion of, and incur the significant monetary costs related to, adopting each of the children who are born to the couple during the marriage to backstop the legal presumption of paternity.

2. "Compulsory"

This leads directly to the next question that must be addressed; namely, whether this contribution is "compulsory." Same-sex couples are, in a sense, doubly compelled to make this contribution to the support of the government. They experience an internal compulsion to incur the costs that comprise the "contribution" as well as the more conventional external (i.e., legal) compulsion to do so.

a. Internal Compulsion

To understand the internal compulsion, it will be helpful to remember that we are concerned here with individuals who have already taken the step of legalizing their relationships. These couples felt the need to publicly acknowledge their relationships, to protect and support each other, and to protect and support their current or future children (should they decide to have any). After all, the legal rights and obligations associated with marriage (or its legal equivalent, in the case of civil unions and domestic partnerships) largely revolve around the mutual protection and support of the couple and the protection and support of their children. The Massachusetts Supreme Judicial Court made this abundantly clear when it undertook to list many of the legal rights and obligations associated with marriage in its decision extending the right to marry to same-sex couples. It is worth quoting this summary at length:

The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death With no attempt to be comprehensive, we note that some of the statutory benefits conferred by the Legislature on those who enter into civil marriage include, as to property: joint Massachusetts income tax filing; tenancy by the entirety (a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate); extension of the benefit of the homestead protection (securing up to \$300,000 in equity from creditors) to one's spouse and children; automatic rights to inherit the property of a deceased spouse who does not leave a will; the rights of elective share and of dower (which allow surviving spouses certain property rights where the decedent spouse has not made adequate provision for the

survivor in a will); entitlement to wages owed to a deceased employee; eligibility to continue certain businesses of a deceased spouse; the right to share the medical policy of one's spouse; thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies; preferential options under the Commonwealth's pension system; preferential benefits in the Commonwealth's medical program . . . ; access to veterans' spousal benefits and preferences; financial protections for spouses of certain Commonwealth employees (fire fighters, police officers, prosecutors, among others) killed in the performance of duty; the equitable division of marital property on divorce; temporary and permanent alimony rights; the right to separate support on separation of the parties that does not result in divorce; and the right to bring claims for wrongful death and loss of consortium, and for funeral and burial expenses and punitive damages resulting from tort actions.

Exclusive marital benefits that are not directly tied to property rights include the presumptions of legitimacy and parentage of children born to a married couple; and evidentiary rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases. Other statutory benefits of a personal nature available only to married individuals include qualification for bereavement or medical leave to care for individuals related by blood or marriage; an automatic "family member" preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health care proxy; the application of predictable rules of child custody, visitation, support, and removal out-of-State when married parents divorce; priority rights to administer the estate of a deceased spouse who dies without a will, and requirement that surviving spouse must consent to the appointment of any other person as administrator; and the right to interment in the lot or tomb owned by one's deceased spouse.

Where a married couple has children, their children are also directly or indirectly, but no less auspiciously, the recipients of the special legal and economic protections obtained by civil marriage. Notwithstanding the Commonwealth's strong public

policy to abolish legal distinctions between marital and non-marital children in providing for the support and care of minors, the fact remains that marital children reap a measure of family stability and economic security based on their parents' legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social, such as the enhanced approval that still attends the status of being a marital child. Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one's parentage.¹²¹

In reading this list, one cannot help but be struck by society's felt need to facilitate mutual protection and support within (at least some) loving relationships.¹²² By marrying, a couple is provided immediate access to a legal framework that affords the couple a number of protections, among which are a special form of property ownership (i.e., tenancy by the entirety), homestead protections, inheritance rights, survivor's rights to a deceased spouse's wages and to continue a deceased spouse's business, access to health coverage, access to pension and veteran's benefits, financial protections on the breakup of the relationship, the right to sue if a third party kills or injures one's spouse, evidentiary privileges that protect the couple's private conversations, qualification for leave to care for or support each other in time of illness or the death of a family member, and the right to make healthcare decisions for each other in the absence of an advance directive. The facilitation of mutual protection and support also extends to the couple's children, who benefit from presumptions of parentage and predictable child support and custody rules in the event of the breakup of the family. It should come as no surprise, then, that the Massachusetts Supreme Judicial Court went on to state that, "[b]ecause it fulfils yearnings for *security, safe haven, and connection that express our common humanity*, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition."¹²³ In fact, the court went so far as to contend that, "[w]ithout the right to marry—or more

121. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955–57 (Mass. 2003) (citations omitted).

122. See Taunya Lovell Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 J. GENDER RACE & JUST. 1, 7 (1999) ("Laws reflect shared social values and play an important role in shaping societal perceptions of these values.").

123. *Goodridge*, 798 N.E.2d at 955 (emphasis added).

properly, the right to choose to marry—one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.'"¹²⁴

Some in the LGBT community disagree with this assessment of the importance that should be accorded to marriage because marriage is "[s]teeped in a patriarchal system that looks to ownership, property, and dominance of men over women as its basis."¹²⁵ Importantly, they protest that fighting for the legal recognition of same-sex marriage "will not transform our society from one that makes narrow, but dramatic, distinctions between those who are married and those who are not married to one that respects and encourages choice of relationships and family diversity."¹²⁶ Some have also questioned the headlong embrace of legal recognition and regulation of same-sex relationships by the state when, so recently, those same relationships were subject to criminal sanction.¹²⁷ Instead of seeking the right to marry, some members of the LGBT community argue that we should seek to "bridge the economic and privilege gap between the married and the unmarried."¹²⁸ They would fight for the recognition (in some cases legal, in others not) that other types of relationships are equally valuable as marriage; for the elimination of marital conditions on access to government support and benefits (e.g., healthcare, housing, Social Security, and pension plans); and for "a larger effort to *strengthen the security and stability of diverse households and families*."¹²⁹ The focus of these LGBT critics is thus also squarely on facilitating the ability of those in relationships to protect and support each other—the key difference being that these LGBT critics would not fetter access to legal and other structures that facilitate mutual protection and support with any requirement that the relationship take a marriage-like form.

In short, both those who extol the virtues of marriage and those who wish to knock marriage from its privileged pedestal recognize the central importance of mutual protection and support in all loving and familial relationships, whether that mutual protection and support takes

124. *Goodridge*, 798 N.E.2d at 957 (citation omitted).

125. Paula Ettelbrick, *Since when Is Marriage a Path to Liberation?*, reprinted in *LESBIANS, GAY MEN, AND THE LAW* 402 (William B. Rubenstein ed., 1993).

126. *Id.*; see generally NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

127. See generally Franke, *supra* note 97.

128. Ettelbrick, *supra* note 125, at 405; see also POLIKOFF, *supra* note 126, at 1–10.

129. See *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, http://www.beyondmarriage.org/full_statement.html (July 26, 2006) (emphasis added); see generally Franke, *supra* note 90.

place inside, outside, or in the shadow of the law. Given the generally acknowledged centrality of mutual protection and support to committed relationships and the fact that the same-sex couples with whom I am primarily concerned in this Article have already chosen to access the publicly established framework for providing such protection and support by entering into a marriage, civil union, or domestic partnership, it can only be expected that they will feel *compelled* to shore up or reestablish portions of that framework that the federal and some state governments have actively undermined or completely eroded. As mentioned earlier,¹³⁰ couples may vary in the extent to which they shore up this framework of protection and support because different couples will value different portions of this framework differently. Further contributing to the variation between couples is the fact that different couples will have different levels of resources, which means that some will do better than others—and some will spend more than others—in shoring up the legal protections for their relationship. But this in no way changes the compulsory nature of these expenses; it simply makes the amount of the “contribution” exacted from same-sex couples variable—and, in all likelihood, roughly progressive—in nature.¹³¹ And, naturally leading us into a discussion of the external compulsion to make this contribution, for those who do not have the money to pay for some or all of these expenses (and for those who choose to forego certain legal protections), the DOMAs simply take in kind (that is, in forfeited legal protections) what they cannot (or do not) take in cash.

b. External Compulsion

The more conventional “compulsion” that is associated with taxes is the external, legal compulsion that the government uses to exact the required contribution from recalcitrant taxpayers. As described immediately above, most same-sex couples are willing payers of the tax imposed by the DOMAs. These couples’ internal compulsion to protect and support each other and their children ensures that they will take the necessary steps—and incur the associated monetary costs—to shore up the legal protections that the DOMAs have undermined or eroded. Some couples will, however, find themselves either unwilling or finan-

130. *See supra* note 51.

131. I expect that the amount of the contribution will result in a roughly progressive tax because those with greater means will likely spend more on re-creating the rights and obligations of marriage—they will have the wherewithal both to compile a more complete set of legal documents and to hire service providers who charge a higher fee.

cially unable to incur some or all of the required “contribution.” The federal government and the states with mini-DOMAs do not let these “recalcitrant” taxpayers off the hook.

As mentioned above, in these situations, the tax imposed by the DOMAs acts much like a property tax. When the government imposing a property tax is unable to collect the tax in cash, it takes the property subject to tax in satisfaction of the taxes owed. The property is presumably of some value, and, as a result, the government can sell the property for cash and use the proceeds as it sees fit. Similarly, when same-sex couples find themselves unable to pay all or part of the tax imposed by the DOMAs in cash, the federal government and the states with mini-DOMAs take the unpaid tax in kind. In other words, in lieu of cash, these governments are willing to take some or all of the legal rights and obligations associated with same-sex marriages, civil unions, and domestic partnerships. These legal rights and obligations are both valuable¹³² and, as I describe more fully below,¹³³ akin to property. Although the government cannot sell this valuable property to obtain cash in the same way that it can sell a piece of land for cash when property taxes are in arrears, this compelled contribution is nonetheless to the “support of government,” as described in the next section.

3. “Support of Government”

The final question that must be addressed is whether the contribution exacted from same-sex couples, however compulsory, is to the “support of government.” Some might be wondering how I can get past this hurdle, given that most of the cost of replicating the legal protections of a marriage, civil union, or domestic partnership makes its way not into the coffers of the federal government or the states with mini-DOMAs, but into the hands of private attorneys and ancillary service providers. Even the cost of invoking the help of the courts often redounds not to the benefit of the federal government or the states with mini-DOMAs, but to the benefit of the state where the couple resides (or previously resided) and entered into their legal relationship. How, then, is this compulsory contribution “to the support of [the] government” imposing the burden on same-sex couples?

132. Could you really describe rights or obligations that have been classified by the U.S. Supreme Court as “fundamental,” *see infra* note 199 and accompanying text, as anything less?

133. *See infra* Part III.A.2.

The answer to this question lies in the literature on so-called implicit taxes. Economists and tax academics draw a distinction between “explicit” and “implicit” taxes.¹³⁴ Myron Scholes and Mark Wolfson succinctly explain the distinction as follows:

[W]hen two assets give rise to identical pretax cash flows, but the cash flows to one asset are taxed more favorably than those to the other asset, taxpayers will bid for the right to hold the tax-favored asset. As a result, the price of the tax-favored asset will increase relative to the price of the tax-disfavored asset and the before-tax rates of return on the tax-favored asset will decrease (relative to the before-tax return on the tax-disfavored asset). And since the before-tax cash flows for the two investments are identical, the pretax rate of return to the tax-favored asset will fall below that for the tax-disfavored asset. In important special cases, their prices will adjust such that their after-tax rates of return will be the same to all investors. In fact . . . , without further tax rule restrictions or market frictions, the equalization of after-tax rates of return is a necessary condition for market equilibrium.

Given differences in tax treatment, if after-tax returns are to be equalized, then before-tax rates of return must differ across the assets. More lightly taxed investments require lower before-tax rates of return than do more heavily taxed investments. As a result, investors pay taxes *explicitly* on heavily taxed investments and they pay taxes *implicitly* on lightly taxed investments through lower before-tax rates of return.¹³⁵

For example, consider the differential treatment of municipal and other bonds. The interest on municipal bonds is generally exempt from federal income tax.¹³⁶ The interest on these bonds is tax-favored when compared with the interest on comparable corporate or Treasury bonds,

134. *E.g.*, MYRON S. SCHOLES & MARK A. WOLFSON, *TAXES AND BUSINESS STRATEGY: A PLANNING APPROACH* 83–99 (1992); Charlotte Crane, *Some Explicit Thinking About Implicit Taxes*, 52 SMU L. REV. 339 *passim* (1999); Calvin H. Johnson, *A Thermometer for the Tax System: The Overall Health of the Tax System as Measured by Implicit Tax*, 56 SMU L. REV. 13 *passim* (2003); Michael S. Knoll, *Of Fruit and Trees: The Relationship Between Income and Wealth Taxes*, 53 TAX L. REV. 587, 598–601 (2000); Michael S. Knoll, *The UBIT: Leveling an Uneven Playing Field or Tilting a Level One?*, 76 FORDHAM L. REV. 857, 874–79 (2007).

135. SCHOLES & WOLFSON, *supra* note 134, at 83–84.

136. I.R.C. § 103 (2006).

because the interest on corporate and Treasury bonds is fully taxable. Due to the tax benefit associated with municipal bonds, “[i]nvestors bid up the prices of these municipal bonds such that their before-tax return is lower than the return on fully taxable bonds.”¹³⁷ Accordingly, investors in corporate or Treasury bonds pay explicit taxes (i.e., the federal income tax imposed on the interest that they receive), and investors in municipal bonds pay implicit taxes—in the form of a reduced rate of return on an otherwise comparable investment. In a perfect market, one would expect the explicit and implicit tax rates on these comparable investments to be equal.¹³⁸

To whom is this implicit tax paid? In the case of our municipal bond example, the implicit tax is paid to the state or local government that issued the bonds, as that government is the intended recipient of the benefit of the federal income tax exemption. The state or local government issuing the bonds receives the benefit of the tax exemption in the form of lowered borrowing costs.¹³⁹ Because these payments are not made directly to the federal government (i.e., the government providing the tax exemption in this situation), some commentators have criticized the application of the “tax” label to these payments.¹⁴⁰ But this view exalts form over substance, making it inconsistent with how a levy’s

137. SCHOLES & WOLFSON, *supra* note 134, at 85; see Johnson, *supra* note 134, at 13.

138. SCHOLES & WOLFSON, *supra* note 134, at 87–88; see Johnson, *supra* note 134, at 14 (“A tax system with an implicit tax lower than the maximum statutory tax rate is not a healthy tax system. Using the tax system to give subsidies or incentives under such conditions is inefficient, even immoral. Paying directly with dollars is cheaper and more efficient.”).

139. SCHOLES & WOLFSON, *supra* note 134, at 87; Johnson, *supra* note 134, at 16; see I BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 15.1.1. (1999) (“With the waning of the doctrine of intergovernmental tax immunity, Congress has preserved the exemption [from tax of interest on municipal bonds] as a kind of revenue sharing, enabling states and cities to borrow at interest rates lower than those on taxable obligations of similar quality.”). However, because markets are not perfect, the purchasers of the bonds are typically able to capture part of the intended benefit for themselves. This is possible because market forces will tend to drive the implicit tax rate down to that of the marginal investor, thereby creating a windfall for anyone who pays explicit tax at a rate higher than the marginal investor. SCHOLES & WOLFSON, *supra* note 134, at 96–97; Johnson, *supra* note 134, at 17–18.

140. See, e.g., Johnson, *supra* note 134, at 13 n.2 (“The term ‘implicit tax’ is conventional, but it is in some senses a terribly misleading name. The implicit tax does not provide any revenue for the federal government to pay for the Marines or other government programs.”); David A. Weisbach, *Implications of Implicit Taxes*, 52 SMU L. REV. 373, 374 (1999) (“Implicit taxes are misnamed. Implicit taxes are not taxes in the sense of the confiscation of resources by the government. They are simply asset price adjustments in response to a tax benefit or detriment.”).

classification as a “tax” is normally determined.¹⁴¹ In fact, as Scholes and Wolfson have explained, “[t]his taxing scheme, which uses implicit taxes to subsidize municipal spending programs, is similar to an alternative scheme in which all bonds (including municipal bonds) are fully taxable at the federal level and the federal government remits the tax collected on municipal bonds to each issuing authority.”¹⁴² Thus, echoing the insights of tax expenditure analysis,¹⁴³ Scholes and Wolfson make it clear that implicit taxes (such as those paid by municipal bond holders) are the equivalent of explicit tax payments to the federal government coupled with a federal spending program directing those funds to the state and local governments that are the intended, ultimate recipients of the government’s largesse.

Similarly, the monetary costs that the federal and state governments impose on same-sex couples through the DOMAs can be viewed as the equivalent of the imposition of an explicit tax on those couples that is then used to fund a direct spending program that provides monetary awards to those who facilitate the intended erosion of LGBT civil rights gains.¹⁴⁴ Even when a same-sex couple cannot afford to pay the tax im-

141. See *supra* notes 74–75 and accompanying text. Similarly, in describing the constitutional limitations on taxation in Australia, Miranda Stewart and Kristen Walker note that the Australian courts have not adopted a rigid conception of a payment to the support of government either: “It has been held that . . . a levy may be a tax in certain other circumstances, for example, where it is exacted ‘by a non-public authority’ or for payment to a private organization rather than into Consolidated Revenue, albeit for a ‘public purpose’.” Miranda Stewart & Kristen Walker, *Australia—National Report*, 15 MICH. ST. J. INT’L L. 193, 212 (2007) (footnotes omitted).

142. SCHOLES & WOLFSON, *supra* note 134, at 87. It is worth underscoring that what makes the “tax” label appropriate, according to Scholes and Wolfson, is not that the implicit tax is actually paid to a state or local government—that is merely a fortuitous happenstance because implicit taxes can be paid to anyone. Rather, what makes the “tax” label appropriate is the fact that the implicit tax is the equivalent of the federal government (the government that, in this case, created the implicit tax) imposing an explicit tax on the interest earned on municipal bonds and then enacting a direct federal spending program funneling the tax revenue raised from that explicit tax to (in this case, coincidentally) state and local governments.

143. For a description of tax expenditure analysis and the numerous critiques of it, see Infanti, *A Tax Crit Identity Crisis?*, *supra* note 73, at 717–44.

144. Some might argue that the DOMAs do not impose a tax at all, but merely a fee for the recognition of the legal relationships among same-sex partners and their children. This argument is, however, misguided. One of the hallmarks of a fee is a direct relationship between the fee being charged and the value of either the benefit being provided to the fee-payer or the burden being created by the fee-payer. *E.g.*, Chamberlain, *supra* note 68, at 173–77; Spitzer, *supra* note 67, at 353; *see, e.g.*, United States v. U.S. Shoe Corp., 523 U.S. 360, 370 (1998); Massachusetts v. United States, 435 U.S. 444, 464 (1978); Lightwave Techs., L.L.C. v. Escambia County, 804 So. 2d 176, 180 (Ala. 2001); Marion v. Baioni, 850 S.W.2d 1, 2 (Ark. 1993); State v.

posed by the DOMAs in cash, the actions of the government still mimic this combination of an explicit tax with a direct spending program (i.e., a taking of value from one taxpayer and a transfer of that value to another). When a same-sex couple is without the requisite cash, the government takes some or all of the valuable legal rights and obligations associated with the couple's marriage, civil union, or domestic partnership in satisfaction of the tax.¹⁴⁵ As mentioned above, the government cannot turn around and sell these rights for cash, but it need not do so in order to achieve its purpose. For the purpose of imposing this tax on lesbian and gay families is not to raise general revenue,¹⁴⁶ but to protect, preserve, and *enhance the value* of so-called traditional marriage.¹⁴⁷ Thus,

Medeiros, 973 P.2d 736, 742 (Haw. 1999); *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998); *Clay County Citizens for Fair Taxation v. Clay County Comm'n*, 452 S.E.2d 724, 727 (W. Va. 1994); *see also* Treas. Reg. § 1.901-2(a)(2)(i) (as amended in 1991) (“[A] foreign levy is not pursuant to a foreign country’s authority to levy taxes, and thus is not a tax, to the extent a person subject to the levy receives (or will receive), directly or indirectly, a specific economic benefit . . . from the foreign country in exchange for payment pursuant to the levy.”).

In the case of the DOMAs, there is no relationship whatsoever between the amount paid by same-sex couples and the benefits provided by, or burdens imposed upon, the federal or other state governments. In most cases, the amount being paid has a direct relationship to only one thing: the hourly charge of the couple’s attorney, who has been asked to prepare all of the necessary documents to secure legal recognition of the couple’s relationship (to the extent possible). Similarly, the cost of any ancillary services bears a direct relationship only to the hourly rate or per-transaction charge of the service provider. Moreover, as mentioned in the text above, the amount charged for judicial proceedings—for example, a judicial name change or an adoption—has a direct relationship only to the cost to the government of the state providing these services, and not to any benefit provided by, or burden imposed upon, the federal or other state governments.

145. In fact, even when a same-sex couple can afford to pay the entire amount of the “contribution” in cash, the federal government and the states with mini-DOMAs still take part of the couple’s valuable legal rights and obligations in kind because there are certain legal rights and obligations that only the state can provide (i.e., these rights and obligations cannot be re-created through the execution of documents or undertaking of legal proceedings). *See supra* note 62.
146. As is the case with any tax penalty, the government would probably be delighted to collect no tax at all, because that would mean that it had completely eliminated the behavior to be discouraged. *See infra* note 148.
147. As Representative Henry Hyde, Chairman of the Judiciary Committee, stated during the Subcommittee markup of H.R. 3396:

[S]ame-sex marriage, if sanctified by the law, if approved by the law, legitimates a public union, a legal status that most people . . . feel ought to be illegitimate . . . And in so doing it trivializes the legitimate status of marriage and demeans it by putting a stamp of approval on a union that many people . . . think is immoral.

H.R. REP. NO. 104-664, *supra* note 4, at 16. Incidentally, this tax penalizes same-sex couples for having the audacity to seek access to the rights and obligations of

the government takes the valuable property of one group (i.e., same-sex couples) in order to enhance the value of the property of another group (i.e., married different-sex couples). This is no less a transfer than the combination of an explicit tax collected in cash coupled with a direct spending program in which that cash is awarded to those who facilitate the intended erosion of LGBT civil rights gains. Accordingly, in substance, even if not in form, the compulsory contributions exacted from same-sex couples by the DOMAs are to the “support of government.” Much like tax provisions that act as disguised penalties,¹⁴⁸ these contributions (whether made in cash or in kind) directly further the interest of the government in discouraging the legal recognition of same-sex couples and their families by making that recognition either more expensive or, in the case of those who cannot afford the expense, of limited significance.

Interestingly, when viewed from this perspective, the federal and state governments that have enacted DOMAs are able to force same-sex couples to fund their own government-sponsored oppression. They are also able to turn those who are ostensibly trying to help same-sex couples cope with this oppression (e.g., attorneys, adoption agencies, etc.) into unwitting, paid accomplices in that concerted effort to oppress. Those same-sex couples who cannot afford to fund their own oppression are relegated to standing by powerless as the federal and state governments instead take away the valuable property that the couples do have; namely, the hard-fought legal protections that they had acquired for themselves and their children when they married or entered into a civil union or domestic partnership.

III. RAMIFICATIONS OF AFFIXING THE “TAX” LABEL ON THE DOMAS

Having now established that the DOMAs meet the technical definition of a tax—they exact from same-sex couples who have entered into a marriage, civil union, or domestic partnership a compulsory contribution to the support of the government—we can now turn to a discussion of the repercussions of recharacterizing these measures as “taxes.”

marriage. *See id.* at 31–33 (addressing the possible application to the federal DOMA of *Romer v. Evans*, 517 U.S. 620 (1996), which struck down a Colorado constitutional amendment on equal protection grounds because it was motivated by antigay animus).

148. 1 BITTKER & LOKKEN, *supra* note 139, ¶ 20.3.3 (explaining how the disallowance of deductions for fines and penalties on grounds of frustration of public policy (now codified at I.R.C. § 162(f) (2006)) does not merely preserve the sting of the fine or penalty but rather acts as an additional tax penalty on the activity).

Naturally, the power to tax is far from unlimited; after all, as is so often repeated, “the power to tax involves the power to destroy.”¹⁴⁹ Labeling the DOMAs “taxes” will therefore trigger the respective federal and state constitutional restrictions on the power to tax.¹⁵⁰ In the first section of this Part, I explore the restrictions on the imposition of “direct” taxes contained in the federal constitution. A direct tax (other than a tax on income) can pass constitutional muster only if it is apportioned based on population. I argue that the federal DOMA is a direct tax on property (i.e., on the store of legal rights and obligations associated with a same-sex couple’s marriage, civil union, or domestic partnership) that fails to pass constitutional muster because Congress has not apportioned that tax by population. In the second section of this Part, I explore the “uniformity” requirement that appears in many state constitutions. These uniformity clauses require, for example, that a state impose the same tax on all property of the same character. I argue that the state mini-DOMAs impose different taxes on property of the same character; that is, I argue that the mini-DOMAs vary the tax rate on a couple’s property interest in the legal rights and obligations associated with their marriage (or civil union or domestic partnership) depending on whether the couple is of the same (or different) sex(es). Finally, in the event that such constitutional challenges are unavailable or unavailing, I conclude this Part with a discussion of how a robust notion of tax equity requires this additional tax on lesbian and gay families to be taken into account when determining the justness of the distribution of the overall tax burden.

A. Apportionment of Direct Taxes

On its face, the constitutional grant of taxing power to the federal government appears plenary;¹⁵¹ however, that power is subject to limitations.¹⁵² On the one hand, the Uniformity Clause requires that “all

149. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819).

150. For a sampling of other, nontax constitutional arguments for striking down the DOMAs, see *supra* note 11.

151. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).

152. See Jensen, *Are Consumption Taxes Constitutional?*, *supra* note 66, at 2339–40 (“Although the power [to tax] has therefore been described as plenary, the Constitution prescribes several limitations on that power.” (citation omitted)); *id.* at 2389 (“[T]he conventional wisdom that the taxing power was intended to be plenary, without significant restrictions, is not supported by the historical evidence.”); see also *id.* at 2345–50.

Duties, Imposts and Excises shall be uniform throughout the United States.”¹⁵³ This clause “has been held to require only geographical uniformity: the standards that apply in one state must apply in all other states as well.”¹⁵⁴ On the other hand, two separate clauses of the U.S. Constitution require the apportionment by population of all “direct” taxes (other than income taxes).¹⁵⁵ This apportionment requirement is a more significant hurdle, because it “ties a state’s share of the total direct-tax liability to its share of the nation’s population, measured using the currently applicable census rules.”¹⁵⁶ Indeed, “apportionment among the states commonly turns out to be a silly requirement, ‘absurd[] and inequitable,’ which hobbles direct taxes and makes them impossible, in practice, to use.”¹⁵⁷

Erik Jensen has explained the relationship between the apportionment and uniformity requirements as follows:

The uniformity and apportionment rules have quite different focuses. Indeed, the two rules are set up to be mutually exclusive: taxes other than direct taxes are not subject to the apportionment requirement, and the uniformity rule cannot apply to apportioned direct taxes. Under the case law, a levy is governed by one rule or the other, but not both. The idea that some levies might fall outside the scope of both rules—a possibility that was once taken seriously—has fallen by the wayside.¹⁵⁸

It will thus be necessary to determine whether the tax imposed by the federal DOMA should be characterized as (1) a direct tax subject to the apportionment requirement or (2) an indirect tax (to use the con-

153. U.S. CONST. art. I, § 8, cl. 1.

154. Jensen, *Are Consumption Taxes Constitutional?*, *supra* note 66, at 2340.

155. U.S. CONST. art. I, § 2, cl. 3 (“Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers”) (amended 1868, 1913); *id.* § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.”) (amended 1913); *see also id.* amend. XVI (exempting income taxes from this limitation).

156. Jensen, *Are Consumption Taxes Constitutional?*, *supra* note 66, at 2341.

157. Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 3 (1998) (quoting *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 179 (1796)).

158. Jensen, *Are Consumption Taxes Constitutional?*, *supra* note 66, at 2341; *see also* Johnson, *supra* note 157, at 55 (“Under a doctrine developed by the Supreme Court, ‘excise taxes,’ as well as the impost or customs duties, have been excluded from ‘direct tax,’ so that they do not have to be apportioned.”).

ventional shorthand for “Duties, Imposts and Excises”) subject to the uniformity rule. If it is an indirect tax, the federal DOMA will likely be upheld because it applies on a geographically uniform basis throughout the country. In contrast, if it is a direct tax, the federal DOMA will likely be found unconstitutional because it is neither apportioned by population nor a tax on income.

1. “Direct” Taxes

As historian Robin Einhorn has noted, “[a]lthough several of the framers and a handful of the nation’s early legislators proposed definitions—and many lawyers, judges, and legal scholars have weighed in over the two centuries since then—the question of whether any particular tax should be defined as a direct tax appears to remain open even today.”¹⁵⁹ Nonetheless, Einhorn identifies taxes “on land, polls, slaves, or property generally” as the ones “most likely to count as ‘direct’” at the time the Constitution was drafted.¹⁶⁰ In fact, the Constitution itself makes abundantly clear that a poll tax (also called a head or capitation tax) is a direct tax, because it specifically applies the apportionment requirement to “Capitation, or other direct, Tax[es].”¹⁶¹ Early on, the Supreme Court registered its understanding that real estate taxes are also direct taxes.¹⁶² Later, in *Pollock v. Farmers’ Loan & Trust Co.*, the Supreme Court held that personal property taxes are likewise direct taxes.¹⁶³ Although the Sixteenth Amendment later overturned the *Pollock* Court’s further holding that income taxes on real and personal property are derivatively direct taxes, the Supreme Court has confirmed that the Sixteenth Amendment did not disturb the classification of personal property taxes as direct taxes.¹⁶⁴ Moreover, on several occasions, the Supreme Court has

159. ROBIN L. EINHORN, *AMERICAN TAXATION, AMERICAN SLAVERY* 160 (2006).

160. *Id.* at 186.

161. U.S. CONST. art. I, § 9, cl. 4.

162. *Hylton*, 3 U.S. (3 Dall.) at 175 (Chase, J.); 3 U.S. (3 Dall.) at 176 (Paterson, J.); 3 U.S. (3 Dall.) at 183 (Iredell, J.); see EINHORN, *supra* note 159, at 160; Jensen, *Meaning of “Incomes,” supra* note 66, at 1069–70; see also Johnson, *supra* note 157, at 70 (“Real estate taxes were the heart of the state tax systems at the time of the Constitution so that all speakers would have considered land taxes to be direct . . .”).

163. 158 U.S. 601, 628 (1895).

164.

[I]t is to be observed that although from the date of the *Hylton Case* because of statements made in the opinions in that case it had come to be accepted that direct taxes in the constitutional sense were confined to taxes levied directly on real estate because of its ownership, the Amendment contains nothing repudiating or challenging the ruling in the *Pollock Case* that

reaffirmed the notion that taxes on the ownership of real and personal property are direct taxes subject to the apportionment requirement.¹⁶⁵

Outside of these limited categories—and, in some cases, even with regard to them¹⁶⁶—there has been significant academic debate over the

the word direct had a broader significance, since it embraced also taxes levied directly on personal property because of its ownership, and therefore the Amendment at least impliedly makes such wider significance a part of the Constitution—a condition which clearly demonstrates that the purpose was not to change the existing interpretation except to the extent necessary to accomplish the result intended, that is, the prevention of the resort to the sources from which a taxed income was derived in order to cause a direct tax on the income to be a direct tax on the source itself and thereby to take an income tax out of the class of excises, duties and imposts and place it in the class of direct taxes.

Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 19 (1916).

Bruce Ackerman has suggested that, had the “New Deal Revolution” not so quickly “swept aside the established constitutional understandings of the *Lochner* era,” the Supreme Court would have, in due course, overruled this interpretation of the direct tax clauses. Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 46–47 (1999). Nonetheless, as the tense of the previous sentence clearly indicates, this suggestion is nothing more than speculation about what might have happened had history taken a different course.

165. *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945) (“Congress may tax real estate or chattels if the tax is apportioned, and without apportionment it may tax an excise upon a particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property.”); *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929) (“While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, this court has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned” (citation omitted)); 280 U.S. at 139–40 (Sutherland, J. dissenting) (“Since the *Pollock* Case, however, we know that a tax on property, whether real or personal, or upon the income derived therefrom, is direct; and that to levy a tax by reason of ownership of property is to tax the property.”); *Knowlton v. Moore*, 178 U.S. 41, 78–83 (1900) (holding that an inheritance tax was not a direct tax because it was imposed upon the transfer of property at death and not merely on the ownership or possession of property as such).
166. Ackerman, for example, has expressed a personal belief that the Supreme Court should limit the application of the apportionment requirement to capitation taxes—the only form of “direct” tax specifically mentioned in the text of the Constitution—and repudiate the repeatedly reaffirmed understanding that real estate taxes are likewise “direct” taxes. Ackerman, *supra* note 164, at 58. Ackerman urges this repudiation because the apportionment requirement has its roots in the accommodation of slavery, and “American law should leave no stone unturned in its effort to root out any residue of its original compromise with slavery—and the ‘direct tax’ clause is a small, but potentially damaging, stone.” *Id.* Notwithstanding Ackerman’s laudable motivations, his proposed interpretation is profoundly antitextual, as it disregards the specific mention of “other” direct taxes in U.S.

distinction between direct and indirect taxes. Erik Jensen has argued that “[d]irect taxes are taxes that are not indirect taxes and that are imposed by the national government directly on individuals, generally without the states’ serving as filters of the national power.”¹⁶⁷ According to Jensen, indirect taxes are confined to duties, imposts, and excises imposed on articles of consumption.¹⁶⁸ In a later article, Jensen summed up his thoughts on the difference between direct and indirect taxes as follows:

The founders understood indirect taxes, but not direct taxes, to be “shiftable.” The burden was assumed to fall on the ultimate purchaser: even if the seller is legally obligated to remit the tax, the price paid will have the tax embedded in it. In contrast, direct taxes (subject to apportionment) are imposed directly on individuals who are expected to bear the burden of the taxes.¹⁶⁹

Calvin Johnson has taken issue with Jensen’s interpretation of the direct tax clauses, asserting that the evidence in support of Jensen’s reading is conflicting and that “[o]ptimal tax policy in the twentieth and twenty-first centuries should not be governed by reading tea leaves or looking to such isolated eighteenth century usages.”¹⁷⁰ Johnson proffers instead what he describes as a “functional[], but ahistorical[]” approach to defining direct taxes.¹⁷¹ He would interpret the term to apply only “to

CONST. art. I, § 9, cl. 4. In addition, Ackerman misses the extent to which the accommodation of slavery permeated the structure of our early tax system (being far from confined to the direct tax clauses) as well as the ways in which it continues to influence how we think about taxation. See generally EINHORN, *supra* note 159; see also generally Anthony C. Infanti, *Tax as Urban Legend*, 24 HARV. BLACKLETTER L.J. 229 (2008) (reviewing EINHORN, *supra* note 159). Furthermore, Ackerman does not even contemplate the possibility, broached in this Article, of reclaiming the tainted direct tax clauses for the purpose of fighting—rather than fostering—oppression.

167. Jensen, *Are Consumption Taxes Constitutional?*, *supra* note 66, at 2402.

168. *Id.* at 2394–95.

169. Jensen, *Meaning of “Incomes,” supra* note 66, at 1075.

170. Johnson, *supra* note 157, at 67–70. Jensen responds to Johnson in Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355 (2004). The two also took their debate to the pages of *Tax Notes*. See Erik M. Jensen, *The Constitution Matters in Taxation*, 100 TAX NOTES 821 (2003); Erik M. Jensen, *Jensen’s Response to Johnson’s Response to Jensen’s Response to Johnson’s Response to Jensen (or Is It the Other Way Around?)*, 100 TAX NOTES 841 (2003); Calvin H. Johnson, *Barbie Dolls in the Archeological Dig: Professor Johnson Responds*, 100 TAX NOTES 832 (2003); Calvin H. Johnson, *Purging out Pollock: The Constitutionality of Federal Wealth or Sales Tax*, 97 TAX NOTES 1723 (2002).

171. Johnson, *supra* note 157, at 71.

head taxes and requisitions from the several states, but nothing else.”¹⁷² Under Johnson’s reading of the Constitution:

Apportionment should be required when it is reasonable and convenient, but not when apportionment would lead to perverse results. Apportionment would never make any kind of tax impossible, and Congress would then have plenary power over the subject and manner of federal tax, as the Framers originally intended. The definition preserves the grand purposes of the Constitution and prevents absurdity, sloughing off only a silly requirement.¹⁷³

Johnson grounds this reading of the apportionment requirement in applications of the legal maxim *ejusdem generis* and the doctrine of *cy pres*.¹⁷⁴ He also relies on a similar reading by the Supreme Court in its first decision addressing the apportionment requirement, *Hylton v. United States*, which was decided in 1796 by a court populated with framers and those influential in the ratification debates.¹⁷⁵

Bruce Ackerman arrives at much the same interpretation as Johnson, albeit by a different route.¹⁷⁶ Ackerman similarly proposes a return to a more limited construction of the phrase “direct tax.”¹⁷⁷ He grounds his proposal in the fact that the direct tax clauses “do not represent an independent judgment about the proper system for direct taxation, but were part and parcel of a larger compromise over slavery at the Philadelphia Convention.”¹⁷⁸ In view of the Reconstruction Amendments’ repudiation of the “nation’s bargain with slavery,”¹⁷⁹ Ackerman, like Johnson, advocates a return to the restrained interpretation of the direct tax clauses found in the Supreme Court’s decision in *Hylton*.¹⁸⁰

172. *Id.*

173. *Id.* For a description of how the apportionment requirement can lead to perverse results, see *id.* at 5–12.

174. *Id.* at 72, 78.

175. *Id.* at 73–77.

176. Ackerman, *supra* note 164, at 2 n.1; see *id.* at 15 n.50 (describing the ways in which Ackerman parts company with Johnson’s interpretation of the phrase “direct tax”). Jensen responds to Ackerman in Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687 (1999).

177. Ackerman, *supra* note 164, at 56–58.

178. *Id.* at 4; see *id.* at 7–13 (describing the origins of the direct tax clauses).

179. *Id.* at 25.

180. *Id.* at 58. Ackerman advocates this approach in connection with his defense of a wealth tax proposal that he had formulated with Anne Alstott. As mentioned *supra* note 166, on a personal level, Ackerman actually goes further and advocates an even

Most recently, Joseph Dodge has entered this debate.¹⁸¹ Dodge differs in his views from Jensen, Johnson, and Ackerman. Contrary to Johnson and Ackerman, Dodge maintains that the direct tax clauses still have vitality.¹⁸² And staking out a position in between Jensen and Johnson, Dodge contends that the direct tax clauses apply only to requisitions from the states, capitation taxes, and taxes on real property and tangible personal property.¹⁸³ Though Dodge acknowledges that current case law also includes taxes on intangible personal property within the scope of the direct tax clauses, he argues that taxes on intangible personal property should not be considered direct taxes because the phrase “direct tax” should be construed to apply only to taxes on items that have a fixed geographical location, which intangibles do not.¹⁸⁴

2. DOMA as a Direct Tax

Fortunately, we can skirt this stimulating academic debate over the most appropriate interpretation of the direct tax clauses. The focus of my analysis here is not on whether Jensen, Johnson, Ackerman, or Dodge is correct, but on developing a position that can be credibly advanced in litigation contesting the constitutionality of the federal DOMA. Naturally, such a position is better grounded in the established judicial understanding of the scope of the direct tax clauses than in academic debates that have thus far eluded a clear resolution of the question.

As mentioned above,¹⁸⁵ the Supreme Court has repeatedly reaffirmed the notion that taxes on the ownership of real or personal property are direct taxes. What I will suggest here is that the federal DOMA operates, in essence, as a tax on the ownership of property and, therefore, should be classified as a direct tax under this line of cases.

Marriage, civil unions, and domestic partnerships are most commonly viewed as contractual relationships.¹⁸⁶ Nevertheless, contractual

more limited interpretation of the direct tax clauses under *Hylton*. For criticism of that position, see the discussion *supra* note 166.

181. Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?* (2008), available at <http://ssrn.com/abstract=1311957>.

182. *Id.* at 44–53.

183. *Id.* at 3, 53.

184. *Id.* at 53, 56–63.

185. See *supra* notes 162–165 and accompanying text.

186. E.g., ALA. CODE § 30-1-19(c) (2008) (“Marriage is a sacred covenant, solemnized between a man and a woman, which, when the legal capacity and consent of both parties is present, establishes their relationship as husband and wife, and which is recognized by the state as a civil contract.”); ALASKA STAT. § 25.05.011(a) (2007)

and property interests are not incompatible; in fact, contracts can—and do—give rise to property rights. For example, my status as a tenured professor of law at the University of Pittsburgh arises out of my employment contract with the university. Yet, the courts “have recognized that tenured professors at public universities hold a property interest in their tenure” for purposes of the federal constitutional guarantee of due process of law.¹⁸⁷

(“Marriage is a civil contract entered into by one man and one woman that requires both a license and solemnization.”); CAL. FAM. CODE § 420(c) (2008) (“No contract of marriage, if otherwise duly made, shall be invalidated for want of conformity to the requirements of any religious sect.”); CONN. GEN. STAT. § 46b-38mm (2008) (“All civil unions in which one or both parties are citizens of this state, celebrated in a foreign country, shall be valid, provided: (1) Each party would have legal capacity to contract such civil union in this state and the civil union is celebrated in conformity with the law of that country”); GA. CODE ANN. § 19-3-2(a) (2007) (“To be able to contract marriage, a person must”); HAW. REV. STAT. § 572-1 (2007) (“In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that”); IDAHO CODE ANN. § 32-201(1) (2007) (“Marriage is a personal relation arising out of a civil contract between a man and a woman”); IOWA CODE § 595.1A (2007) (“Marriage is a civil contract”); KAN. STAT. ANN. § 23-101(a) (2006) (“The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex.”); LA. CIV. CODE ANN. art. 87 (2008) (“The requirements for the contract of marriage are”); MICH. COMP. LAWS § 551.2 (2008) (“marriage is a civil contract between a man and a woman”); NEV. REV. STAT. ANN. § 122.010(1) (2007) (“Marriage, so far as its validity in law is concerned, is a civil contract”); N.D. CENT. CODE § 14-03-01 (2007) (“Marriage is a personal relation arising out of a civil contract between one man and one woman”); N.J. REV. STAT. ANN. § 37:1-7 (2008) (“The licensing officer is hereby empowered to issue marriage or civil union licenses to the contracting parties”); OR. REV. STAT. § 106.010 (2007) (“Marriage is a civil contract”); 23 PA. CONS. STAT. § 1102 (2007) (“‘MARRIAGE.’ A civil contract by which one man and one woman take each other for husband and wife.”); WASH. REV. CODE ANN. § 26.04.010(1) (2008) (“Marriage is a civil contract”); WIS. STAT. § 765.001(2) (2007) (“The consequences of the marriage contract are more significant to society than those of other contracts, and the public interest must be taken into account always.”); Or. Laws Adv. Sh. No. 99, § 3(1) (effective Jan. 1, 2008) (“‘DOMESTIC PARTNERSHIP’ MEANS A CIVIL CONTRACT ENTERED INTO IN PERSON BETWEEN TWO INDIVIDUALS OF THE SAME SEX WHO ARE AT LEAST 18 YEARS OF AGE, WHO ARE OTHERWISE CAPABLE AND AT LEAST ONE OF WHOM IS A RESIDENT OF OREGON.”).

187. *Univ. of Pittsburgh v. United States*, 507 F.3d 165, 176 (3d Cir. 2007) (Scirica, J. dissenting) (federal tax dispute over whether early buy-out payments constituted FICA “wages” or were made in exchange for property rights in tenure); *see Perry v. Sinderman*, 408 U.S. 593, 601 (1972) (“A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher’s claim of entitlement to continued employment unless sufficient ‘cause’ is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a ‘property’ interest in re-employment.”); 408 U.S. at

Similarly, once contracted, a marriage, civil union, or domestic partnership gives rise to a whole host of legal rights and obligations, both within the couple and vis-à-vis the state and third parties. For example, a surviving spouse's right to an elective share of a deceased spouse's estate embodies both a legal right in the surviving spouse to a certain portion of the decedent's estate and a legal obligation on the part of the decedent to provide for the surviving spouse following death.¹⁸⁸ Spousal immunity from testifying in court embodies both a legal right in spouses not to be forced to testify against each other and a legal obligation on the part of the state not to invade the privacy of legally recognized unions.¹⁸⁹ Tenancies by the entirety may embody both a legal right in the spouses to hold property free of claims of their individual creditors and a legal obligation on the part of those creditors to look elsewhere for payment.¹⁹⁰ These are but a few examples of the numerous

603–04 (Burger, J. concurring) (“The Court holds today only that a state-employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment to some form of prior administrative or academic hearing on the cause for nonrenewal of his contract.”); *N.D. State Univ. v. United States*, 255 F.3d 599, 605 (8th Cir. 2001) (in the context of holding that early buy-out payments to tenured professors were made in exchange for property and contractual rights and were not wages for tax purposes, stating: “The parties agree that tenure is a protected property right. In this circuit, a tenured professor at a state institution not only has a constitutional right to procedural due process, but also has ‘a substantive due process right to be free from discharge for reasons that are “arbitrary and capricious,” or in other words, for reasons that are trivial, unrelated to the education process, or wholly unsupported by a basis in fact.’”).

188. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 9.1 cmt.b (2003) (“The purpose of the elective share is to grant the decedent’s surviving spouse an appropriate protection against being disinherited. The prevailing view of marriage is that it is an economic partnership, which imports a goal of equalizing the marital assets.”).

189. See 3 WEINSTEIN’S FEDERAL EVIDENCE § 505.03 (Joseph M. McLaughlin ed., 2d ed. 2009) (describing two distinct marital privileges that exist under the Federal Rules of Evidence).

190.

[T]he advent of mutual control prompted protection of both spouses’ interests and consequent denial of creditor access to either spouse’s interest. In a few other states, a spouse’s individual interest is subject to levy and execution. A purchaser of such an interest at an execution sale becomes a tenant in common with the other spouse, but with no right to force partition. A few states permit creditors of either spouse to satisfy debts out of the entirety, thus severing it and destroying the right of survivorship. In still other states, the common law prevails such that a judgment entered against a husband or wife individually does not give rise to a valid lien against property held as tenants by the entirety.

legal rights and obligations that are associated with marriage, civil unions, and domestic partnerships and that affect the spouses, the state, and third parties.¹⁹¹

Taken together, the sundry legal rights and obligations associated with marriage, civil unions, and domestic partnerships are much like the bundle of rights (and the obligations that go with them) that compose every piece of property, whether real or personal, tangible or intangible.¹⁹² With respect to tangible property, among the most commonly mentioned rights in this bundle are the powers to possess the property, to use it, to exclude others from it, and to alienate it.¹⁹³ Although the rights (and obligations) associated with marriage, civil unions, and domestic partnerships are not a form of tangible property, one can detect in these rights (and obligations) analogous powers to possess the property, to use it, to exclude others from it, and to alienate it.¹⁹⁴ For example, the spouses have the power to use this property; that is, to enjoy the many legal benefits accorded to their relationship. As evidenced by the discussion in the previous paragraph of spousal immunity from testifying in court and tenancies by the entirety, the spouses likewise have the power to exclude others (whether the state or third parties) from their relationship. Furthermore, the spouses are able to relinquish or compromise (i.e., alienate) certain of the legal rights that attend their marital status (e.g., through prenuptial agreements).¹⁹⁵ Moreover, the spouses are the only ones who can relinquish their marital status by pursuing dissolution of their relationship.

Some may recoil at the thought of labeling the store of legal rights and obligations associated with marriage, civil unions, and domestic partnerships as a form of property. After all, marriage has a well-known history as a highly patriarchal institution:

7 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 52.03[3] (Patrick J. Rohan rev. ed., 2006) (footnotes omitted).

191. For further examples, see *supra* text accompanying note 121. In addition, as mentioned *supra* text accompanying note 43, there are more than one thousand federal statutes in which marital status is a factor in the determination of legal rights, benefits, and privileges.

192. See generally Goutam U. Jois, Note, *Marital Status as Property: Toward a New Jurisprudence for Gay Rights*, 41 HARV. C.R.-C.L. L. REV. 509 (2006) (arguing that marital status and the legal rights and obligations associated with marriage should both be considered a form of property for purposes of the Fifth Amendment's Takings Clause).

193. See, e.g., *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435–36 (1982).

194. See Jois, *supra* note 192, at 538.

195. See, e.g., UNIFORM PREMARITAL AGREEMENT ACT § 3.

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs everything Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.¹⁹⁶

For this reason, I would like to clarify that I am not asserting here that either spouse becomes the property of the other upon marriage or upon entering into a civil union or domestic partnership. Rather, I am arguing that each spouse has a property interest in the store of legal rights and obligations associated with the marriage, civil union, or domestic partnership. Characterizing the sum of these legal rights and obligations as a form of property is *not* the same thing as saying that either spouse is the property of the other. To return to the tenure example above, no one would argue either that I am the property of the University of Pittsburgh or that the University of Pittsburgh is my property simply because the university's grant of tenure under the terms of my employment contract has given rise to a protectable property interest.

As a tax, the federal DOMA—taken in conjunction with the state mini-DOMAs that it encourages, facilitates, and feeds off of¹⁹⁷—falls squarely on the spouses' property interest in the legal rights (and obligations) associated with their marriage, civil union, or domestic partnership. The incidence of this tax on lesbian and gay families becomes clear upon considering the effect of nonpayment of the tax on the couple and their children. If a couple refuses—or, more likely, simply cannot afford—to pay the tax (i.e., if the couple refuses—or cannot afford—to draft the necessary legal documents and undertake the required legal proceedings for the recognition of their relationship with each other and their children), then the federal government (in complicity with the states that have mini-DOMAs) essentially “forecloses” on those

196. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (Wayne Morrison ed. 2001) (citations omitted); see POLIKOFF, *supra* note 126, at 12–15.

197. See 28 U.S.C. § 1738C (2008) (permitting states to refuse to recognize same-sex marriages celebrated in other states). The federal DOMA feeds off of the state mini-DOMAs because federal law often turns on the application of state law. For example, for federal tax purposes, the tax consequences of (1) familial relationships and (2) property transactions usually turn on the state law treatment of those relationships and transactions. If a same-sex couple's relationship is not legally recognized for either of these state law purposes, then it will not be recognized for federal tax purposes either. See Cain, *supra* note 59, at 389–406.

legal relationships, extinguishing the couple's legal rights and obligations (not to mention their children's legal rights) in much the same way that the government extinguishes a property owner's legal rights and obligations in property when property taxes are delinquent. As a tax on the ownership of property, the federal DOMA should therefore be classified as a "direct" tax and subjected to the constitutional requirement of apportionment on the basis of population—a constitutional requirement that it clearly cannot satisfy as its effects are concentrated in those states that legally recognize same-sex relationships.

The federal DOMA can find no refuge from the constitutional dustbin in the Sixteenth Amendment's exemption from the apportionment requirement for taxes on income. To borrow a phrase from the U.S. Supreme Court in *Commissioner v. Glenshaw Glass Co.*, the legal rights and obligations associated with marriage and its legal equivalents are no more "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion"¹⁹⁸ than are the right to vote, the right to freedom of speech, the right to interstate travel, or any other fundamental right protected by the U.S. Constitution.¹⁹⁹

Equally unavailing is the argument that the DOMAs are a tax on income because they must be paid, directly or indirectly, out of the same-sex couple's income. As Erik Jensen has explained with regard to his work on the constitutionality of consumption taxes:

One reader argued that *all* taxes are effectively income taxes in that they will almost always be paid, directly or indirectly, out of taxpayers' income. . . .

At some level, that proposition may be plausible economically, but it can have no force as a constitutional argument. The Sixteenth Amendment was a response to *Pollock*, not an attempt to validate all conceivable revenue devices. If the framers of the Sixteenth Amendment intended to eliminate all constitutional limitations on the taxing power other than the Uniformity Clause, they picked extraordinarily inefficient language to do so.²⁰⁰

198. 348 U.S. 426, 431 (1955).

199. 2 ROTUNDA & NOWAK, *supra* note 107, § 15.7; 3 *id.* § 17.4(c); 4 *id.* §§ 18.31, 18.40.

200. Jensen, *Are Consumption Taxes Constitutional?*, *supra* note 66, at 2413; *cf.* Tucker v. United States, 83-1 U.S. Tax Cas. (CCH) ¶ 9308 (W.D. Tex. 1983) (rejecting a challenge to the federal income tax's marriage penalty under the direct tax clauses on the ground that the federal income tax rate schedules are "reasonably related to the constitutional objective of the Sixteenth Amendment").

Indeed, I would go further and assert that this argument proves entirely too much to be taken seriously. For instance, it strains credulity to argue that the federal excise taxes on gasoline, tobacco, and alcohol and the federal estate and gift taxes are all “income taxes” merely because they may be paid out of the taxpayer’s income.²⁰¹ In fact, one need not have “income” to incur (or, for that matter, to pay) any of these taxes at all. For example, someone with no job or other source of income but who has non-income-producing, nonappreciated property and a set of credit cards or a line of credit secured by that property²⁰² could still purchase gasoline, tobacco, and/or alcohol—and incur and pay the associated excise taxes—all without “income,” because, under the generally accepted understanding of “income” for federal income tax purposes, borrowed funds are not considered income due to the offsetting obligation to repay (and the use of nonappreciated property to satisfy a debt would not give rise to income either).²⁰³ In addition, an individual with no job or other source of income but who holds a great deal of non-income-producing, nonappreciated property would be liable for estate and/or gift tax upon its transfer. That property could be sold to pay the tax, but without giving rise to any “income” in the accepted federal income tax sense. Failing payment by the transferor, the tax would be levied on the transferee, but that tax would, in essence, be taken only out of the transferred property (and only to the extent of the property’s value at the time of transfer) and not out of “income.”²⁰⁴ Likewise, one can become liable for (and even pay) the taxes imposed by the DOMAs without having any income at all. Attorneys, ancillary service providers, and courts are all normally ambivalent about the source of payment for their fees and charges—they do not care whether it comes from borrowed money; the proceeds of selling nonappreciated property; or wages, dividends, or interest—just so long as they are paid.

Viewed from this perspective, then, the federal DOMA is an unconstitutional tax on lesbian and gay families because it is an unapportioned direct tax on their property interests in the legal rights (and obligations) associated with their marriages, civil unions, and domestic partnerships.

201. See I.R.C. §§ 2001, 2501, 4081, 5001, 5041, 5051, 5701 (2008).

202. This may be less far-fetched than it sounds: just think of an unemployed victim of subprime lending who has now lost her only source of income and, in the wake of the real estate bubble’s burst, is sitting on a home whose value has dipped significantly below the amount she paid for it.

203. 1 BITTKER & LOKKEN, *supra* note 139, ¶ 7.1.

204. I.R.C. §§ 2002, 2502(c), 6324 (2008).

B. State Constitution Uniformity Clauses

As of this writing, forty-one states have enacted some form of a mini-DOMA. Of these states, twelve have only a statutory prohibition against same-sex marriage, three have only a constitutional prohibition against same-sex marriage, and twenty-six have both a statutory *and* a constitutional prohibition against same-sex marriage.²⁰⁵ Thirty-five of these forty-one states with mini-DOMAs also have some form of a provision in their constitutions that requires some or all of the state's taxes to be imposed uniformly.²⁰⁶ Given that the mini-DOMAs do not im-

205. See *supra* note 16.

206. See ALA. CONST. art. XI, § 217(b) (“With respect to ad valorem taxes levied by the state, all taxable property shall be forever taxed at the same rate.” The language “taxed at the same rate” has been interpreted to mean “uniformity in taxation,” see *State v. Deaton, Inc.*, 355 So. 2d 378, 380 (Ala. Civ. App. 1978); ARIZ. CONST. art. IX, § 1 (“all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax”); ARK. CONST. art. XVI, § 5(a) (“All real and tangible personal property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property for which a tax may be collected shall be taxed higher than another species of property of equal value, except as provided and authorized in Section 15 of this article, and except as authorized in Section 14 of this article.”); CAL. CONST., art. IV, § 16(a) (“All laws of a general nature have uniform operation.”); *id.* art. XIII, § 1(a) (“All property is taxable and shall be assessed at the same percentage of fair market value.”); COLO. CONST. art. X, § 3(1)(a) (“Each property tax levy shall be uniform upon all real and personal property not exempt from taxation under this article located within the territorial limits of the authority levying the tax.”); DEL. CONST. art. VIII, § 1 (“All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax”); FLA. CONST. art. VII, § 2 (“All ad valorem taxation shall be at a uniform rate within each taxing unit, except the taxes on intangible personal property may be at different rates but shall never exceed two mills on the dollar of assessed value”); GA. CONST. art. VII, § I, para. 3(a) (“Except as otherwise provided . . . , all taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.”); IDAHO CONST. art. VII, § 5 (“All taxes shall be uniform upon the same class of subjects within the territorial limits, of the authority levying the tax . . . provided, that the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just”); ILL. CONST. art. IX, §§ 2 (“In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly.”), 4(a) (“taxes upon real property shall be levied uniformly by valuation”); IND. CONST. art. 10, § 1(a) (“The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal.”); KAN. CONST. art. 11, § 1(a) (“Except as otherwise hereinafter specifically provided, the legislature shall provide for a uniform and equal basis of valuation and rate of taxation of all property subject to taxation.”); KY. CONST. § 171 (“Taxes shall be levied and collected for public purposes only and shall

pose a tax uniformly on all married couples (or their legal equivalent, in

be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax"); LA. CONST. art. VII, §§ 4 ("Equal and uniform taxes may be levied on net incomes"), 18(A) ("Property subject to ad valorem taxation shall be listed on the assessment rolls at its assessed valuation, which . . . shall be a percentage of its fair market value. The percentage of fair market value shall be uniform throughout the state upon the same class of property."); MD. CONST. Declaration of Rights art. XV ("[A]ll taxes thereafter provided to be levied by the State for the support of the general State Government, and by the Counties and by the City of Baltimore for their respective purposes, shall be uniform within each class or sub-class of land, improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy"); MICH. CONST. art. IX, § 3 ("The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates."); MINN. CONST. art. X, § 1 ("Taxes shall be uniform upon the same class of subjects"); MISS. CONST. art. IV, § 112 ("Taxation shall be uniform and equal throughout the State."); MO. CONST. art. X, § 3 ("Taxes . . . shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax."); NEB. CONST. art. VIII, § 1 ("Taxes uniform as to class of property or the ownership or use thereof may be levied by valuation or otherwise upon classes of intangible property as the Legislature may determine"); NEV. CONST. art. 10, § 1, cl. 1 ("The legislature shall provide by law for a uniform and equal rate of assessment and taxation"); N.C. CONST. art. V, § 2, para. 2 ("No class of property shall be taxed except by uniform rule, and every classification shall be made by general law uniformly applicable in every county, city and town, and other unit of local government."); N.D. CONST. art. X, § 5 ("Taxes shall be uniform upon the same class of property"); OKLA. CONST. art. X, § 5(b) ("Taxes shall be uniform upon the same class of subjects."); OR. CONST. art. I, § 32 ("all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax"); PA. CONST. art. VIII, § 1 ("All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax"); S.C. CONST. art. X, § 1 ("The General Assembly may provide for the ad valorem taxation by the State or any of its subdivisions of all real and personal property. The assessment of all property shall be equal and uniform"); S.D. CONST. art. VI, § 17 ("all taxation shall be equal and uniform"); TENN. CONST. art. II, § 28 ("The ratio of assessment to value of property in each class or subclass shall be equal and uniform throughout the State Each respective taxing authority shall apply the same tax rate to all property within its jurisdiction."); TEX. CONST. art. VIII, § 1(a) ("Taxation shall be equal and uniform."); VA. CONST. art. X, § 1 ("All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax"); WASH. CONST. art. VII, § 1 ("All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax"); W. VA. CONST. art. X, § 1 ("taxation shall be equal and uniform throughout the State"); WIS. CONST. art. VIII, § 1 ("The rule of taxation shall be uniform"); WYO. CONST. art. XV, § 11(d) ("All taxation shall be equal and uniform within each class of property.").

For a discussion of how such uniformity clauses are rooted in the accommodation of slavery, see EINHORN, *supra* note 159, at 202–11, 230–50.

the case of couples who have entered into a civil union or domestic partnership), the mini-DOMAs in these thirty-five states may be susceptible to a constitutional challenge based on this common restriction on state taxing power.

Among these thirty-five states, those with mini-DOMAs that are purely statutory in nature are the most clearly susceptible to a state constitutional law challenge to their validity on uniformity grounds, because, in the event of a conflict between a state constitutional provision and a state statute, the constitutional provision must prevail. In those states with a constitutional mini-DOMA, a challenge will be more difficult—though not impossible—to mount. Naturally, given the novelty of the argument being put forth here as well as the variety in the type of mini-DOMA(s) a state has adopted and in the text and interpretation of the various uniformity clauses in state constitutions, an exhaustive discussion of how to formulate a challenge in all thirty-five of these states is beyond the scope of this Article.²⁰⁷ Instead, I have chosen to focus on the uniformity clause in the Arizona Constitution as an illustrative example of how to formulate a uniformity clause challenge. Arizona is a good example because it now has both a constitutional and a statutory mini-DOMA. Thus, by using Arizona as an example, I will be able to address both (1) how to overcome the conflict between a more recently enacted constitutional prohibition against same-sex marriage and an earlier uniformity clause and (2) the type of constitutional challenge that might be made to a mini-DOMA (whether constitutional, statutory, or both) based on the requirement that taxation must be uniform throughout a state.

1. Overcoming the Constitutional Conflict

In November 2008, the voters of Arizona passed Proposition 102, which added the following sentence to the state constitution: “Only a union of one man and one woman shall be valid or recognized as a marriage in this state.”²⁰⁸ The uniformity clause of the Arizona Constitution, which predates the passage of Proposition 102, provides that “all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax.”²⁰⁹ If, as described more fully be-

207. For a brief overview of the types of questions to consider when formulating a uniformity clause challenge in other states, see Steve R. Johnson, *Uniformity Clause Limitations on State Taxes*, ABA SEC. TAX'N NEWS Q., Spring 2008, at 12, 12–13.

208. ARIZ. CONST. art. XXX, § 1; see McKinley & Goodstein, *supra* note 16.

209. ARIZ. CONST. art. IX, § 1.

low, these two provisions conflict, then it will be necessary to address the question of how to resolve this conflict. In other words, should the later-enacted mini-DOMA simply trump the earlier uniformity clause in the Arizona Constitution?

It has been suggested that all constitutional norms may not be created equal—that there may actually be a hierarchy of constitutional norms based on the democratic legitimacy of their source.²¹⁰ Focusing on the U.S. Constitution, Carlos González has argued that federal constitutional norms emanating from government institutions (e.g., amendments to the U.S. Constitution that are proposed by Congress and ratified by three-fourths of the state legislatures) are of a lesser hierarchical order than constitutional norms emanating from “we the people” (e.g., the original U.S. Constitution and the Bill of Rights), because legislatures are of lesser democratic legitimacy than the popular sovereign.²¹¹ This means that “constitutional norms sourced in We the People [should] be immune from repeal by later-in-time created truly conflicting constitutional norms sourced in ordinary government institutions.”²¹²

An analogous argument can be made at the state level. In Arizona, amendments to the state constitution may be initiated either by (1) a bare majority of both houses of the state legislature or (2) “initiative petition signed by a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for governor at the last preceding general election.”²¹³ Any amendment, whether initiated by the legislature or by petition, must be approved by a majority of the state’s voters.²¹⁴ Notwithstanding the ultimate need for voter approval, one could argue that amendments initiated by the state legislature are of lesser democratic legitimacy than those initiated by the voters themselves. In total, there are ninety members in the Arizona legislature (thirty senators and sixty representatives), meaning that forty-seven legislators can put a constitutional amendment on the ballot.²¹⁵ In contrast, for an amendment initiated by petition to qualify for the 2008 ballot, the signatures of 230,047 voters were required.²¹⁶ Given this huge

210. See Carlos E. González, *Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment Not Amend the Constitution?*, 80 WASH. U. L.Q. 127 (2002).

211. *Id.* at 130–33.

212. *Id.* at 164; see also *id.* at 225–28.

213. ARIZ. CONST. art. XXI, § 1.

214. *Id.*

215. *Id.* art. IV, pt. 2, § 1(1).

216. See ARIZONA SECRETARY OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2006 GENERAL ELECTION, (2006), available at <http://www.azsos.gov/election/2006/>

disparity in the number of people needed to put a proposed amendment before the voters and the potential for agency problems when the legislature, in the place of the voters, acts to initiate the amendment process, it could be argued that constitutional amendments initiated by the legislature are of lesser democratic legitimacy than, and therefore should be hierarchically subordinate to, both the core text of the state constitution and amendments initiated by the voters.²¹⁷

In the case of Proposition 102, this argument is only strengthened by several additional factors. First, the legislature “struggled to get [Proposition 102] through each chamber.”²¹⁸ Second, an ethics complaint was lodged against the state senator who abruptly terminated a filibuster of the proposed constitutional amendment by simply shutting off the filibustering senators’ microphones.²¹⁹ Third, the Arizona voters rejected a “marriage” amendment to the state constitution just two years earlier.²²⁰ Finally, initiatives on social issues (e.g., same-sex marriage) are often placed on the ballot for reasons unrelated to their ostensible purposes.²²¹ Accordingly, one might plausibly argue that the uniformity clause of the Arizona Constitution is immune from the effects of Proposition 102 because the uniformity clause emanated from “we the people” (in fact, this clause was included in the original Arizona Constitution adopted at the time of statehood) while Proposition 102 emanated from the state legislature under questionable circumstances.

General/Canvass2006GE.pdf (indicating that 1,533,645 votes were cast for governor in that election; 15% of that number is 230,047).

217. See González, *supra* note 210, at 198–99 (“Principal-agent relationships cannot avoid situations where the agent fails to do that which the principal wants done, acts before the principal is prepared to act, or even engages in self-dealing behavior against the interests or desires of the principal.”); see also *id.* at 208 (“Party politics, rather than a popular consensus favoring presidential term limits, was the major impetus for proposing the Twenty-second Amendment.”).
218. Amanda J. Crawford, *Weighing Same-Sex Marriage*, ARIZ. REPUBLIC, July 13, 2008, Valley & State at 3.
219. Amanda J. Crawford, *Ethics Panel to Investigate Senator Who Ended Debate*, ARIZ. REPUBLIC, July 29, 2008, Valley & State at 3 (senator under investigation); Amanda J. Crawford, *Ethics Complaint Against Senator Dismissed*, ARIZ. REPUBLIC, Aug. 13, 2008, Valley & State at 8 (complaint dismissed in what one elected official called a “whitewash”).
220. Amanda J. Crawford, *Campaign Proposing Ban on Same-Sex Marriage Concedes Defeat*, ARIZ. REPUBLIC, Nov. 16, 2006, Valley & State at 1.
221. See Ian Urbina, *Social Initiatives on State Ballots Could Draw Attention to Presidential Race*, N.Y. TIMES, Aug. 11, 2008, at A12 (“[M]any of the social measures on the ballots are being pushed by evangelical groups that hope to force Senator John McCain of Arizona, the presumptive Republican presidential nominee, to pay closer attention to their agenda.”).

2. The Uniformity Clause Challenge

With the question raised by the constitutional conflict addressed, we can now turn to the substance of the uniformity clause challenge that can be made to a mini-DOMA (whether constitutional or statutory in nature). As mentioned above, the uniformity clause of the Arizona Constitution provides that “all taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax.”²²² The Arizona Supreme Court has held that this clause “imposes greater limits on state taxing authorities than the federal equal protection clause.”²²³ Nevertheless, the uniformity clause does permit the legislature to classify property and to tax property at different rates; however, “the legislature may not unfairly and unreasonably discriminate ‘between taxpayers of the same class, or be arbitrary, specious, or fanciful.’”²²⁴ Accordingly, all classifications must be reasonable and based on real differences between the classes of property, which necessarily “means that property of the same character must be taxed the same.”²²⁵

In *America West Airlines, Inc. v. Department of Revenue*, the Arizona Supreme Court considered a uniformity clause challenge to a rate cap that applied only to certain property subject to an ad valorem flight property tax.²²⁶ The rate cap applied to “the flight property of airlines with either a system-wide average passenger capacity below fifty-six seats or a system-wide average payload capacity below 18,000 pounds.”²²⁷ The purpose of the rate cap was “to encourage commuter service in Arizona by giving commuter airlines flying small airplanes to rural locations a lower effective tax rate.”²²⁸ Although America West did fly commuter aircraft in Arizona, its system-wide average passenger capacity and its system-wide average payload capacity exceeded the threshold for application of the rate cap because America West also flew “much larger aircraft on its interstate routes.”²²⁹ Consequently, none of America West’s aircraft qualified for the rate cap—not even its commuter aircraft.²³⁰ Indeed, during the two tax years at issue, America West was the only

222. ARIZ. CONST. art. IX, § 1.

223. *Am. W. Airlines, Inc. v. Dep’t of Revenue*, 880 P.2d 1074, 1076 (Ariz. 1994); see *Aileen H. Char Life Interest v. Maricopa County*, 93 P.3d 486, 491 (Ariz. 2004).

224. *Am. W. Airlines*, 880 P.2d at 1077 (quoting *People’s Fin. & Thrift Co. v. Pima County*, 38 P.2d 643, 645 (Ariz. 1934)).

225. *Am. W. Airlines*, 880 P.2d at 1077.

226. 880 P.2d 1074.

227. 880 P.2d at 1075.

228. 880 P.2d at 1075.

229. 880 P.2d at 1075.

230. 880 P.2d at 1075.

airline flying commuter aircraft to rural areas of Arizona that did not benefit from the rate cap, which put the company at a competitive disadvantage because it paid approximately \$436,000 more in tax than it would have had the rate cap applied.²³¹

The Arizona Supreme Court held that the rate cap provision violated the uniformity clause of the Arizona Constitution because it “effectively tax[ed] America West’s commuter airplanes at a higher rate than commuter aircraft used by any other airline for the same purpose.”²³² In the past, the court had upheld the placement of the same type of property in different classifications when that property was put to different uses. But the court distinguished those cases on the ground that the tax rate cap in *America West Airlines* effectively placed the same commuter aircraft put to the same use in the same industry in different tax classifications and subjected them to different rates of tax:

Although *Apache County* and *Trico* may allow the legislature to place airline company property—a Ford truck, for instance—in one tax class, put identical railroad company property—the same Ford truck—in another, and tax them at different rates, we deal here with a statute creating different tax rates for property with similar physical attributes and productiveness, used the same way and for the same purpose by owners in the same industry. If the uniformity requirement of the constitution has any meaning—and it must—this goes too far.²³³

Likewise, through its mini-DOMA, Arizona essentially applies two different tax rates to couples’ property interests in the legal rights (and obligations) associated with their marriages, civil unions, and domestic partnerships.²³⁴ To illustrate the disparity in treatment, let us return to the earlier example of the two Massachusetts couples—one same-sex, one different-sex, but both married and entitled to the same legal rights and obligations under Massachusetts law as a result of their marriage.²³⁵

231. 880 P.2d at 1075.

232. 880 P.2d at 1078.

233. 880 P.2d at 1078–79 (footnote omitted).

234. For a discussion of spouses’ property interest in the legal rights (and obligations) associated with marriage, civil unions, and domestic partnerships, see *supra* Part III.A.2.

235. It is worth noting that the same comparison could be made between a married Massachusetts same-sex couple and a married Arizona different-sex couple. I have chosen to continue with our earlier example both for the sake of simplicity and continuity and because it better isolates the uniformity problem with the Arizona mini-DOMA.

As described above,²³⁶ Arizona's mini-DOMA will compel the married Massachusetts same-sex couple to take steps to shore up or reestablish the legal protections afforded to them and their children by reason of their marital status, should they wish to travel or move to Arizona or to have dealings with individuals or entities there that implicate their marital or familial status.²³⁷ These steps will entail significant financial costs for the drafting of legal documents, the hiring of ancillary service providers, and the invocation of the machinery of the courts.²³⁸ As established above,²³⁹ those financial costs amount to nothing less than a tax on this lesbian or gay family.

In contrast, Arizona imposes no analogous levy on the different-sex couple, should they wish to travel or move to Arizona or to have dealings with individuals or entities there that implicate their marital or familial status. No tax is imposed on them because Arizona will, without hesitation, legally recognize their Massachusetts marriage.²⁴⁰

In other words, while the Arizona mini-DOMA imposes a tax on the same-sex couple's property interest in the store of legal rights and obligations associated with their marriage, Arizona imposes no tax at all (i.e., an effective zero rate of tax) on the different-sex couple with regard to its property interest in the store of legal rights and obligations associated with their marriage. Just as in *America West Airlines*, this differential treatment should be found to violate the uniformity clause of the Arizona Constitution because the law imposes different rates of tax on property with the same attributes (i.e., Massachusetts marriages), used in the same way (i.e., to facilitate the mutual protection and support of the

236. See *supra* Part I.B.

237. Because application of the mini-DOMA turns on whether the couple is of the same sex and not on whether the members of the couple are residents or nonresidents of Arizona (i.e., the Arizona mini-DOMA places the same burden on nonresident couples visiting Arizona, on resident couples who married in another jurisdiction prior to relocating to Arizona, and on Arizona couples who leave the state temporarily in order to marry or enter into a civil union or domestic partnership elsewhere), a challenge under the Privileges and Immunities Clause of Article IV of the U.S. Constitution would likely be unavailing. See 2 ROTUNDA & NOWAK, *supra* note 107, §§ 13.8, 14.3(a).

While on the subject of federal constitutional challenges to the state tax imposed by the Arizona mini-DOMA, it is worth noting that a challenge under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution is not discussed here because, as mentioned *supra* text accompanying note 223, the uniformity clause of the Arizona Constitution, which embodies general equal protection principles, imposes greater restrictions on the state's taxing power than does the federal Equal Protection Clause.

238. See *supra* note 116 and accompanying text.

239. See *supra* Part II.B.

240. ARIZ. REV. STAT. § 25-112(A) (2007).

respective couples and their children), and in the same “industry” (in this case, arguably the establishment and protection of family units).

Some might nevertheless be tempted to argue that the Arizona legislature has drawn a reasonable distinction between these couples based on whether they are of the same sex or different sexes. To put it in the polemic of opponents of same-sex marriage, Arizona’s mini-DOMA—and any tax that it incidentally imposes—are necessary to encourage and defend the primacy of so-called traditional marriage because, among other reasons, (1) its universality supports the notion that it “is important to the survival of a culture”;²⁴¹ (2) it “is the best context for rearing children”;²⁴² (3) it encourages heterosexual behavior;²⁴³ (4) it “channels potentially destructive energy into beneficial activity, especially for men”;²⁴⁴ and (5) it “promote[s] individual flourishing” because “[m]arried people live longer and enjoy better physical and psychological health and greater wealth.”²⁴⁵ Of course, all of these reasons for encouraging and defending so-called traditional marriage are highly contestable. Yet, even if taken at face value, these claims still should not be sufficient to fend off a constitutional challenge under the uniformity clause.

In an illuminating passage in *America West Airlines*, the Arizona Supreme Court rejected just such a public policy justification for the distinction drawn by the taxing statutes in that case. As the court explained:

The sole basis for the discrimination is the number and size of the other airplanes in America West’s fleet. Because of its other airplanes, America West’s commuter airplanes, flying commuter routes to rural Arizona, are taxed at a higher rate than the airplanes of its commuter competitors, whose fleets are small enough to qualify for the tax rate limit The only reason advanced for this unequal treatment is that a tax break for small airlines may encourage the use of commuter equipment to serve Arizona cities and towns that would otherwise lack any air service. Although this may be a good and valid reason, it is certainly not a *property* classification. We deal here only with the latter.

241. George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 419, 428 (2004).

242. *Id.*

243. *Id.* at 433–34.

244. *Id.* at 434.

245. *Id.* at 435.

A property classification statute arguably might, for instance, tax small airplanes differently from large ones or airplanes used for rural service differently from those flying urban routes. The classification thus made would be a classification of property—based on one of the property's characteristics or uses—rather than a classification of owners.²⁴⁶

To return once again to the example of our two Massachusetts couples, the classification being made by the Arizona mini-DOMA is *not* a property classification. The statute is not treating the couples differently because they have different property rights or put those property rights to different uses. Indeed, as a result of their marriages in Massachusetts, the two couples have precisely the same property rights and put them to the same use. The only difference between the two couples is that one is same-sex and the other is different-sex. To paraphrase the Arizona Supreme Court in *America West Airlines*, the Arizona mini-DOMA does not delineate a classification of property based on its characteristics or uses—the property has precisely the same characteristics and uses in the hands of both couples—but rather establishes an impermissible classification of owners in violation of the constitutional requirement that the tax be imposed uniformly.

Viewed from this perspective, the Arizona mini-DOMA is an unconstitutional tax on lesbian and gay families because it is not imposed uniformly on the same class of property throughout the state.

C. *Marrying Policy and Persuasion*

Some states with mini-DOMAs do not have uniformity clauses in their constitutions. And even where the constitutional challenges described in the previous two sections of this Part are available, the courts may ultimately decide to reject those challenges. In either case, the reconceptualization of the DOMAs as a tax may still be of some effect.

The notion that the DOMAs operate as a tax on lesbian and gay families can be deployed to affect the shape—or, at the very least, the perceived fairness—of a jurisdiction's tax policies. Among the most often articulated goals of tax policy is tax "equity," which is simply tax policy jargon for the notion that we should strive for the fair treatment of taxpayers. Typically, we speak of two different types of tax equity (or fairness): horizontal equity and vertical equity. Horizontal equity aims to ensure that similarly situated taxpayers are treated similarly, and vertical

246. *Am. W. Airlines, Inc. v. Dep't of Revenue*, 880 P.2d 1074, 1078 (Ariz. 1994).

equity aims to ensure that we develop an appropriate means of differentiating the tax burdens imposed on taxpayers who are not similarly situated (whether that be, for example, through progressive, proportional, or regressive taxes).²⁴⁷

Horizontal and vertical equity analyses usually take place with regard to a single tax; for example, a commentator might discuss horizontal and/or vertical equity issues raised by a given provision in the federal income tax.²⁴⁸ Nevertheless, commentators do also speak about the equity of the tax system more generally. For instance, some commentators speak of the estate and gift taxes as the most progressive part of our federal tax system, because they are intended to apply only to the very wealthiest among us.²⁴⁹ Other commentators chide those who argue that “every American who pays income taxes’ should benefit from tax reductions—[because] . . . that group includes the economically privileged and excludes those among the working poor who do not pay income taxes, but who do pay payroll taxes.”²⁵⁰

In an earlier article, I criticized the blinkered focus of the conventional conceptualization of tax equity on the economic dimension of people, with its concomitant (not to mention wholly unrealistic) refusal to acknowledge the many other lines along which our society is grouped and divided (e.g., race, ethnicity, gender, sexual orientation, and disability).²⁵¹ In that article, I encouraged both mainstream and critical tax scholars to recognize and question how the concept of tax equity “may influence their thinking in unexpected ways” and urged them to work

to forge competing ideas about what makes a tax fair or just so that we can break the ideological hold of the concept of tax equity and replace it with something more meaningful that addresses the impact of taxation not only on the dominant group but also on all of the subordinated groups in our society.²⁵²

247. See Infanti, *Tax Equity*, *supra* note 73, at 1193–94 & n.5.

248. E.g., Karen B. Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 S. CAL. REV. L. & WOMEN’S STUD. 223 *passim* (1998) (discussing horizontal equity issues raised by amendments to I.R.C. § 104).

249. E.g., GRAETZ & SHAPIRO, *supra* note 82, at 3.

250. Infanti, *Tax Equity*, *supra* note 73, at 1257 (quoting Remarks on Signing the Tax Increase Prevention and Reconciliation Act of 2005, 42 WKLY. COMP. PRES. DOC. 943, 944 (May 17, 2006)); see, e.g., Deborah A. Geier, Letter to the Editor, *Payroll Tax Tilts Burden onto Poor, Middle Class*, WALL ST. J., Nov. 27, 2002, at A11.

251. See generally Infanti, *Tax Equity*, *supra* note 73.

252. *Id.* at 1260.

I must admit that I certainly did not expect to be taking up this task so soon; however, I find myself doing just that now.

Returning, in a sense, to the earlier discussion of the figurative sense of the word “tax” and its rhetorical power,²⁵³ one could attack the DOMAs from a tax policy perspective on the ground that they single out a certain type of family for disadvantageous tax treatment based solely on that family’s difference from the heterosexual norm. Viewed from this perspective, can we really call a tax “fair” or “equitable” when it adds to the tax burden of families headed by same-sex couples—who already face significant tax (as well as social) burdens based on sexual orientation²⁵⁴—when we do not impose a similar tax on similar families headed by different-sex couples? In other words, should sexual orientation be a ground for differential taxation when it adds to the burdens of those with the marginalized orientation?

Of course, some in the majority disapprove of same-sex relationships and would likely support such differential taxation.²⁵⁵ But for many, I suspect that imposing a tax on lesbian and gay families based solely on their difference from the heterosexual, nuclear family norm might just push things too far. Though the most recent census shows that married couple households still predominate—they comprised 52% of all households in the 2000 census—the brief on households and families from that census underscores “the growing complexity of American households.”²⁵⁶ In addition, the 2000 census showed a significant increase in the number of same-sex and different-sex unmarried partner households over the 1990 census: while the 1990 census found 3.2 million unmarried partner households in the United States, the 2000 census found 5.5 million unmarried partner households in the United States.²⁵⁷ Given how common nontraditional living arrangements are, taxing individuals based on a departure from the traditional, nuclear family norm may be perceived as either (1) out of step with reality or (2) threatening to the many people who would not be subject to *this* tax, but whose living arrangements do not hew to traditional expectations (e.g., people living alone, single parent families, unmarried different-sex partner households, or extended family or group living

253. See *supra* Part II.A.

254. See generally Infanti, *Deconstructing the Duty to the Tax System*, *supra* note 73; Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004) [hereinafter Infanti, *Sodomy Statute*].

255. See *supra* note 94.

256. TAVIA SIMMONS & GRACE O’NEILL, U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: HOUSEHOLDS AND FAMILIES: 2000, at 1 (2001), available at <http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf>.

257. Simmons & O’Connell, *supra* note 92, at 1.

arrangements) and who might reasonably fear future reactionary measures designed to push them into the traditional family form if this tax is allowed to stand.

Moreover, recent polls have shown that a majority of Americans support civil unions and the extension of at least some of the rights and obligations of marriage to same-sex couples.²⁵⁸ Presumably, this same majority would oppose the imposition of a tax on these same legal rights and obligations. It would hardly seem fair (let alone productive or useful) to give legal protections with one hand and then take them back with the other.

Alternatively (and more controversially), same-sex couples could argue that they already pay *more* than their fair share of state and/or federal taxes. The federal and state governments take tax dollars from lesbians and gay men and often use that money to fund oppression on the basis of sexual orientation. For example, the federal government has used tax dollars from lesbians and gay men to prevent the District of Columbia from implementing its domestic partnership regime for a decade,²⁵⁹ to amend the District of Columbia's Human Rights Act to allow Georgetown University to refuse to recognize lesbian and gay student groups despite a court ruling to the contrary,²⁶⁰ to actively engage in employment discrimination against lesbians and gay men through its "Don't Ask, Don't Tell" policy,²⁶¹ and to provide rather precarious protections against discrimination on the basis of sexual orientation to its other employees.²⁶² In addition, most state governments take tax dollars

258. Dan Balz & Jon Cohen, *Poll Finds Americans Pessimistic*, WASH. POST, Nov. 4, 2007, at A1 (in a national poll, 55% favored extending some of the legal rights and obligations of marriage to same-sex couples); Wyatt Buchanan, *Field Poll: Californians More Accepting of Gays*, S.F. CHRON., Mar. 22, 2006, at B1 (in California, 64% of respondents favored either same-sex marriage or civil unions); Tim Craig & Jon Cohen, *Va. Voters Unhappy with Bush but Aren't Blaming State GOP*, WASH. POST, July 15, 2007, at C1 (in Virginia, a majority of respondents favored either same-sex marriage or civil unions); Laura Smitherman, *Majority Favors Legalized Unions*, BALT. SUN, Jan. 17, 2008, at 1A (in Maryland, 58% of respondents favored either same-sex marriages or civil unions); cf. Bill Salisbury, *Voters Oppose Gay Marriage, Amendment*, ST. PAUL PIONEER PRESS, Sept. 28, 2006, at 1B (in Minnesota, 49% of respondents supported legalizing civil unions).

259. *Compare* Act of Dec. 21, 2001, Pub. L. No. 107-96, 115 Stat. 923, 950, with Act of Oct. 5, 1992, Pub. L. No. 102-382, 106 Stat. 1422, 1422.

260. District of Columbia Appropriations Act, 1990, Pub. L. No. 101-168, § 141, 103 Stat. 1267, 1284 (1989) (codified at D.C. CODE § 2-1402.41(3) (2007)).

261. 10 U.S.C. § 654 (2007). For further discussion, see INFANTI, *supra* note 3, at ch. 4.

262. The Bush administration was less than enthusiastic about enforcing these protections and, through executive order, actually ended the unequivocal prohibition against discrimination on the basis of sexual orientation in the granting of security clearances that the Clinton Administration had put in place. See Christopher Lee, *Groups Ap-*

from lesbians and gay men and, in return, provide them only limited civil rights—for example, by providing them little or no protection against employment discrimination on the basis of sexual orientation²⁶³ and often no protection at all against housing-related discrimination on the basis of sexual orientation.²⁶⁴ Furthermore, as described above,²⁶⁵ the federal government and every state with a mini-DOMA force same-sex couples who have married or entered into a civil union or domestic partnership to fund their own government-sponsored oppression by effectively compelling them to incur legal fees, the fees of ancillary service providers, and court costs in order to secure legal protections that they should already have. And these tax dollars do not just go to pay the salaries of the legislators who, to quote one reader of an earlier draft of this Article, “pass the obnoxious laws.” These dollars also go to pay for the witch hunts to ferret lesbians and gay men out of the military;²⁶⁶ for the judges who make it difficult (if not impossible) for lesbians and gay men to obtain custody of, or visitation with, children from previous relationships;²⁶⁷ and for the support of public institutions (for example, until a few short years ago, my own university) that engage in employment discrimination by providing lesbian and gay employees with lesser fringe benefit packages than heterosexual employees.²⁶⁸

If the tax burden is to be fairly apportioned, lesbians and gay men could argue, then the cost of such state-sanctioned, state-supported, and/or state-facilitated discrimination on the basis of sexual orientation should be funded entirely by heterosexuals. On this ground, same-sex couples could argue that, until the DOMAs are repealed or struck down, affording targeted tax relief (e.g., a credit against income, payroll, and/or property taxes) to same-sex couples in order to balance out the

plaud Discrimination Ban, WASH. POST, Apr. 10, 2004, at A3 (discussing the administration’s resistance to enforcing prohibitions against discrimination on the basis of sexual orientation for federal employees). Compare Memorandum from Stephen J. Hadley, Assistant to the President for Nat’l Sec. Affairs, on Adjudicative Guidelines for Determining Eligibility for Access to Classified Information to William Leonard, Dir. Info. Sec. Oversight Office, at attachment, Guideline D: Sexual Behavior ¶ 12 (Sept. 29, 2005), available at <http://www.fas.org/sgp/isoo/guidelines.html>, with Exec. Order No. 12,968, § 3.1(c)–(d), 60 Fed. Reg. 40,245, 40,250 (Aug. 7, 1995). For further discussion, see INFANTI, *supra* note 3, at ch. 5. So far, the Obama administration has been rather slow to address LGBT rights issues. See Michael D. Shear, *At White House, Obama Aims to Reassure Gays*, WASH. POST, June 30, 2009, at A1.

263. INFANTI, *supra* note 3, at 113 tbl.5.1.

264. *Id.* at 121 tbl.5.2.

265. See *supra* Part I.B.

266. See Fiona Morgan, *Inside a Lesbian Witch Hunt*, SALON, June 8, 2000, <http://www.salon.com/news/feature/2000/06/07/lesbians/index2.html>.

267. INFANTI, *supra* note 3, at 205–10.

268. *Id.* at 107, 117–19.

financial and other²⁶⁹ costs imposed by the DOMAs would be a welcome first step toward the necessary recalibration of the overall tax burden imposed on them to make it fairer and more equitable.²⁷⁰ In the case of the federal government, this tax relief could be afforded to all same-sex couples who live in a state that legally recognizes their relationship. In keeping with the focus of this Article, the states with mini-DOMAs might afford tax relief to currently and formerly out-of-state same-sex couples in recognized legal relationships who have some connection with, or who move to, the state.²⁷¹ (In lobbying for this tax relief, in-state couples could

269. See, e.g., *supra* note 113.

270. Interestingly, this argument would actually bring the idea of tax “equity” more in line with the conventional legal use of the word “equity,” which usually carries reparative or gap-filling connotations. Infanti, *Tax Equity*, *supra* note 73, at 1197–98.

Nonetheless, some might be concerned about the possibility of an equal protection challenge to this idea of targeted tax relief. But given the ameliorative nature of the tax relief, the fact that sexual-orientation-based classifications have not been unambiguously subjected to heightened constitutional scrutiny, and the leeway generally granted to legislatures in distributing tax burdens, it seems unlikely that this proposal would be susceptible to an equal protection challenge. See 2 ROTUNDA & NOWAK, *supra* note 107, § 13.7(a) (“A review of the cases involving the issue of equal protection of state tax statutes indicates that the Court generally defers to the judgment of the state legislative bodies.”); Purvi S. Patel, *Eighth Annual Review of Gender and Sexuality Law: Constitutional Law Chapter: Equal Protection*, 8 GEO. J. GENDER & L. 145, 175–84 (2007) (indicating that federal and state courts generally apply the rational basis test to sexual-orientation-based classifications, but acknowledging the debate among commentators about whether the U.S. Supreme Court has, in practice, applied a heightened form of rational basis review to such classifications); cf. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (applying strict scrutiny to sexual-orientation-based classifications, making it the first state high court to do so). If anything, it would seem that failing to provide such targeted tax relief would raise a more serious equal protection issue because lesbians and gay men are now arguably singled out for the imposition of higher taxes than heterosexuals, simply by reason of their sexual orientation. See generally Wolfson & Melcher, *supra* note 11 (arguing that DOMA is unconstitutional on equal protection grounds because, out of antigay animus, Congress singled out lesbians and gay men for the imposition of an inferior legal status).

271. Residents of a state with a mini-DOMA who leave that state to enter into a same-sex marriage (or a civil union or domestic partnership) run up against the general rule that an “evasive” marriage (i.e., one in which a couple leaves a state for the purpose of avoiding a legal ban on their marriage) that is against the strong public policy of the couple’s home state is invalid. RESTATEMENT (SECOND) CONFLICT OF LAWS § 283(2) (1971). This rule renders the out-of-state legal celebration of the relationship symbolic, at best, or grounds for discharge from the military or adverse immigration consequences, at worst. See 10 U.S.C. § 654(b)(3) (2008) (making an “attempted” same-sex marriage grounds for discharge from the military); INFANTI, *supra* note 3, at 155 (“[A] same-sex marriage, civil union, or domestic partnership may not only be denied recognition [by the federal government] but may also serve as the basis for de-

underscore the political oddity of providing tax relief to currently and formerly nonresident same-sex couples, but not to same-sex couples who are long-time residents of the state. By drawing attention to this distinction, they may be able to increase political support for repealing the state's mini-DOMA as an easier and more equitable solution to the problem.)

Before going further, I would like to underscore the words "first step" that might have gotten buried in the previous paragraph. Under the argument articulated above, the targeted tax relief would be the first—but not the only—step toward a necessary recalibration of the overall tax burden. Other steps to adjust the tax burden on lesbians and gay men would need to follow this first one if a fair distribution of societal burdens were to be achieved. Yet, by beginning with this one area in which the government imposes a concrete, easily understood financial burden on same-sex couples, lesbian and gay rights advocates would be able to open the door to a wider conversation about how the unseen (at least by the heterosexual majority) societal burdens imposed on the basis of (homo)sexual orientation should be taken into account when distributing the more visible burdens that we all bear in funding our government and paying for public services.

I am sure that many readers will recoil at this argument, likely out of a reflexive resistance to the idea of differing tax burdens based on noneconomic criteria.²⁷² Yet, it is worth pointing out that the direct tax clauses of the U.S. Constitution not only countenance, but in most cases would actually require, tax rates to vary based on the population of each state—an indisputably noneconomic criterion.²⁷³ To take a more recent example, as a candidate, President Obama proposed exempting low-income senior citizens from paying federal income tax.²⁷⁴ Though entailing a hybrid classification, this proposal would clearly vary tax rates based on age (i.e., younger low- and middle-income people would not benefit from this proposal), and age, like population, is an indis-

nying renewal of a visa or reentry into the country (because it may be construed as evidence of an intent to remain in the United States permanently).").

272. See, e.g., Paul Krugman, *Fiscal Poison Pill*, N.Y. TIMES, June 16, 2008, at A19 ("one wonders why we should create the precedent of exempting particular demographic groups from taxes").

273. See EINHORN, *supra* note 159, at 158–60 (describing the problem and providing a table indicating the range of rates that would apply in different states if our current federal income tax were apportioned by population).

274. William E. Gibson, *Two Prescriptions, One Sick Economy*, SOUTH FLORIDA SUN-SENTINEL (Ft. Lauderdale, Fla.), Aug. 1, 2008, at 1A; see also PLATFORM DRAFTING COMMITTEE, DEMOCRATIC NATIONAL CONVENTION COMMITTEE, THE DRAFT 2008 DEMOCRATIC NATIONAL PLATFORM: RENEWING AMERICA'S PROMISE 9 (2008), available at <http://www.workinglife.org/storage/users/4/4/images/111/2008%20democratic%20platform%20080808.pdf>.

putably noneconomic criterion for differing individual tax burdens. (It is worth noting that this proposal is not unprecedented, as senior citizens already benefit from an extra standard deduction that provides them with a lower effective tax rate than others.)²⁷⁵ Accordingly, I would urge those who might reflexively react negatively to the idea that lesbians and gay men should be taxed differently (i.e., in the case of at least certain taxes, more lightly) than straight men and women to resist their instinctive reaction to this idea and to consider this proposal seriously, especially in view of the implicit constitutional imprimatur given to differential taxation based on noneconomic criteria. (If, however, you cannot resist this instinctive reaction, that's fine, too—because it will only further undermine support for the DOMAs and militate in favor of their repeal as a quick and easy means of avoiding a debate over how best to vary the tax burden based on sexual orientation.)

Thus, even in the absence of more technical constitutional arguments against the DOMAs, same-sex couples can still rhetorically use the reconceptualization of the DOMAs as a tax on lesbian and gay families in an attempt to affect the shape—or, at the very least, the perceived fairness—of federal and state tax policies. This rhetorical move only strengthens the attempt to displace the idea that the DOMAs are necessary to protect the institution of marriage from some imagined assault by same-sex couples and to replace it with the idea that the DOMAs are really nothing more than an unjust penalty imposed on same-sex couples and their children because they happen to be different. Again, this shifts the framing of the debate away from a focus on forcing states to recognize the right of same-sex couples to marry, which tends to generate reflexive resistance among the many heterosexuals who are not ready to take this step on their own, and toward a discussion of whether it is fair to tax two similarly situated families differently—a framing of the question that is of more general appeal because it is phrased in terms of the widely held belief that those who are similarly situated should receive similar treatment under the law. Simultaneously, this move enriches the debate over tax fairness by shunning the typically unbending focus on the economic life of individuals and by instead pushing us to begin to think about how an individual's noneconomic characteristics (here, sexual orientation) might be taken into account in assessing tax fairness.

275. I.R.C. § 63(c), (f)(1) (2008).

CONCLUSION (OR, GREASING THE SLIPPERY SLOPE)

After spending much time (and spilling much ink) on the ways in which the Internal Revenue Code overtly and covertly burdens same-sex couples,²⁷⁶ I have shifted direction in this Article by considering how other burdens that society imposes on same-sex couples might be reconceptualized as a tax on lesbian and gay families. My purpose in writing this Article has been severalfold. First, as part of a larger project of which this Article forms a part,²⁷⁷ I hope to have shaken generally accepted notions of what constitutes a “tax” and to have moved both mainstream and critical tax scholars to question the contours and content of this (and other) tax concepts that, on their face, appear to be normal, natural, or plainly incontestable.²⁷⁸ Second, I hope to have opened viable new avenues for challenging the constitutionality of the DOMAs. Third, I hope to have provided some new rhetorical ammunition to those

276. See Infanti, *Deconstructing the Duty to the Tax System*, *supra* note 73; Infanti, *supra* note 10, at 27; Infanti, *Sodomy Statute*, *supra* note 254; Anthony C. Infanti, *Tax Protest, “A Homosexual,” and Frivolity: A Deconstructionist Meditation*, 24 ST. LOUIS U. PUB. L. REV. 21 (2005).

277. See *supra* note 73.

278. Based on my experience in presenting this Article, I believe that I have succeeded in achieving at least this goal. A common reaction to this Article was to try to raise every possible scenario in which something could be recharacterized as a tax and to then raise the specter that my analysis creates a slippery slope in which it seems like everything is a tax. In retrospect, I found these discussions to be quite illuminating because they raised a number of intriguing questions about how we, as lawyers, think. For instance, does an idea or argument necessarily become less valid or valuable simply because it might be applied in other areas or in ways that we might not like? Or does that say less about the idea and more about the results that we wish to achieve or are comfortable with allowing to occur—or, in this and many other cases, about the types of discrimination that we still find acceptable? In addition, does an idea become less valid or valuable because it pushes (erases?) the boundaries that we have come to live within and that define the parameters of our comfortable intellectual lives? Or, as described in the text below, might these attributes make the idea more valuable?

These interactions also serve as a mirror, reflecting—and clearly framing for us—the conservative nature of the legal profession and legal academia. From the first days of law school, lawyers are trained to fear slippery slopes. We are accustomed to dealing with issues on a case-by-case basis, attempting to confine the results of our arguments to the case at hand (and similar cases) and leaving other cases for future treatment. By deliberately crafting an open-ended argument, this Article sets up a direct conflict with the “lawyerly nature” of legal academics and seems to provoke an instinctually adverse reaction. I would thus ask readers who have similarly thought up a parade of horrors as they read this Article to step back for a moment and reflect on why they had this reaction. Is it because of some flaw in my argument or is it because of their own discomfort with losing control over their accustomed intellectual surroundings?

battling for lesbian and gay rights. In this regard, I hope to have helped lesbian and gay rights advocates to shift this front in their battle for social justice to a new tax terrain that might just prove a more hospitable spot from which to wage their campaign.

Finally and most broadly, I hope to have drafted a blueprint for using the tax system and tax rhetoric in future attacks on legal structures that disadvantage nontraditional families (as well as others who share our outsider status). This Article has directly addressed only the burdens imposed on same-sex couples who have entered into a marriage, civil union, or domestic partnership. But, having chipped away at the hegemony of so-called traditional marriage and the nuclear family through a concrete example that is both easily accessible and understood, I hope that others will take up this work and use these (or similar) arguments to chip away at this hegemony on behalf of same-sex and different-sex couples who have not entered into a marriage, civil union, or domestic partnership; single parents; extended family units; persons living alone; and others who do not hew to convention. They also suffer unique burdens because of their difference from the norm—burdens that might similarly be likened to taxes and might suffer from the same constitutional and equitable infirmities as the DOMAs. Thus, in contrast to those who worry about slippery slopes and carefully argue why the line should be moved only just enough to include them within the privileged circle,²⁷⁹ I hope to have applied a thick layer of grease to an already slippery slope in order to ease the way for those who come after me. In this regard, I view this project as an example of the transformative potential of same-sex marriage²⁸⁰—what some deride as an assimilationist act can actually take on a revolutionary character when viewed in the proper light.²⁸¹ ♣

279. See generally Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155 (2005).

280. Infanti, *A Tax Crit Identity Crisis?*, *supra* note 73, at 709–10, 813–18.

281. See INFANTI, *supra* note 3, at 223–25 (describing how lesbian and gay parenting is a transgressive act).