SAME-SEX RELATIONSHIPS, DOMA, AND THE TAX CODE: RETHINKING THE RELEVANCE OF DOMA TO STRAIGHT COUPLES

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INTRODUCTION

According to Professor Derrick Bell's seminal article describing his Interest Convergence Theory, the interests of Blacks are only accommodated when they coincide with the interests of Whites.[1] By analogy, the interests of same–sex couples are only accommodated when they coincide with the interests of heterosexual couples.[2] The elimination of discriminatory provisions that cause heterosexual married couples to pay *more* federal income tax than their same–sex counterparts might just be the mutually beneficial interest

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[1] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest–Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) ("[T]his principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.").

[2] *See* Kenji Yoshino, *Idea Lab: Marriage Partners*, N.Y. TIMES MAGAZINE, June 1, 2008, www.nytimes.com/2008/06/01/magazine/01wwln-idealab-t.html.

necessary to prompt Congress to recognize same-sex legal unions.

Current federal income tax laws require certain heterosexual married couples to pay *more* federal income tax than domestic partners[3] and same-sex married couples who earn identical incomes.[4] Most domestic partners are same-sex couples not allowed to marry one another.[5] In an earlier article, I recommended that Congress create a new federal income tax filing category to eliminate these disparities and to equalize the tax liability between heterosexual married couples and their same-sex counterparts.[6] If Congress finds this recommendation untenable, this Article proposes another solution to mitigate these inequalities: Repeal Section 3 of the Defense of Marriage Act ("DOMA") which, for federal purposes, limits the definition

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[3] All domestic partner references are to those domestic partners registered with the State of California in accordance with CAL. FAM. CODE §§ 297-299.6 (2011) and those domestic partners registered with the State of Nevada in accordance with NEV. REV. STAT. §122A.100 (2011) and those domestic partners registered with the State of Washington in accordance with WASH. REV. CODE §26.60.030 (2011).

[4] *See infra* Tables 1 and 2. *See also* Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1545 (2008) ("[G]ay couples can often arrange their affairs so as to face systematically lower federal income tax liabilities than their identically situated heterosexual counterparts.").

[5] CAL. FAM. CODE § 297(b)(5) expressly limits domestic partnership to same-sex couples and heterosexual couples, as long as one person in the heterosexual couple is over the age of 62. Because of the age restriction imposed on heterosexual couples, most domestic partners in California are same-sex couples. *See* Keeva Terry, *Separate and Still Unequal? Taxing California Registered Domestic Partners*, 39 U. TOL. L. REV. 633, 633. *Compare* CAL. FAM. CODE § 297(b)(5) (2011) *with* NEV. REV. STAT. § 122.020 (2011) (marriage restricted to heterosexual couples), *and* WASH. REV. CODE § 26.60.030(b)(6) (2011) (domestic partners restricted to same-sex couples and heterosexual couples in which one person is 62 years of age or older).

[6] Keeva Terry, *Separate and Still Unequal? Taxing California Registered Domestic Partners*, 39 U. Tol. L. Rev. 633, 649-52 (2008).

of marriage to heterosexual marriage ("DOMA's Marriage Definition").[7]

For purposes of federal law, DOMA defines *marriage* as "only a legal union between one man and one woman as husband and wife" and limits the application of the term *spouse* to "a person of the opposite sex who is a husband or a wife."[8] In effect, DOMA precludes the recognition of same-sex marriage for purposes of federal law.[9] There has been ample litigation involving DOMA, but most of the litigation has focused on how

[7] Defense of Marriage Act (DOMA), 1 U.S.C. § 7 (2011) [hereinafter DOMA's Marriage Definition] (establishing definition of marriage for construction of Acts of Congress). Section 2 of DOMA, the other DOMA provision, which authorizes states to refuse recognition of same-sex marriages, is codified separately. *See* Defense of Marriage Act (DOMA), 28 U.S.C. § 1738C (2011) [hereinafter DOMA's Full Faith and Credit Provision].

[8] DOMA's Marriage Definition ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

[9] *Id.* Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and New York fully recognize and issue licenses for same-sex marriage. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, SAME-SEX MARRIAGE, CIVIL UNIONS AND DOMESTIC PARTNERSHIPS (2011), *available at* http://www.ncsl.org/default.aspx?tabid=16430. *See infra* note 26 about same-sex marriage in California.

DOMA harms same-sex couples[10] with little attention paid to the inequities DOMA creates for heterosexual couples. Economically, DOMA causes many heterosexual married couples to pay more federal income tax than same-sex married couples who earn identical taxable income.[11] While DOMA's legislative history clearly indicates that Congress intended for DOMA to have the effect of "defending and nurturing the institution of traditional, heterosexual marriage,"[12] the tax inequities DOMA creates undermines this intent. DOMA blatantly exposes the marriage tax penalty,[13] possibly

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[10] *See generally* Perry v. Schwarzenegger, 704 F.Supp.2d 921 (N.D. Cal. 2010); *see also* Mass. v. U.S. Dep't. of Health and Human Servs., 698 F.Supp.2d. 234, 253 (D. Mass. 2010) ("[T]he state constitution requires that the Commonwealth honor [same-sex] union[s]. The Commonwealth therefore finds itself in a Catch-22: it can afford [same-sex couples] the same privileges as other similarly-situated married couples, as the state constitution requires, and surrender millions in federal grants, or deny [those same privileges], and retain the federal funds, but run afoul of its own constitution."); Gill v. Office of Pers. Mgmt., 699 F.Supp.2d 374, 394 (D. Mass. 2010) (". . . DOMA does not provide for nationwide consistency in the distribution of federal benefits among married couples. Rather it denies to same-sex married couples the federal marriage-based benefits that similarly situated heterosexual couples enjoy."); *In re* Levenson, 587 F.3d 925, 932 (9th Cir. 2009) ("[D]iscouraging gay marriage serves only to force gay couples to live in a 'state of sin' rather than in a lawfully-recognized 'state of connubial bliss' that encourages a long-enduring permanent relationship that, in turn, serves as the basis for a state recognized family."); Bishop v. Okla. *ex. rel.* Edmondon, 447 F. Supp. 2d 1239, 1248-49 (N.D. Okla. 2006), *rev'd on other grounds*, *Bishop v. Okla.*, 333 F. App'x 361 (10th Cir. 2009) ("DOMA was enacted pursuant to the Full Faith and Credit Clause, thus does not give standing to a Canadian same-sex marriage which could be recognized under comity principles."); Smelt v. County of Orange, 374 F. Supp. 861, 871 (C.D. Cal. 2005) *abrogated by* Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006) (". . . DOMA's definition [prevents] Plaintiff's legal union [from] receiv[ing] the rights or responsibilities afforded to marriage under federal law. This is a concrete injury suffered by the Plaintiffs . . . .").

[11] *See infra* Table 2.

[12] H.R. REP. No. 104-664, at 12 (1996).

[13] "A marriage penalty occurs whenever a couple pays higher federal income taxes as a result of their marriage than they would pay if they remained single and filed individual returns." Dorothy A. Brown, *The Marriage Bonus/ Penalty in Black and White*, *in* TAXING AMERICA 45, 45 (Karen Brown & Mary Louise Fellows eds., 1996).

discouraging traditional, heterosexual marriage in the process.[14] DOMA also adversely impacts the federal budget, thereby restricting available resources for the general public.[15] Additional tax revenues would be generated if same-sex marriage were recognized for purposes of federal law.[16] Contrary to what many may think, the Congressional Budget Office has determined that recognition of same-sex marriage would have a positive net impact on the bottom line of the federal budget.[17]

This Article endorses recent decisions made by the Internal Revenue Service ("IRS") with respect to the federal income taxation of domestic partners and same-sex married couples. First, this Article confirms that the federal income tax inequality between domestic partners and heterosexual married couples is compelled under current federal income tax laws[18] and DOMA does not preclude this federal income tax disparity.[19] Second, this Article shows that same-sex married couples should calculate income for federal income tax purposes in the same manner as heterosexual married couples.[20] In the absence of DOMA, married couples would be taxed equally for federal income tax purposes, but DOMA compels disparate federal income tax liabilities between same-sex married couples and heterosexual married couples, often to the detriment of heterosexual married couples.[21] Congress should act to equalize

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[14] *Id.* at 46 ("Empirical evidence suggests that economic factors, including tax liabilities, play a role in the decision to marry." (citations omitted)).

[15] CONG. BUDGET OFFICE, POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGE 2 (2004) [hereinafter BUDGETARY IMPACT] (CBO estimates that recognizing same-sex marriages would increase federal revenues by $500 million to $700 million annually from 2011 through 2014.).

[16] *Id.*

[17] *Id.*

[18] *See infra* Table 1.

[19] *See infra* Part II.

[20] *See infra* Part III.

[21] *See infra* Table 2.

these tax liabilities.[22] Even those who find the federal income tax inequality between domestic partners and heterosexual married couples tolerable because domestic partnership is not identical to marriage must agree that there is something different about marriage. Once married, all married couples should be taxed equally. This Article ultimately concludes that the repeal of DOMA's Marriage Definition, 1 U.S.C. § 7, is the first step necessary to restore equity, not only on behalf of same–sex couples, but also for the benefit of heterosexual couples as well.

Part I of this Article describes the federal income tax disparities that exist under current law because of Congress' refusal to recognize domestic partnerships and same–sex marriages. Part II examines the tax treatment of domestic partners by the Internal Revenue Service and the impact of DOMA on domestic partnerships in contrast to marriage. Part II establishes that the plain language and legislative history of DOMA do not support DOMA's application to domestic partnerships or any other legal union that is not marriage.[23] Part III considers the IRS treatment of same–sex married couples and the proper way for same–sex married couples to calculate income for federal income tax purposes. Premised upon long-standing federal income tax principles which dictate that the test of taxability is ownership determined pursuant to state law,[24] Part III argues that DOMA does not change determinations of ownership. Ultimately, Part III concludes that same–sex married couples should calculate income for federal income tax purposes in the same manner as heterosexual married couples.

I. The Refusal by Congress to Recognize Same-Sex Legal Unions Creates Federal Income Tax Disparities

The federal income tax disparities between heterosexual married couples and their same–sex counterparts will surely increase as more states recognize same–sex marriages and domestic partnerships. This Article uses California as a case study to explore these federal income tax disparities. California

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[22] Terry, *supra* note 6, at 649–52.

[23] *See infra* Part II.

[24] *See infra* Part III.

is a particularly useful case study because it is a community property state[25] that recognizes and bestows the same rights and responsibilities upon three kinds of legal unions: domestic partnership, same-sex marriage, and heterosexual marriage.[26] However, for federal income tax purposes, only one of these legal unions – heterosexual marriage – is recognized and allowed to file jointly.[27]

The IRS recently released a memorandum from the Office of Chief Counsel addressing the federal income tax consequences of the full extension of community property rights to domestic partners ("IRS Memorandum").[28] A domestic partner must report one-half of community (household)

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[25] For federal income tax purposes, there are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. *See* I.R.S., DEP'T OF THE TREASURY, CAT. NO. 15103C, COMMUNITY PROPERTY (2011) [hereinafter COMMUNITY PROPERTY]. The community property system conceives of marriage as a community, and is based on an equal economic partnership model in which the contributions made by each spouse, financial or otherwise, are fully appreciated and equally valued. *See* Michael McAuley, *The Wanting of Community Property*, 20 TUL. EUR. & CIV. L.F. 57, 58 (2005); Susan Kalinka, *Federal Taxation of Community Income: A Simpler and More Equitable Approach*, 1990 Wis. L. Rev. 633, 637 (1990).

[26] Same-sex marriage was legal in California from June 17, 2008 until November 5, 2008, the effective date of Proposition 8, the amendment to the California Constitution which eliminated the right of same-sex couples to marry in California. *Strauss v. Horton*, 207 P.3d 48, 64 (Cal. 2009). Even though a federal court in California held Proposition 8 to be unconstitutional, the judgment has been stayed pending appeal to the Ninth Circuit Court. *Perry v. Schwarzenegger*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010). Thus, the prohibition on same-sex marriage in California remains the law of the land, leaving domestic partnership as the only legally recognized union available to same-sex couples in California. *See* CAL. FAM. CODE § 297.5 (2011). Proposition 8 does not alter existing California law with respect to domestic partnership. *Strauss*, 207 P.3d at 70–78.

[27] I.R.S., DEP'T OF THE TREASURY, CAT. NO. 11325E, FORM 1040 INSTRUCTIONS, at 12 (2010) [hereinafter FORM 1040 INSTRUCTIONS] ("For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife.").

[28] *See* I.R.S., Chief Couns. Mem. 201021050 (2010) [hereinafter I.R.S. Memorandum].

income,[29] whether received in the form of compensation for personal services or income from property, on his or her federal income tax return.[30] Table 1 reveals the federal income tax inequality that currently exists between domestic partners and heterosexual married couples.[31]

The IRS also recently issued guidance in one of its publications instructing each same-sex married person domiciled in California to report one-half of community (household) income on his or her federal income tax return.[32] Table 2 exposes the federal income tax disparity that currently exists between same-sex married couples and heterosexual married couples.[33] This disparity exists solely because of DOMA.

TABLE 1. Federal Income Tax Disparity Between Domestic Partners and Heterosexual Married Couples (2010).

	Domestic Partners		**Heterosexual Married Couple**
	Michael and Mark		Paul and Patricia
	Michael	Mark	Married Filing Jointly
Gross Income	$170,000	$170,000	$340,000
Standard Deduction	($5,700)	($5,700)	($11,400)
Personal Exemption(s)	($3,650)	($3,650)	($7,300)
Taxable Income	$160,650	$160,650	$321,300
Federal Income Tax	$36,300	$36,300	$83,810

[29] Earnings, income, or receipts that are considered community property pursuant to state law are also by definition community income. *See* CAL. FAM. CODE § 760 (1994).

[30] I.R.S. Memorandum, *supra* note 28; COMMUNITY PROPERTY, *supra* note 25.

[31] I.R.S. Memorandum, *supra* note 28; COMMUNITY PROPERTY, *supra* note 25.

[32] *See* COMMUNITY PROPERTY, *supra* note 25 ("[A] person in California who is married to a person of the same sex generally must report half the combined community income earned by the individual and his or her same-sex spouse.").

[33] *Id.*

TABLE 2. Federal Income Tax Disparity Between Same-Sex Married Couples and Heterosexual Married Couples (2010).

	Same-Sex Married Couple		Heterosexual Married Couple
	Kimberly and Karen		Paul and Patricia
	Kim	Karen	Married Filing Jointly
Gross Income	$170,000	$170,000	$340,000
Standard Deduction	($5,700)	($5,700)	($11,400)
Personal Exemption(s)	($3,650)	($3,650)	($7,300)
Taxable Income	$160,650	$160,650	$321,300
Federal Income Tax	$36,300	$36,300	$83,810

One critical reason for the federal income tax disparity is the filing status accorded each legal union.[34] Same–sex married couples and domestic partners are *not* permitted to file jointly for federal income tax purposes, but heterosexual married couples are required to file as married persons.[35] For federal income tax purposes, married persons must generally file their federal income tax returns in one of two filing categories: married filing jointly or married filing separately.[36] *Married filing jointly* means that both spouses file one joint federal income tax return that reflects the combined income of both spouses.[37] *Married filing separately* means that each spouse files a separate federal income tax return that reflects only that spouse's respective

[34] *See* I.R.C. § 1 (2008). This disparity in federal income tax liability also exists at lower income levels. For example, assuming the standard deduction and personal exemptions, gross income of $180,000 yields a federal income tax liability of $33,408 for the heterosexual married couple, which exceeds the combined federal income tax liability of $32,700 for the same–sex married couple and for the domestic partners.

[35] COMMUNITY PROPERTY, *supra* note 25, at 2 ("Registered domestic partners (and individuals in California who are married to an individual of the same sex) are not married for federal tax purposes. They can use only the single filing status, or if they qualify, the head of household filing status.").

[36] FORM 1040 INSTRUCTIONS, *supra* note 27, at 12–13 (2010).

[37] *Id.*

income.[38] Congress has structured the Internal Revenue Code (the "Code")[39] such that the federal income tax liability of the joint return when couples file married filing jointly is almost always less than the sum of the federal income tax liabilities from both separate returns when couples file married filing separately.[40] As a result, most married persons file their federal income tax returns as married filing jointly.

Individuals who are *not* married for federal income tax purposes are not permitted to file jointly.[41] Married filing separately has a completely different and less beneficial rate structure than the filing categories for single persons who are not married for federal income tax purposes.[42] A marriage tax penalty occurs whenever a married couple pays higher federal income taxes as a result of their marriage than they would pay if they remained unmarried and filed individual returns.[43] The federal income tax disparities shown in Tables 1 and 2 reflect the marriage tax penalty incurred by heterosexual married couples as a result of their marriage, but not incurred by domestic partners and same-sex married couples who are not recognized as married persons for purposes of federal law.[44]

Clearly, disparities currently exist between the federal income tax liabilities of heterosexual married couples and domestic partners and same-sex married couples. An opportunity for interest convergence is present because the

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[38] *Id.*

[39] All references are to the Internal Revenue Code of 1986, as amended, and the Treasury regulations promulgated thereunder (26 U.S.C.).

[40] *See* I.R.C. § 1.

[41] *See id.*; FORM 1040 INSTRUCTIONS, *supra* note 27, at 12–13 (2010).

[42] *See* I.R.C. § 1.

[43] Brown, *supra* note 13, at 45.

[44] Many scholars have advocated for the elimination of marital status as a basis for taxation, in which case these disparities would disappear. *See, e.g.*, Lily Kahng, *One is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 Hastings L.J. 651, 684 (2010) ("The joint return is unsupportable and should be abolished.").

elimination of discriminatory provisions that cause heterosexual married couples to pay *more* federal income tax than their same–sex counterparts accommodates the interests of both heterosexual and same–sex couples.

II. DOMA Has No Bearing on the Federal Income Taxation of Domestic Partners

DOMA was enacted in 1996 in response to concerns that the Supreme Court of Hawaii was going to legalize same–sex marriage.[45] Proponents of DOMA emphasized that the bill was limited in scope to achieve two main objectives.[46] First, DOMA clarified that no state was required to recognize a same–sex marriage even if such marriage had been legally and validly entered into in another state.[47] Second, DOMA codified two hundred years of American tradition by limiting the definition of "marriage" to a legal union between one man and one woman for purposes of federal law.[48]

The IRS has determined that DOMA has no bearing on the federal income taxation of domestic partners because DOMA merely defines the word "marriage" for purposes of federal law

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[45] *See supra* note 12, at 2 ("H.R. 3396 is a response to a very particular development in the State of Hawaii . . . the state courts in Hawaii appear to be on the verge of requiring that State to issue marriage licenses to same–sex couples.").

[46] *See id.* ("H.R. 3396, the Defense of Marriage Act, has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same–sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.").

[47] *See* DOMA's Marriage Definition, *supra* note 7.

[48] *See* DOMA's Full Faith and Credit Provision, *supra* note 7.

and a domestic partnership is not a marriage.[49] Thus, according to the IRS Memorandum, the federal income taxation of domestic partners is based upon the statutory language of the Code and corresponding federal income tax jurisprudence, without regard to DOMA.[50] The IRS Memorandum requires domestic partners to calculate income in the same way married persons calculate income for federal income tax purposes.[51] Critics contend that the IRS Memorandum is wrong. Specifically, critics challenge the accuracy of the IRS Memorandum in light of the Defense of Marriage Act.[52] This Article maintains, however, that the IRS got it right and DOMA has no bearing on the federal income taxation of domestic partners. Because the IRS is an administrative body, courts must give substantial deference to the IRS's interpretation of DOMA

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[49] *See* I.R.S. Memorandum, *supra* note 28 (discussing the federal income taxation of domestic partners); Shareen Pflanz and Steve Toomey, the IRS representatives for this Chief Counsel Advice, via separate telephone conversations on June 18, 2010, each stated that "DOMA does not apply [to this Chief Counsel Advice]." Telephone Interviews with Shareen Pflanz & Steve Toomey, Internal Revenue Service (June 18, 2010); COMMUNITY PROPERTY, *supra* note 25 ("Registered domestic partners . . . are not married for federal tax purposes.").

[50] *See* I.R.S. Memorandum, *supra* note 28.

[51] *Id. See also* COMMUNITY PROPERTY, *supra* note 25; Terry, *supra* note 6.

[52] *See* Laura Meckler, *Gay Couples Get Equal Tax Treatment*, WALL ST. J., June 5, 2010, at A3, *available at* http://online.wsj.com/article/SB10001424052748704080104575286931017169308.html ("The IRS ruling has detractors. It doesn't appear to square with the Defense of Marriage Act . . . the IRS should not be recognizing these unions, even if state law directs otherwise." (citations omitted)). *See also* Steven Stamstad, *Achieving Marriage Rights for Same-Sex Couples is a Marathon, Not a Sprint*, THE HUFFINGTON POST (June 17, 2010, 11:06PM) http://www.huffingtonpost.com/steven-stamstad/achieving-marriage-rights_b_616761.html ("[S]ome legal experts point out that the IRS ruling is in conflict with the 1996 Defense of Marriage Act . . . .").

under the analytical framework set out by the Supreme Court in *Chevron v. Natural Resources Defense Council*.[53]

A. Plain Meaning of the Word "Marriage" in the Defense of Marriage Act

When interpreting a federal statute, congressional intent controls. If congressional intent is clear and unambiguous, an agency must give effect to the clearly expressed intent of Congress.[54] To ascertain congressional intent, we first look to the language of the statute to determine whether the language at issue has a plain and unambiguous meaning.[55] "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[56]

The language at issue is the word "marriage" used in DOMA's Marriage Definition.[57] Specifically, the question posed is whether the common, ordinary meaning of the word

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[53] 467 U.S. 837, 844 (1984). *Chevron* stands for the principle of deference to administrative interpretations. The Supreme Court considered two critical questions in *Chevron*. The first question was whether Congress had spoken directly to the precise question at issue. If Congress had not spoken directly to the precise question at issue, the second question was whether the agency's decision was based on a permissible construction of the statute. The Supreme Court has determined that a reasonable policy choice by an agency should not be disturbed unless it appears from the statute or its legislative history that Congress would not have sanctioned such a choice.

[54] *Id.* at 842–43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[55] Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

[56] *Id.* at 341.

[57] "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." DOMA's Marriage Definition. This Part of the Article focuses on the meaning of the word "marriage" but the same analysis could be applied to the parallel question about the word "spouse."

"marriage" includes domestic partnerships.[58] Historically, the word "marriage" has held a very unique meaning indicating a lifelong committed intimate relationship between a man and a woman legalized by the state.[59] In some ways, domestic partnerships can now be described in a similar fashion, but there are important distinctions.[60]

For example, the California Constitution now prohibits same–sex marriage, but same–sex domestic partnerships remain valid under California law.[61] Dissolution of a California marriage requires a court judgment of divorce.[62] On the other hand, certain domestic partners can terminate their domestic partnership by merely filing a form of dissolution with the California Secretary of State.[63] No court proceeding is necessary.[64] A couple under the age of eighteen can marry in California under certain circumstances;[65] whereas, the minimum age for domestic partnership is eighteen.[66] Marriages are generally recognized and respected from state to state unless the

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[58] Hamilton v. Lanning, 130 S.Ct. 2464, 2471 (2010) ("When terms used in a statute are undefined, we give them their ordinary meaning.") (citations omitted).

[59] Dictionary.com defines marriage as "the social institution under which a man and woman establish their decision to live as husband and wife by legal commitments, religious ceremonies, etc." and gay marriage as "a similar institution involving partners of the same gender." Dictionary.com, *Marriage*, http://dictionary.reference.com/browse/marriage (last visited August 20, 2010).

[60] Dictionary.com defines domestic partner as "either member of an unmarried, cohabiting, and esp[ecially] homosexual couple that seeks benefits usu[ally] available only to spouses." Dictionary.com, *Domestic Partner*, http://dictionary.reference.com/browse/domestic+partnership (last visited August 20, 2010).

[61] *See* Strauss v. Horton, 207 P.3d 48 (Cal. 2009).

[62] *See* CAL. FAM. CODE § 310 (2011).

[63] *Id.* § 299(a).

[64] *Id.*

[65] *Id.* § 302.

[66] *Id.* § 297(b)(4).

state has some specific statutory exclusion or public policy exception prohibiting recognition of such marriage.[67] Domestic partnerships are just the opposite; they are generally *not* recognized from state to state, unless the state has some specific statutory provision permitting recognition of such a relationship.[68] California law is illustrative of the substantive differences that exist between marriages and domestic partnerships. The terms are not interchangeable or identical. They are simply not the same thing.

Most importantly, when DOMA was enacted in 1996, none of the 50 states had enacted civil union or domestic partner legislation.[69] As a result, it cannot be said that the plain meaning of the word "marriage" at the time DOMA was enacted also referred to domestic partnerships. Since the common, ordinary meaning of the word "marriage" does not include domestic partnerships, DOMA's Marriage Definition must be analyzed in context to determine whether Congress clearly intended the word "marriage" to encompass domestic partnerships.

B. Contextual Analysis and Legislative History of the Word "Marriage" in the Defense of Marriage Act

The critical question is whether in enacting DOMA, Congress intended for the word "marriage" to cover domestic partnerships. If the goal was to prohibit recognition of *any*

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[67] *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283(2) (1971).

[68] *Compare* N.J. STAT. ANN. § 26:8A-6c (2011) ("A domestic partnership . . . entered into outside of this State, which is valid under the laws of the jurisdiction in which the partnership was created shall be valid in this State."), *with* NEV. REV. STAT. § 122A.500 (2011) (requiring any union "substantially equivalent" to a Nevada Domestic Partnership to be registered in Nevada in order to be recognized).

[69] *See* Gay & Lesbian Advocates & Defenders, *A Short History of the Defense of Marriage Act* (2009), http://www.glad.org/uploads/docs/publications/doma-short-history.pdf. In 1999, California passed its first domestic partner legislation. *See* Domestic Partnership Act of 1999, 1999 Cal. Stat. 588 (codified as amended in scattered sections of CAL. FAMILY CODE § 297, CAL. GOV. CODE § 22867, CAL. HEALTH AND SAFETY CODE § 1261). In 2000, Vermont was the first state to use existing marital law as a model to create a separate set of statutes defining the legal rights and responsibilities of same-sex couples to be joined in civil union. 2000 VT. ACTS & RESOLVES 91.

same–sex legal union for purposes of federal law, it seems that Congress would have used a more comprehensive term or phrase than the word "marriage." Congress made clear that spouses and domestic partners are not the same during debate involving the Family and Medical Leave Act of 1993 ("FMLA"), federal legislation enacted prior to DOMA.[70] When the Secretary of Labor published the final regulations concerning FMLA, he stated that the definition of "spouse" and the legislative history both precluded broadening the definition to include domestic partners in committed relationships, including same–sex relationships.[71] The most obvious reason for use of the word "marriage" is that Congress intended DOMA to be limited in scope. The purpose of DOMA was to protect the venerable institution of marriage, not to prohibit recognition of any and all same–sex legal unions.[72]

According to DOMA's legislative history, one of the governmental interests advanced by DOMA is the defense and nurturing of traditional, heterosexual marriage.[73] The word "traditional" is attached to the concept of marriage throughout DOMA's legislative history.[74] It certainly cannot be said that domestic partnerships are traditional or have been in America for two hundred years, so it would seem that domestic partnerships

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[70] Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2011). *See Defense of Marriage Act: Hearing on S. 1740 Before S. Comm. on the Judiciary*, 104th Cong. 5 (1996) [hereinafter HEARING] (statement of Sen. Don Nickles, Member, S. Comm. on the Judiciary) (discussing the importance of defining spouse for the Family and Medical Leave Act because of petitions to the Dep't of Labor to expand the definition to include unmarried partners, both same-sex and opposite sex).

[71] *See* 142 CONG. REC. S4,869 (1996) (introductory remarks of Sen. Nickles) ("Another example of why we need a Federal definition of the terms 'marriage' and 'spouse' stems from experience during debate on the Family and Medical Leave Act of 1993.").

[72] HEARING, *supra* note 70, at 10–11 (statement of Sen. Paul Simon, Member, S. Comm. on the Judiciary). Even proponents of DOMA advocated for some legal protection for same–sex couples with respect to hospital visitation and other similar rights. *Id.*

[73] *See supra* note 12.

[74] *See generally* HEARING, *supra* note 70.

were not within congressional purview at the time DOMA was enacted.[75] During the committee hearings, there was also frequent mention of the "preferred" status of marriage or marriage as a "preferred institution" with respect to a variety of laws.[76] It is difficult to imagine that domestic partnerships were viewed by Congress as a "preferred institution" deserving of "preferred" status, which would be the case if domestic partnerships were encompassed within the definition of marriage.

The Defense of Marriage Act was enacted in response to concerns about marriage.[77] The title of the legislation speaks for itself. The traditional institution of marriage was the key – not the legal rights and responsibilities of same–sex couples.[78] Marriage was the sole focus of Congress at the time DOMA was enacted, and consequently, Congress did not intend the word "marriage" to include domestic partnerships when Congress enacted DOMA.[79]

C. *Chevron* Analysis of the IRS Interpretation of the Defense of Marriage Act

The IRS decision not to apply DOMA to the federal income taxation of domestic partners should be respected because it represents a reasonable interpretation of a technical and complex statutory scheme that the agency is entrusted to administer.[80] A review of the statutory language and legislative history of

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[75] The House Report is replete with references to 200 years of American tradition and references to marriage as an "institution that is the keystone in the arch of civilization." *See supra* note 12, at 15.

[76] *See id.* at 30.

[77] *See supra* Part II. A. and B.

[78] *See supra* Part II. A. and B.

[79] *See supra* Part II. A. and B.

[80] *Chevron*, 467 U.S. at 843 n. 11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." (citations omitted)).

DOMA reveals that Congress did not intend the word "marriage" to include domestic partnerships.[81] Even if one were to disagree, it cannot be said that Congress clearly intended the word "marriage" to encompass domestic partnerships.[82] DOMA does not explicitly define the word "marriage" to include domestic partnerships, and its legislative history does not plainly indicate that the word "marriage" also refers to domestic partnerships.[83] At best, congressional intent is ambiguous with respect to this particular issue.[84] Under the *Chevron* standard, if congressional intent is not clear, agency interpretation of the language at issue should be respected so long as it is based on a reasonable construction of the statute.[85] Thus, the IRS decision not to apply DOMA to the federal income taxation of domestic partners should be respected because it is based on a permissible construction of the statute.[86]

D. Federal Court Interpretations of the Defense of Marriage Act

Courts have typically agreed that DOMA pertains to marriage and not domestic partnerships. *Smelt v. County of Orange, California*[87] and *Rabin v. Schoenmann*[88] are two federal court cases that consider the relationship between DOMA and domestic partnerships. In these cases, the Ninth Circuit held that DOMA has no bearing on domestic partners because domestic partnership is not identical to marriage and domestic partners are not spouses.

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[81] *See supra* Part II. A. and B.

[82] *See supra* Part II. A. and B.

[83] *See supra* Part II. A. and B.

[84] *See supra* Part II. A. and B.

[85] Nat'l Cable and Telecomm. Ass'n, 545 U.S. 967, 986 (2005).

[86] *Chevron*, 467 U.S. at 843 n. 11.

[87] Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006).

[88] *In re* Rabin v. Schoenmann, 359 B.R. 242 (B.A.P. 9th Cir. 2007).

Smelt v. County of Orange

In *Smelt*, the Ninth Circuit determined that a domestic partner does not constitute a married individual.[89] Therefore, domestic partners Arthur Smelt and Christopher Hammer lacked standing to challenge DOMA.[90] Smelt and Hammer were domestic partners in California who sought to marry.[91] At the time, California law prohibited same–sex marriage.[92] As a result, Smelt and Hammer brought suit against local and state officials who refused to issue the couple a marriage license.[93] Smelt and Hammer claimed that DOMA and the California statute prohibiting same–sex marriage violated sections of the federal Constitution.[94] Declining to decide the substantive issues before it, the Ninth Circuit ruled that Smelt and Hammer lacked the requisite standing to challenge DOMA,[95] reasoning that only married individuals have standing to challenge DOMA's Marriage Definition.[96]

In considering whether a domestic partner constitutes a married individual, the Ninth Circuit focused on three main points. First, no state had determined that Smelt and Hammer

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[89] *Smelt*, 447 F.3d at 682–86.

[90] *Id.* at 686.

[91] *Id.* at 676.

[92] CAL. FAM. CODE § 308.5 (2011) ("Only marriage between a man and a woman is valid or recognized in California."); *contra In re* Marriage Cases, 76 Cal.Rptr.3d 683, 765 (Cal. 2008) (holding that § 308.5 violates the California Constitution).

[93] *Smelt*, 447 F.3d at 676.

[94] *Id.* at 677 (The complaint "alleged that Section 3 of DOMA violates the 'liberty interests protected by the Due Process Clause'; discriminates 'on the basis of gender' and 'sexual orientation' in violation of equal protection; and violates 'the privacy interests protected by the Right to Privacy'.").

[95] *Id.* at 686.

[96] *Id.* at 683 ("Smelt and Hammer are not even married under any state law, or, for that matter, under the law of any foreign country . . . . We, therefore, do not see how they can claim standing to object to Congress's definition of marriage for federal statutory and regulatory purposes.").

were married under state law.[97] In fact, California state courts had ruled that a domestic partnership is *not* "a 'marriage' by another name."[98] Second, the mere presence of a legal relationship between two individuals does not necessarily equal a marriage.[99] For example, a cohabitation agreement between two people living together, a business partnership agreement between two individuals, and a corporation formed between two people do not equal a marriage even though they are also legal relationships.[100] Finally, the Ninth Circuit found no reason to treat a domestic partner unlike any other unmarried person.[101] Otherwise, the possibility existed for any citizen to challenge DOMA even though it minimally affected him or her.[102]

The Ninth Circuit stated that a domestic partnership is not "treated as a marriage" under DOMA's Full Faith and Credit Provision and a domestic partnership is not a "marriage" under DOMA's Marriage Definition.[103] As such, DOMA did not injure the couple or exclude them from some undefined benefit because DOMA has no bearing on domestic partners or anyone else who is not included within the definition of marriage.[104]

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[97] *Id.*

[98] Knight v. Superior Court, 26 Cal.Rptr.3d 687, 699 (Cal. Ct. App. 2005).

[99] *Smelt*, 447 F.3d at 684 ("Thus, the mere fact that Smelt and Hammer were in a kind of recognized legal relationship in California is not sufficient to confer standing upon them to attack Section 3 of DOMA on its face.").

[100] *Id.*

[101] *Id.* at 685. ("True, they are in a relationship, but their attack on DOMA in its multitude of applications is one that every taxpayer and citizen in the country could theoretically bring on the basis that the definition does not include some favorite grouping within its definition of marriage.").

[102] *Id.*

[103] *Id.* at 682–86.

[104] *Id.* at 683–84 ("It certainly is not a question of Congress's refusal to recognize *their* status." DOMA "does not purport to preclude Congress or anyone else in the federal system from extending benefits to those who are not included within that definition.").

Rabin v. Schoenmann

In *Rabin v. Schoenmann*, the Bankruptcy Appellate Panel acknowledged that, as domestic partners, Marla Rabin and Nanoshka Johnson were not married individuals.[105] Rabin and Johnson are two women who filed bankruptcy in California as domestic partners.[106] Each domestic partner filed a separate bankruptcy petition and each claimed an individual homestead exemption under California law.[107] The Trustee objected to the separate applications for homestead exemption and asserted that California law required Rabin and Johnson to be subject to the same rule as married persons.[108] In other words, the Trustee argued that a single homestead exemption must be shared between Rabin and Johnson in the same manner a single homestead exemption must be shared between spouses.[109]

Joint cases under the Bankruptcy Code may be filed by an individual with his or her spouse.[110] Since domestic partners are not spouses because they are not married individuals, the Bankruptcy Appellate Panel did not entertain the notion that joint filing should be permitted.[111] Instead, the Bankruptcy Appellate Panel engaged in a separate, substantive analysis of the statutory law defining the legal rights and responsibilities of domestic partners to determine the appropriate homestead

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[105] Rabin v. Schoenmann, 359 B.R. 242, 248 (B.A.P. 9th Cir. 2007) ("Noting that there are a number of differences between the 'status' of a married couple and registrants under the DPRRA, the [state] Court held that the two are not identical." (discussing Knight v. Super. Ct., 26 Cal.Rptr.3d 687 (Cal. Ct. App. 2005))).

[106] *Id.*

[107] *Id.* at 244.

[108] *Id.* at 243.

[109] *Id.* at 246. *Accord* CAL. CIV. PROC. § 703.110(a) (establishing that "two spouses together are entitled to one exemption").

[110] BANKRUPTCY CODE § 302, 11 U.S.C. § 302 (2011).

[111] *Rabin*, 359 B.R. at 247 ("Bankruptcy Code section 302 does indeed limit joint filings . . . to married people as a matter of federal law . . . .").

exemption for domestic partners.[112] DOMA had no bearing on the couple because the Bankruptcy Appellate Panel concurred that domestic partnership is not identical to marriage and domestic partners are not spouses.[113]

The plain language and legislative history of DOMA do not support DOMA's application to domestic partnerships or any other legal union that is not marriage, and Ninth Circuit decisions uniformly hold that domestic partnerships do not constitute marriage and domestic partners are not spouses.[114] Therefore, the IRS got it right: DOMA has no bearing on the federal income taxation of domestic partners.

III. Same-Sex Married Couples Should Calculate Income for Federal Income Tax Purposes in the Same Manner As Heterosexual Married Couples

Each heterosexual married person domiciled in a community property state must report one-half of the community (household) income as his or her respective income for federal income tax purposes, even if such person did not actually earn any of the income.[115] It is well settled that the earnings of either spouse acquired during the marriage, whether received in the form of compensation for personal services or income from property, constitute community income.[116] The IRS has instructed each same-sex married person domiciled in California to calculate income for federal income tax purposes in the same

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[112] *Id.* at 245–46.

[113] *Id.* at 248 ("Wherever the line may be drawn by California's courts between marital status on one hand, and the economic rights and liabilities of couples on the other, we hold that application of the homestead exemption statute clearly falls in the latter category.").

[114] *See supra* Part II.

[115] *See* Poe v. Seaborn, 282 U.S. 101, 108 (1930); United States v. Malcolm, 282 U.S. 792, 793–94 (1931); COMMUNITY PROPERTY, *supra* note 25.

[116] State Bd. of Equalization v. Woo, 98 Cal. Rptr. 2d 206, 208 (Cal. Ct. App. 2000); *accord* COMMUNITY PROPERTY, *supra* note 25.

manner as a heterosexual married person.[117] These instructions, stipulated in an IRS publication, have not yet become the subject of much debate, but this Article contends that the IRS is correct to require each same-sex married person to report one-half of the community income as his or her respective income for federal income tax purposes. DOMA does not change determinations of ownership and ownership determined pursuant to state law controls the taxability of income.[118] A substantive analysis of the rights provided to the two individuals who comprise a same–sex marriage reveals that such individuals do indeed possess substantial rights under state law evidencing an *equal* ownership interest in community income.[119]

A. Income is Calculated for Federal Income Tax Purposes Based on Ownership Determined Pursuant to State Law

Federal taxation of income is based on principles of ownership determined pursuant to state law.[120] Marriage is not the determinant factor.[121] In an earlier article, I analyzed contemporary and historic marital cases and discovered that ownership, not marriage, drives the federal taxation of income.[122] *Blair v. Comm'r*[123] and *Group No. I Oil Corp. v.*

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[117] *See* COMMUNITY PROPERTY, *supra* note 25 ("[A] person in California who is married to a person of the same sex generally must report half the combined community income earned by the individual and his or her same–sex spouse.").

[118] *See infra* Part III. A.

[119] *See* CAL. FAM. CODE § 751 (2011) ("The respective interest of [each spouse] in community property during continuance of the marriage relationship are present, existing, and equal interests."). Earnings, income, or receipts that are considered community property pursuant to state law are also by definition community income. *See id.* § 760 (2011).

[120] *See* I.R.C. § 61 (2011).

[121] *Id.*

[122] Terry, *supra* note 6, at 640–46.

[123] Blair v. Comm'r, 300 U.S. 5 (1937).

Bass[124] are two Supreme Court cases that examine the federal taxation of income outside the context of marriage, and both cases provide early precedent for the fundamental federal income tax principle that ownership determined based on state law controls the taxability of income.

Blair v. Commissioner of Internal Revenue

Blair provides an early illustration of the now well established principle that federal income tax liability follows ownership determined pursuant to state law.[125] During his life, Mr. Blair was to receive all of the net income of property held in trust.[126] In 1923, Mr. Blair assigned an interest in the trust income to his daughter.[127] Mr. Blair made like assignments of interests in the trust income to another daughter and to his sons at about the same time and also in subsequent years.[128] As a result of these assignments, the trustees distributed the trust income directly to Mr. Blair's children, who paid the tax on such income.[129] The IRS protested and ruled that the trust income was taxable to Mr. Blair rather than his children.[130]

Blair presented a question about the liability for federal income tax upon trust income that a beneficiary had assigned to his children and that the trustees paid directly to such assignees.[131] To answer this question, the Court clearly stated

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[124] Grp No. I Oil Corp. v. Bass, 283 U.S. 279 (1931).

[125] Blair v. Comm'r, 300 U.S. 5 (1937).

[126] *Id.* at 7.

[127] *Id.* ("[P]etitioner assigned to his daughter, Lucy Blair Linn, an interest amounting to $6,000 for the remainder of that calendar year, and to $9,000 in each calendar year thereafter, in the net income which the petitioner was then or might thereafter be entitled to receive during his life.").

[128] *Id.*

[129] *Id.* ("The trustees accepted the assignments and distributed the income directly to the assignees.").

[130] Blair, 300 U.S. at 7.

[131] *Id.*

that the "one who is to receive the income as the owner of the beneficial interest is to pay the tax."[132] Because "tax liability attaches to ownership,"[133] the question of liability rested on whether Mr. Blair continued to own the beneficial interest even after he had assigned such interests to his children.[134]

The Court further stated that "[t]he question of the validity of the assignments is a question of local law."[135] State law determines the validity of the assignments, and hence, the owner of the beneficial interest.[136] The Illinois state court found the assignments to be valid voluntary assignments of parts of Mr. Blair's interest in the trust income.[137] Mr. Blair was no longer the sole owner of the beneficial interest in the trust income.[138] Instead, the assignees, his children, were now owners of the specified beneficial interests in the trust income.[139]

The Court concluded that because the assignments were valid according to Illinois law, the assignees became the owners

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[132] *Id.* at 12.

[133] *Id.*

[134] *Id.* ("If under the law governing the trust the beneficial interest is assignable, and if it has been assigned without reservation, the assignee thus becomes the beneficiary and is entitled to rights and remedies accordingly.").

[135] *Id.* at 9.

[136] *Blair*, 300 U.S. at 9–10 ("By that [Illinois] law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined. The decision of the state court upon these questions is final.").

[137] *Id.* at 10 ("The point of the [Government's] argument is that, the trust being of that character [a spendthrift trust], the state law barred the voluntary alienation by the beneficiary of his interest. The state court held precisely the contrary. The ruling also determines the validity of the assignment by the beneficiary of parts of his interest. That question was necessarily presented and expressly decided.").

[138] *Id.*

[139] *Id.*

of the specified beneficial interests in the trust income.[140] And because the assignees, Mr. Blair's children, were the owners of the specified beneficial interests in the trust income, Mr. Blair's children were taxable for such trust income for the years in question.[141]

Group No. I Oil Corporation v. Bass, Collector of Internal Revenue

Group No. I Oil Corp. serves as a foundation for the long standing rule that "state law controls in determining the nature of the legal interest which the taxpayer [has] in the property or income sought to be reached by the [federal income tax] statute."[142] Group No. I Oil Corporation leased land from the state of Texas.[143] In exchange for the land leases, Group No. I was required to pay the state of Texas royalties from the sale of oil and gas located on the land.[144] Group No. I challenged the federal taxation of the income it derived from the sale of oil and gas.[145] Specifically, Group No. I contended that the leases were "instrumentalities of the state" and therefore any income derived from such leases was "constitutionally immune" from taxation by the federal government.[146]

Property owned by a state government, as well as the income derived from such property, may not be taxed by the

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[140] *Id.* at 14.

[141] *Blair*, 300 U.S. at 14.

[142] Grp. No. I Oil Corp. v. Bass, 283 U.S. 279 (1931); *see also* Morgan v. Comm'r, 309 U.S. 78, 82 (1940).

[143] *Id.* at 281.

[144] *Id.* at 281–82.

[145] *Id.* at 280.

[146] *Id.* ("[Petitioner] set up that in those years it received income derived from the sale of oil and gas produced under leases to it by the state of Texas; that these leases were instrumentalities of the state for the development of its public domain; and that petitioner's income derived from them was constitutionally immune from the tax as one imposed by the federal government on an instrumentality of the state.").

federal government.[147] Texas law, however, characterizes an oil and gas lease as a present sale of all oil and gas located on the land.[148] To determine the legality of the federal income tax, the Court had to decide whether to respect the state law characterization of ownership when evaluating whether the oil and gas were no longer property owned by the state of Texas after the leases were executed.[149] If the oil and gas were no longer owned by the state of Texas after the leases were executed, then it was proper for the federal government to tax Group No. I on any income derived from the sale of oil and gas abstracted from the leased lands.[150]

To determine ownership, the Court applied the settled rule of the state with respect to oil and gas leases.[151] Thus, as a matter of Texas law, the interest that passed to Group No. I was characterized as an ownership interest.[152] Therefore, when the leases were executed, the oil and gas ceased to be property owned by the state of Texas.[153] As a result, Group No. I was

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[147] *Id.* at 282.

[148] *Grp. No. 1 Oil Corp.*, 283 U.S. at 281 ("Leases of university lands like those of petitioner have been held by [the highest court of the state of Texas] to be . . . present sales to the lessees, upon execution of the leases, of the oil and gas in place.").

[149] *Id.* at 282–83.

[150] *Id.* at 283 ("Property which has thus passed from either the national or a state government to private ownership becomes a part of the common mass of property and subject to its common burdens. Denial to either government of the power to tax it, or income derived from it . . . would be an encroachment on the sovereign power to tax, not justified by the implied constitutional restriction.").

[151] *See id.* at 281–82. *See also* Burnet v. Harmel, 287 U.S. 103, 109–10 (1932) ("Whether the title had so passed was a question of state law . . . ." (discussing *Group No. 1 Oil Corp.*)).

[152] *Grp. No. 1 Oil Corp.*, 283 U.S. at 283.

[153] *Id.*

rightfully taxed for income derived from the sale of oil and gas.[154]

Ownership determined pursuant to state law controls the taxability of income.[155] DOMA does not alter this fundamental federal income tax principle. Because state law provides that each same–sex married person has an *equal* ownership interest in community income,[156] each same–sex married person domiciled in a community property state should be required to report one–half of the community income as his or her respective income for federal income tax purposes, whether received in the form of income from property or compensation for personal services.[157]

B. Income from the Performance of Services May be Taxable to Someone Other than the Service Provider

Federal income tax principles generally dictate that compensation for personal services, such as salaries or wages, is taxed exclusively to the individual who provides the service.[158] Yet, the IRS treats income earned by spouses individually as part of the general earnings of the marital unit, taxable to both spouses with each spouse taxed for exactly one–half of all

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[154] *Id.* at 282–83 ("This Court has consistently held that, where property or any interest in it has completely passed from the government to the purchaser, he can claim no immunity from taxation with respect to it, merely because it was once government owned, or because the sale of it effected some government purpose.").

[155] *See supra* Part III. A.

[156] *See* CAL. FAM. CODE § 751 (2011) ("The respective interest of [each spouse] in community property during continuance of the marriage relationship are present, existing, and equal interests."). Earnings, income, or receipts that are considered community property pursuant to state law are also by definition community income. *See id.* § 760 (2011).

[157] *See* COMMUNITY PROPERTY, *supra* note 25 ("[A] person in California who is married to a person of the same sex generally must report half the combined community income earned by the individual and his or her same–sex spouse.").

[158] *See generally* Lucas v. Earl, 281 U.S. 111 (1930).

community income.[159] This methodology mirrors the treatment of income earned in the business partnership context,[160] and thus, precedent about partnership taxation is useful in evaluating the proper federal income tax treatment of community income. *Schneer v. Comm'r*[161] and *Bufalino v. Comm'r*[162] are two Tax Court decisions that provide precedent for the taxation of income from the performance of services to someone other than the service provider.

Schneer v. Commissioner of Internal Revenue

Schneer confirms that a partnership agreement, in which partners agree in advance to turn over to the partnership all income from their individual efforts, can survive scrutiny under the assignment of income principles articulated in *Lucas v. Earl*.[163] Mr. Schneer was a practicing attorney during 1984 and 1985, the tax years in question.[164] As a condition of joining the partnership of a new law firm, Mr. Schneer agreed to turn over to the partnership all legal fees received by him, regardless of whether the fees were earned in the partnership's name or by Mr. Schneer in his individual capacity.[165] The critical question decided in *Schneer* is whether such legal fees, when earned in his individual capacity, are taxable to Mr. Schneer individually or includible as part of the general earnings of the partnership, and thus, taxable to *all* partners based on each partner's distributive share of partnership income.[166]

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[159] *See* sources cited *supra* note 115.

[160] *See* United States v. Basye, 410 U.S. 441, 449 (1973) (acknowledging that a partnership can, as an entity, earn income for purposes of calculating each partner's distributive share of partnership income).

[161] Schneer v. Comm'r, 97 T.C. 643 (1991).

[162] Bufalino v. Comm'r, 35 T.C.M. (CCH) 494 (1976).

[163] Schneer v. Comm'r, 97 T.C. 643, 662 (1991).

[164] *Id.* at 644.

[165] *Id.* at 645.

[166] *Id.* at 644.

After joining the partnership of his new law firm, Mr. Schneer continued to provide legal advice to the clients of his former employer.[167] In exchange for the services he provided, Mr. Schneer received legal fees from his former employer in his individual capacity.[168] In accordance with the partnership agreement at his new law firm, Mr. Schneer turned over to the partnership all legal fees received by him from his former employer, and the partnership included such fees in the general earnings of the partnership.[169] The legal fees from his former employer were generated from services performed exclusively by Mr. Schneer.[170] Yet, all partners at his new law firm were taxed on some portion of the legal fees earned by Mr. Schneer based on each partner's distributive share of partnership income.[171]

The IRS challenged this tax treatment and asserted that the legal fees should be taxed exclusively to Mr. Schneer because the legal fees were earned in his individual capacity and not on behalf of the partnership.[172] Moreover, Mr. Schneer alone provided all of the services that generated the legal fees.[173] Citing *Lucas v. Earl*, the IRS maintained that income from

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[167] *Id.* at 645–46 ("During 1984 and 1985, BSI [Mr. Schneer's former employer] remitted $21,329 and $10,585 to petitioner. The amounts represented petitioner's percentage of fees from BSI clients that he had referred to BSI at a time when he was an associate with BSI. With the exception of $1,250 for the 1984 taxable year, all of the fees received during 1984 and 1985 were for work performed after petitioner left BSI.").

[168] *Id.*

[169] *Schneer*, 97 T.C. at 646 ("Petitioner . . . turned those amounts over to the [partnership which] in turn treated the amounts as partnership income . . . .").

[170] *Id.* at 645–46.

[171] *Id.* at 646 ("[T]he law firm partnership] treated the amounts as partnership income which was distributed to each partner (including petitioner) according to the partner's percentage share of partnership profits.").

[172] *Id.* at 652 ("According to respondent, petitioner should not be allowed to characterize as partnership income fees that did not have a requisite or direct relationship to a partnership's business.").

[173] *Id.* at 645–46.

services should be taxable to the individual who provides the services and should not be taxable to a partnership to which such individual assigns the income.[174] In *Lucas v. Earl*, the seminal case regarding assignment of income, the Supreme Court held that a husband–taxpayer's legal practice was entirely taxable to him, even though he and his wife had entered into a valid contract to split all income earned by each of them.[175] The performance of services by Mr. Earl generated all of the income in question.[176] The Supreme Court reasoned that Mr. Earl had earned all of the income, and therefore, he alone owed tax on all of the earned income.[177] The subsequent assignment of one–half of the income to his wife by virtue of a voluntary contractual agreement did not disturb the taxability of that income to Mr. Earl at the moment that it was earned.[178]

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[174] *Schneer*, 97 T.C. at 647–48.

[175] Lucas v. Earl, 281 U.S. 111, 114 (1930).

[176] *Id.*

[177] *Id.*

[178] *Id.* at 114–15 ("There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us . . . .").

This challenge from the IRS called into question "the viability of the principle that partners may pool their earnings and report partnership income in amounts different from their contribution to the pool."[179] The Code does not specifically address the treatment of income earned by partners in their individual capacity.[180] Nevertheless, Congress intended there to be pooling of income in a partnership setting, as it is essential to the meaningful existence of a partnership.[181] A partnership is defined as an association of persons joined with others in business, sharing its risks and profits.[182] Each partner contributes something of value to the partnership for all partners to share and enjoy.[183] In exchange, each partner is taxed on his or her proportionate share of the *collective* income or loss earned by all partners.[184]

In *Schneer*, the Tax Court embraced the essence of partnership taxation and adopted an entity approach.[185] Under an entity approach, income earned in a partner's individual capacity would be considered income of the partnership rather than that of the partner, as long as the income is of a type normally earned

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[179] *Schneer*, 97 T.C. at 646.

[180] *Id.* at 657 ("No section of [the Code] nor the legislative history specifically addresses the treatment of income earned by partners in their individual capacity but which is pooled with other partnership income.").

[181] *Id.* at 657 ("It is implicit in subchapter K [of the Code], however, that the pooling of income and losses of partners was intended by Congress.").

[182] *See* Dictionary.com, Partnership, http://dictionary.reference.com/browse/partnership (last visited Sept. 20, 2010); Dictionary.com, Partner, http://dictionary.reference.com/browse/partner (last visited Sept. 20, 2010).

[183] *See* 68 C.J.S. *Partnership* § 107 (2011).

[184] *See* STEPHEN LIND ET. AL., FUNDAMENTALS OF BUSINESS ENTERPRISE TAXATION 112 (4th ed. 2008).

[185] *See Basye*, 410 U.S. at 449 (acknowledging that a partnership can, as an entity, earn income.)

by the partnership.[186] If the partnership is treated as the entity earning the income, assignment of income principles do not come into play.[187] Therefore, it is appropriate to treat income earned by partners individually as part of the general earnings of the partnership, taxable to all partners based on each partner's distributive share of partnership income.[188]

By analogy to *Schneer*, it is appropriate for the IRS to treat income earned by spouses individually as part of the general earnings of the marital unit (the community), taxable to both spouses based on each spouse's equal ownership interest in community income. Certainly, state law treatment of earned income should be respected for federal income tax purposes, if voluntary contractual partnership agreements calling for the same treatment are respected for federal income tax purposes.

Bufalino v. Commissioner of Internal Revenue

Bufalino confirms that payments made to a partnership for services rendered primarily by one partner are includable in the income of the partnership rather than directly in the income of the partner.[189] Mr. Bufalino and his cousin Angelo formed a partnership called ABS Contracting Company ("ABS Partnership") to engage in business in the garment industry.[190] Many families choose to operate businesses through family partnerships. Although there was no formal, written partnership agreement, Mr. Bufalino and his cousin Angelo were 50%

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[186] *Schneer*, 97 T.C. at 658–662 ("This is the very essence of a professional service partnership, because each partner, although acting individually, is furthering the business of the partnership.").

[187] *Id.* at 658–661 ("The business entity is cast as the earner of the income, obviating the need to analyze whether there has been an assignment of income.").

[188] *Id.* at 662. *See also* Rev. Rul. 64-90, 1964-1 C.B. 226 (holding that "fees received by a partner for similar services performed in his individual capacity will be considered as partnership income if paid to the partnership in accordance with the [partnership] agreement.").

[189] Bufalino v. Comm'r, 35 T.C.M. (CCH) 494 (1976).

[190] *Id.* at 495.

partners, sharing equally both ABS Partnership profits and losses.[191] During the tax years in question, ABS Partnership distributed income received from Fairfrox, a dress manufacturing business, equally to both partners based on their 50% distributive share of partnership income.[192] The IRS objected and sought to impose federal income tax on Mr. Bufalino alone for the entire amount paid by Fairfrox to ABS Partnership.[193] The IRS argued that because Mr. Bufalino was the service provider whose service had generated these payments, he should be taxed exclusively on the income from Fairfrox.[194] The key question decided in *Bufalino* was whether payments made to a partnership for services rendered by one partner are includable in the income of the partnership, and thus, taxable to all partners based on each partner's distributive share of partnership income, or whether such payments are includable only in the income of the partner who provided the services that generated the income.[195]

Prior to the formation of ABS Partnership, Fairfrox engaged Mr. Bufalino individually to locate cutting and sewing shops to which Fairfrox could send its dress material.[196] At that time, Fairfrox made regular payments directly to Mr. Bufalino for his services.[197] After ABS Partnership was formed, however, Fairfrox made payments for the same services provided by Mr. Bufalino to ABS Partnership at Mr. Bufalino's direction.[198] The IRS adjusted the partnership income of ABS Partnership because

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[191] *Id.*

[192] *Id.* at 496.

[193] *Id.*

[194] *Bufalino*, 35 T.C.M. (CCH) at 496.

[195] *Id.* at 497.

[196] *Id.* at 495.

[197] *Id.* at 495–96.

[198] In 1969 and 1970, the tax years in question, Fairfrox made payments of $10,400 and $10,950 to ABS Partnership at the direction of Mr. Bufalino. *Id.* at 495.

the IRS determined the amounts received from Fairfrox constituted income earned by Mr. Bufalino in his individual capacity and were improperly reported by ABS Partnership as partnership income.[199]

In *Bufalino*, the Tax Court focused its analysis on whether the payments from Fairfrox related to activities within the ambit of the partnership business.[200] Receipts derived from activities or transactions incident to the conduct of the business of the partnership constitute income to the partnership, not to the individual partner.[201] During the tax years in question, the services that Mr. Bufalino provided to Fairfrox comprised part of the business of ABS Partnership.[202] At the inception of ABS Partnership, Mr. Bufalino's business arrangement with Fairfrox was contributed to ABS Partnership, and thereafter, was included in the composite of activities that comprised the business of ABS Partnership.[203] The mere fact that Mr. Bufalino was the service provider does not alter the characterization of the services as activities incident to the conduct of the business of the partnership.[204] Consequently, the Tax Court held that the amounts paid by Fairfrox to ABS Partnership constituted income to ABS Partnership, and therefore, should be included in the computation of Mr. Bufalino's and his cousin Angelo's distributive share of partnership income.[205]

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[199] *Id.* at 496.

[200] *Bufalino*, 35 T.C.M. (CCH) at 497 ("In essence, respondent's position is that the income in issue was earned by petitioner in his individual capacity from activities outside the scope of the partnership business . . . .").

[201] *Id.* at 498.

[202] *Id.* ("[T]he business of ABS included the arrangement with Fairfrox.").

[203] *Id.*

[204] *Id.*

[205] *Id.*

The Internal Revenue Service endorsed this Tax Court decision in one of its revenue rulings four years after the *Bufalino* decision.[206] Revenue Ruling 80-338 describes a partner in an accounting firm who was appointed executor of an estate in a state whose laws prohibit a partnership from serving as executor.[207] The accounting firm required that its partners obtain permission from the partnership before engaging in business activities not directly related to the business of the partnership.[208] The partnership granted permission to accept the appointment, provided the fees received in connection with the appointment were turned over to the partnership.[209] The IRS ruled that the fees were partnership income that did not require separate reporting by the partner on his individual return.[210] However, the partner's distributive share of partnership income, which he had to report on his individual return, included a portion of such fees.[211]

Citing *Bufalino*, the IRS reasoned that as long as the source of the income earned by a partner has a business nexus with the partnership, the income is included in the partnership's taxable income and excluded from the taxable income of the partner who received it.[212] Fees received by a partner for similar services performed in his individual capacity will be considered partnership income if the services bear any relation to the business of the partnership.[213] The IRS explained that the services provided by the partner as an executor depend on the partner's expertise and are similar to the services provided by the partner to the accounting firm, resulting in a business nexus with

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[206] Rev. Rul. 80-338, 1980-2 C.B. 30.

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id*

[211] Rev.Rul. 80-338, 1980-2 C.B. 30.

[212] *Id. Accord* Bufalino v. Comm'r, 35 T.C.M. (CCH) 494, 498 (1976).

[213] *Bufalino*, 35 T.C.M. (CCH) at 498.

the partnership.[214] Compensation for the services provided by the partner as an executor is partnership income, although derived from services performed by the partner in his individual capacity.[215] Therefore, under certain circumstances, it is appropriate to treat income earned by partners individually as part of the general earnings of the partnership, taxable to *all* partners based on each partner's distributive share of partnership income.[216]

Partnership taxation provides a strong foundational analogy for determining the proper federal income tax treatment of community income received in the form of compensation for personal services. Community property states view the marital unit as the entity earning the community income even though individual members of the marital unit may perform the services that generate such income.[217] State law treatment of earned income should be respected for federal income tax purposes in the same way voluntary contractual partnership agreements are respected for federal income tax purposes.[218] Income from the performance of services may be taxable to someone other than the service provider.[219] Therefore, the IRS is correct to treat income earned by spouses individually as part of the general earnings of the marital unit, taxable to both spouses based on each spouse's equal ownership interest in community income.[220]

Each same-sex married person domiciled in a community property state should report one-half of the community income as his or her respective income for federal income tax

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[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *See* sources cited *supra* note 115.

[218] *See supra* Part III. B.

[219] *See supra* Part III. B.

[220] *See* COMMUNITY PROPERTY, *supra* note 25.

purposes.[221] Ownership determined pursuant to state law controls the taxability of income.[222] DOMA does not alter this fundamental federal income tax principle or change determinations of ownership. A substantive analysis of the rights provided to the two individuals who comprise a same-sex marriage reveals that such individuals do indeed possess substantial rights under state law evidencing an *equal* ownership interest in community income.[223] Income from the performance of services and income from property both constitute community income taxable to both spouses based on each spouse's equal ownership interest in community income.[224] Therefore, the IRS got it right: Same-sex married couples should calculate income for federal income tax purposes in the same manner as heterosexual married couples.

CONCLUSION

DOMA's Marriage Definition, 1 U.S.C. § 7, should be repealed. DOMA was heralded as legislation beneficial to traditional, heterosexual marriage. Yet, DOMA creates economic inequities for heterosexual couples such that many married heterosexual couples pay *more* federal income tax than same-sex married couples and domestic partners who earn identical incomes.[225] DOMA does not preclude the federal income tax disparity between domestic partners and heterosexual married couples that currently exists under federal income tax laws,[226]

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[221] *See* COMMUNITY PROPERTY, *supra* note 25 ("[A] person in California who is married to a person of the same sex generally must report half the combined community income earned by the individual and his or her same-sex spouse.").

[222] *See supra* Part III. A.

[223] *See* CAL. FAM. CODE § 751 (2011) ("The respective interest of [each spouse] in community property during continuance of the marriage relationship are present, existing, and equal interests."). Earnings, income, or receipts that are considered community property pursuant to state law are also by definition community income. *See id.* § 760 (2011).

[224] *See* cases cited *supra* note 115.

[225] *See supra* Tables 1 and 2.

[226] *See supra* Part II.

but it does compel disparate federal income tax liabilities between married same-sex and heterosexual couples, often to the detriment of heterosexual couples.[227] Thus, DOMA's harmful effects are broader than what has been discussed in the mainstream media. The interest same-sex couples have in achieving recognition for purposes of federal law may be accommodated because their interest converges with the interest heterosexual married couples have in not paying more federal income tax than their same-sex counterparts.[228]

DOMA causes economic burdens at the federal level as well as the state level. DOMA contributes to our federal budget deficit by denying federal revenues that would be available were DOMA not in existence.[229] State budgets may also be adversely affected by DOMA as it creates additional costs for many state taxing authorities. States that recognize same-sex marriage and domestic partnerships are significantly disadvantaged due to the additional expenditures necessary for tax compliance purposes to reconcile the disparity between federal income tax returns, which do not permit same-sex married couples and domestic partners to file jointly, and state income tax returns, which often mandate just the opposite. The ultimate consequence is that these additional expenditures must be absorbed by *all* citizens. Contrary to federalist principles and the balance of authority between state and federal governments, the additional costs incurred by many state taxing authorities may lead some to argue that the federal government actually penalizes states for choosing to recognize same-sex marriage and domestic partnerships.

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[227] *See supra* Part III.

[228] Some scholars have cautioned against reliance on the interest convergence theory. *See, e.g.*, Shalanda Baker, *Telling: Living with "Don't Ask, Don't Tell,"* 57 J. Legal Educ. 187, 193 (2007) ("I disagree with this as a principle of advocacy going forward, because once the interests of the minority and majority diverge, minorities are often left with a rights vacuum.")

[229] BUDGETARY IMPACT, *supra* note 15.

In addition, DOMA violates the principle of equal treatment of married couples. "According to the principle of equal treatment, married couples who have equal incomes should pay the same income taxes."[230] Table 2 confirms that same–sex married couples and heterosexual married couples do not pay the same federal income taxes even when they have equal incomes. Because same–sex married couples are treated as *un*married persons for purposes of federal law,[231] DOMA blatantly exposes the marriage tax penalty and possibly discourages traditional, heterosexual marriage in the process.

The discriminatory nature of DOMA creates inequity in the system. The elimination of discriminatory provisions that cause heterosexual married persons to pay *more* federal income tax than their same–sex counterparts might just be the mutually beneficial interest to prompt Congress to recognize same–sex legal unions. The repeal of DOMA's Marriage Definition is the first step necessary to restore equity, not only on behalf of same–sex couples, but also for the benefit of heterosexual couples as well.[232]

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[230] CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 2 (1997).

[231] *See* DOMA's Marriage Definition, *supra* note 7.

[232] It appears that support for change may be growing. The President recently directed the Department of Justice to stop defending DOMA's Marriage Definition. *See* Letter from Eric Holder, U.S. Att'y Gen., to John Boehner, Speaker of the H.R. (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html (informing Speaker Boehner of President Obama's instruction to the Dep't of Justice to no longer defend DOMA's Marriage Definition).

COLUMBIA JOURNAL OF GENDER AND LAW

Issue 20.2

The spacious home of today's feminist movement.

The *Columbia Journal of Gender and Law* (*JGL*) is published by students at Columbia University School of Law, 435 West 116th Street, New York, New York, *10027. General correspondence should be directed to this address.*
Web address: http://www.columbia.edu/cu/jgl/index.html
E-mail: jmgen@law.columbia.edu

Subscriptions: Subscriptions are $65 per volume for institutions, $50 per volume for public interest organizations, $40 per volume for individuals, and $20 per volume for current students. For international subscribers, please add $10. Individual issues may be purchased for $15, subject to availability.
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