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ONE SMALL STEP FOR FEDERAL TAXATION, ONE  
GIANT LEAP FOR SAME-SEX EQUALITY: REVISING §  
2702 OF THE INTERNAL REVENUE CODE TO APPLY  
EQUALLY TO ALL MARRIAGES

I. THE STORY OF JAMES AND JONATHAN

James and his twin brother, Jonathan, have done almost everything together in life. They attended college together, followed by law school together, and they are now very successful partners in the same large law firm. The brothers commute into the city together every day from the New Jersey suburban community where each brother bought a beautiful home. James and Jonathan even got married during the exact same month—though at different weddings—and, coincidentally, each of them married a physician. Both couples earn an equivalent combined annual income. Both couples want to adopt children, as James’s wife is unable to bear children. The two couples even took a celebratory vacation together to commemorate their ten-year anniversaries. James and Jonathan live uncannily similar lives in almost every way. In fact, the only major distinction between James and Jonathan’s lives is that James married a woman, Danielle, whereas Jonathan entered into a civil union with a man, Daniel.

When tragedy strikes during an icy, early morning commute, both James and Jonathan die in a highway accident—fitting that they would die together. In addition to two distraught spouses, the brothers leave behind a small fortune, which James and Jonathan bequeath to Danielle and Daniel, respectively. Their upscale New Jersey homes have appreciated in value and are now worth \$4,000,000 each. The beach house that James and Jonathan’s parents gave to the twins three decades before is now valued at \$4,000,000. In addition, each brother had substantial savings and investments totaling \$2,000,000.

A few months after the joint funeral, Danielle and Daniel finally consult with an attorney to discuss estate taxes and their responsibilities as widow and widower. The attorney assures Danielle that she has nothing to worry about: everything that James owned is now hers, and she owes no taxes whatsoever. Daniel, on the other hand, is not so secure.

The attorney explains to Daniel that, under federal law, he and Jonathan were legal strangers. Their marriage was not recognized, and for tax purposes he was never Jonathan’s spouse. As Daniel expresses sadness at the fact that his ten-year marriage is not only over, but, in a sense, never existed, the attorney tells him *that* should be the least of his worries. There is more bad news to come.

Because Jonathan’s parents were not accepting of their son’s sexual orientation, there may be a will contest, in which case a court will determine if

Daniel receives what Jonathan explicitly left to him in his last will and testament. Even if the will contest is resolved in Daniel's favor, the estate taxes he will owe could be financially devastating. Questions arise as to whether Jonathan and Daniel truly co-owned their home, since Daniel was finishing his residency and was making no income when the couple supposedly purchased the home. Even if Daniel is found to have paid for half of the home, the transfer of the other half of the home will result in high taxes to Jonathan's estate, as will the transfer of one-half of the beach house and all of Jonathan's other assets. In the end, Jonathan's estate will have transferred \$5,000,000 to Daniel. This means that even after deductions, exclusions, and the estate tax unified credit,<sup>1</sup> Jonathan's estate (i.e., Daniel) is likely to owe the Internal Revenue Service over \$1,000,000 in federal estate tax alone.<sup>2</sup> The estate will also have to pay state inheritance taxes. Meanwhile, Danielle will not have to pay one cent of federal estate tax from James's estate.

The only good news comes when the attorney remembers that several years ago Jonathan placed \$1,000,000 of his assets in a special trust, called a grantor retained income trust, with Daniel as the sole beneficiary. Jonathan technically owed gift taxes for transferring this trust to Daniel, but he used his gift tax unified credit and did not pay any taxes out of pocket.<sup>3</sup> Meanwhile, Jonathan manipulated the trust so that while he gained almost no income from it, the trust property appreciated to twice its original value, leaving Daniel with \$2,000,000 in assets, a transfer for which Jonathan already paid federal tax. In this way, Jonathan decreased his estate's tax liability significantly by transferring \$1,000,000 tax free.

This Comment discusses the great disparity in tax treatment between James's estate and Jonathan's estate—heterosexual married couples' estates and same-sex married couples' estates.<sup>4</sup> Many provisions of the wealth transfer tax system treat same-sex married couples very differently than opposite-sex married couples.<sup>5</sup> While Congress enacted the wealth transfer taxation provisions of the Internal Revenue Code in order to generate revenue, many

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1. I.R.C. § 2010 (2006).

2. The tax imposed on a transfer of \$5,000,000 (minus the I.R.C. § 2010 unified credit of \$2,000,000) will amount to \$1,025,800, plus fifty percent of any excess over the amount of \$2,500,000. *Id.* § 2001(c). On the \$3,000,000 (post-unified credit) transfer, the estate will owe \$1,025,800 plus fifty percent of \$500,000, which totals \$1,275,800. This hypothetical does not account for deductions against Jonathan's estate, such as funeral costs and legal fees.

3. *Id.* § 2505 (allowing each taxpayer to transfer up to \$1,000,000 free of tax).

4. This Comment uses the terms "same-sex couples" and "same-sex married couples" interchangeably to refer to gay and lesbian couples that have officially entered into legal marriages, civil unions, or domestic partnerships under state law. For the sake of both simplicity and respect for these couples' commitments, this Comment does not distinguish between one form of commitment and another, as many same-sex couples who enter into domestic partnerships or civil unions would gladly enter into marriages if given the option. See *infra* Part II.C.2 for an overview of the status of same-sex marriage in several states.

5. See *infra* Part II.B for a discussion of several provisions that give preference to heterosexual spouses.

provisions were also motivated by public policy goals.<sup>6</sup> This Comment addresses policy-driven provisions that focus on the family as an economic unit, specifically the unlimited marital deduction,<sup>7</sup> unlimited marital gift provision,<sup>8</sup> the family farm provision,<sup>9</sup> the small business provision,<sup>10</sup> the joint filing option,<sup>11</sup> and the special valuation rules for grantor retained income trusts.<sup>12</sup> Each of these provisions is based on the same underlying policies of taxing the economic unit as a whole, horizontal equity in wealth transfer taxation, and taxation based upon the taxpayer's economic reality.<sup>13</sup> In general, these provisions confer a great benefit upon family units that fit the federal definition of "family," or at least give the family the benefit of choice;<sup>14</sup> however, the special valuation rules for grantor retained income trusts ("GRITs"), codified in § 2702, confer an obvious taxation burden in terms of transfer of wealth on the family unit.<sup>15</sup>

A growing number of same-sex couples who, like Jonathan and Daniel, have entered into a state marriage or equivalent recognition of their relationship are excluded from the numerous benefits conferred upon the family unit by these policy-focused tax provisions.<sup>16</sup> The Defense of Marriage Act prohibits federal entities such as the Internal Revenue Service from recognizing the state-sanctioned marital relationships of same-sex couples.<sup>17</sup> At the same time that this refusal to recognize same-sex relationships excludes same-sex families from numerous benefits provided by several wealth transfer taxation provisions, it also allows couples like Jonathan and Daniel to use one of the policy provisions that normally confers a burden on the family unit to their great benefit, as a means to collusively transfer wealth without incurring any wealth transfer tax. This is exactly what § 2702 was intended to prevent with its special valuation of family giving.<sup>18</sup>

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6. See *infra* Part II.A for a discussion of the public policy goals that motivated Congress to enact the wealth transfer taxation provisions.

7. I.R.C. § 2056.

8. *Id.* § 2523.

9. *Id.* § 2032A.

10. *Id.* § 6166.

11. *Id.* § 1.

12. I.R.C. § 2702.

13. See *infra* Part II.B for a discussion of the policies underlying several provisions of the Internal Revenue Code.

14. See Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465, 469–70 (2000) (discussing heterosexual couples' ability to choose to file jointly or not depending on whether doing so will increase or decrease their tax liability).

15. See *infra* Part II.E for a discussion of § 2702 and its effect on the family unit.

16. Christopher T. Nixon, *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as are Currently Granted to Married Couples?: An Analysis in Light of Horizontal Equity*, 23 S. ILL. U. L.J. 41, 44 (1998).

17. See Defense of Marriage Act § 3, 1 U.S.C. § 7 (2006) (defining marriage as legal union of man and woman).

18. Lawrence P. Katzenstein, *Planning Techniques for Large Estates: Running the Numbers: An Economic Analysis of GRATs and QPRTs*, SM077 A.L.I.-A.B.A. COURSE OF STUDY 467, 471 (2007).

This Comment suggests that same-sex married couples should be treated as a family unit for purposes of § 2702. This revision will take away same-sex couples' ability to evade wealth transfer taxation through the use of GRITs and thereby will increase federal revenue. Although this change will harm same-sex partners economically, the change is necessary in order to ensure that wealth transfer provisions remain true to the policy goals on which this provision was originally based and which should apply equally to both same-sex and opposite-sex married couples.<sup>19</sup>

While taking this economic benefit away from same-sex family units will be economically harmful to some same-sex partners, it is a step forward in theory because it requires at least some degree of recognition of the reality of same-sex partnerships. Ideally, this theoretical progress would be but the first step in a series of changes to the Internal Revenue Code aimed at equal treatment of same-sex taxpayers. The most desirable means of ensuring equal treatment would be the repeal of the Defense of Marriage Act; however, until that occurs, there are other options through which to recognize the economic reality of same-sex partnerships, including allowing same-sex couples to form tax partnerships<sup>20</sup> or simply defining the same-sex couple as "family" for federal taxation provisions.<sup>21</sup> At the very least, same-sex married couples should be recognized as family for purposes of § 2702's special valuation rules.<sup>22</sup>

To explore the inequitable treatment of same-sex couples under the Internal Revenue Code, Part II of this Comment provides a general overview of federal wealth transfer taxation. Part II first discusses the history and function of wealth transfer taxation and then explores several specific provisions that Congress intended to benefit marital and family relationships. Next is an examination of how those relationships are defined within the Internal Revenue Code and under federal law, which excludes same-sex couples from definitions of family and marriage. Part II then discusses the numerous benefits reserved for families, as well as two provisions that cause a detriment to families.

Part III considers several potential solutions to the disparity in taxation of similarly situated taxpayers and suggests specific revision of the Internal Revenue Code to ensure that same-sex married couples are treated as a family unit for purposes of § 2702. This seemingly small revision will be the first step toward greater equality in federal tax law.

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19. See *infra* Part III.B for a discussion of the taxation policies in support of revising § 2702.

20. Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677, 704–07 (2000) (proposing that same-sex couples be allowed to form tax partnerships to resolve tax problems they face). See *infra* notes 176–78 and accompanying text for a discussion of Patricia Cain's tax partnership proposal.

21. See *infra* Part III.A for a proposed revision of the definition of "family" throughout the Internal Revenue Code.

22. See *infra* Part III.A for a specific proposal for revision of § 2702 to be applicable to same-sex married couples. Professor Theodore P. Seto arrives at this same conclusion regarding inclusion of same-sex partners under the federal income tax scheme. Theodore P. Seto, *The Assumption of Selfishness in the Internal Revenue Code: Reframing the Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=850645>.

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## II. WEALTH TRANSFER TAXATION AND THE FAMILY

Understanding the divergent treatment of same-sex and opposite-sex married couples requires an understanding of the history of, and the policies behind, the wealth transfer taxation provisions of the Internal Revenue Code, including the unlimited marital deduction, the family farm provision, the small business provision, and the special valuation rules for intrafamily transfers such as GRITs.

### A. *Wealth Transfer Taxation*

The federal government taxes the transfer of wealth in the United States predominantly with two provisions of the Internal Revenue Code: the estate tax<sup>23</sup> and the gift tax.<sup>24</sup> Since 1916, the federal estate tax<sup>25</sup> has taxed the transfer of wealth from a decedent to his or her heirs.<sup>26</sup> The motivation for the tax included a number of factors, not the least of which was satisfying the revenue needs of the country.<sup>27</sup>

In addition to raising revenue with the estate tax, Congress intended to produce certain socioeconomic effects as well.<sup>28</sup> Wealth transfer taxation, specifically, keeps in check the practice of “wealth-holding” by the few wealthiest citizens in a market economy.<sup>29</sup> According to one federal tax commentator, “[t]he periodic imposition of a tax on accumulated wealth seems a basic prerequisite for a nation that purports to embrace notions of equality and

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23. I.R.C. § 2001 (2006).

24. *Id.* §§ 2501, 2511. Wealth transfer taxation is also accomplished through the Generation-Skipping Tax, *id.* § 2601, which is beyond the scope of this Comment.

25. The estate tax is popularly referred to as the “death tax” and is commonly misunderstood. See Richard Schmalbeck, *Does the Death Tax Deserve the Death Penalty? An Overview of the Major Arguments for Repeal of Federal Wealth-Transfer Taxes*, 48 CLEV. ST. L. REV. 749, 764 (2000) (explaining that if you talk to random people on street, most will say there should not be death tax, but that they would answer differently if aware that, in reality, death tax affects only decedents with estates “which have an average net value of over two million dollars” and will likely not affect most people). In reality, the estate tax affects only a small minority of the wealthiest Americans due to large exemption amounts and numerous exclusions. See Krisanne M. Schlachter, Note, *Repeal of the Federal Estate and Gift Tax: Will It Happen and How Will It Affect our Progressive Tax System?*, 19 VA. TAX REV. 781, 810 (2000) (explaining that transfer taxes apply to only two or three percent of taxpayers). The unified credit, codified at I.R.C. § 2010, allows an exclusion from a decedent’s gross estate of \$2,000,000 in 2007 and 2008. In 2009, the excludible amount will be \$3,500,000. See I.R.C. § 2010(c) (setting forth applicable credit amounts). Furthermore, if the decedent did not use his or her second unified credit, reserved for inter vivos gift exclusions, the decedent’s estate will be able to pass another \$1,000,000 tax free at decedent’s death. *Id.* § 2012. Therefore, assuming the decedent dies in 2008, having made no taxable gifts during his or her lifetime, the decedent is able to pass \$3,000,000 on to others without the estate incurring any tax liability.

26. Schmalbeck, *supra* note 25, at 749.

27. PAUL R. MCDANIEL ET AL., FEDERAL WEALTH TRANSFER TAXATION 4 (5th ed. 2003).

28. See Scott Burris et al., *Integrating Law and Social Epidemiology*, 30 J.L. MED. & ETHICS 510, 516 (2002) (describing taxation as means of “addressing economic inequality through public policy”).

29. Schmalbeck, *supra* note 25, at 752–53.

fairness.”<sup>30</sup> Congress enacted the federal gift tax, not primarily to raise revenue, but rather to ensure the effectiveness of the estate tax in raising revenue.<sup>31</sup> As soon as the estate tax became law, wealthier Americans to whom the tax would inevitably apply could avoid the tax by transferring their assets as gifts while still alive.<sup>32</sup> With the passage of the federal gift tax, Congress could tax the inter vivos transfer of assets previously used by some taxpayers as a tactic to evade estate tax liability.<sup>33</sup>

The Internal Revenue Code provides numerous deductions and exceptions within the wealth transfer taxation framework, a number of which exist principally for social policy, rather than revenue-focused, reasons.<sup>34</sup> Such provisions represent Congress’s willingness to forego the collection of taxes in order to encourage socially beneficial behavior. More relevant to this Comment, however, is the unlimited marital deduction, which allows one spouse, during life or at death, to transfer assets to his or her spouse without incurring wealth transfer taxation liability.<sup>35</sup> The unlimited marital deduction is only one of many Internal Revenue Code provisions that confer tax benefits upon certain social relationships.<sup>36</sup>

#### B. Provisions Giving Preference to “Family” and “Spouse”

Numerous provisions in the Internal Revenue Code intentionally benefit the marital relationship through “unambiguously preferential tax treatment and measures designed to protect the surviving spouse.”<sup>37</sup> These “related-party provisions”<sup>38</sup> were intended and tailored to privilege certain types of relationships, specifically the marital relationship.<sup>39</sup> The Internal Revenue Code treats married couples differently from unmarried couples—both same-sex and heterosexual—with no regard to the economic reality of the couples’ lives and the entanglement of their finances.<sup>40</sup>

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30. Cain, *supra* note 20, at 683.

31. Schmalbeck, *supra* note 25, at 751–52.

32. MCDANIEL ET AL., *supra* note 27, at 5.

33. I.R.C. §§ 2501, 2511 (2006).

34. *See, e.g., id.* § 2055 (providing unlimited deduction for charitable gifts, thereby encouraging charitable giving despite loss of potential federal revenue).

35. *Id.* §§ 2056, 2523.

36. *See infra* Part II.B for a discussion of other provisions that confer tax benefits upon certain social relationships, including the family farm provision, the small business provision, and the joint filing income tax provision.

37. Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 169 (1998).

38. Seto, *supra* note 22, at 1 n.2, 3 (outlining numerous income tax provisions of Internal Revenue Code giving preference or burden based upon relationship between parties to transaction).

39. Knauer, *supra* note 37, at 132.

40. Cain, *supra* note 14, at 465. Cain’s article also addresses the stigmatic harm that comes along with differential treatment under the law and suggests that the stigma is far worse than any economic harm done to same-sex couples: “Laws that . . . privilege heterosexuals by indicating their relationships

### 1. Unlimited Marital Deduction

The unlimited marital deduction<sup>41</sup> is perhaps one of the most explicit examples of preferential treatment given to couples that the federal government views as legitimately married. Under this provision of the estate tax, transfers of property to the spouse of a decedent will incur no transfer taxation while that spouse is still living.<sup>42</sup> It is due to this unlimited deduction that Danielle will pay no taxes upon James's death. The IRS will certainly tax that property upon the death of the surviving spouse.<sup>43</sup> The net estate of the decedent does not include spousal property; rather, it is determined "by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse."<sup>44</sup> The spousal relationship is similarly privileged by the unlimited marital gift provision.<sup>45</sup> This exception to the gift tax allows one spouse to make unlimited gifts to the other spouse that would incur gift tax liability if transferred to any person other than the spouse.<sup>46</sup>

Though adopted in 1948, the marital deduction did not exist in its current, unlimited form until 1981.<sup>47</sup> Between 1948 and 1981, the deduction survived a long list of amendments and changes due to the differences between community-property and noncommunity-property states.<sup>48</sup> The legislative history behind the unlimited marital deduction makes clear that the primary justification for allowing the tax-free transfer of assets and gifts between spouses is that a married couple functions as a single economic unit.<sup>49</sup> In effect, treating the married couple as a single taxpayer<sup>50</sup> is justified because the members of the unit pool economic resources as part of their marital obligations.<sup>51</sup> When Congress

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are more valuable than same-sex relationships . . . cause harm that extends beyond the denial of a possible economic benefit, including the harm of stigmatization caused by the negative message." *Id.*

41. I.R.C. § 2056 (2006).

42. *Id.* § 2056(a).

43. *See id.* § 2056(d)(3)(C) (noting that estate is subject to tax upon death of surviving spouse).

44. *Id.* § 2056(a).

45. *Id.* § 2523(a).

46. I.R.C. § 2501(a).

47. *See* Knauer, *supra* note 37, at 172 (outlining history of marital deduction).

48. For an overview of the policy decisions behind changes to the marital deduction, see Mitchell M. Gans, *Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance?*, 48 EMORY L.J. 871, 888-910 (1999).

49. Estate of Shelfer v. Comm'r, 86 F.3d 1045, 1049 (11th Cir. 1996) (citing S. REP. NO. 97-144, at 127 (1981), *reprinted in* 1981 U.S.C.C.A.N. 105, 228). Federal income taxation, as a parallel to wealth transfer taxation, treats married couples as economic units by allowing joint filing. *Talman v. United States*, 37 Fed. Cl. 741, 747 (1997). Neither the income taxation nor the wealth transfer taxation schemes require a showing that the family does, in fact, function as a single economic unit; therefore, myriad benefits are extended to many married couples who "do not deserve" them. Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1509 (2006).

50. Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757, 770 (2004).

51. Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 96 (1993).

revised the marital deduction in 1981 to make it unlimited, it recognized the difficulty that a married couple faces upon having to trace each individual's contributions to the couple's jointly held assets.<sup>52</sup> Those members of Congress backing the change to an unlimited deduction described marriage as "a unique economic partnership that deserved special tax treatment."<sup>53</sup> While Congress fully intended to tax any property passed by the first spouse to die to the surviving spouse,<sup>54</sup> it allowed for the surviving half of the economic unit to use the unit's joint assets, without paying taxes on them, until that spouse's death.<sup>55</sup>

## 2. Family Farm Provision

Other wealth transfer provisions, such as the family farm provision,<sup>56</sup> give preferential treatment to the family as well as the spouse. Upon the death of one owner of a family farm, this provision allows for the remaining owners to assess the value of the property for use as a farm or small business (so long as the decedent was using it as such), rather than value it at its potential market value for another use, such as real estate development, which is likely to be substantially higher.<sup>57</sup> This provision gives preferential treatment specifically to the family unit because it applies only if, on the date of decedent's death, "the decedent or a member of the decedent's family" was using the property for qualified purposes.<sup>58</sup> In enacting the provision, lawmakers hoped to allow a family to continue operating its farm or small business, rather than being forced to sell the property to pay taxes owed.<sup>59</sup> Congress intended the family farm provision, much like the unlimited marital deduction, to protect the surviving portion of an economic unit that has suffered the death of a member.<sup>60</sup>

## 3. Small Business Provision

A third wealth transfer provision provides a very valuable benefit to the typical small, family-owned business.<sup>61</sup> This small business provision allows a fifteen-year deferral or installment plan for paying estate taxes where a business

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52. S. REP. NO. 97-144, at 127; *see also* Gans, *supra* note 48, at 904 (explaining that it would be inappropriate to tax transfers within "economic partnership" before death of both partners).

53. Crawford, *supra* note 50, at 770 (citing *Tax Reform (Administration and Public Witnesses): Public Hearings Before the H. Comm. on Ways and Means*, 94th Cong. 1187 (1976) (statement of William E. Simon, Secretary, Department of Treasury)).

54. *Estate of Clayton v. Comm'r*, 976 F.2d 1486, 1491 (5th Cir. 1992); Crawford, *supra* note 50, at 772.

55. *Estate of Shelfer v. Comm'r*, 86 F.3d 1045, 1050 (11th Cir. 1996).

56. I.R.C. § 2032A (2006).

57. Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1, 32 (2005).

58. I.R.C. § 2032A(b)(1).

59. *Stovall v. Comm'r*, 101 T.C. 140, 147 (1993) (citing H.R. REP. NO. 94-1380, at 21-22 (1976), reprinted in 1976 U.S.C.C.A.N. 3356, 3375-76).

60. Crawford, *supra* note 57, at 32.

61. I.R.C. § 6166.

exceeds thirty-five percent of the decedent's gross estate and where the business is closely held.<sup>62</sup> The exception explicitly applies to stock or partnership interests jointly held by husband and wife<sup>63</sup> and to interests held by any members of the decedent's "family,"<sup>64</sup> including siblings, a spouse, ancestors, and lineal descendants.<sup>65</sup>

According to legislative history, Congress intended this small business provision to save closely held businesses from being broken up or forced into sale upon the death of one of the owners, a loss which could be "devastating" to a business.<sup>66</sup> The Congressional Record reveals a primary concern of protecting the executor of a decedent's estate from being forced to sell the decedent's small or family-owned business simply to pay the federal estate taxes.<sup>67</sup> The time extension was intended to give the remaining business owners or family members time to "regain sufficient financial strength" to be able to more comfortably pay estate taxes.<sup>68</sup>

#### 4. Married Filing Jointly

The estate tax preferences for the family and marital relationship are mirrored in income tax provisions allowing married individuals to file joint income tax returns.<sup>69</sup> The married filing jointly option of § 1 allows married couples to file joint income taxes if they choose to do so.<sup>70</sup> The reasoning behind giving married couples this option is that the married couple is likely to function as a single economic unit and should therefore be taxed as such.<sup>71</sup> Although discussions of a "marriage penalty" are popular,<sup>72</sup> tax scholars estimate that approximately twenty-five million couples receive a tax benefit from filing jointly.<sup>73</sup> Depending on a couple's economic circumstances, filing income taxes as a married couple filing jointly<sup>74</sup> may increase or decrease the couple's tax liability.<sup>75</sup> In either case, the couple has the choice of filing jointly or separately.<sup>76</sup> Furthermore, approximately fifty percent of married couples have chosen to

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62. *Id.* § 6166(a)(1).

63. *Id.* § 6166(b)(2)(B).

64. *Id.* § 6166(b)(2)(D).

65. *Id.* (borrowing this definition of family from I.R.C. § 267(c)(4)).

66. Crawford, *supra* note 57, at 35.

67. H.R. REP. NO. 94-1380, at 30-31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3356, 3384-85.

68. *Id.* at 30.

69. I.R.C. § 6013.

70. *Id.* § 1(a), (d).

71. Frederick R. Schneider, *Which Tax Unit for the Federal Income Tax?*, 20 U. DAYTON L. REV. 93, 128 (1994).

72. See Knauer, *supra* note 37, at 212 (recognizing marriage penalty debate among scholars and politicians).

73. *Id.* at 145.

74. See I.R.C. § 1(a), (d) (giving married individuals option of filing jointly or separately).

75. Knauer, *supra* note 37, at 133-34.

76. See Cain, *supra* note 14, at 469-71 (discussing benefit implicit in having option to file jointly or separately).

incur a greater income tax burden as a consequence of enjoying the countless other benefits that come along with marriage,<sup>77</sup> including recognition of their relationship.

C. *What Is "Family"?*

The definition of what qualifies as "family" varies significantly throughout these various Internal Revenue Code provisions that provide benefits to spouses and families.<sup>78</sup> The family farm provision requires that property pass from the decedent to a "qualified heir," which is defined as "a member of the decedent's family."<sup>79</sup> An accompanying definition defines "member of family" as "(A) an ancestor of [the decedent], (B) the spouse of [the decedent], (C) a lineal descendant of [the decedent], of [the decedent]'s spouse, or of a parent of [the decedent], or (D) the spouse of any lineal descendant described in subparagraph (C)."<sup>80</sup> The small business provision allows for all interests held by the decedent at the time of his death or by any member of decedent's family to be treated as owned by the decedent himself.<sup>81</sup> The definition of decedent's "family" includes siblings, a spouse, ancestors, and lineal descendants.<sup>82</sup> The marital deduction applies only to property that passes from decedent to his or her surviving spouse, but the Internal Revenue Code fails to define "spouse."<sup>83</sup>

Difficulty arises in determining who fits into these definitional categories. "Spouse" is not defined anywhere in the Internal Revenue Code, nor is "marriage."<sup>84</sup> The United States Supreme Court explicitly recognized in *De Sylva v. Ballentine*<sup>85</sup> that "there is no federal law of domestic relations."<sup>86</sup> Therefore, federal tax law must depend upon state law determinations of what is "family" and "marriage."<sup>87</sup> The IRS has long deferred to state laws to determine whether a taxpayer is married under the laws of the state of his or her domicile;<sup>88</sup> if two people were legally married in the state of Massachusetts, for example,

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77. See *id.* at 467-83 (outlining numerous tax benefits and one primary tax burden distributed based on marriage).

78. See Crawford, *supra* note 57, at 7-36 (discussing definition of "family" in various I.R.C. sections).

79. I.R.C. § 2032A(b)(1).

80. *Id.* § 2032A(e)(2)(A)-(D).

81. *Id.* § 6166(b)(2)(D).

82. *Id.* § 267(c)(4); see also Crawford, *supra* note 57, at 42 n.214 (noting that definition of "family" under § 6166, unlike under § 2032, does not include ancestors or siblings of taxpayer's spouse).

83. I.R.C. § 2056(a).

84. Knauer, *supra* note 37, at 162.

85. 351 U.S. 570 (1956).

86. *De Sylva*, 351 U.S. at 580.

87. Patricia A. Cain, *Federal Tax Consequences of Civil Unions*, 30 CAP. U. L. REV. 387, 389-90 (2002).

88. Knauer, *supra* note 37, at 162; see also Rev. Rul. 58-66, 1958-1 C.B. 60 ("The marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws.").

that couple would be considered married for all federal government purposes.<sup>89</sup> Until the Defense of Marriage Act (“DOMA”),<sup>90</sup> Congress had given almost exclusive control regarding who is treated as married for tax purposes to the states, which regulated civil marriage pursuant to their police powers.<sup>91</sup>

### 1. The Defense of Marriage Act

The 1996 DOMA provided, for the first time in our nation’s history, a federal definition of “marriage” and “spouse.”<sup>92</sup> In doing so, DOMA expressly barred federal recognition or acceptance of same-sex marriages, such as those occurring in Hawaii at the time.<sup>93</sup> DOMA provides that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.<sup>94</sup>

DOMA represents “a marked change for the tax code which has always deferred to state law to determine marital status.”<sup>95</sup> As one example, federal courts defer to state law to decide cases in which the availability of the marital deduction depends on state marital status.<sup>96</sup> Despite blatant inconsistency with precedent and despite much constitutional attack,<sup>97</sup> DOMA remains effective law today.

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89. See Rev. Rul. 58-66, 1958-1 C.B. 60 (deferring to state definitions of marriage for federal income tax purposes); John R. Dorocak, *Same-Sex Couples and the Tax Law: Tax Filing Status for Lesbians and Others*, 33 OHIO N.U. L. REV. 19, 20 (2007) (noting same-sex married couple in Massachusetts could file income taxes under married filing jointly status).

90. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)). With overwhelming congressional support, DOMA was introduced and signed in the midst of the 1996 presidential campaign as part of a larger plan to “strengthen marriage and family” and stabilize the word “marriage.” Knauer, *supra* note 37, at 188–90 & n.295 (citing 142 CONG. REC. S10,100–02, S10,116 (statement of Sen. Kempthorne)).

91. See *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (recognizing that marriage is regulated pursuant to police powers); Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 HASTINGS L.J. 1593, 1602 (1996) (describing tradition of Congress deferring to states on issue of marriage).

92. Hayes, *supra* note 91, at 1602–03.

93. *Id.* at 1598; see also Nixon, *supra* note 16, at 44 (noting congressional refusal to accept changing societal norms and giving preferential treatment to heterosexual couples).

94. 1 U.S.C. § 7.

95. Knauer, *supra* note 37, at 163.

96. See *Comm’r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (deferring to highest court of state as ultimate authority on questions of state law).

97. Commentators have attacked DOMA on numerous grounds, but overwhelmingly as a violation of the Equal Protection Clause, see, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 24–32 (1997) (arguing that “invidious purpose” of DOMA violates Equal Protection clause under *Romer v. Evans*, 517 U.S. 620 (1996) analysis), the Full Faith and Credit Clause, see, e.g., Hayes, *supra* note 91, at 1623–24 (labeling unconstitutional “unprecedented assertion of congressional power” in mandating that states refuse to

DOMA bars all federal programs and laws from extending marital benefits or recognition to same-sex married couples like Jonathan and Daniel.<sup>98</sup> The first provision of DOMA, a definitional provision, limits marriage for all federal purposes to heterosexual marriage.<sup>99</sup> By barring the recognition of same-sex marriage, DOMA goes far beyond simply defining marriage; it deprives same-sex couples of all federal benefits to which married couples are entitled.<sup>100</sup> The second provision allows states to refuse to give full faith and credit<sup>101</sup> to other states' decisions by ignoring same-sex marriages performed in other states; therefore, Pennsylvania and New York are legally entitled to refuse to recognize civil unions legally granted by New Jersey.<sup>102</sup> With this provision, DOMA invalidates the longstanding American common law notion that a marriage valid in one state is valid throughout all the states.<sup>103</sup> Unless and until Congress repeals DOMA, the IRS cannot legally extend "marital" tax benefits, nor even recognition, to the growing number of married same-sex couples, like Jonathan and Daniel, in the United States.<sup>104</sup>

## 2. Same-Sex Married Couples Are Not "Families" Under Federal Law

An increasing number of states recognize the unions of same-sex couples under their laws.<sup>105</sup> A number of states' highest courts have found that same-sex couples are entitled to receive the same marital benefits as heterosexual couples,<sup>106</sup> but most states have stopped short of granting "marriage" to same-

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recognize laws of other states, contrary to Article IV, Section I of the U.S. Constitution), and federalism in general, *see, e.g.*, Jonathan Brophy, Comment, *Death Is Certain, Are Taxes? Another Argument for Equality for Same-Sex Couples Under the Code*, 34 SW. U. L. REV. 635, 646 (2005) (arguing DOMA violates principles of federalism but recognizing that supporters of DOMA bolster their arguments with federalist principles).

98. Nixon, *supra* note 16, at 44.

99. 1 U.S.C. § 7; Koppelman, *supra* note 97, at 1.

100. Nixon, *supra* note 16, at 44.

101. U.S. CONST. art. IV, § 1.

102. Koppelman, *supra* note 97, at 1.

103. *Id.* at 10.

104. Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363, 364 (2002); *see also* Nixon, *supra* note 16, at 64 (noting that if Congress repeals DOMA, it may thereafter consider reform to grant benefits to same-sex married couples).

105. *See* Dorocak, *supra* note 89, at 36–37 (outlining same-sex status in United States and internationally). Massachusetts is the only state that allows same-sex couples to enter into "marriage," while New Jersey, Connecticut, and Vermont provide marital benefits to same-sex couples that enter into civil unions. *Id.* at 27 & n.67, 35. California and Washington recognize domestic partnerships, while Hawaii recognizes "reciprocal beneficiaries" that guarantee rights similar to domestic partnership benefits. *Id.* at 27. New York now recognizes same-sex marriages performed in other jurisdictions. *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 743 (N.Y. App. Div. 2008), *leave to appeal dismissed*, 859 N.Y.S.2d 617 (N.Y. 2008).

106. *See, e.g.*, *Baehr v. Lewin*, 852 P.2d 44, 48 (Haw. 1993) (rejecting lower court's conclusion that marriage is, by definition, between man and woman); *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999) (finding that Vermont's equal protection clause required that same-sex and heterosexual couples be given equal benefits).

sex couples.<sup>107</sup> Rather, labels such as “civil union” and “domestic partnership” are commonly used to signify legal recognition of same-sex partnerships. Despite increasing recognition of the legal relationships of same-sex couples, DOMA renders all state recognition impotent for federal purposes.<sup>108</sup> In other words, couples in Massachusetts can be recognized as married spouses for purposes of state law, but not for federal tax law.<sup>109</sup>

*D. Benefits Reserved for Families*

Because of DOMA’s ban on federal recognition of same-sex marriages, even where legal under state laws, many benefits that states give to married heterosexual couples are denied to same-sex couples, despite those same-sex couples being similarly situated as the heterosexual couples.<sup>110</sup> Scholars estimate that approximately 1,049 federal benefits, rights, and responsibilities come along with federal marriage, including health care, Social Security, and tax benefits.<sup>111</sup> By excluding same-sex couples from what the federal government calls “marriage,” DOMA excludes those couples from myriad federal rights and benefits that accompany marriage,<sup>112</sup> such as tax-free health insurance for the spouse of an employee, as just one example.<sup>113</sup> An employee with a same-sex spouse would incur tax liability by taking advantage of this and other fringe benefits, whereas a spouse viewed as “married” for federal tax purposes would incur no tax liability.<sup>114</sup> In other words, if Jonathan’s law firm provided partnership insurance coverage to Daniel while he was still a student, Jonathan would have been taxed as if he had given Daniel a gift. The same would not have occurred if the same firm’s insurance policy covered Danielle via James’s policy.

While the Internal Revenue Code provides a 100% marital deduction for inter vivos gifts to a spouse,<sup>115</sup> any transfer between same-sex partners is likely to be a taxable gift if it is not excluded by the annual deduction.<sup>116</sup> Even the

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107. Compare *Baker*, 744 A.2d at 886–87 (finding Vermont obligated to extend marital benefits to same-sex couples, but declining to find plaintiffs entitled to marriage license), with *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (giving not only same benefits and protections, but also same legal term, “marriage,” to same-sex unions).

108. See Anthony C. Infanti, *Tax Protest, “A Homosexual,” and Frivolity: A Deconstructionist Meditation*, 24 ST. LOUIS U. PUB. L. REV. 21, 21 (2005) (discussing federal tax law’s refusal to recognize same-sex marriage).

109. *Id.* at 57.

110. Patricia A. Cain, *Imagine There’s No Marriage*, 16 QUINNIPIAC L. REV. 27, 55–56 (1996); Nixon, *supra* note 16, at 47.

111. Robert Emond, Note, *Does the Equal Protection Analysis in Lawrence Make Bans on Same-Sex Marriage Unconstitutional?*, 26 T. JEFFERSON L. REV. 447, 457 (2004).

112. 1 U.S.C. § 7 (2006).

113. Hayes, *supra* note 91, at 1600–01.

114. *Id.*; Nixon, *supra* note 16, at 47.

115. I.R.C. § 2523 (2006).

116. *Id.* § 2501; see also Cain, *supra* note 14, at 475 (explaining how sharing of living expenses by lesbian couple, one of whom makes significantly more money and pays more of expenses, leads to tax liability, whereas similarly situated heterosexual couple would not be taxed). To the IRS, groceries

purchase of property to be held in joint tenancy may be treated as a gift if the property is paid for unequally; the partner paying more has technically made a gift to the partner paying less.<sup>117</sup>

Possibly one of the most significant of the many inequitable effects of wealth transfer taxation on same-sex married couples is their exclusion from the estate tax marital deduction.<sup>118</sup> Upon the death of one same-sex partner, the surviving partner will be burdened by gift and estate taxes that a heterosexual widow or widower would not incur.<sup>119</sup> Often the most valuable asset passed at a person's death is a home.<sup>120</sup> While the estate of a decedent leaving a house to a heterosexual widow would be allowed a 100% marital deduction, causing the estate and the surviving spouse to face no taxation whatsoever for the transfer of a home she lived in or co-owned, the estate of the same-sex decedent will be taxed on fifty percent of the fair market value of the property he or she co-owned.<sup>121</sup> The marital deduction simply does not protect the "unmarried" same-sex widower, like Daniel, from the devastating effects of high estate taxes, such as losing the family home, despite the couple's legal status under state same-sex marriage or civil union laws.<sup>122</sup> Neither does the family farm provision<sup>123</sup> apply to undervalue (and potentially save) a family farm that is co-owned and operated by a same-sex married couple upon the death of either. Nor would the small business provision<sup>124</sup> apply to give the surviving partner an extension in time to pay estate taxes on a closely held business that he or she co-owned with his or her same-sex partner.

#### E. Rare Detriment to Families

In contrast to the many provisions mentioned above that provide a benefit based upon family and marital status, there do exist provisions that place a burden on a "family."<sup>125</sup> This detriment does not fall on nonfamilies such as same-sex married couples.<sup>126</sup> For example, tax commentators often cite the income tax marriage penalty.<sup>127</sup> Depending on a couple's economic

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and foreign travel expenses are taxable gifts from one unmarried partner to the other. Cain, *supra* note 14, at 475.

117. See Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 383–84 (1995) (citing Treas. Reg. § 25.2511-1(h)(5) (as amended in 1986)) (explaining that husband and wife who enter into joint tenancy are not considered to have made transfer for gift tax purposes, whereas nonmarital couple may not take advantage of this deduction).

118. I.R.C. § 2056.

119. Chase, *supra* note 117, at 367–68.

120. Camille M. Quinn & Shawna S. Baker, *Essential Estate Planning for the Constitutionally Unrecognized Families in Oklahoma: Same-Sex Couples*, 40 TULSA L. REV. 479, 512 (2005).

121. *Id.*

122. I.R.C. § 2056.

123. *Id.* § 2032A.

124. *Id.* § 6166.

125. *Id.* § 2702.

126. See *id.* (applying special valuation rules to transfers between family members).

127. Knauer, *supra* note 37, at 212.

circumstances, filing joint income taxes as a married couple<sup>128</sup> may increase the couple's tax liability.<sup>129</sup> Despite the so-called marriage penalty, approximately fifty percent of married couples choose to accept this burden in order to enjoy the countless other benefits that come along with marriage.<sup>130</sup> "One thing is certain, however: opposite-sex couples have the option of weighing benefits and burdens and making choices."<sup>131</sup> Same-sex partners do not have the option of weighing the benefits and burdens, such as a potential marriage penalty, and making the decision whether to file jointly, as DOMA precludes them from filing as "married."<sup>132</sup>

Another provision of the Internal Revenue Code that imposes a detriment based on family and marital status is the special valuation rule codified at § 2702.<sup>133</sup> Before the enactment of § 2702, grantor retained income trusts, or "GRITs," were popularly used to undervalue the amount of gift tax paid on a transfer relative to the amount of the gift.<sup>134</sup> A typical GRIT is a trust that pays income to the grantor for a specified term; when that term has expired, the principal passes to a beneficiary.<sup>135</sup>

Although the transfer of assets to a GRIT causes the grantor to incur gift tax liability, before the enactment of § 2702 that liability was limited to the actuarial value of the remainder expected to pass to the beneficiary.<sup>136</sup> At transfer, the transferor would pay tax on a certain amount of principal, then the transferor would strategically decrease the income he receives in order to increase the principal without incurring any increase in tax liability for the larger gift.<sup>137</sup> In other words, the income expected to come to the transferor was overvalued, due to "unrealistic assumptions regarding retained interests,"<sup>138</sup> and the portion actually given as a gift was undervalued.<sup>139</sup> Because the Internal Revenue Code was unable to predict<sup>140</sup> and tax appropriately the gift given,<sup>141</sup>

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128. See I.R.C. § 1(a), (d) (giving married individuals option of filing jointly or separately).

129. Knauer, *supra* note 37, at 133–34.

130. See Cain, *supra* note 14, at 467–83 (outlining numerous tax benefits and one primary tax burden—often called marriage penalty—distributed based on marriage).

131. *Id.* at 469.

132. *Id.* at 470.

133. I.R.C. § 2702. In addition to § 2702, but outside the scope of this Comment, is § 318, which attributes constructive ownership of stock to certain immediate family members of the true owner. *Id.* § 318.

134. WILLIAM E. SCHOLTES, USING AND DRAFTING TRUSTS IN ESTATE PLANNING 5 (2005).

135. Michael V. Bourland & Jeffery N. Myers, *Estate Planning for the Family Business Owner: Hot Topics Under the 2001 Tax Act and Transfer Planning: Grantor Trusts Including Grantor Retained Interest Trusts and Intentionally Defective Grantor Trusts*, SH005 A.L.I.-A.B.A. COURSE OF STUDY MATERIALS (2002), available at <http://www.bwwlaw.com/downloads/mvb/2002%20aliaba/2002%20GTv12.htm>.

136. SCHOLTES, *supra* note 134, at 5.

137. *Id.*

138. Katzenstein, *supra* note 18, at 470.

139. SCHOLTES, *supra* note 134, at 5.

140. Prior to enactment of § 2702, retained interests were valued using valuation tables that did not account for "outperformance" of the tables, or strategic manipulation of the income actually

wealthy grantors were able to transfer portions of their estates to family members for “a fraction of the property’s actual value” in terms of transfer taxes.<sup>142</sup> It is easy to see why GRITs became “very popular” by 1990.<sup>143</sup>

In order to create more certainty in taxing trusts, and to stop such collusive “valuation abuse” in transfers of wealth,<sup>144</sup> Congress enacted Internal Revenue Code § 2702. This provision created special valuation rules that value the interest retained by the transferor at zero and assess gift taxation on the entire amount transferred to the trust<sup>145</sup> or the current value of the transferred asset, despite the transferor’s retained income interest.<sup>146</sup> Upon undervaluing the retained interest, § 2702 increases the value of the gift for transfer tax purposes.<sup>147</sup> According to one tax commentator, § 2702’s special valuation rules were “designed to prevent” the ultimate objective of estate planning, which is reduction of estate and gift tax liability upon the taxpayer’s death.<sup>148</sup> The policy behind the provision was to prevent “arbitrary and abusive elimination of value,” which eventually passed to the beneficiary as part of the gift.<sup>149</sup>

Application of the special valuation provision, however, is dependent upon the relationship between the transferor and the beneficiary: it applies only to transfers “to (or for the benefit of) a member of the transferor’s family.”<sup>150</sup> The definition of “family” comes from I.R.C. § 2701(e)(2), which defines an “applicable family member . . . with respect to any transferor” as “(A) the transferor’s spouse, (B) an ancestor of the transferor or the transferor’s spouse, and (C) the spouse of any such ancestor.”<sup>151</sup> If transferred to any one of these categories of people, the special valuation rules of § 2702 work to overvalue the amount of the gift in order to prevent tax evasion.<sup>152</sup> The presumption underlying this aspect of the special valuation rules, as well as many other “related-party” provisions, has been described as the “assumption of selfishness,” meaning that the average taxpayer is presumptively unlikely to act

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produced. Louis S. Harrison, *The Real Implications of the New Transfer Tax Valuation Rules—Success or Failure?*, 47 TAX LAW. 885, 900 (1994).

141. See Katzenstein, *supra* note 18, at 469 (detailing technical process of using GRITs to decrease wealth transfer tax liability).

142. John M. Tassillo Jr. & John L. Berger, *Does the Bell Toll for Personal Residence GRITs: Time May Be Running Out for Using This Effective Tax Planning Technique*, 156 N.J. L.J. 688, 688 (1999).

143. *Id.*

144. *Cook v. Comm’r*, 269 F.3d 854, 858 (7th Cir. 2001).

145. I.R.C. § 2702(a)(2) (2006).

146. Keith Depies, *Grantor Trusts and the Zero Valuation Rules*, 1997 TAX ADVISER 75, 75.

147. MCDANIEL ET AL., *supra* note 27, at 836.

148. Depies, *supra* note 146, at 75.

149. *Walton v. Comm’r*, 115 T.C. 589, 601 (2000). For further illustration of the use of a GRIT to decrease tax liability, see examples provided in MCDANIEL ET AL., *supra* note 26, at 836.

150. I.R.C. § 2702(a)(1).

151. *Id.* § 2701(e)(2).

152. Depies, *supra* note 146, at 75.

selflessly and against his or her financial interests.<sup>153</sup> Within some relationships, however, the assumption of selfishness fails; spouses and other family members often act selflessly regarding one another.<sup>154</sup> When a taxpayer is willing to act against his own financial interest in order to benefit his economic unit as a whole, such as his children or spouse, special rules must apply to prevent collusion.<sup>155</sup>

Because same-sex married partners are not “spouses” under federal law, they are not included in the § 2701(e)(2) definition of “applicable family member,”<sup>156</sup> and in fact are prohibited by DOMA from being treated as such.<sup>157</sup> Therefore, § 2702 special valuation rules do not affect a GRIT used by one same-sex partner for the selfless benefit of the other partner; this allows same-sex partners to collude and to use GRITs in order to rearrange finances and decrease wealth transfer tax liability, ultimately benefiting their economic unit.<sup>158</sup> A partner in a same-sex marriage is free to use a GRIT to transfer a gift in trust to his or her partner while paying the least amount of federal gift tax possible on the undervalued gift.<sup>159</sup> Couples like Jonathan and Daniel can even use a GRIT to transfer the couple’s residence without incurring estate tax liability for transfer of one-half the value of the property.<sup>160</sup>

For this reason, despite § 2702’s special valuation provisions, same-sex married couples, “who are not family members” for federal purposes, are still able to use GRITs to their great benefit and transfer large amounts of assets without incurring nearly as much wealth transfer tax liability.<sup>161</sup> In this instance, the Internal Revenue Code’s inconsistent treatment of families can be used to the benefit of same-sex married couples, just as Jonathan used a GRIT that greatly benefited Daniel.<sup>162</sup>

### III. ONE STEP IN THE DIRECTION OF EQUALITY

This Comment suggests a slight revision of the Internal Revenue Code that would have far-reaching consequences in the fight not only for equality but also the integrity of the tax code. Revising the Internal Revenue Code to apply to

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153. See Seto, *supra* note 22, at 6 (explaining “assumption of selfishness” as basis for multiple income tax provisions).

154. *Id.* at 6–7.

155. *Id.* at 7.

156. I.R.C. § 2701(e)(2).

157. 1 U.S.C. § 7 (2006).

158. See Katzenstein, *supra* note 18, at 471 (explaining that GRITs can be used by persons to whom § 2702’s special valuation rules do not apply).

159. See Brian R. Selvin & Allen V. Brown, *Post Civil-Union Planning: The Tax and Estate Planning Issues Faced by the Nontraditional Family*, 189 N.J. L.J. 48, 48 (2007) (explaining how civil union partner can use GRIT to undervalue taxable gift to his or her partner).

160. See *id.* (detailing use of GRIT to avoid § 2702’s restrictions upon transfer of personal residence). See *supra* Part II.D for a description of the tax liability of a same-sex couple upon transfer of title of property held in joint tenancy.

161. Katzenstein, *supra* note 18, at 471.

162. See Depies, *supra* note 146, at 75 (noting present value deduction is allowed only when beneficiary is nonfamily member).

same-sex married couples that have legally joined together under state law is the first step toward equal treatment of same-sex married couples and families under federal law. Without implicating DOMA, Congress can further its traditional policy goals of horizontal equity, taxation of the economic unit, and taxation based upon economic reality, by recognizing the economic reality of same-sex families.<sup>163</sup> Moreover, by treating same-sex married couples the same as similarly situated heterosexual couples for federal wealth transfer taxation purposes, Congress can use the Internal Revenue Code to further the goal of horizontal equity.<sup>164</sup>

A. *Suggested Revision of § 2702*

Congress should revise the special valuation rules of § 2702 to apply to same-sex married couples that have legally joined together under state law. There are several means of accomplishing the inclusion of same-sex married couples and their families within the purview of federal wealth transfer taxation provisions despite the existence of DOMA.<sup>165</sup> In fact, the following proposals do not even implicate DOMA because they do not require federal recognition of same-sex couples' valid state marriages, nor do they change the definitions of "spouse" or "marriage" throughout the Internal Revenue Code. If the revision does not reference the marital relationship of transferor and transferee, DOMA is clearly irrelevant.

Revising the Internal Revenue Code is the first and simplest step to effectuate equal treatment of same-sex married couples and families. While a number of federal tax commentators argue for the elimination of all family preferences and classifications for tax purposes,<sup>166</sup> such a major shift in tax policy may be "politically unfeasible."<sup>167</sup> Whereas one tax commentator advocates that Congress redefine "family" in the Internal Revenue Code,<sup>168</sup> the following proposals are arguably more feasible. Of course, one possible course of action that Congress could take is including same-sex partners within the definition of

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163. See Knauer, *supra* note 37, at 155–56 (noting same-sex married couples may be as likely to pool income and function as economic units as heterosexual married couples).

164. See Nixon, *supra* note 16, at 45–48 (explaining that tax reform extending equal benefits to same-sex couples and married couples would further tax policy goal of horizontal equity because they are similarly situated).

165. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)).

166. *E.g.*, Motro, *supra* note 49, at 1558–59 (arguing tax filing as marital unit is often unjustifiable and that married filing jointly should be used only by those who are truly economically united); Schneider, *supra* note 71, at 131 (recommending use of household or individual as unit of taxation while rejecting use of marital unit as economically inappropriate and rejecting family unit due to difficulty in defining "family").

167. Crawford, *supra* note 57, at 58 (recognizing that, despite problems inherent in family preferences, such classifications have gained popular support through political rhetoric).

168. *Id.* at 48–56.

“family”<sup>169</sup> to whom the special valuation rules apply; DOMA, on its face, does not prohibit classifying and treating same-sex partners as “family.”<sup>170</sup> In fact, DOMA makes no reference to same-sex households.<sup>171</sup> It is not necessary, however, for Congress to redefine “family” in order to stop the abuse of the wealth transfer taxation scheme by these couples.

In order to stop same-sex partners from benefiting from grantor retained interest trusts in the way that Congress prohibits heterosexual married couples from doing, Congress should revise § 2702 to apply to the transfers of same-sex married couples. Congress could amend the special valuation provision to define those to whom the valuation rules apply as any legal partner under state statutes.<sup>172</sup> A bright-line limitation, such as deferring to state recognition of a legal commitment, is necessary so as not to apply the burdens or benefits of wealth transfer taxation to every nonmarital relationship in which two people cohabit or pool income. A valid state marriage, civil union, or similar legal commitment would serve as an effective bright-line rule only because it evinces a commitment and presumptive income pooling between same-sex partners, much as the Internal Revenue Code applies the bright-line rule of “marriage” to heterosexual couples.<sup>173</sup> Furthermore, deference to a state’s highest court was, for much time, the traditional federal taxation standard.<sup>174</sup> This solution does not require federal recognition of a same-sex marriage. Therefore, DOMA is not implicated explicitly, and there may be less political uproar over the revision.<sup>175</sup>

An alternative solution, suggested by tax scholar Patricia Cain, would similarly achieve equal treatment of same-sex married couples under the Internal Revenue Code while avoiding the roadblock of DOMA by excluding titles like “spouse” and “family” entirely.<sup>176</sup> Cain suggests that same-sex spouses be allowed to create “personal tax partnerships” that would function much like

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169. I.R.C. § 2701(e)(2) (2006) currently applies special valuation provisions to GRITs benefiting “the transferor’s spouse . . . an ancestor of the transferor or the transferor’s spouse, and . . . the spouse of any such ancestor.”

170. See 1 U.S.C. § 7 (defining “marriage” and “spouse” when used in congressional acts and federal administrative regulations).

171. *Id.*

172. See Crawford, *supra* note 57, at 62 (suggesting statutory inclusion of new “family-like relationships” in federal estate tax provisions, limited to relationships given legal recognition under state law).

173. See I.R.C. § 1 (allowing joint filing of income tax returns by couples legally married under state law); I.R.C. § 2056 (extending unlimited marital deduction based on legal state marriage status); Knauer, *supra* note 37, at 162–63 (stating that I.R.C. determines filing status according to state law).

174. See *Comm’r v. Estate of Bosch*, 387 U.S. 456, 465 (1967) (noting that highest court of state is ultimate authority on underlying questions of state law).

175. Equalizing the tax treatment of same-sex marriages may be likely to provoke opponents of same-sex marriage, who may view economic equality as a step toward recognition of the marriage. See Knauer, *supra* note 37, at 185–97 (discussing how public outrage pressures political figures to defend heterosexual marriage through legislation).

176. See Cain, *supra* note 20, at 704–06 (proposing use of “personal tax partnerships” by same-sex couples).

business partnerships based around the sharing of income and loss.<sup>177</sup> In order to ensure that personal tax partnerships are used to benefit a true economic unit, rather than simply to take advantage of tax benefits, Cain suggests limitations on the partnership, including that it be between only two people and that no person could enter into more than one partnership.<sup>178</sup>

*B. Tax Policies in Support of This Change*

Federal tax policies of horizontal equity and taxation based on economic reality support the proposal of this Comment, whereas the current treatment of same-sex married couples within the wealth transfer taxation framework has left behind these goals. Current political rhetoric of family values and the debate over same-sex marriage have overshadowed these important policy goals.<sup>179</sup> Although current discussions of tax policy quickly turn into discussions of religion and morals,<sup>180</sup> the tax code was not intended to reform morals.<sup>181</sup> Rather, the tax code was intended to further other explicit policies and goals. While it is not for Congress to decide whether same-sex relationship equality “will destroy ‘the integrity of the marriage-based family’” or “‘the innocence of childhood and the very fabric of American life,’”<sup>182</sup> Congress should focus attention on ensuring that the Internal Revenue Code furthers stated policy goals such as horizontal equity. Numerous taxation policies support the revision of the Internal Revenue Code as this Comment proposes.

1. Taxation of the Economic Unit

The theory of taxing an economic unit, rather than an individual, has led to taxation of the marital unit as a single economic unit.<sup>183</sup> Clearly, however, the theory is not applicable just to federally recognized heterosexual marriages.<sup>184</sup> Although in *Shelfer* the Eleventh Circuit developed the “marital unit”

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177. *Id.*

178. *Id.* at 705. Cain has also suggested recognition of “tax households,” basing taxation on a household economic unit. Cain, *supra* note 110, at 57.

179. See Knauer, *supra* note 37, at 168 (describing prevailing view that marriage is society’s fundamental “ordering unit”).

180. See *id.* (discussing power of morality in public policy considerations and legislation). See *infra* Part III.B.1 for a discussion of the political refocusing of tax policy on morality.

181. *Comm’r v. Tellier*, 383 U.S. 687, 691–92 (1966) (noting that Congress rejected morality-based amendments to first modern income tax bill).

182. Knauer, *supra* note 37, at 187 (quoting Alan Keyes, 1996 presidential candidate).

183. See *Estate of Shelfer v. Comm’r*, 86 F.3d 1045, 1049 (11th Cir. 1996) (citing S. REP. NO. 97-144, at 127 (1981), *reprinted in* 1981 U.S.C.C.A.N. 105, 228) (justifying marital deduction through economic unit theory).

184. Same-sex married couples are just as likely as heterosexual married couples to function as a single economic unit and, therefore, should receive tax treatment that recognizes the unique functioning of the marital unit. Knauer, *supra* note 37, at 155–56.

concept,<sup>185</sup> the basis of the rule was grounded in economic reality and the functioning of an economic partnership.<sup>186</sup>

The Internal Revenue Code's taxation of the economic unit is both underinclusive and overinclusive.<sup>187</sup> The current provisions giving preference to family and marital units, such as the unlimited marital deduction, are underinclusive because they actually disregard economic unity, even where it could be demonstrated, such as by same-sex spouses.<sup>188</sup> The same provisions are overinclusive because many married couples are given the benefits intended for the economic unit despite failing to pool income and function as a unit.<sup>189</sup> As one tax commentator put it, "no necessary connection exists between marital status and economic unity."<sup>190</sup> This overinclusiveness arises because provisions giving preference to the marital unit use marriage as a bright-line rule and wrongly assume that all married couples pool their income and assets.<sup>191</sup> For example, James and Danielle would be treated as an economic unit even if they kept all their income separate, used separate accounts, and kept all assets divided. The economic reality is that not all married couples function as an economic unit, and there are many unmarried couples and same-sex married couples who do pool their income, as did Jonathan and Daniel.<sup>192</sup>

Revising provisions of the Internal Revenue Code that burden or give preference to marital and familial units to include same-sex married couples would reflect the economic reality of taxing the economic unit, a policy upon which numerous tax provisions are firmly grounded.<sup>193</sup> For example, the primary justification for the unlimited marital deduction is that a married couple functions as a single economic unit,<sup>194</sup> and treating the couple as a single taxpayer<sup>195</sup> is reasonable where the partners pool economic resources and

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185. *Shelfer*, 86 F.3d at 1049.

186. See S. REP. NO. 97-144, at 127 (discussing economic unity at time of congressional debate over unlimited marital deduction).

187. Crawford, *supra* note 50, at 792-93; see also Crawford, *supra* note 57, at 44 (noting that domestic partners are not considered members of same "family" for federal estate tax purposes).

188. Crawford, *supra* note 50, at 792-93.

189. Motro, *supra* note 49, at 1541.

190. *Id.* at 1512.

191. *Id.* at 1528.

192. Knauer, *supra* note 37, at 163.

193. See S. REP. NO. 97-144, pt. 1, at 127 (1981), reprinted in 1981 U.S.C.C.A.N. 105, 228 (justifying unlimited marital deduction with discussion of economic unit); H.R. REP. NO. 94-1380, at 21-22 (1976), reprinted in 1976 U.S.C.C.A.N. 3356, 3375-76 (discussing family farm provision as means of ensuring survival of economic unit); H.R. REP. NO. 94-1380, at 30-31 (debating small business provision to give economic unit more time to pay potentially destructive estate taxes).

194. Estate of *Shelfer v. Comm'r*, 86 F.3d 1045, 1049 (11th Cir. 1996). Federal income taxation also treats married couples as economic units by allowing joint filing. *Talman v. United States*, 37 Fed. Cl. 741, 747 (1997). Neither the income taxation nor the wealth transfer taxation schemes require a showing that the family does, in fact, function as a single economic unit; therefore, myriad benefits are extended to many married couples who do not deserve them. Motro, *supra* note 49, at 1541.

195. Crawford, *supra* note 50, at 770.

function as one economic body.<sup>196</sup> The family farm provision relies on a similar rationale—that the family functions as an economic unit—but focuses on protection, rather than taxation, of that unit upon the death of one member.<sup>197</sup> Similarly, the small business provision was motivated by a desire to protect the remaining members of an economic unit from devastating tax burdens in the event of the death of one member of the unit.<sup>198</sup> Finally, the income tax joint filing option given to married couples relies completely on the premise that a family that functions as an economic unit should pay taxes as one unit.<sup>199</sup>

Clearly, the theory of economic unity should apply no differently to same-sex couples who pool income, which same-sex married couples are likely to do,<sup>200</sup> than it applies to opposite-sex spouses. Where it is clear that same-sex married couples are just as likely as heterosexual married couples to function as economic units, there is no other rational basis for treating couples differently. In fact, the only explanation for failure to treat same-sex couples as the economic units that they are may be the national debate over same-sex marriage<sup>201</sup> and the “cultural attitude” towards unions other than the traditional heterosexual marriage.<sup>202</sup>

It is necessary, at this point, to mention that “pro-family” tax reform was not the original intention of Congress when it enacted the provisions that give preference to the marital or family unit.<sup>203</sup> The original justification for taxing the marital unit as a single taxpayer, as well as giving a marital deduction, was based on the idea of economic unity.<sup>204</sup> Recently, a shift has begun to occur: “Over a period of more than thirty years, the marital deduction then evolved from a tool for achieving jurisdictional uniformity into an institution based on an unreal and idealized story of proper gender roles for men and women and the economic significance of marriage.”<sup>205</sup> Contemporary discussions of tax policy eventually included the romanticization of marriage as “society’s basic

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196. Kornhauser, *supra* note 51, at 96.

197. Crawford, *supra* note 57, at 32.

198. H.R. REP. NO. 94-1380, at 30–31.

199. Schneider, *supra* note 71, at 128.

200. Knauer, *supra* note 37, at 155–56.

201. *See id.* at 168 (discussing “pro-family tax reform” and national debate (internal quotation marks omitted)).

202. Motro, *supra* note 49, at 1543. The alternative to simply including all same-sex partners in provisions motivated by treatment of the economic unit might be to require a family or couple to actually function as an economic unit before extending such treatment; commentators argue that this would require invasive and burdensome factual inquiries into specific household relationships. Cain, *supra* note 110, at 57. Many same-sex couples, however, are already required to endure such invasions of privacy by state agencies to prove they fit the economic unit model in order to receive domestic partnership benefits. Knauer, *supra* note 37, at 157. Therefore, any added burden of proving economic unity would fall predominantly on heterosexual couples.

203. *See* Crawford, *supra* note 50, at 765–75 (outlining history of marital deduction as means of remedying geographic taxation disparity and recognizing economic unity).

204. Kornhauser, *supra* note 51, at 96.

205. Crawford, *supra* note 50, at 761 (footnote omitted).

institution”<sup>206</sup> at the “heart of our values as Americans,”<sup>207</sup> and a value that must be promoted, not discouraged, by tax provisions.<sup>208</sup> This rhetoric regarding the “sacred institutions of marriage and the family” arises often amid the national debate over same-sex marriage.<sup>209</sup> Unfortunately, morality- and values-focused arguments such as “[s]ame-sex unions do not make strong families” have dominated tax policy regarding same-sex marriages and have shifted the focus from the policies underlying these family provisions.<sup>210</sup>

## 2. Taxation Based on Economic Reality

The policy of economic reality suggests that tax law should be based on the reality of the taxpayer’s situation, rather than on titles.<sup>211</sup> As applied to same-sex married couples, this policy favors taxation of partners that reflects the couple’s life together,<sup>212</sup> rather than treating the same-sex married couple as legal strangers for federal purposes.<sup>213</sup>

The Internal Revenue Service has used the policy of economic reality to increase revenue and tax taxpayers numerous times;<sup>214</sup> accordingly, revision of § 2702 to apply to same-sex married couples would use the economic reality of same-sex marriages and unions to increase the tax base.<sup>215</sup> The government’s refusal to recognize the economic reality of some same-sex taxpayers’ lives and state marriages is resulting, in this case, in “losses to the treasury” and “unnecessary inefficiencies.”<sup>216</sup> By allowing same-sex couples to decrease their

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206. Knauer, *supra* note 37, at 168.

207. *Id.* at 168 (quoting Letter from Bob Etheridge, Member of the United States Congress, to William Jefferson Clinton, President of the United States (Jan. 19, 1998)).

208. *Id.* at 168 (noting conservatives’ use of marriage and values rhetoric to further their tax policies, including DOMA). Knauer also points out that the same strategies of romanticizing the marital union and the values behind it are used by political groups advocating same-sex equality. *Id.*

209. Crawford, *supra* note 50, at 794 (quoting 142 CONG. REC. S10,068 (statement of Sen. Helms)).

210. 142 CONG. REC. S10,117 (statement of Sen. Faircloth).

211. *See Lopez v. Silverman*, 14 F. Supp. 2d 405, 413–14 (S.D.N.Y. 1998) (describing economic reality test as one not based upon terminology but upon totality of circumstances and reality of relationships).

212. Cain, *supra* note 20, at 700.

213. *See* Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1270–71 (2006) (urging refocus of same-sex marriage debate on important issue of partners’ lack of legal standing).

214. *See, e.g., Ark. Best Corp. v. Comm’r*, 485 U.S. 212, 223 (1988) (using objective test and economic reality view in determining that stocks were taxable as capital assets); *Saunders v. Comm’r*, 720 F.2d 871, 873 (5th Cir. 1983) (treating low-interest loans from employer to employee’s children as taxable income to employee).

215. By stopping same-sex couples from using GRITs to decrease their transfer tax liability, the IRS will increase federal tax revenue.

216. Cain, *supra* note 110, at 59. In fact, as Knauer explains, same-sex couples are especially likely to incur the so-called “marriage penalty” if treated the same as heterosexual married couples and allowed to file joint income tax returns, because homosexual couples are more likely to have comparable income levels which will, once combined, increase tax liability. Knauer, *supra* note 37, at 212. For this reason, Jonathan Brophy comments that, to some people it may “seem illogical” that

wealth transfer tax liability with the use of GRITs, the federal government loses revenue.

### 3. Horizontal Equity in Taxation

Because of the preferential treatment given to heterosexual marriages, the Internal Revenue Code currently violates the policy of horizontal equity.<sup>217</sup> Horizontal equity is a traditional taxation policy of “taxing similarly situated taxpayers at a similar rate.”<sup>218</sup> It represents a “concept of fairness” that is rarely disputed or argued against.<sup>219</sup> Empirical data shows that many same-sex couples cohabit, share financial benefits and burdens, and often even raise children together.<sup>220</sup> Aside from the gender difference between Danielle and Daniel, the two families discussed throughout this Comment are alike in almost every way; although fictional, the story of Jonathan and Daniel is far from unlikely, nor would it be uncommon if based in fact. It is clear that many same-sex married couples in long-term relationships and state-recognized marriages are similarly situated, if not “virtually indistinguishable from,” heterosexual married couples.<sup>221</sup>

Despite being similarly situated, same-sex and heterosexual married couples are taxed very differently and at different rates. Moreover, same-sex partners must file taxes as individuals and may not account for their relationships.<sup>222</sup> In other words, every year during tax season, same-sex partners are required by federal law to fabricate information regarding their economic reality in order to file as single and possibly even as single parents.<sup>223</sup> This distinction places numerous tax burdens on same-sex married couples that are not placed on couples whose marriages are federally recognized, such as increased expenses of time and money for estate planning not required for the traditional married couple.<sup>224</sup> While it is possible for same-sex partners to plan their estates in order to provide for one another, such as through the use of GRITs, doing so requires complex and expensive estate planning to achieve the same effect that opposite-sex married couples receive automatically.<sup>225</sup> In addition, many same-sex couples face the threat of a will contest that most heterosexual couples would never

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homosexual partners want the tax code to apply equally to them because the couples are likely to pay higher taxes if they are considered married; however, he adds, “[g]ay and lesbian couples want to be treated equally under the law and do not want preferential treatment.” Brophy, *supra* note 97, at 654.

217. Nixon, *supra* note 16, at 44.

218. *Id.* at 45 (citing WILLIAM A. KLEIN & JOSEPH BANKMAN, FEDERAL INCOME TAXATION 19-20 (10th ed. 1994)).

219. Brophy, *supra* note 97, at 647.

220. Nixon, *supra* note 16, at 45-46.

221. *Id.* at 45 (quoting Harlon L. Dalton, *Reflections on the Lesbian and Gay Marriage Debate*, 1 LAW & SEXUALITY 1, 4 (1991)).

222. *Id.* at 46.

223. Knauer, *supra* note 37, at 216.

224. Cain, *supra* note 14, at 494.

225. See Emond, *supra* note 111, at 458 (noting same-sex couples must incur legal fees to protect their rights to care for one another, whereas rights of married couples are automatically guaranteed).

imagine.<sup>226</sup> As one tax commentator writes, “[t]o put this in perspective, all of the benefits denied to a homosexual couple of twenty years can be instantly had by a heterosexual couple that just met and got married in a drive through chapel in Las Vegas.”<sup>227</sup>

The clear solution to this problem is that Congress treat same-sex couples who have entered into marriages, civil unions, or a state’s equivalent, the same as it treats heterosexual married couples.<sup>228</sup> Until and unless DOMA is successfully challenged as a constitutional violation,<sup>229</sup> the Internal Revenue Code will continue to distinguish between same-sex state marriages and federally recognized marriages. While DOMA remains good law, however, the described amendment to wealth transfer taxation provisions would provide for the similar treatment of same-sex couples and married couples that are similarly situated.<sup>230</sup> The policy goal of horizontal equity does not require explicit federal recognition of same-sex marriage, but would be satisfied by federal recognition and equal treatment of the reality of economic units made up of committed same-sex couples.

Considering the Internal Revenue Code’s disparate treatment of same-sex married couples in light of these foundational taxation policies, it is clear that provisions that make distinctions based upon marital and family arrangements fail to meet these policy goals. Treating Jonathan and Daniel differently than James and Danielle for tax purposes is supported by none of these traditional policies underlying the wealth transfer taxation system.

#### IV. CONCLUSION

This Comment suggests the revision of one specific provision of the federal wealth transfer taxation scheme as one small step in the direction of equality for all married couples, regardless of sexual orientation.<sup>231</sup> It is true that this suggested change would be an economic setback for same-sex couples that currently use GRITs as a means of transferring wealth within their economic unit while avoiding tax liability.<sup>232</sup> In the grand scheme of equality, however, many same-sex taxpayers might be grateful for the hint of federal recognition

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226. Knauer, *supra* note 37, at 177.

227. Emond, *supra* note 111, at 458.

228. Brophy, *supra* note 97, at 647.

229. *See id.* at 654 (arguing DOMA will be invalidated because it violates equal protection and federalism); Cain, *supra* note 87, at 407 (challenging DOMA as “expression of hostility”); Koppelman, *supra* note 97, at 24–32 (arguing DOMA may be invalidated due to invidious purpose under *Romer v. Evans*, 517 U.S. 620 (1996) analysis); Nixon, *supra* note 16, at 63 (arguing DOMA may be repealed as violation of not only social and tax policy, but also equal protection).

230. *See supra* Part III.A for this Comment’s suggestions on how to revise the Internal Revenue Code to provide for equal treatment of same-sex couples.

231. *See supra* Part III.B for a discussion of how revisions to the Internal Revenue Code would promote equal treatment and remain consistent with existing tax policies.

232. *See supra* Part II.E for a discussion of GRITs and how same-sex couples are currently able to use GRITs to their advantage when transferring wealth.

that has, for so long, been denied to their marriages and civil unions. Eventually every provision of the Internal Revenue Code should be revised to guarantee equal treatment of same-sex couples based upon the foundational principles of horizontal equity, taxation of the economic unit, and a recognition of—and taxation based upon—economic reality rather than labels and politics. Revision of the Internal Revenue Code in pursuit of legislators’ guiding principles will result in a tax code with integrity, a code that treats all taxpayers under it equally and is not influenced by the political zeitgeist.

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