



**NEW YORK STATE OF MIND:
HOW THE MARRIAGE EQUALITY ACT
FORESHADOWS THE REPEAL OF DOMA
AND THE POTENTIAL TAX CONSEQUENCES
FOR SAME-SEX COUPLES**

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Student Note

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I. INTRODUCTION—NEW YORK: THE CITY AND STATE THAT NEVER SLEEP

New York is a place familiar with crises. From the crime outbreak of the 1970s to the financial crisis of 2008, New York has dealt with significant economic and social troubles.² Luckily, New York does not remain in a state of decline for long.³ From the ashes of these crises, New York has discovered ways to regain its prominent global position.⁴ New York's most recent improvement followed the 2008 financial crisis and took aim at a divisive social issue: same-sex marriage.⁵

New York's Marriage Equality Act, passed in July 2011, restructured the long-standing definition of marriage.⁶ The State's attempt to provide equality for all couples received praise from more liberal, western European nations such as Spain and the Netherlands.⁷ These nations recognize the legality of same-sex marriages and cheered the passage of a similar American law.⁸ On the other hand, conservative Eastern European

² History of New York City, LONELY PLANET, <http://www.lonelyplanet.com/usa/new-york-city/history#99142> (last visited Nov. 23, 2012) (stating how the 1970s were a low point for New York due to increasing crime and explaining how it was able to regain its former prominence beginning in the 1980s); Economic Crisis and Market Upheavals, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/c/credit_crisis/index.html (last visited Sept. 30, 2012) (explaining the financial "panic" beginning September 2008).

³ *Id.* (explaining how the city regained its title as the "economic capital of the world").

⁴ *Id.* (discussing the "fiscal speed hump" of the late 2000s and the city's ability to "shrug[] its shoulders and prove[] itself resilient").

⁵ Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest to Pass Law*, N.Y. TIMES (June 24, 2011), www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html.

⁶ N.Y. DOM. REL. LAW § 10-a (McKinney 2011).

⁷ Jeff Mason, *Obama Says Same-Sex Couples Should Be Able to Marry*, REUTERS (May 9, 2012), <http://www.reuters.com/article/2012/05/09/us-usa-campaign-obama-gaymarriage-idUSBRE84818Y20120509>.

⁸ Barry D. Adam, *The Defense of Marriage Act and American Exceptionalism: The "Gay Marriage" Panic in the United States*, 12 J. OF THE HIST. OF SEXUALITY

nations, like Russia, feared this dramatic leap to a broader definition of marriage.⁹ This political divide is seen in America as well.¹⁰

The divide between the socially liberal and socially conservative political camps may be deeper and more apparent than the rifts found among nations.¹¹ States and citizens that have already accepted a new formation of the “legally” married couple cheered New York’s Marriage Equality Act as another step towards reformation of the outdated Defense of Marriage Act (DOMA).¹² Equally as vocal, however, are opponents who support the traditional family unit and the values that are associated with that structure.¹³

259, 261 (2003) (explaining how continental Europe has decriminalized homosexual activities since the 1960s).

⁹ Mark Johanson, *Gay Pride 2011: Amazing Parade Photos from Around the World*, INT’L BUS. TIMES (Jun. 27, 2011), <http://www.ibtimes.com/articles/170037/20110627/gay-pride-parade-2011-new-york-san-francisco-paris-mexico-world-global-pride-lgbt-gay-queer.htm> (describing how Eastern Europe remains less tolerant of Lesbian, Gay, Bi-sexual, and Transgendered (LGBT) individuals).

¹⁰ Jessica Dye, *National Impact from New York Marriage Law: Experts*, REUTERS (June 24, 2011, 10:53 PM), <http://www.reuters.com/article/2011/06/25/us-gaymarriage-new-york-impact/idUSTRE7500DB20110625?feedType=RSS&feedName=domesticNews>.

¹¹ *Id.* (describing the impact this legislation has on the nation due to New York’s large population and the difficulties that were faced in passing this legislation); see also Scott Clement, *Americans Split on New York Gay Marriage Law*, WASH. POST (Jul. 29, 2011), http://www.washingtonpost.com/blogs/behind-the-numbers/post/americans-split-on-new-york-gay-marriage-law/2011/07/28/gIQAehckfI_blog.html (showing the breakdown of supporters of the law based upon religious and political beliefs); Confessore & Barbaro, *supra* note 5; Adam, *supra* note 8, at 273.

¹² States that issue marriage licenses to same-sex couples include Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and New York. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated June 2012).

¹³ See Seth Forman, *Five Arguments Against Gay Marriage: Society Must Brace for Corrosive Change*, NEW YORK DAILY NEWS (June 23, 2011), http://articles.nydailynews.com/2011-06-23/news/29710731_1_gay-marriage-

Currently, the states and federal government must decide how the Marriage Equality Act will affect the distribution of benefits, tax laws, and recognition of same-sex marriages in states that have yet to approve them. The underlying political divides will not make these decisions easy.

This note discusses how New York's historic ability to promote burgeoning social issues, like same-sex marriage, will lead to comparable political changes nationwide. First, it will discuss how New York's more radical stances on divisive social issues, like same-sex marriage, will encourage the repeal of DOMA. Second, the note will argue that following the repeal of DOMA, the federal government is likely to adopt the tax law changes that were made in New York following the Marriage Equality Act's passage. Third, the federal tax law changes will be discussed on a state level, to explain how the changes in federal tax law will not result in automatic acceptance and equality for same-sex couples in states that do not recognize such marriages. Finally, this note will propose potential solutions for these discrepancies and will explain why these solutions will not work in our current politically polarized nation.

II. HOW NEW YORK LEGISLATION SWEEPS IN NATIONWIDE CHANGES

From its early history, the State of New York embraced dramatic and controversial social reforms. The State's early progressivism promoted the nationwide Women's Equality Movement.¹⁴ In 1800s Rochester, women actively promoted social service to the "poor, imprisoned, or insane."¹⁵ Men of the community supported the women's activism, providing them

traditional-marriage-gay-advocates (discussing five possible consequences that people of "good conscience" must examine).

¹⁴ NANCY A. HEWITT, WOMEN'S ACTIVISM AND SOCIAL CHANGE: ROCHESTER, NEW YORK, 1822-1872 40 (1984).

¹⁵ *Id.* at 46 (describing women's "active promotion of social order and community welfare" through social service and reform).

with money and materials.¹⁶ The early activism eventually transitioned into more developed and organized campaigns targeting capital punishment, tobacco, and Indian rights.¹⁷ Through these public campaigns, women became recognized and respected members of the Rochester community.¹⁸

The grassroots movement in Rochester eventually spread throughout the nation.¹⁹ The women of Rochester pushed into larger cities like New York City, Philadelphia, and Boston to spread their demand for activism and an increased role for women in public forums.²⁰ While this social movement did not lead to automatic social equality for women, it was one of the first prominent showings of women working side-by-side with men, without challenge, to improve their communities.²¹ Rochester's acceptance of a "radical" social movement opened the door for the women's equality movement, far before the movement could take a concrete hold on the nation.

Similarly, New York City became an early battleground for race-based, civil rights fights for equality following World War II. New York City proved it was the prime location to wage such a battle. It had a "large Black population, progressive race leadership, strong trade unions, and progressive print media."²² In its traditional fashion, New York State passed one of the first and strictest employment discrimination laws in the nation.²³

¹⁶ *Id.* at 50 (explaining how men, particularly husbands and clergy, supported the women's efforts through money, materials, and political favors).

¹⁷ *Id.* at 46.

¹⁸ *Id.* at 50-1 (describing how the men's support of the reform movement lent to the social acceptance of women's public involvement).

¹⁹ *Id.* at 45 (explaining how the women's equality movement transitioned from local to nationwide campaigns for moral reform).

²⁰ HEWITT, WOMEN'S ACTIVISM AND SOCIAL CHANGE 45 (1984).

²¹ *Id.* (describing how men and women utilized their unique, gender-specific characteristics to work together to push for social change).

²² MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY 37 (2003).

²³ Elmer A. Carter, *Fighting Prejudice with Law*, 19 J. OF EDUC. SOC. 299 (1946).

The 1945 Ives-Quinn Law followed the advice of the Federal Fair Employment Practice Committee by seeking “to eliminate discrimination in employment because of race, creed, color, and national origin.”²⁴ New York’s Ives-Quinn Law predated the national Civil Rights Act, which would not develop until the mid-1960s.²⁵ While New York legislation took a commanding national lead in the fight for civil rights equality, the state, like the rest of the nation, failed to fully reach the expectations created by such reformative legislation. The Ives-Quinn Act was not enforced, did not end residential and school segregation, and allowed for the continuation of racially motivated police brutality.²⁶ As Harlem civil rights leader, Malcolm X made clear in his speech, “The Ballot or the Bullet,” “the government ha[d] failed the Negro.”²⁷ Even with these unfortunate outcomes, the quick action of the New York legislature to promote social change and equality before the national legislature exemplifies the state’s progressive legislative attitude.

New York’s Hate Crime Legislation is another example of the State passing controversial, but necessary laws. Currently, only twenty-seven states include gender in their hate crime and discrimination laws.²⁸ In 2000,²⁹ New York was among the states to pass a hate crime act that included gender.³⁰ Once again, federal legislation lagged behind New York. The federal

²⁴ *Id.*

²⁵ ANTHONY S. CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972* 88 (2009) (describing the development of the Civil Rights Act in the national legislature in 1964).

²⁶ BIONDI, *supra* note 22, at 2.

²⁷ *Id.*

²⁸ Troy A. Scotting, *Hate Crimes and the Need for Stronger Federal Legislation*, 34 AKRON L. REV. 853, 883 (2001) (explaining that as of 2001 only nineteen states had passed legislation that criminalized hate crimes based on gender); *Anti-Defamation League State Hate Crimes Statutory Provisions*, ANTI-DEFAMATION LEAGUE, http://www.adl.org/learn/hate_crimes_laws/map_frameset.html (last visited Sept. 27, 2011).

²⁹ N.Y. Penal Law § 485.05 (McKinney 2010); *see also* 2000 107 N.Y. CONSOL. LAWS ADV. LEGIS. SERV. 1-9 (LexisNexis).

³⁰ *Id.*

hate crime bill, the Matthew Shepard Hate Crimes Prevention Act, was not introduced and passed until 2009.³¹ The Matthew Shepard Hate Crimes Prevention Act makes it a crime to cause “bodily injury” to people based on sexual orientation, gender, and gender identity.³² While the Anti-Defamation League promoted the inclusion of gender in hate crimes legislation since 1996,³³ it took the backing of larger, more prominent states, such as New York, to encourage the government to mimic the changes made to state hate crime legislation.

These three examples show that New York is a state on the forefront of social reform and is not reluctant to pass potentially controversial laws. Both The Matthew Shepard Hate Crimes Prevention Act and the Civil Rights Act are examples of the national legislature following in the footsteps of the New York State legislature and New York State laws. Without the passage of the two Acts or the development of the women’s equality movement, the federal government may never have embraced such reforms. It is unclear why New York legislation promotes national change. Some possible reasons could be its population density, size, or its clout as one of the country’s economic centers.³⁴ Although the exact reason for New York’s political stronghold is arguable, history has proven that when New York acts, the country will follow.

III. NEW YORK’S MARRIAGE EQUALITY ACT FORESHADOWS THE REPEAL OF THE DEFENSE OF MARRIAGE ACT (DOMA)

The New York Marriage Equality Act (“Act”) is arguably the State’s most controversial move for social reform.³⁵ The Act was

³¹ Matthew Shepard Hate Crime Prevention Act, 18 U.S.C.A. § 249 (2009).

³² *Id.*

³³ *Hate Crimes Laws*, ANTI-DEFAMATION LEAGUE, <http://www.adl.org/99hatecrime/print.asp>, created 2003 (last visited Sept. 27, 2011).

³⁴ Dye, *supra* note 10.

³⁵ N.Y. DOM. REL. LAW § 10-a (McKinney. 2011).

passed on June 24, 2011 and amends the New York Domestic Relations Law to legally recognize same-sex marriages.³⁶ The Act provides that “no government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage shall differ based on the parties to the marriage being the same sex or a different sex.”³⁷ Therefore, an application for a marriage license cannot be denied solely on the grounds that the couple is of the same or different sex.³⁸ The Act provides for some religious exceptions and does not require a religious entity to perform a marriage that is inconsistent with its religious principles.³⁹ Regardless, the Act grants same-sex couples the same legal recognition of their marriage as the state offers to different-sex couples.

The passage of the Act will likely bring a significant shift to federal legislation. As of March 16, 2011, New York Democratic representative, Jerrold Nadler, sponsored the Respect for Marriage Act (“RFMA”) in the United States House of Representatives.⁴⁰ The bill proposes to repeal DOMA in order to “ensure respect for State regulation of marriage.”⁴¹ Under DOMA, “‘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.”⁴² RFMA hopes to erase the biological distinctions mandated for marriage.⁴³ RFMA was also introduced in the

³⁶ Press Release, Gov. Andrew M. Cuomo, Governor Cuomo Announces Passage of Marriage Equality Act (June 24, 2011), <http://www.governor.ny.gov/press/062411passageofmarriageequality> (quoting N.Y. DOM. REL. LAW § 10-a (McKinney 2011)).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Respect for Marriage Act, H.R. 1116, 112th Cong. (1st Sess. 2011).

⁴¹ *Id.*

⁴² Definition of “Marriage” and “Spouse,” 1 U.S.C. § 7 (1996); Certain Acts, Records, and Proceedings and the Effect Thereof, 28 U.S.C. § 1783C (1996) (these acts are commonly known as the Defense of Marriage Act, or DOMA).

⁴³ Respect for Marriage Act, H.R. 1116, 112th Cong. (1st Sess. 2011).

Senate the same day it was introduced in the House and, as of September 2012, had 157 co-sponsors.⁴⁴

Since the passage of the Act in New York, RFMA has been gaining steam in the House and the Senate. As the momentum builds, a substantial number of representatives are beginning to support the bill.⁴⁵ This increasing support is slowly becoming more bi-partisan.⁴⁶ Republican representative, Ileana Ros-Lehtinen of Florida recently joined her name to RFMA's list of supporters stating, "[g]etting the federal government out of playing favorites when it comes to marriage shouldn't be a partisan issue."⁴⁷ While bi-partisan support will obviously aid RFMA's passage, other less obvious similarities with the Act, support the likelihood of RFMA's passage.

New York legislation has other characteristics that lend to the belief that the Act will help push forward the federal legislation. First, New York is one of the nation's largest states.⁴⁸ Its large population allows new legislation to affect and

⁴⁴ *Id.*; see also Definition of "Marriage" and "Spouse," 1 U.S.C. § 7 (1996); Certain Acts, Records, and Proceedings and the Effect Thereof, 28 U.S.C. § 1783C (1996) (these acts are commonly known as the Defense of Marriage Act, or DOMA).

⁴⁵ *Nadler Announces Record Support for Respect for Marriage Act to Repeal DOMA*, CONGRESSMAN JERROLD NADLER (Sept. 13, 2011), <http://nadler.house.gov/press-release/nadler-announces-record-support-respect-marriage-act-repeal-doma>; Confessore & Barbaro, *supra* note 5 (describing how only one Democratic member of the New York State Senate refused to support the Marriage Equality Act).

⁴⁶ *Republican House Member Co-Sponsors DOMA Repeal Bill HRC Applauds Rep. Ileana Ros-Lehtinen's Leadership*, STATES NEWS SERVICE (Sept. 23, 2011), <http://www.hrc.org/press-releases/entry/republican-house-member-co-sponsors-doma-repeal-bill>; see also *Respect for Marriage Act*, H.R. 1116, 112th Cong. (1st Sess. 2011) (stating Rep. Ros-Lehtinen remains the only Republican to support the Act).

⁴⁷ *Republican House Member Co-Sponsors DOMA Repeal Bill HRC Applauds Rep. Ileana Ros-Lehtinen's Leadership*, *supra* note 46.

⁴⁸ *Republican House Member Co-Sponsors DOMA Repeal Bill HRC Applauds Rep. Ileana Ros-Lehtinen's Leadership*, *supra* note 46 (describing how the passage of the New York legislation could represent a national shift in gay rights); see also Michael A. Lindenberg, *Historic Vote Makes Gay Marriage Legal in New York State*, TIME (June 24, 2011), <http://www.time.com/time/nation/article/0,8599,2079841,00.html> (stating that New York is the sixth and largest state to make gay marriage legal); see also

change the laws governing a large subsection of the American population.⁴⁹ This characteristic means that a large section of the national electorate now lives in a state protecting the right to gay marriage.⁵⁰ If the guarantee of a legally recognized marriage does not cause any major problems for the State, it could mobilize more people to push for a subsequent change in federal law. Second, the State also has one of the most prominent and powerful gay communities.⁵¹ This sociological differentiation makes New York a prime location to spurn a national movement since the presence of more same-sex couples within the state increases the chances that more homosexual couples will embrace their new opportunity to marry.⁵² Third, unlike the five previous states to enact same-sex marriage legislation, New York is consistently present in the national news and vocal about its societal changes.⁵³ For example, days after the passage of the Marriage Equality Act, New York City hosted a Gay Pride Weekend, which attracted millions of visitors to the city to revel

Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws, supra note 12.

⁴⁹ New York has the nation's third largest population. *Annual Estimates of Resident Population Change for the United States, Regions, States and Puerto Rico: April 1, 2010 to July 1, 2011 (NST-EST2011-01)*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/data/national/totals/2011/index.html> (last updated Dec., 2011).

⁵⁰ New York has 31 electoral votes. Adam Nagourney, Jeff Zeleny, & Shan Carter, *The Electoral Map: Key States*, N.Y. TIMES (Nov. 4, 2008), <http://elections.nytimes.com/2008/president/whos-ahead/key-states/map.html>.

⁵¹ Confessore & Barbaro, *supra* note 5 (mentioning New York's large and politically active gay community).

⁵² Approximately 45,000 gay couples live in New York State. Nicholas Confessore & Michael Barbaro, *At Clerks' Offices, Girding for More Weddings*, N.Y. TIMES (Jun. 25, 2011), <http://www.nytimes.com/2011/06/26/nyregion/new-york-clerks-offices-gird-for-influx-of-gay-couples.html>.

⁵³ *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws, supra* note 12.

in the celebratory atmosphere.⁵⁴ The popularity of the event, in conjunction with the passage of the legislation, made national and world headlines.⁵⁵ These social distinctions make New York one of the most influential states in promoting national legislative change.

New York's passage of the Marriage Equality Act likely foreshadows the passage of the currently pending RFMA. First, RFMA is slowly gaining the majority backing and bi-partisan support it needs to be passed in Congress. Second, New York's unique social makeup allows the state's legislation to play a more prominent role in national politics. Therefore, the combination of the similar political process and influence of New York's social pressure will make the passage of RFMA likely and the repeal of DOMA complete.

IV. NOW WHAT? THE CHANGES IN THE FEDERAL TAXATION SYSTEM THAT WILL OCCUR FOLLOWING THE REPEAL OF DOMA

Following the passage of the Marriage Equality Act, substantial changes were made to the New York State tax code in order to conform to the newly recognized legal status of same-sex married couples. Since the New York legislation will likely encourage Congress to repeal DOMA, the legislature will also need to reevaluate and restructure its longstanding tax codes utilized by the Internal Revenue Service (IRS). This section will predict the likely course Congress will take in reforming its tax code to conform to the changes and the problems it may face in the process.

Congress will need to look to states, such as New York, to determine what changes were made, how they were accomplished, and decide whether those changes will work for the federal tax code. Congress also will have to overcome

⁵⁴ John Leland, *At N.Y. Pride Parade, Joy over Gay Marriage Law*, BOSTON.COM (June 27, 2011), http://articles.boston.com/2011-06-27/news/29709450_1_marriage-bill-marriage-law-gay-weddings.

⁵⁵ Andrew Grossman, *Gay Pride Parade Turns into a Victory Lap*, WALL ST. J. (June 27, 2011), <http://online.wsj.com/article/SB10001424052702304314404576410081392706452.html>; see also Johanson, *Gay Pride 2011*, *supra* note 9.

certain problems that states do not face when adjusting tax laws. These issues will mainly arise in states that refuse to recognize same-sex marriage and states that utilize whatever loopholes they may find to subvert the national tax codes. This section will contend that the proposed solutions to the discrepancies among state tax laws, while viable, are unlikely to work. The existing cultural, political, and religious divides that exist surrounding the issue of same-sex marriage will prevent such changes. Ultimately, while the government has several alternatives to the tax code changes, the divides in public opinion are likely to prevent these modifications until a larger consensus is built.

A. TAX LAW CHANGES IN NEW YORK

After passing the New York Marriage Equality Act, the State legislature quickly took steps to reform the State's tax codes. On July 29, 2011, about a month following the Act's passage, the New York State Department of Taxation and Finance began reporting the inconsistencies between the Act and the State's tax laws.⁵⁶ The Legislature amended the state laws to allow same-sex married couples to file "New York personal income tax forms as married individuals even though they were required to file separate federal returns."⁵⁷ Same-sex couples received many tax benefits from this one change. Some of these benefits included: pooling and splitting income, as well as deductions, potentially saving the higher-earning spouse from entering a higher tax bracket and allowing one spouse's deductions to offset the income of the other; lower tax rates for some married couples, depending on how much income is earned by each; and deductions that are available only to married individuals who file a joint return.⁵⁸

⁵⁶ Carlyn S. McCaffrey & Jay E. Rivlin, *Same-Sex Marriage Legalized in New York: Implications for Estate and Tax Planning*, NAT'L L. REV. (Aug. 3, 2011), <http://www.natlawreview.com/article/same-sex-marriage-legalized-new-york-implications-estate-and-tax-planning>.

⁵⁷ *Id.*

⁵⁸ *Id.*; see also Stephen T. Black, *Same-Sex Marriage and Taxes*, 22 BYUJ. PUB. L. 327, 329-330 (2008) (describing how married couples divide their income to reduce the total income of one partner and prevent this partner from entering a higher tax bracket).

In addition, same-sex married couples in New York also can enjoy a spouse's employment benefits, such as insurance.⁵⁹ These benefits enjoyed by most different-sex married couples without thought, have now been granted to same-sex couples married in New York.

Besides the extension of income tax benefits to same-sex married couples, the New York legislature also corrected other inconsistencies in the tax laws to further extend the taxation benefits associated with marriage. One of the inconsistencies concerned the State's estate tax. As New York based its estate tax laws off federal tax laws, the State allowed for "an unlimited marital deduction for assets transferred to a surviving spouse," provided that the spouse is a United States citizen.⁶⁰ This law allows a spouse to provide for his married counterpart after his death without facing any tax consequences.⁶¹ Similarly, the tax laws allowed 50% of the property value to be excluded from the value of the gross estate if the property was held jointly with a spouse.⁶² Previously, same-sex couples could not receive a substantial marital deduction, since they did not hold property with a "spouse." Fortunately, the New York legislature corrected this inconsistency by allowing same-sex couples to compute the estate tax as different-sex married couples do for state tax purposes.

The New York legislature could not change federal tax law. One such example regarded the gift tax. Similar to the estate tax, married couples can take spousal gift tax deductions. Unlike the estate tax, the gift tax deduction in New York falls solely under federal tax law.⁶³ "Under current law, each gift in

⁵⁹ McCaffrey & Rivlin, *supra* note 56.

⁶⁰ MICHAEL D. STEINBERGER, FEDERAL ESTATE TAX DISADVANTAGES FOR SAME-SEX COUPLES 3 (The Williams Institute, UCLA Economics Department, Pomona College, 2009).

⁶¹ *Id.* at 4.

⁶² McCaffrey & Rivlin, *supra* note 56.

⁶³ Gift tax is only applicable for property transfers made prior to 2000. *What is a gift tax?* THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, http://tax.custhelp.com/app/answers/detail/a_id/423/related/ (last updated Jan. 11, 2012 2:44 PM); *see also Has the New York State Gift Tax Been Repealed?*, THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, http://tax.custhelp.com/app/answers/detail/a_id/424 (last updated Jan. 9,

excess of \$1[3],000 is taxable as a gift to the donor, and is counted against the donor's applicable exclusion amount."⁶⁴ While a married couple has the privilege of making unlimited gift transfers to his or her spouse without suffering a tax penalty, this benefit does not extend to same-sex married couples.⁶⁵ For a same-sex couple, once a person exceeds the \$13,000 limit, the gift tax becomes applicable.⁶⁶ Therefore, same-sex couples would not benefit from the gift tax deductions that are given to married couples on property transfers occurring prior to January 1, 2000.⁶⁷

Similarly, the New York legislature was unable to change federal benefits that are restricted by the narrow definition of marriage found in DOMA.⁶⁸ Certain benefits, such as the tax exemption given to married couples on a spouse's health insurance benefits, can only be affected at the federal level.⁶⁹ Likewise, married same-sex couples will need to fill out separate

2012 11:23 AM) (explaining that the state gift tax returns do not have to be filed after January 1, 2000).

⁶⁴ Gifts made to spouses are deemed an exception to the general rule that any gift is a taxable gift. *Frequently Asked Questions on Gift Taxes*, INTERNAL REVENUE SERVICE (Mar. 14, 2012), <http://www.irs.gov/businesses/small/article/0,,id=108139,00.html>; Black, *supra* note 58, at 343; McCaffrey & Rivlin, *supra* note 56 (showing that the current gift tax allowance for individuals is \$13,000).

⁶⁵ McCaffrey & Rivlin, *supra* note 56 (explaining that married couples have gift tax benefits, such as gift-splitting, which increases their tax-exempt gifts to \$26,000).

⁶⁶ McCaffrey & Rivlin, *supra* note 56; *see also* *Frequently Asked Questions on Gift Taxes*, *supra* note 64 (providing that the taxpayer reaches the \$5 million lifetime deduction).

⁶⁷ THE NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, *supra* note 63.

⁶⁸ Definition of "Marriage" and "Spouse," 1 U.S.C. § 7 (1996); Certain Acts, Records, and Proceedings and the Effect Thereof, 28 U.S.C. § 1783C (1996) (defining marriage as between a man and a woman).

⁶⁹ Tara Siegel Bernard, *How Gay Marriage Will Change Couples' Financial Lives*, N.Y. TIMES (June 27, 2011), <http://bucks.blogs.nytimes.com/2011/06/24/how-gay-marriage-will-change-couples-financial-lives/>.

federal income tax returns, as the federal government does not legally recognize their married status.⁷⁰ New York's legislature has made huge strides in correcting the disparities existing between the Marriage Equality Act and the existing tax laws, however, many inconsistencies remain for the federal government to correct.

While New York cannot change federal tax law, the state can still be used as a reference tool for federal tax law changes. As Susan Sommer, Director of Constitutional Litigation at Lambda Legal, a legal advocacy organization for the gay community stated, "New York opens the door for couples who get married to be in a position to get those federal rights and protections when the day comes, in the not distant future, that DOMA falls. . . . Marriage in New York brings the upside of access to . . . federal protections."⁷¹ The New York tax law changes provide hope that the federal government will make federal benefits available to same-sex married couples and put them on equal footing with different-sex couples.

B. HOW THE FEDERAL GOVERNMENT MAY USE OR ALTER NEW YORK'S TAX LAW CHANGES FOR NATIONAL PURPOSES

There are several ways that the repeal of DOMA will lead to national tax law changes, similar to those found in New York. These changes will vary from differences in filing procedures to the actual tax benefits that can be given to same-sex married couples. In addition, the law will need to be altered to provide tax free benefits to a same-sex spouse. By mirroring the New York tax law changes and correcting some of the federal tax laws, a taxation system may arise that provides same-sex couples, in states that recognize same-sex marriage, with the taxation benefits given to different-sex married couples.

First, the federal government will have to eliminate the need for married same-sex couples to file separate federal income tax forms.⁷² This change would only affect same-sex couples living

⁷⁰ Black, *supra* note 58, at 345.

⁷¹ Siegel Bernard, *supra* note 69 (internal quotation marks omitted).

⁷² Black, *supra* note 58, at 345.

in states that recognize same-sex marriage.⁷³ For these couples, tax filing will be simpler since they will only need to file two returns, instead of three.⁷⁴ While this change will likely benefit most same-sex couples in those states, some argue that this change is not as beneficial as it appears. Couples with high individual incomes may have higher taxes when married.⁷⁵ The filing of a joint income tax return could move the couple into a higher income tax bracket, causing the couple to lose the benefit of the marriage bonus they could have received if they had lower incomes.⁷⁶ Opponents argue that a same-sex couple in the higher tax bracket would have benefitted from the filing of separate returns.⁷⁷ However, even with the potential marriage penalty being assessed in the higher income tax bracket, it is likely that same-sex couples will still prefer to file a joint federal income tax return as it will reduce the amount of tax preparation fees they will have to pay by filing additional forms.⁷⁸

Another benefit of repealing DOMA and changing the federal tax laws for same-sex married couples concerns the estate and gift taxes. By eliminating the distinction between different-sex and same-sex married couples, same-sex couples will be able to take deductions for gift and estate taxes. Currently, same-sex couples are forced to pay gift and estate taxes, without receiving

⁷³ Black, *supra* note 58, at 345.

⁷⁴ Black, *supra* note 58, at 345.

⁷⁵ While some married same-sex couples could opt for married filing separately status, “this filing status generally pays the most tax of all that filing statuses.” *Married Filing Joint vs. Married Filing Separately*, TURBOTAX, <http://turbotax.intuit.com/support/iq/Filing-Status/Married-Filing-Joint-vs--Married-Filing-Separately/GEN83639.html> (last updated Nov. 21, 2012); Siegel Bernard, *supra* note 69 (explaining that couples earning less than \$65,000 may end up with lower state income taxes than they would filing as individuals).

⁷⁶ Siegel Bernard, *supra* note 69; *see also* Black, *supra* note 58, at 330-331 (using mathematical examples to show how married couples making below the federally prescribed amount of income receive a “marriage bonus,” but those that make above that amount receive a “marriage penalty”).

⁷⁷ Siegel Bernard, *supra* note 69.

⁷⁸ Siegel Bernard, *supra* note 69.

the benefit of unlimited transfers between spouses.⁷⁹ However, if the tax laws were reformed following the repeal of DOMA, same-sex couples would be able to avoid estate taxes until they reach the five million dollar limit for federal taxes and the lower limits set for state taxes.⁸⁰ While wealthy same-sex couples would not have the estate tax benefits regardless of changes to the current laws in place, the benefits of transferability and gift-splitting will likely benefit a majority of same-sex couples.⁸¹

A third tax benefit concerns health insurance. Currently, “[p]eople who work for companies that offer domestic partner insurance must pay income taxes on the value of their partner’s benefits, unless they are considered a dependent.”⁸² A spouse is not considered a dependent.⁸³ Different-sex married couples are not subject to this tax because the federal government recognizes them as a single unit.⁸⁴ With the repeal of DOMA, the tax laws will need to be altered to recognize that same-sex married couples are a solitary economic unit comparable to the heterosexual couple and should not have to pay income taxes on the insurance benefits they receive from their partner’s employer.

Unfortunately, federal tax law changes do not automatically place same-sex married couples on equal footing with their different-sex couple counterparts. Many other changes must take place in states that currently do not recognize same sex marriage. While these states could not revoke federal privileges from same-sex couples legally married in other states, the state could refrain from extending state benefits to these couples.

⁷⁹ McCaffrey & Rivlin, *supra* note 56.

⁸⁰ New York’s limit for state estate tax is \$1 million. McCaffrey & Rivlin, *supra* note 56.

⁸¹ McCaffrey & Rivlin, *supra* note 56.

⁸² Siegel Bernard, *supra* note 69.

⁸³ *Six Important Facts about Dependents and Exemptions*, INTERNAL REVENUE SERVICE (Jan. 11, 2011), <http://www.irs.gov/newsroom/article/0,,id=202335,00.html>.

⁸⁴ Siegel Bernard, *supra* note 69; *see also* Black, *supra* note 58, at 333 (explaining how Congress chooses to protect the traditional family unit by implementing tax policy that favors such a set-up).

Therefore, same-sex couples living in a state that recognizes their union will receive the greatest benefits from changes to the federal income tax system.

IV. THE PROBLEMS CONTINUE: THE FEDERAL TAXATION SYSTEM AND STATES THAT DO NOT RECOGNIZE SAME-SEX MARRIAGE

The changes that may be made to the federal taxation system following the likely repeal of DOMA do not ensure a uniform tax system for same-sex marriages. While the federal government may follow New York's precedent with social changes, the rest of the nation is not always as keen to copy. Currently, there are twenty-nine states that have state constitutional amendments defining marriage in the same language as DOMA.⁸⁵ Similarly, twelve other states have statutory provisions that repeat DOMA's definition.⁸⁶ If states continue to recognize the antiquated definition of a marriage, even the passage of RFMA will not accomplish much change.⁸⁷ RFMA does not require that states recognize same-sex marriage, nor does it require that states alter their tax laws to extend the benefits of marriage to same-sex couples.⁸⁸

One way to solve this discrepancy is for the courts to hold that the denial of state marriage benefits for same-sex couples is a violation of the Equal Protection Clause of the Fourteenth Amendment.⁸⁹ Similarly, if the courts do not recognize this type

⁸⁵ Tara Siegel Bernard, *What a Repeal of the Gay Marriage Ban Means*, N.Y. TIMES (June 9, 2011), <http://bucks.blogs.nytimes.com/2011/06/09/what-a-repeal-of-the-gay-marriage-ban-means/> (explaining how RFMA will face roadblocks in states that do not recognize same-sex marriage as these states continue to define marriage as "between a man and a woman"); William E. Thro, *The Heart of the Constitutional Enterprise: Affirming Equality and Freedom in Public Education*, 2011 BYU EDUC. & L.J. 571, 578 (2011).

⁸⁶ Siegel Bernard, *supra* note 85.

⁸⁷ Respect for Marriage Act, H.R. 1116, 112th Cong. (1st Sess. 2011); *see also* Respect for Marriage Act, S. 598, 112th Cong. (1st Sess. 2011).

⁸⁸ *Id.*; *see also* Siegel Bernard, *supra* note 85.

⁸⁹ William A. Reppy, Jr., *The Framework of Full Faith and Credit and Interstate Recognition of Same-Sex Marriages*, 3 AVE MARIA L. REV. 393 (2005) (explaining

of discrimination under the Fourteenth Amendment, it might be possible for the courts to compel states to recognize same-sex marriage under the Full Faith and Credit Clause.⁹⁰ However, since the courts have been reluctant to make such bold determinations thus far, the discrepancies between state tax laws and federal tax laws are likely to remain for some time.⁹¹

This section will concentrate on how states that do not recognize same-sex marriage can legally avoid this recognition following the repeal of DOMA and the passage of RFMA. It also will explain the ways these states may deny same-sex couples tax-related benefits that accompany marriage. If more states do not recognize same-sex marriage, the repeal of DOMA will have little impact on a variety of state-controlled benefits that will continue to be withheld from gay couples.

A. STATES AND THEIR ABILITY TO CONTROL CIVIL STATUS

A state has the right to control whether or not it will recognize a marriage.⁹² While the United States Constitution may prohibit a state from irrational sexual discrimination, it does not prohibit a state from refusing to grant recognition of a marriage, whether a different-sex or same-sex marriage.⁹³ Traditionally, states have control over domestic relations concerning husband and wife and parent and child relationships.⁹⁴ This is one area where the federal government is careful not to overstep its bounds and risk the possibility of

how this approach might be possible since the Supreme Court has classified marriage as a fundamental right or because a ban on same-sex marriage is equivalent to gender discrimination banned by the Equal Protection Clause).

⁹⁰ *Id.* (proscribing the use of the Full Faith and Credit Clause of Article IV in the U.S. Constitution to prevent discrimination against same-sex marriages); *Cf.* Thro, *supra* note 85, at 580-581 (describing how the Full Faith and Credit Clause will not prevent states from discriminating against same-sex couples because it does not require a state to violate its legitimate public policy).

⁹¹ Siegel Bernard, *supra* note 85.

⁹² Thro, *supra* note 85, at 578.

⁹³ Thro, *supra* note 85, at 577.

⁹⁴ Thro, *supra* note 85, at 578.

treading on state sovereignty.⁹⁵ By granting the state the ability to determine which marriages it will recognize, the state maintains the ultimate control of finalizing national uniformity on the issue of same-sex marriage and the benefits granted to such couples.

This federally granted state right is one of the largest roadblocks preventing same-sex couples from guaranteed equality following a repeal of DOMA. Same-sex couples will be able to marry in a state that recognizes their marriage and, upon moving to another state, will lose the tax related benefits that had been previously extended to them. While the federal tax benefits will follow the couple, since a state cannot deny federally granted rights, the state tax benefits will not be guaranteed. A state's power to control its definition of a civil status will create wide discrepancies in the treatment of homosexual couples throughout the United States.

B. HOW THE STATES WILL USE THEIR CONTROL OF CIVIL STATUS TO PREVENT SAME-SEX COUPLES FROM GAINING TAX RELATED STATE BENEFITS

RFMA provides that a marriage will be recognized under the law of the state where the marriage took place, allowing federal taxation benefits given to a same-sex couple to follow that couple if they move to a state that does not recognize their marriage.⁹⁶ However, RFMA does not provide protection to same-sex couples if a state refuses to provide them with state tax benefits.⁹⁷ Due to these discrepancies, it will most likely come down to the courts to determine how a state can use its control of a civil status and the right to marry in order to deny state tax benefits to same-sex couples.

One of the first cases that captured national attention for gay marriage issues was *Baehr v. Lewin*, decided by the Hawaiian Supreme Court in 1993.⁹⁸ This case limited the trial court's

⁹⁵ Thro, *supra* note 85, at 578.

⁹⁶ Siegel Bernard, *supra* note 85.

⁹⁷ Siegel Bernard, *supra* note 85.

⁹⁸ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

ability to find that there were necessary state interests in disallowing two men from obtaining a marriage license and to determine whether the denial resulted in a violation of the men's equal protection rights.⁹⁹ The court determined that the State could deny the right to marry only if it has a compelling reason to do so.¹⁰⁰ Next, the court discussed its limitations and found it could not freely take away a citizen's right to marry as, "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free [people]."¹⁰¹ The Hawaiian Court tried to distinguish itself from prior state court decisions that either avoided commenting on same-sex marriage or determined that a state did not recognize such unions.¹⁰² While Hawaii tried to extend the possibility of same-sex marriage through its courts, many other state courts have denied marriage to these couples.¹⁰³

Prior to *Baehr*, state courts had denied same-sex couples the right to marry for a variety of reasons. First, state courts refused

⁹⁹ *Id.*; see also John R. Dorocak, *Same-Sex Couples and the Tax Law: Tax Filing Status for Lesbians and Others*, 33 OHIO N.U.L. REV. 19, 26-27 (2007) (explaining how *Baehr* is one of the leading cases regarding the rights of same-sex couples and the impact of these rights on tax laws).

¹⁰⁰ *Baehr*, 852 P.2d 59 (citing *Salisbury v. List*, 501 F. Supp 105, 107 (D. Nev. 1980) (holding that plaintiffs have a right to marry prison inmates and denying injunctive relief assuming prison officials would amend the procedure that violated their constitutional right to marry)).

¹⁰¹ *Baehr*, 852 P.2d 60 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (reversing the lower court and holding that the restrictions on freedom to marry due to racial classifications imposed by the state were a violation of the Equal Protection Clause and deprived the couple of Due Process)).

¹⁰² *Baehr*, 852 P.2d at 59-68 (citing *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky. 1973) (holding that two women are incapable of entering into a marriage as defined by state law); *De Santo v. Barnsely*, 476 A.2d 952, 955-56 (Pa. Super. Ct. 1984) (holding that common law same-sex marriage did not exist in Pennsylvania); *Singer v. Hara*, 11 Wash. Ct. App. 247 (1974) (holding that the legislature of Washington did not authorize same-sex marriage and did not violate the Washington State Constitution's Equal Rights Amendment, nor equal protection under the United States Constitution)).

¹⁰³ HAW. CONST. art. I, § 23 (Mitchie 2011); see, e.g., *Milberger v. KBHL, LLC*, 486 F. Supp. 2d 1156, 1164 (2007) (explaining how a 1994 amendment to the Hawaiian marriage licensing statute led to the 1997 amendment of the state constitution reserving marriage to different-sex couples).

to address same-sex marriage and a state's definition of marriage by avoiding the issue in cases, in which such problems arose.¹⁰⁴ Second, state courts utilized the language of their laws to define marriage as between a man and a woman and denied same-sex marriage on the basis that such a union was not possible.¹⁰⁵ Third, state courts also found that denying the right of marriage to same-sex couples was not a violation of either an individual's state or federal constitutional rights.¹⁰⁶

State legislatures also were influential in restricting marriage to a man and a woman. Following the *Baehr* case, states that feared an extension of benefits to same-sex couples began to pass their own Defense of Marriage Acts.¹⁰⁷ Hawaii was one of the states to take legislative action to fix the potentially lenient precedent set by its state supreme court.¹⁰⁸ These mini-DOMAs act in the same fashion as the current, federal DOMA by refusing to recognize same-sex marriage even if the federal legislation is repealed.¹⁰⁹

This refusal is not as uniform as it appears. States that have enacted a variation of DOMA, either constitutionally or statutorily, vary greatly with the types of enforcement mechanisms each law proscribes. The first group of states developed express prohibitions against giving any out-of-state marriages that are performed validly, local effect.¹¹⁰ The second,

¹⁰⁴ *De Santo*, 476 A.2d at 955-56 (holding that common law same-sex marriage did not exist in Pennsylvania).

¹⁰⁵ *Jones*, 501 S.W.2d at 589 (holding that two women are incapable of entering into a marriage as defined by state law).

¹⁰⁶ *Singer*, 11 Wash. Ct. App. at 264 (holding that the Washington legislature did not authorize same-sex marriage and did not violate the Washington State Constitution's Equal Rights Amendment, nor equal protection clause under the United States Constitution).

¹⁰⁷ Siegel Bernard, *supra* note 85 (explaining how twenty-nine states have Constitutional provisions defining marriage as between a man and a woman and twelve states have statutory provisions with the same definition).

¹⁰⁸ HAW. CONST. art. I, § 23; *see, e.g., Milberger*, 486 F. Supp. 2d at 1164.

¹⁰⁹ Siegel Bernard, *supra* note 85.

¹¹⁰ Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2243 (2005); *see e.g., ALASKA STAT. § 25.05.013* (Lexis 2011) ("A marriage entered into by persons of the same sex, either under

more lenient group of states does not expressly reject the possibility of recognizing out-of-state valid marriages.¹¹¹ Instead, this group will look to the purposes of the marriage and determine whether the denial of the union will “frustrate reasonable expectations or produce significant hardships.”¹¹² Court-induced changes may not work in every state, as states that do not recognize same-sex marriage vary greatly in the degree of harshness toward gay marriage in their state statutes. States such as Alaska and Missouri, may create the biggest challenges for extending tax benefits to same-sex couples.¹¹³ Their statutes invalidate same-sex marriage performed validly outside of the state.¹¹⁴ States with both flexible and inflexible status statutes will continue to pose continuing challenges for same-sex couples seeking tax related equality and benefits.

Besides the differing language of the laws, the differing implementations create further variation among the states. States with mini-DOMAs imposed by statute allow for the prospect of future change through the legislature.¹¹⁵ In

common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state.”); MO. ANN. STAT. § 451.022(4) (Lexis 2011) (“A marriage between person of the same sex will not be recognized for any purpose in this state even when valid where contracted.”).

¹¹¹ Barrington Wolff, *supra* note 110, at 2243-44. Some state statutes do not mention that same-sex marriages will be void in their state nor do these states recommend different treatment of same-sex marriages. See e.g., HAW. STAT. § 572-1 (Mitchie 2011) (stating that a valid marriage contract is between a man and a woman); IOWA CODE ANN. § 595.2 (Lexis 2011) (“Only a marriage between a male and a female is valid.”); TEX. FAM. CODE ANN. § 2.001 (Lexis 2011) (“A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state. A license may not be issued for the marriage of persons of the same sex.”).

¹¹² Barrington Wolff, *supra* note 110, at 2244.

¹¹³ See e.g., ALASKA STAT. § 25.05.013 (Lexis 2011); MO. ANN. STAT. § 451.022(4) (Lexis 2011).

¹¹⁴ See e.g., ALASKA STAT. § 25.05.013 (Lexis 2011); MO. ANN. STAT. § 451.022(4) (Lexis 2011).

¹¹⁵ Lynn A. Baker, *Governing By Initiative: Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 143 (1995) (explaining that forty-nine states impose a super-majority requirement for state constitutional amendments, requiring the submission of legislation to the People and approval

comparison, states that added mini-DOMAs to their constitutions further entrenched the laws.¹¹⁶ The constitutional changes will need to proceed through an amendment process, which can be more difficult and time-consuming.¹¹⁷ Ultimately, these varying approaches suggest that a uniform prohibition of same-sex marriage is unlikely.

V. POSSIBLE SOLUTIONS

The repeal of DOMA only guarantees changes in federal tax law. Same-sex couples will need to take additional steps to find tax law equality in states that refuse to recognize their unions. There are various possible solutions to address these discrepancies and to correct the inequality. The federal government could eliminate the distinction between couples living together and couples that are married. The removal of this distinction would eliminate the need to address sexual orientation when assigning tax law benefits. The federal government also could eliminate state control of civil status. This option could be accomplished by having the U.S. Supreme Court rule that the public policy exception is being used to violate constitutionally granted rights. These options are only a few of the possible solutions that would be available to the government to eliminate the rift that may form in the national tax policy following the repeal of DOMA.

by a majority of those voting); see also Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 360 (1994).

¹¹⁶ Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture*, *supra* note 115, at 360 (referencing such requirements as “denials of equal protection”).

¹¹⁷ *Id.* at 360 (explaining how super-majority requirements “safeguard [] a stable constitutional framework, [] protect[] private rights, and [] avoid[] hasty, ill-advised decisions); see also Baker, *Governing By Initiative*, *supra* note 115, at 145 (questioning whether the adoption of an amendment through the initiative should require more than a simple majority vote required to pass a statute by the initiative).

A. ELIMINATING THE DISTINCTION BETWEEN LIVE-IN COUPLES AND MARRIED COUPLES

The first possible solution that the federal government may attempt following the repeal of DOMA is to eliminate the distinction between couples that merely live together and couples that are married. Removing this distinction will allow same-sex couples to obtain tax benefits given to different-sex couples without encountering issues of sexual orientation.¹¹⁸ Reshaping such a division will play a crucial role in ending the inequality faced by same-sex couples.¹¹⁹ Under such a policy, same-sex couples, either married or unmarried, will be taxed as one economic unit.¹²⁰ While the current tax laws recognize heterosexual families as an economic unit for tax purposes, same-sex units are not recognized in a similar fashion.¹²¹ By extending this assumption to same-sex couples, the federal government would be considering the realities of most current family units.¹²² Such a change would eliminate the antiquated belief embodied by the tax code that heterosexual married couples function as solitary economic units.¹²³ By recognizing live-in couples, as an economic unit for tax purposes, the federal

¹¹⁸ Frank S. Berall, *Tax Consequences of Unmarried Cohabitation*, 23 QUINNIPIAC L. REV. 395, 408 (2004) (describing how cohabitants of either sex must file as single people unless deemed married by applicable law).

¹¹⁹ Matthew Fry, *One Small Step for Federal Taxation, One Giant Leap for Same-Sex Equality*, 81 TEMP. L. REV. 545, 568 (2008) (explaining how preferential treatment of heterosexual, married couples violates the Internal Revenue Code's horizontal equity policy); MICHAEL A. LIVINGSTON & DAVID S. GAMAGE, *TAXATION: LAW, PLANNING, AND POLICY* 8 (2nd ed. 2010) ("Horizontal equity means fairness in the sense of treating like cases alike, or in the words of the famous tax tongue-twister, 'similarly situated taxpayers ought to be treated similarly.'").

¹²⁰ Fry, *supra* note 119, at 564-66.

¹²¹ Fry, *supra* note 119, at 564-66.

¹²² Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J. L. FAM. STUD. 135, 136 (2005) (describing how cohabitation for different-sex couples became socially accepted in the 1970s); *See also* Fry, *supra* note 119 (describing changes in the traditional family unit).

¹²³ Fry, *supra* note 119.

government would extend the benefits reserved for heterosexuals to many untraditional, modern family structures.

Cohabiting couples are unlikely to be taxed as an economic unit. First, cohabitation is historically viewed as a criminal and immoral act.¹²⁴ This negative connotation associated with cohabitation makes it an unlikely solution to change the definition of a “family” found in tax law.¹²⁵ Second, the emphasis placed on the traditional family unit and the institution of marriage makes the recognition of cohabitation for tax law unlikely, as many opponents fear the destruction of such important social institutions.¹²⁶ Many opponents believe that the importance of the traditional family unit may be diminished with the federal recognition of cohabitation.¹²⁷ Finally, opponents to this type of taxation policy change fear the effects it may have on heterosexual marriages.¹²⁸ By granting live-in couples the same tax benefits as married couples, heterosexual couples will become less inclined to marry since they will receive some benefits of marriage without the formal commitment.¹²⁹ The influence this type of national taxation policy overhaul could have on the moral and social structure of the American family makes it unlikely to have many supporters. In addition, the complexity of implementing such a policy would also make it unlikely to become a part of the Internal Revenue Code.

While the recognition of cohabiting couples under tax law would extend the taxation benefits associated with marriage to many more same-sex couples, the negative consequences to the family unit and those trying to take advantage of the system

¹²⁴ Mahoney, *supra* note 122, at 203 (detailing the historical views on cohabitation and the criminal laws that were implemented to prevent it).

¹²⁵ Mahoney, *supra* note 122, at 202-03 (explaining how the regulation of the “traditional nuclear family” occurs in criminal, tax, and property law).

¹²⁶ Mahoney, *supra* note 122, at 203 (emphasizing the policy considerations accompanying cohabitation, including the “venerable institution of marriage”).

¹²⁷ Mahoney, *supra* note 122, at 203.

¹²⁸ Mahoney, *supra* note 122, at 203-04 (explaining that the use of cohabitation as another option for heterosexual couples, may lead to abandoning the institution of marriage).

¹²⁹ Mahoney, *supra* note 122, at 203-04.

make it almost impossible to implement. In addition, recognizing cohabitation does not solve the inequality faced by same-sex married couples. Rather, cohabitation eliminates the possibility of a formal marriage for homosexual couples. It also provides more benefits to heterosexual couples that chose to live together rather than enter a formal marriage. Therefore, this possible solution is unlikely to be used to fix the discrepancies that will arise among states following the repeal of DOMA.

B. SUPREME COURT ELIMINATES THE DISCRIMINATORY USE OF CIVIL STATUS ON CONSTITUTIONAL GROUNDS.

Another possible solution is for the federal government to pass the responsibility to the judicial branch to make a determination on the constitutionality of the states' control of civil statuses and the public policy exception. States have the power to control which types of marriages will be recognized as valid under their laws.¹³⁰ This right is derived from the Full Faith and Credit Clause of the Constitution.¹³¹ Generally, a state is compelled to recognize a marriage that is validly performed under the laws of the state where the marriage was held.¹³² However, along with crafting the definition of a marriage, a state may refuse to recognize an outside marriage if "it violates the strong public policy of another state."¹³³ Therefore, a state can

¹³⁰ Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 48 (1998) (explaining that "a state may invoke its public policy when faced with a claim that it must adhere to the law of another state" and that such conflicts often revolve around marriage recognition).

¹³¹ "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1; "The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" *Baker v. GMC*, 522 U.S. 222, 232 (1998) (quoting *Pac. Emp'rs Ins. Co. v. Indus. Accident Comm'n*, 306 U.S. 493, 501 (1939)).

¹³² Myers, *supra* note 130, at 48-9.

¹³³ *Id.* at 49 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283 (1971)). The Equal Protection Clause and Due Process Clause are alternative arguments to challenge same-sex marriage without focusing on the elimination of the public policy exception. See Mark Strasser, *Domestic Relations*

control, not only, who is married within its boundaries, but also, what marriages it will recognize.

Some states use the public policy exception to deny same-sex couples the state tax benefits conferred to different-sex couples. The only way to correct this problem and to ensure same-sex couples receive the same tax benefits as different-sex couples is to have the Supreme Court rule against these state privileges.¹³⁴

There are two constitutional approaches that the Supreme Court could take. First, the Supreme Court could rule that the public policy exception is a violation of the Privileges and Immunities Clause,¹³⁵ as it unfairly discriminates against citizens of other states merely because they are citizens of another state.¹³⁶ When a state refuses to recognize a same-sex marriage validly performed in a neighboring state, the anti-discrimination principle of the clause is violated because “the forum laid an uneven hand on causes of action arising within and without the forum state.”¹³⁷ This kind of rejection of a validly performed, out

Jurisprudence and the Great, Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests, 64 *FORDHAM L. REV.* 921, 925 (1995); see generally Todd C. Hilbig, *Will New York Recognize Same-Sex Marriage?: An Analysis of the Conflict-of-Laws' Public Policy Exception*, 12 *BYU J. PUB. L.* 333 (1998) (describing how the public policy exception is used to deny same-sex couples the fundamental right to marry protected by the Equal Protection Clause).

¹³⁴ There are four situations in which the conflict of laws full faith questions have arisen or could arise:

[E]vasive marriages—situations where the parties travel out of their home states for the express purpose of evading a state prohibition; (2) migratory marriages—situations in which the parties “subsequently move to a state where their marriage was prohibited;” (3) visitor marriages—situations where the parties are temporarily visiting states that do not recognize the marriage; and (4) extra-territorial marriages—situations “in which the parties have never lived within the state but the marriage is relevant to litigation conduct there.”

Dorocak, *supra* note 99, at 35.

¹³⁵ “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.” U.S. CONST. art. IV, § 2, cl. 1.

¹³⁶ Myers, *supra* note 130, at 56-57.

¹³⁷ Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 *YALE L.J.* 1965, 1985 (1997) (quoting *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518-19 (1953)).

of state marriage cannot be allowed simply because the forum state finds another state's law promotes a "repugnant" policy.¹³⁸ Therefore, when a state rejects a valid same-sex marriage because the forum state found the policy rationale that allowed the marriage "repugnant," the Supreme Court should find this a violation of the Privilege and Immunities Clause.

In addition, the Supreme Court may also find that the public policy exception is a violation of the Establishment Clause.¹³⁹ The Establishment Clause could be invoked against a state that rejects a validly performed, same-sex marriage, on the basis that the forum state rejected the marriage solely due to religious opposition.¹⁴⁰ A proponent of this argument would contend that "opposition to same-sex 'marriage' is necessarily based on religious intolerance (or, put another way, that there are no secular arguments against recognizing such unions as marriages) and it violates the Establishment Clause for the state to act on this basis."¹⁴¹ Under this theory, statutes such as the mini-DOMAs passed in states that do not recognize same-sex marriage are invalid since there is no form of secular reasoning behind them.¹⁴² By recognizing a state's use of the public policy

¹³⁸ *Id.* at 1987.

¹³⁹ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

¹⁴⁰ Myers, *supra* note 130, at 59-60.

¹⁴¹ *Id.* at 62-63.

¹⁴² *Id.* at 63; see e.g., ALASKA STAT. § 25.05.013 (2011) ("A marriage entered into by persons of the same sex either under common law or under statute, that is recognized by another state or foreign jurisdiction is void in this state, and contractual rights granted by virtue of the marriage, including its termination, are unenforceable in this state."); HAW. STAT. § 572-1 (Mitchie 2011) (stating that a valid marriage contract is between a man and a woman); IOWA CODE ANN. § 595.2 (Lexis 2011) ("Only a marriage between a male and a female is valid."); MO. ANN. STAT. § 451.022(4) (2011) ("A marriage between persons of the same sex will not be recognized for any purpose in this state even when valid where contracted."); TEX. FAM. CODE ANN. § 2.001 (West 2011) ("A man and a woman desiring to enter into a ceremonial marriage must obtain a marriage license from the county clerk of any county of this state. A license may not be issued for the marriage of persons of the same sex.").

exception as a violation of the Establishment Clause, the Supreme Court would compel states to revise their discriminatory statutes. This revision would likely extend into a state's tax code and promote the extension of tax benefits to same-sex couples married outside the state.

These two potential approaches, however, also face some likely challenges. The violation of the Privileges and Immunities Clause argument would likely fail because the public policy exception is not used by states simply to discriminate against foreign states.¹⁴³ In reality, the public policy exception allows a home state to avoid recognizing a marriage when it violates an important interest of the forum state.¹⁴⁴ A forum state's decision to apply the choice of law rule is not intended to be discriminatory against other states, rather it is to ensure that the forum state's public policy is followed.¹⁴⁵ These actions are rare to begin with and are "not done [to act] as a gratuitous slap to out-of-staters."¹⁴⁶ Rather, it allows a forum state to keep its home laws intact by not forcing these types of states to "subordinate [their] interest[s] to the place of marriage."¹⁴⁷ Since the public policy exception is not a blatant attack on other states' policies, the Supreme Court is unlikely to hold that it violates the Privileges and Immunities Clause of the Constitution.

The Supreme Court is unlikely to hold that the Establishment Clause is violated by states that employ the public policy exception when refusing to recognize same-sex marriage. The Court has been confronted with similar cases concerning morality and has refused to invoke the Establishment Clause in those prior cases.¹⁴⁸ The Court will

¹⁴³ Myers, *supra* note 130, at 58-60.

¹⁴⁴ *Id.* at 58 (explaining how certain important local policies and interests will allow a home state to defer to its own laws, rather than the laws of the state where the marriage took place).

¹⁴⁵ *Id.* at 59-60.

¹⁴⁶ Richard S. Myers, *Same-Sex "Marriage" and the Public Policy Doctrine*, 32 CREIGHTON L. REV. 45, 59 (1998).

¹⁴⁷ *Id.* at 59.

¹⁴⁸ *Id.* at 61-66.

likely conform to its past precedents in a same-sex marriage case as “the Court continually reaffirms the idea that a moral position should not be regarded as religious simply because it happens to coincide with the tenets of some religious organizations.”¹⁴⁹ Since it is almost impossible to eliminate morality issues from certain topics that require laws to govern them, the Supreme Court is unlikely to hold that the Establishment Clause is violated because of a state’s use of the public policy exception. Therefore, the Supreme Court is unlikely to take any Constitutional action to compel States to extend taxation benefits to same-sex couples married outside the state.

C. SOLUTIONS WILL NOT BE SUCCESSFUL

It is unlikely that any of the proposed solutions will create a fair tax system for same-sex couples. First, eliminating the distinction between live-in couples and married couples is likely to face intense criticism from traditionalists, who favor traditional family structures, and will likely prevent an overhaul of the tax system. Second, the Supreme Court is unlikely to strike down the states’ use of the public policy exception to create laws that discriminate against same-sex couples on constitutional grounds. The Court does not have any past precedents to follow in such cases and does not seem willing to take such dramatic measures. Therefore, since these possible solutions are unlikely to be imposed, same-sex couples will continue to be denied the taxation benefits their different-sex counterparts enjoy.

VI. CONCLUSION

New York legislation is often a historically accurate predictor of forthcoming legislative moves by Congress. From the early 1800s and branching into modern times, controversial legislation addressing social reform has begun in New York and

¹⁴⁹ Richard S. Myers, *Reflections on the Teaching of Civic Virtue in the Public Schools*, 74 U. DET. MERCY L. REV. 63, 81 (1996); see also Douglas Laycock, *Freedom of Speech That is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 797 (1996) (“The Court has never accepted in any context the view that religious arguments are excluded from or restricted in political debate.”).

subsequently led to an equivalent form of federal legislation. Currently, New York's approval of the Marriage Equality Act has led to an increased push for the repeal of DOMA. It is, therefore, highly likely that the repeal of DOMA will become another example of New York's legislative prominence and influence on national policy.

Unfortunately, the repeal of DOMA will not establish equality between same-sex and different-sex couples, particularly concerning taxes. The tax consequences associated with a federal change to a longstanding legal status have yet to be decided and the repeal of DOMA is likely to lead to discrepancies. The remaining disparities between same-sex and different-sex couples will prevent homosexual couples from obtaining the benefits that accompany a marriage. In addition, it is likely that a rift will form between states that recognize same-sex marriage and those that do not, as those that refuse to recognize otherwise legal marriages will bar same-sex couples from state tax benefits.

While there are many possible solutions to the discrepancies that may arise, many of these solutions are unlikely to receive the necessary political support they need. The federal government will not be successful in implementing any of the current possibilities as the solutions range from eliminating long-standing states' rights that concern other important areas of state control, to an infringement on traditional family structures. Therefore, while the New York legislation likely foreshadows DOMA's repeal, it remains unlikely that same-sex couples will realize the same taxation benefits that married, different-sex couples have long been afforded.