Loving Couples, Split Interests:  

Tax Planning in the Fight to Recognize Same-Sex Marriage  

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ABSTRACT  

A fundamental tension exists between the Defense of Marriage Act, which forbids the Internal Revenue Service and the federal judiciary from recognizing same-sex marriages, and the Internal Revenue Code, which uses marital status to identify parties likely to collude in order to minimize their collective tax burden. Same-sex couples married under state law are arguably exempt from anti-abuse rules promulgated to eliminate tax shelter strategies employed by opposite-sex married couples. This Article provides a relatively simple example of a tax-planning device that advocates for same-sex marriage may be able to use to exploit this tension as part of a campaign to repeal the Defense of Marriage Act. Such a campaign would center upon legal challenges forcing the Service either to allow a “homosexual-only tax shelter” or to recognize same-sex relationships for the purpose of tax law.

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"RULE 4: Make the enemy live up to its own book of rules."

As three men and one woman sit at a DC watering hole after work discussing the highlights of their lives, the conversation turns towards matters of taxation. Two of the men, married in Massachusetts, grouse about the fact that they cannot file as a married couple for federal tax purposes. The third man, an advocate for same-sex marriage, agrees with his friends that federal policy with respect to same-sex marriage constitutes an indignity, but leavens his condemnation with concern that federal courts are not friendly fora for securing rights for same-sex couples. The conversation quickly becomes heated, with the married couple—let us call them Adam and Ben Kent—insisting that their rights should not be sacrificed to the best interests of "the movement," while the activist counsels for patience, remarking upon the legislative backlash that he believes occurred outside Massachusetts after Goodridge v. Department of Public Health. Meanwhile, none of the men notice that the woman at the table has been silent.

Ms. Stone (as we shall call her) is quiet only because she is deep in thought. As a tax attorney, Ms. Stone has a quite different perspective on the relationship between tax and marriage. She recognizes that the "secular ritual" of joint filing is a powerful recognition of a married relationship. Yet she also knows that the Code does not view marriage as an unmitigated virtue. Far from it. Many, if not most, of the Code provisions dealing with marriage explicitly view couples as conspirators likely to collude against the treasury. Casebook tax law is replete with examples of married couples brought before the Tax Court to answer for their collaboration. Against such a background, Ms. Stone wonders whether a same-sex couple can act in concert while at the same time preventing the Internal Revenue Service from observing such collusion.

This Article describes how the four friends mentioned above—the Kents, the activist (whom we can call Mr. Douglas), and the attorney Stone—might take

3. See infra notes 138-42 and accompanying text.
4. See infra notes 139-41 and accompanying text.
5. See Knauer, supra note 2, at 216 (describing filing taxes as a secular ritual).
advantage of the peculiar relationship between the tax code and social policy not to minimize tax liability, but to encourage the federal government to grant equal recognition to same-sex relationships.\textsuperscript{7} In so doing, the Article relies heavily upon recent work by two tax scholars, one focusing upon the relationship between income tax and protest, and the other pondering the unintended benefits that the Code may bestow upon same-sex taxpayers.

The first of these authors, Anthony Infanti, recently published a \textit{cri du coeur} expressing the particular depression of a same-sex couple during tax time. Like many taxpayers in same-sex partnerships, Infanti complains that, "Each year, when tax season comes around, I feel the legal eraser scraping against me once again as the federal government returns to ensure that it has removed all trace of my relationship."\textsuperscript{8} He aims his rhetoric squarely at the federal Defense of Marriage Act (DOMA),\textsuperscript{9} the statute which defines "marriage" and "spouse" for purposes of federal law, and in so doing prevents any member of the executive or legislative branch from acknowledging the marriage of two men or two women.\textsuperscript{10} He ends his article with the suggestion that same-sex couples should, \textit{en masse}, engage in a kind of taxation-based "guerilla warfare" in order to assert their rights.\textsuperscript{11}

Unfortunately, Infanti's imagined insurgency tends towards a peasants-with-pitchforks strategy, and may not be a match for a government bureaucracy. He envisions thousands of same-sex domestic partners in California and same-sex married couples in Massachusetts filing their returns jointly, together with a cover letter expressing why they are doing so.\textsuperscript{12} Infanti suggests that such protest might frustrate the service, much as a denial of service attack brings down a website.\textsuperscript{13} But the IRS is not a website hosted on a computer that slavishly

\begin{itemize}
\item \textsuperscript{7} As far as I know, no conversation like the one described above has ever taken place. The four characters I describe serve two purposes. First, readers who are not tax specialists will likely find it much easier to understand the detailed tax shelter described in Part II if the structure is presented as the outcome of decisions made between realistic parties, not abstract entities. Second, the four characters mentioned herein are amalgams of the individuals with whom I have discussed this idea over the course of the last three years.
\item \textsuperscript{8} Anthony Infanti, \textit{Homo Sacer, Homosexual: Some Thoughts on Waging Tax Guerrilla Warfare}, 2 UNBOUND 27, 28 (2006).
\item \textsuperscript{9} Id.
\item \textsuperscript{10} Pub. L. No. 104-199, § 3(a), 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2000)) ("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.").
\item \textsuperscript{11} See Infanti, \textit{supra} note 8, at 53-54.
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Id. at 54. Denial of service attacks attempt to prevent legitimate users from accessing information services, most commonly by inundating the victim service with false information or bogus requests until no bandwidth remains for legitimate users. See United States Computer Emergency Readiness Team, Cyber Security Tip ST04-015, Understanding Denial-of-Service Attacks, http://www.us-cert.gov/cas/tips/ST04-015.html (last updated Aug. 1, 2007).
\end{itemize}
follows its instructions until some human happens to intervene. If confronted with thousands of non-compliant tax forms, the Service need merely send back the filings—along with an accounting for penalties—and ask that the taxpayer comply with the letter of the law. The IRS has a considerable history of dealing with tax protestors, and there is no reason to believe that an influx of deliberately misfiled tax forms would present a novel, insolvable, or even more than ephemeral problem. 14

Infanti's proposed insurgency suffers from a lack of heavy weaponry, but an article by Theodore P. Seto suggests that an arsenal lies readily available. 15 Seto focuses upon the disjunction between the Defense of Marriage Act and the provisions of the Code that use marital status as a proxy for parties who are likely to collude to avoid paying taxes. He posits that the majority of the tax code functions upon an “assumption of selfishness,” in that most code provisions assume that a taxpayer will not give $100 of income to an unrelated third party merely to avoid $30 worth of tax. The Code needs provisions that address transactions between related parties, however, because one cannot expect such collectives—husbands and wives, parents and children—to behave as selfish individuals with respect to one another. 16 They are likely to work together to retain more for themselves at the expense of the public.

Seto focuses more upon the tax challenges facing same-sex couples than any particular form of “guerilla” activism. These challenges are real: same-sex couples lose out not only on the “secular ritual” of joint filing, but also upon concrete tax advantages enjoyed by their heterosexual counterparts. 17 Yet he also describes how a savvy same-sex couple might exploit several provisions of the Code to avoid income tax. To list only a few of Seto’s examples, a same-sex couple might be able to: sell appreciated personal real estate while deferring

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14. The Service may impose a civil penalty of up to $5,000 when a taxpayer files a self-assessment that “contains information that on its face indicates that the self-assessment is substantially incorrect” and “reflects a desire to delay or impede the administration of Federal tax laws.” I.R.C. § 6702 (2000). Taxpayers who, for example, strike or otherwise modify the jurat on a tax form are subject to such penalties. See Rev. Rul. 2005-18, 2005-1 C.B. §17. Because Infanti would have same-sex couples include a cover letter directly challenging a same-sex couple’s inability to file jointly, such guerilla warriors risk a $5,000 fine after the Service returns their filings. The Service already deals with dozens of categories of frivolous filings every year. See I.R.S. Notice 2007-30, 2007 IRB LEXIS 201 (Apr. 2, 2007).


16. Id. at 4-5.

17. To cite only a few examples: one party in a same-sex couple cannot exclude from his income health benefits provided to his spouse by an employer; same-sex couples who adopt a child will in many scenarios be more likely to lose tax credits aimed at the child’s higher education; and same-sex partners may not deduct each other’s medical expenses unless the ill partner may be considered a dependent. See Knauer, supra note 2, at 162-71, 179-85; William A. Kratzke, The Defense of Marriage Act is Bad Income Tax Policy, 35 U. MEM. L. REV. 399, 427-36 (2005).
capital gains upon that property; \(^\text{18}\) avoid the recognition of capital gains by generating "losses" on sales between spouses; \(^\text{19}\) deduct expenses incurred in adopting a spouse's child; \(^\text{20}\) and take additional advantage of the earned income tax credit. \(^\text{21}\) Best of all, Seto concludes that there is no easy way for Congress to patch these loopholes, short of rejecting DOMA or otherwise providing some sort of status to same-sex couples that can be invoked by anti-abuse rules. \(^\text{22}\) 

This Article matches Infanti's goals with Seto's tools. Infanti counsels civil disobedience and a conscious defiance of the Defense of Marriage Act. Seto highlights the tensions between that statute's non-recognition of collaborating individuals and the Code's general need to identify parties with the potential to work together to cheat the tax man. This Article suggests that DOMA may best be defeated not by defying the Act, but by strictly and conspicuously complying with it, and insisting that the IRS—and any administration that supports DOMA—comply with it as well. In the process, this Article suggests that the Defense of Marriage Act has resurrected a tax-planning device and tax-shelter strategy rendered largely obsolete in 1989. Such a device might be used by same-sex couples who wish to prove futile the federal government's refusal to recognize that same-sex couples are capable of long-term, loving, and selfishly collusive behavior. \(^\text{23}\) Such planning at least arguably remains within the limits of the law. If Infanti calls for "guerrilla" activists to violate the law, I propose a "gonzo" approach of steadfastly insisting upon its application. \(^\text{24}\)

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18. If Adam and Ben Kent live in a house that has appreciated in value, Seto suggests that Adam may transfer the property to Ben in exchange for a twenty-year note for the fair value purchase price, while Ben then sells the property at market. Under the installment sale rules of I.R.C. § 453, Adam will not have to recognize gain until the note is paid, while Ben sells the house with a higher basis. An opposite-sex married couple attempting such a transaction would fall afoul of I.R.C. § 1041, which treats all transfers between spouses as non-recognition events, and I.R.C. § 453(c)(1), which forbids this kind of abusive transaction when carried out between "related persons." Seto, supra note 15, at 28-29.

19. If Adam and Ben Kent both have diversified portfolios, Adam can sell loss positions at market value to Ben in order to offset any unavoidable gains. Assuming that the Kents spend much of their income for their joint benefit, the only loser is the tax man. Again, opposite-sex married couples fall afoul of I.R.C. § 1041 and § 267(a)(2). Id. at 29-30.

20. Opposite-sex married couples are prohibited by Section 23 from taking a credit for adoption expenses if they adopt the child of their spouse. Id. at 45.

21. Id. at 23-24.

22. Id. at 51-52.


24. Although the term "gonzo" often refers to a style of non-objective journalism most closely associated with Hunter S. Thompson, its use has long since expanded to other disciplines and activities. See, e.g., CHRISTOPHER LOCKE, GONZO MARKETING: WINNING THROUGH WORST PRACTICES (2002); NILES ELLIOT GOLSTEIN, GONZO JUDAISM: A BOLD PATH FOR RENEWING AN ANCIENT FAITH (2006). "Gonzo" activities tend to turn mainstream rules on their head. Gonzo journalism largely rejects the ability of journalists to be objective in their reporting, while Christopher Locke's Gonzo Marketing turns its back on a mass-media approach to attracting customers.
Although a few papers, including Seto's, have briefly touched upon the use of same-sex status to exploit anti-abuse rules, academic discussion has generally relegated the idea to footnotes, briefly dismissing purported tax advantages with the suggestion that anti-shelter doctrines such as economic substance or business purpose would render them ineffective. This Article challenges such assumptions, considering in detail how a same-sex couple might at least escape penalties, and at best, prevail in their challenge to the IRS. Moreover, a defeat in Tax Court might itself constitute a victory for advocates of same-sex marriage. An even "worst case" scenario, in which a couple pays both interest and penalties on a tax insufficiency, will involve a dangerous precedent for DOMA proponents: the Tax Court penalties will have to be imposed as a result of some form of recognition of the related status of the partners.

Though gonzo tax plans might come in many varieties, in this Article I focus upon only one. Part I sets out a simple tax planning device based upon older split-interest tax shelters rendered largely obsolete in the late 1980s and early 1990s by case law and the passage of I.R.C. § 167. Part II revisits our friends at the cocktail bar—the Kents, Mr. Douglas the activist, and Ms. Stone the tax planner—to demonstrate how they can work together to craft a similar tax device based upon the Kents' "non-related" status. Part III addresses the legal and political gains available through gonzo tax planning, as well as some reasons why advocates for same-sex marriage who are reluctant to proceed in federal court might nonetheless consider this strategy.

I. THE RISE AND FALL OF SPLIT-INTEREST TAX SHELTERS: KORNFELD, GORDON, AND RICHARD HANSEN

An individual's marital status alters tax liability so often in the Code that there are possibly dozens, if not hundreds, of potential opportunities for the Kents to defer or shelter income from taxation. Full evaluation of any particular strategy cannot begin and end with the Code, but must also consider

In the same way, I describe the tax structure in this Article as "gonzo" because it inverts the standard assumptions of many academic tax practitioners and same-sex marriage rights activists. Such planning does not rely upon a presumption that any group is endowed with a fundamental right of access to a government institution, or to the recognition of their relationships. The gonzo tax planner focuses not upon a system's rights, but its unworkability, and does not share the common distrust of textualism or originalism common among many academic tax theorists. See, e.g., Brian Galle, Interpretative Theory and Tax Shelter Regulation, 26 VA. TAX REV. 357 (2006) (proposing a new method of understanding and dealing with textualist statutory interpretations used by tax planners seeking to enjoy impermissible tax shelters and by courts unsympathetic to the economic substance doctrine). Make no mistake: the tax planning described in this Article draws inspiration from the same sources that can be used to justify certain corporate and individual tax shelters. Tax shelters rarely exist without a poorly conceived or ambiguous law. Although not part of the Code itself, DOMA is just such a law.

27. See Seto, supra note 15, at 1-3.
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how courts and Congress have treated similar strategies. This Article evaluates a structure based upon “split-interest” tax shelters, a form chosen for three reasons. First, a reasonable amount of case law exists to provide guidance as to the regulation of split-interest personal tax shelters. Second, such shelters became almost entirely unworkable, at least on a personal basis, after Congress addressed the issue of split-interest transactions with I.R.C. § 167(e). That section of the Code uses the concept of “related parties”—including married couples—to limit depreciation allowances, and thus provides a good test of whether couples in same-sex marriages can use the Defense of Marriage Act to avoid statutory proscriptions on tax shelters. Third, split-interest transactions may be designed to be easily replicated on a large scale, an important consideration if Seto’s concept of individual tax avoidance is to become a means of changing the status quo.

A. The Basic Split-Interest Transaction

Bonds present an easy context in which to explain split-interest transactions, although many forms of property may be used. When a taxpayer purchases a bond, the price of the security generally cannot be depreciated or amortized over its lifetime. Instead, the bond’s cash basis may be applied to the value of the bond when it matures or is sold, and taxes must be paid on any interest received (unless the bond is tax-exempt). However, any simple interest-bearing bond can be conceived of as a combination of two component parts: an income stream lasting for a term of years and a non-interest bearing (or “zero-coupon”) bond. If these two interests can be separated, the tax consequences change markedly. The zero-coupon bond remains non-depreciable with a cost-basis, but the income stream may now be considered a “term interest” in property. Such an interest may normally be depreciated over the period of its ownership.

28. See infra Part I.B.
29. See Gordon v. Comm’r, 85 T.C. 309, 324 (1985) (describing bonds as generally non-amortizable property). An exception to the rule is the amortizable bond premium depreciable under I.R.C. § 171, and even this is not allowed if the bond is tax-exempt. See I.R.C. § 171(a)(2) (2000). For simplicity’s sake, it can be assumed that, unless otherwise stated, no bonds in this Article have any amortizable bond premium.
31. For example, the owner of a $5,000 ten-year bond paying ten percent simple interest will earn $500 per year over the life of the bond, plus a return of $5,000 at the end of ten years. Mathematically, this is no different from two separate contracts, the first to pay the owner $500 per year, and the second to return $5,000 at the end of ten years.
32. I.R.C. § 1001(e)(2) defines a “term interest in property” as either a life interest in property, an interest in property for a term of years, or an income interest in a trust. As the income stream from the bond by definition lasts for a term of years, it will generally count as a term interest in property.
33. As property held for production of income, the term interest in the bond qualifies for depreciation under I.R.C. § 167(a)(2).
Bonds are far from the only property in which interests may be split. A fee simple interest in real property, for instance, may not normally be depreciated, but if the fee simple interest is instead divided into a life estate and a remainder interest, the value of the life estate (being a wasting asset qualifying as a term of years) may, generally speaking, be depreciated.\(^{34}\) In this sense, the splitting of interests theoretically allows two taxpayers to defer the taxes of one by converting non-depreciable property into depreciable term interests.

In many cases, the ability to alter the taxable nature of property by dividing present and future interests is not only allowable but desirable. For instance, assume that two parties wish to invest in property, but one desires to shield income through depreciation while the other wants to invest in property but does not want immediate taxable income streams. By purchasing, respectively, a life estate in income-producing property and the remainder interest, the first party may take advantage of an allowance for depreciation, while the remaining party's investment generates no taxable income until the disposition of his predecessor's property.\(^{35}\) In essence, the remainderman eventually takes possession of the property at a lower price, while the holder of the life estate may defer tax on income.\(^{36}\)

The ability to split interests poses particular problems, however, where the holder of the term interest and the life estate are related parties. The tax court has long recognized that the holder of an entire interest in property may not create a depreciable asset by dividing that asset into component parts and holding both pieces.\(^{37}\) Allowing the creation of such depreciable interests threatens the fisc: why would any taxpayer retain an entire interest in property if she might hold instead both a life estate subject to a depreciation deduction and remainder interest? The next logical leap is obvious: a taxpayer should not be able to create depreciable assets by splitting interests between herself and closely related parties, especially her spouse. Congress directly addressed this issue with the passage of I.R.C. \(\S\) 167(3) in 1989:

No depreciation deduction shall be allowed under this section (and no depreciation or amortization deduction shall be allowed under any other provision of this subtitle) to the taxpayer for any term interest in property for any period during which the remainder interest in such property is held (directly or indirectly) by a related person.\(^{38}\)

The same section that disallows losses for transfers of property between related

\(^{34}\) I.R.C. \(\S\) 167(d) (2000).
\(^{35}\) See Paul Youngs, The Taxation of Split Interests: How Are They Treated? How Should They Be?, 76 U. DET. MERCY L. REV. 165, 169-70 (1998), from which I have taken this example.
\(^{36}\) See id.
\(^{38}\) I.R.C. \(\S\) 167(e)(1) (emphasis added).
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The section primarily describes familial, partnership, and trust relationships. Familial relationships are specifically limited: "The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants . . ." The potential for abuse by same-sex couples becomes immediately apparent: § 167(e) prevents the holding of remainder interests by related persons, defined in relevant part as "spouses." By its terms, the Defense of Marriage Act blinds the Code to the existence of same-sex spouses, even if their relationship is legally recognized by Massachusetts or any other state.

Yet compliance with the simple text of the Code will not be enough for the Kents. Attempts to abuse related party transactions in order to defer taxes were grist for the Tax Court mill long before 1989. Even without statutory guidance, courts ignored such transactions, considering them to be artificial, without a business purpose, or entered into with the sole intent of avoiding taxes. On the other hand, courts did not find that these transactions lacked business purpose simply because they reduced taxable income, and at least one taxpayer secured a depreciation deduction over the objections of the Service. To take advantage of the statutory tension between Code and DOMA, it is first necessary to see why some taxpayers failed and others succeeded in extracting depreciation deductions from normally non-depreciable property.

B. Gordon, Richard Hansen, and Kornfeld

Three cases set down the basic rules for personal, split-interest tax planning prior to the enactment of § 167(e). Two Tax Court cases, Gordon v. Commissioner and Richard Hansen Land, Inc. v. Commissioner, both decided by Judge Tannenwald, chart the narrow path between unacceptable tax avoidance and prudent tax planning. The Tenth Circuit confirmed the Tax Court's reasoning in Kornfeld v. Commissioner, but held that courts may consider certain taxpayers other than those listed in § 267 to be related parties. Careful examination of each case and its reasoning provides a map by which one may navigate the narrow shoals left by the courts.

39. I.R.C. § 267 (2000). I.R.C. § 167(e)(5) specifies that § 267 is to be used to define "related person."
40. I.R.C. § 267(c)(4) (emphases added).
43. 85 T.C. 309.
44. 65 T.C.M. (CCH) 2869.
45. Kornfeld v. Comm'r, 137 F.3d 1231 (10th Cir. 1998).
46. These cases are summarized and evaluated in more detail in Youngs, supra note 35.
1. **Gordon v. Commissioner**

In *Gordon v. Commissioner*, Dr. Gordon purchased the income interest in several bonds, while the remainders were simultaneously purchased by a family trust. Dr. Gordon's wife acted as trustee for the benefit of their children.\(^{47}\) In disallowing Dr. Gordon from amortizing the purchase price of his income interests, the court employed an early version of the step-transaction doctrine, and determined that Dr. Gordon had merely purchased an entire bond and subsequently divided the interests.\(^{48}\) The court noted three factors critical to its decision. First, the transaction involved the joint acquisition of term and remainder interests from a third party "not in any way concerned" with the relationship between the joint acquirers.\(^{49}\) Second, the joint-acquirers, Dr. Gordon and the irrevocable trust run by his wife, were related parties.\(^{50}\) Finally, the court found that Dr. Gordon and his wife, in executing the joint purchases, used the family trust as a "mere stopping place" for funds: "[T]he family trust was intended to be used as a vehicle for implementing Dr. Gordon's investment strategy only to the extent that it was provided with sufficient cash funds by petitioners or other related entities."\(^{51}\) The court emphasized that despite her nominal role as trustee, Ms. Gordon did not formulate an investment strategy or independently decide to purchase the bonds.\(^{52}\) This conclusion provided the court with its justification for characterizing the transaction as a purchase by Dr. Gordon in the whole bond, not merely a term interest.\(^{53}\)

2. **Richard Hansen Land, Inc. v. Commissioner**

Eight years later, Judge Tannenwald again confronted a taxpayer who converted normally non-depreciable property through the use of interest-splitting, but this time he provided no comfort to the Commissioner.\(^{54}\) Richard Hansen, his wife, and a wholly-owned corporation, Richard Hansen Land, together purchased a parcel of land, with the corporation accepting a thirty-year estate and the Hansens jointly purchasing the remainder interest.\(^{55}\) As the corporation now owned a wasting asset, it claimed depreciation deductions for its life estate.\(^{56}\)

In determining that the deduction was appropriate, Judge Tannenwald specifically distinguished his prior ruling in *Gordon v. Commissioner*. The

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\(^{47}\) *Gordon*, 85 T.C. at 309.

\(^{48}\) *id.* at 324-25.

\(^{49}\) *id.* at 325.

\(^{50}\) *id.*

\(^{51}\) *id.* at 328.

\(^{52}\) *id.* at 330.

\(^{53}\) *id.*


\(^{55}\) *id.* at *2-*3.

\(^{56}\) *id.* at *23.
simultaneous purchase of a term and remainder interest in property, even by related parties from an indifferent third party, did not make the transaction per se unallowable: "The fact that the remainder interests were acquired simultaneously by [the corporation's] shareholders while suspect, is insufficient, standing alone, to disregard the form of the transactions at issue."  

Rather, Tannenwald examined the money trail to determine whether separate steps of the joint-purchase transactions could be considered as one for purposes of tax law. Unlike the taxpayer in Gordon, the corporation did not use Hansen as a "mere stopping place" for funds, or vice-versa. The separate existence of Hansen and his corporation was not questioned by the Service. Given this, Judge Tannenwald rejected the Commissioner's argument that the transaction had no valid business purpose:

We are not impressed with respondent's search for a business purpose to justify the form of the transaction. It is obvious that respondent's attack is not directed at the fact that petitioners ended up with an estate for years. Rather, respondent is saying that however valid the reasons for acquiring an estate for years may be, one must have a reason other than a tax reason for the form used. The effect of such a position is to suggest that if tax advantages are the motivating force, one must choose a structure for the transaction which will minimize and even eliminate those advantages, at least where related parties are involved. Under this thesis, the fact that the transaction has substance would be irrelevant. We were not prepared to go this far in Gordon v. Commissioner... and we are not prepared to extend our holding in that case to a situation such as is involved herein.

Critically, Hansen and his company executed this transaction before Congress passed § 167(e). Under that provision, the two purchasers would be considered related parties, and no depreciation deduction would be allowed. For our purposes, however, Hansen stands for two important propositions. First, the simultaneous acquisition of split-interests by related parties does not per se eliminate the possibility of depreciating otherwise non-depreciable property, at least so long as the parties do not fall into a relationship defined in § 267. Second, a critical factor in determining the acceptability of such transactions is whether the purchasing entities are considered by the court to have independent existences. In Gordon, the court found it easy to trace, and subsequently disregard, the flow of money from Dr. Gordon to the family trust. Although

57. Id. at *22-*23.
58. Id. at *18-*22. In Hansen, the corporation transferred funds, in the form of wages on which taxes were paid, to Mr. Hansen. The wage payment preceded the land purchase by six months.
59. Id. at *20-*21.
60. See I.R.C. § 267(b)(2) (defining an individual and a corporation more than fifty percent owned by the individual to be related parties).
funds also flowed between Hansen and his corporation, these funds were not gifts: the Commissioner chose to challenge a purchase made with money from Hansen's wages, a standard and non-controversial payment between a corporation and employee.  

Hansen's application to a DOMA-based tax avoidance strategy becomes immediately apparent. The spouses in any same-sex couple married in Massachusetts may have their own separate sources of funds with which they may execute joint purchases of term and remainder interests. Hansen allows such purchases. In the normal course of events, § 167(e) would prevent any claim of depreciation, but as explained in Part II, DOMA arguably exempts married same-sex couples from its scope. In order to apply any substance-over-form argument to persons in same-sex marriages, the Service would have to find some justification, other than marriage, to consider the partners to be “related.”

3. Kornfeld v. Commissioner

The Service might hope to find some solace in Kornfeld v. Commissioner, 62 a Tenth Circuit case involving transactions similar to those in Gordon. Kornfeld, himself a tax attorney, first created a revocable trust with his two daughters. 63 He then executed joint-purchase agreements with his daughters in which they purchased remainder interests in tax-free bonds while his trust purchased a life estate in the same. 64 Immediately before purchasing the bonds, Kornfeld would send checks to his daughters for the value of the remainder interests. 65 (Taking a cue from Tannenwald's criticism of Dr. Gordon, Kornfeld would later file gift-tax returns in an attempt to bolster the legitimacy of the transactions.) 66 He then attempted to depreciate the value of his life estates. 67

Some of Kornfeld's transactions took place after 1989, so he was forced to modify this structure in later years. Kornfeld provided funds to both his daughter and his secretary, Patsy Permenter, with which the daughter then purchased a second life estate effective after Kornfeld's death, and Permenter purchased the final remainder interest. 68 Taken in the most literal terms, this would avoid the strictures of § 167(e), for Permenter (the holder of the remainder interest) did not qualify as a related person. 69

It may be for this reason that the Tenth Circuit did not employ § 167 in

61. Hansen, 65 T.C.M. (CCH) at *20.
62. 137 F.3d 1231.
63. Id. at 1232-33.
64. Id.
65. Id.
66. Id. at 1233.
67. Id.
68. Id.
69. This potential weakness in § 167(e) has long been recognized. See Youngs, supra note 35, at 186 (proposing that judicial examination of business purpose is more likely to prevent abuse than statutory rules defining related parties).
their decision. Instead, the court specifically approved *Gordon v. Commissioner* (and distinguished *Hansen*), and proceeded to use the substance-over-form doctrine to determine that Kornfeld had actually purchased the bonds and proceeded to split his interests in property already owned. Although much of the analysis parallels that of *Gordon*, the Tenth Circuit made a few novel observations. First, the court focused upon the fact that Kornfeld and his daughters determined the price of their interests based upon IRS estate and gift tax tables, not market prices: “Here, however, one hundred percent ownership of the bonds was acquired from or through Prudential-Bache in a market transaction; but taxpayer presented no evidence that any brokerage firm would sell only a life estate in the bonds.”

Second, the court emphasized that for the steps of a transaction to be combined, any of three tests could be used: the binding commitment, end-result, or interdependence tests. Kornfeld attempted to rely upon the binding commitment test, arguing that his daughters were not obligated to purchase remainder interests with the money given them. The court dismissed that rather formal argument and explicitly stated that transactions met the other two tests: the end-result test because they appeared to be actions taken together in order to reach a specific result, and the interdependence test because the legal relationships taken by each step appeared objectively fruitless without the other steps in the series.

For purposes of considering the tax status of same-sex couples, however, the court’s treatment of Ms. Permenter provides the most guidance. *Kornfeld* emphasizes that courts should treat with skepticism transactions wherein related parties participate in the joint acquisition of split-interests. Importantly, however, the court did not limit itself to the definition of related parties found in § 267(b):

> Although Permenter [Kornfeld’s secretary] is not a natural object of taxpayer’s bounty in the same sense as his daughters, she is his long time secretary, cotrustee of his revocable trust, and taxpayer made contemporaneous gifts to her to enable the purchases of her remainder interests. In such circumstances it is not inappropriate to treat her in the same category as a related party.

If *Hansen* stands for the proposition that related parties are not always precluded from splitting interests (at least in the absence of a statutory prohibition), *Kornfeld* suggests that “related persons” may be judicially construed more

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70. *Kornfeld*, 137 F.3d at 1234-36.
71. *Id.* at 1234.
72. *Id.* at 1235. *See also* Associated Wholesale Grocers, Inc. v. United States, 927 F.2d 1517 (10th Cir. 1991) (defining step-transaction tests).
73. *Kornfeld*, 137 F.3d at 1235.
74. *Id.*
75. *Id.*
76. *Id.* at 1235 n.4.
broadly than the text of § 267 would suggest. Even if the footnote constitutes pure dicta, Kornfeld warns that mere compliance with the text of the Code may not be enough to create tax-advantaged investments for same-sex couples. Kornfeld, however, did not have the advantage of a federal statute explicitly instructing the court to ignore the existence of an employer-secretary relationship. Although not dispositive, the existence of DOMA may prevent a court from applying Kornfeld to our hypothetical couple.

II. CONSTRUCTING A SPLIT-INTEREST TAX STRUCTURE FOR SAME-SEX COUPLES

These precedents provide guidance for Mr. Douglas, Ms. Stone, and the Kents as they plan to turn the Defense of Marriage Act into a tool for creative tax planning. Before describing in detail how these parties might go forward, however, their goals deserve particular consideration. Unlike most tax planning (or tax sheltering) efforts, the goal of this plan is primarily political, not financial: the Kents would be quite happy to give up their hypothetical tax advantage in exchange for governmental recognition. Victory thus lies through forcing the federal government to recognize the marital status of same-sex couples, not through maximizing the Kents’s collective income. As a practical matter, this means that same-sex couples may be willing to accept the risk that the IRS will find against them, provided that such risk does not involve extreme financial or criminal penalties. On the other hand, a gonzo tax planner cannot take advantage of the audit lottery, perhaps the most powerful weapon in the arsenal of tax avoidance. The political nature of this tax planning requires a public challenge to the Service. Such openness has its advantages, however: many anti-shelter regulations focus upon attempts at secrecy that will not bedevil our planners.

Finally, as the parties structure the investment, they must bear in mind that the judicial precedent goes further than the statutory proscription. To succeed,

77. I.R.C. § 267(c)(4) explicitly limits who may be considered “family” for purposes of § 167(e): “The family of an individual shall include only his brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants . . . .” I.R.C. § 267(c)(4) (emphasis added). The 10th Circuit appears to give no weight to the word “only.” Moreover, the footnote seems curiously superfluous: if Permenter was co-trustee of Kornfeld’s trust, then the two were related-parties irrespective of any personal relationship to Kornfeld. See I.R.C. § 267(b)(4) (defining a grantor and fiduciary of a trust to be related parties).

78. Investors in tax shelters play the “audit lottery” by filing their returns and hoping that they are not unfortunate enough to get audited. The risk involved in a tax shelter derives both from the penalty paid by the taxpayer if caught, and the risk that the taxpayer will be caught at all. See Marvin A. Chirelstein & Lawrence A. Zelenak, Tax Shelters and the Search for a Silver Bullet, 105 COLUM. L. REV. 1939, 1947 (2005).

the investment vehicle must look more like Hansen than either Kornfeld or Gordon. To the greatest degree possible, transactions should be made at arm’s length in the market. The entire structure, and every element within it, should have a plausible business purpose. Most importantly, the Kents should not act in such a way that they might statutorily be considered “related parties” under any part of § 267(b) other than as members of a family.80 A court facing the Kents should be forced to make a choice: either allow a depreciation deduction and recognize a tax advantage possessed by same-sex parties; disallow the deduction and recognize that the Kents are married, ignoring DOMA; or disallow the deduction by forcing a “constructive” relationship between the Kents using implausible, results-driven argumentation to avoid the obvious conflict with DOMA.

A. Structure

The proposed transaction involves three steps and five different parties: a company seeking to raise debt capital (Company X), an underwriter or brokerage firm to sell the bonds (Underwriter Y), a human rights organization with an interest in same-sex marriage rights (HRO, represented by Mr. Douglas), an attorney (Ms. Stone), and same-sex couples married in Massachusetts (typified here by the Kents). Marriage in Massachusetts may not be a necessary limitation. The political effect of this structure is directly proportional to the number of same-sex couples that may participate: the more bonds sold, the greater the effect on the fisc. If the bonds could be sold in such a way as to advantage not only same-sex married couples, but also same-sex couples in other domestic partnerships, then the potential market expands considerably. As we will see, however, the strange tax status of domestic partners means that they may face considerably greater risk.

In the first step, Company X issues securities with the assistance of Underwriter Y and Mr. Douglas. For sake of illustration, assume that Company X wants to issue $100,000 worth of debt securities, and its normal cost of capital (the interest rate that it would have to pay to the market) is five percent.81 Because Company X provides health benefits to same-sex partners, it pays a higher effective rate of tax than it might otherwise.82 Obviously, Company X would like to offset this cost, and HRO would like to encourage companies to provide equivalent health benefits to same-sex partners.

To accomplish this goal, Ms. Stone suggests that Company X issue a new

80. See I.R.C.§ 267(b) (including such non-familial relationships as grantor and fiduciary of a trust, or a person and a charitable organization controlled by such a person).

81. These figures are chosen purely for the sake of mathematical simplicity, rather than as the reflection of the actual cost of capital of any particular company.

82. Kratzke, supra note 17, at 414-15 (explaining that companies providing health care to same-sex partners of employees cannot exclude employer-provided coverage from an employee’s gross income under I.R.C. § 106).
"socially responsible" bond. The Company first agrees on a set of equality standards with HRO, covering employment discrimination, health insurance, and other employment benefits. Each year, HRO agrees to inspect the company’s records and evaluate any discrimination complaints, and then to issue a seal of approval if Company X is found to be in substantial compliance. So long as Company X is HRO-approved, the bonds will pay only 4.875% interest, but should the seal of approval ever be lost, they revert to a five percent rate. Ms. Stone, having considered the cases examined above, also insists that the bonds be designed with severability in mind. That is to say, from the date of their issue Underwriter Y expects and is specifically allowed to separate the coupons from the underlying bond and sell the interests to different parties. In our example, again choosing numbers for the sake of simplicity, assume that the bonds mature in five years.

When the bonds are issued, Company X will now have two different types of bonds circulating in the market: their standard bonds that pay 5% interest, and their socially-responsible bonds that pay 4.875%. Some altruistic investors may be willing to sacrifice part of their return in order to ensure social responsibility. However, one group of investors may be able to achieve a higher after-tax rate of return on the socially-responsible bonds than on the more expensive standard bonds: married same-sex couples.

83. Ian Ayres and Jennifer Gerarda Brown have already proposed a rough outline for a "fair employment mark" that could be granted to companies that provide equal opportunities to same-sex employees. See Ian Ayres & Jennifer Gerarda Brown, Straightforward: How to Mobilize Heterosexual Support for Gay Rights 79-94 (2005).

84. As a technical matter, Ms. Stone will have to make certain that the bond is not subject to the tax regime for contingent debt. See 26 C.F.R. § 1.1275-4. She should have no problem, however, given that remote or incidental contingencies do not qualify for special treatment. See 26 C.F.R. § 1.1275-4(a)(5) (providing remote or incidental contingencies as an exception to rules of § 1.1275-4); § 1.1275-2(h) (defining remote contingencies). Ideally, the Company should manifest its commitment to maintaining equal treatment for same-sex employees through public announcements or even Securities Exchange Commission filings in order to establish that the likelihood of the penalty rate becoming relevant is truly remote. To minimize the likelihood of the debt being found to be contingent, an ideal company would already offer benefits and fully intend to continue providing them.

The fact that a company already offers benefits to employees in same-sex partnerships does not render a contract with a human rights organization illusory, however. The consideration for the lower rate of interest comes from the commitment of the Company to maintain same-sex benefits in the event of conceptually remote occurrences. For instance, prior to its merger in 2000, Mobil Corporation "was on the forefront of companies that offered benefits to gay and lesbian workers equal to those offered to married employees." After merging with Exxon, however, the new entity announced that it would not extend these benefits to same-sex partners of new employees in the United States. See Amy Joyce, Majority of Large Firms Offer Employees Domestic Partner Benefits, WASH. POST, June 30, 2006, at D3.

To illustrate this, assume that Adam and Ben Kent each earn income in excess of $100,000 per year, have a cost of capital of four percent, and are subject to a thirty-five percent tax rate. If either partner were to purchase $100,000 worth of the "standard" bonds, that partner would earn $5,000 per year, on which he would pay $1,750 in income tax, for an after-tax return of $3,250. Assume, however, that the Kents work together to purchase $100,000 worth of the socially responsible bonds. Adam Kent purchases the coupons, which under a simple net-present value calculation are worth $21,273.21, and Ben Kent purchases the bond itself, worth the remaining $78,726.79.

Were the Kents a man and a woman in a pre-Goodridge marriage, this transaction would provide them with little profit (other than the satisfaction of supporting a socially-responsible firm). Each year the Kents would receive $4,875 in interest payments, on which they would pay $1,706.25 per year in tax, for an annual after-tax return of $3,168.75, less than they would earn with the standard bonds. By purchasing the split-interests, however, Adam Kent may attempt to amortize the purchase value of his wasting asset. Assuming that he paid $21,273.21 for his term interest, an amortization deduction would be worth $4,235.87 per year. Over the five years of his investment, Adam Kent thus pays tax upon a gain of only $693.13 per year ($4,875-$4,235.87), approximately $223.70. Ben Kent, on the other hand, pays no taxes for the first four years of the bond, but must pay $7,412.76 in year five when the bond matures. The taxes paid under both scenarios are illustrated in Table 1.

86. Again, the tax rate is chosen for simplicity of calculation. It is worthwhile noting, however, that under present tax rules, the Kents may well already benefit from a marriage bonus: a married man and woman each with a taxable income of $100,000 per year after deductions and exemptions would be subject to a marriage penalty. In this scenario, assuming that the Kents act in a solely economically rational fashion, they have little incentive to pursue gonzo tax planning at all. See Mapes v. United States, 576 F.2d 896, 898 (Ct. Cl. 1978) ("[W]hen both spouses generate somewhat comparable incomes . . . the benefits of income-splitting cease to exist . . . . As a general rule, two-income couples would benefit from filing separately and using the tax rates applicable to single persons.") See also Seto, supra note 15, at 10-11.

Two obvious responses are in order. First, even if the couple described in this Article would not benefit from gonzo tax planning, other same-sex couples might. If Adam Kent makes $200,000 per year, and Ben Kent has enough in residual assets to acquire the underlying bond, then they may engage in the transaction secure in the knowledge that if they ever get married, they will enjoy a marriage bonus. Second, same-sex couples are no more likely to be drawn from the stock of homo economicus than anyone else: even assuming that the Kents would suffer a tax penalty from a recognition of their relationship, they may be willing to pay it.

87. Under Lomas Santa Fe, a party is not allowed to split an interest he already owns without providing additional investment. See Lomas Santa Fe, Inc. v. Comm'r, 74. T.C. 662, 682 (1980). In order to secure the transaction against a later judicial attempt to apply the step-transaction doctrine, it may be worth asking the Kents to pay slightly more than the net present value of each portion of the bond. This additional investment might qualify as an amortizable debt premium subject to additional tax deductions. See I.R.C. § 171. I have not considered these values in the calculations above, however, again for the sake of simplicity.

88. Ben Kent receives $100,000 when the bond matures, against which he may deduct his basis of $78,820.67. This leaves him with income of $21,179.33, which at a thirty-five percent tax rate yields $7,412.76 in taxes.
Table 1: Tax Paid by Kents over Life of Bond

<table>
<thead>
<tr>
<th>Year</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax without splitting of interests</td>
<td>$1,706</td>
<td>$1,706</td>
<td>$1,706</td>
<td>$1,706</td>
<td>$1,706</td>
<td>$8,532</td>
</tr>
<tr>
<td>Tax after splitting of interests</td>
<td>$224</td>
<td>$224</td>
<td>$224</td>
<td>$224</td>
<td>$7,636</td>
<td>$8,532</td>
</tr>
</tbody>
</table>

Splitting the interests does not actually reduce the Kents’ taxes over five years, but it does allow them to defer the vast majority of taxes paid on the investment until year five. The tax deferral is worth more to the Kents than the purchase of the standard bonds, a fact most easily illustrated by comparing the net present value of the after-tax income streams available under both investments as shown in Table 2.

Table 2: Net Present Value of $100,000 invested by Kents in Standard and Socially Responsible Bonds (Assuming 4.0% cost of Capital)

<table>
<thead>
<tr>
<th>Year</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>NPV</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standard bond</td>
<td>$3,250\textsuperscript{89}</td>
<td>$3,250</td>
<td>$3,250</td>
<td>$3,250</td>
<td>$103,250\textsuperscript{90}</td>
<td>$96,661</td>
</tr>
<tr>
<td>Socially-responsible bond (depreciated)</td>
<td>$4,651\textsuperscript{91}</td>
<td>$4,651</td>
<td>$4,651</td>
<td>$4,651</td>
<td>$97,239\textsuperscript{92}</td>
<td>$96,807</td>
</tr>
</tbody>
</table>

The socially responsible bond represents a victory for every party except the IRS. Company X performs its debt financing at 12.5 basis points less than its market cost of capital, allowing it to (slightly) offset the cost of providing employment benefits to same-sex partners. Married same-sex couples provide a market for the bonds, at least as long as an amortization allowance is sustained by the courts, because the lower interest rate is offset by their tax deferral. In reality, the socially responsible bonds are nothing more than an arbitrage structure: HRO is selling Company X a tax advantage theoretically possessed by

89. $5,000 interest payment - $1,750 in taxes.
90. $3,250 interest payment + $100,000 bond maturation. The bond maturation is untaxed as a return of capital.
91. $4,875 interest payment - $224 in taxes.
92. $100,000 bond maturation + $4,651 post-tax interest payment - $7,413 tax on bond maturation.
same-sex couples in exchange for an assurance that employees with a same-sex partner will receive equal treatment in the workplace.  

B. Surviving Challenge by the Service

In order for this arbitrage to work, of course, at least one of the Kents must be able to claim a depreciation deduction despite § 167(c). Ms. Stone will have two ways of presenting her clients’ case. First, she could request a letter opinion from the IRS, asking how the Service would treat the transaction. Such letters are binding on neither the Service nor the courts, but the Kents could seek such a ruling with a minimum of risk. Nevertheless, if they received an unfavorable opinion, they would be unable to challenge it in the courts without executing the transaction, paying the non-depreciated rate of tax in the first year, and then suing the IRS for a refund.

The parties might choose instead to execute the transaction, claim a depreciation allowance, and then wait for the IRS to challenge them. Although nothing obligates the Service to prosecute the action, sufficient publicity—buzz about a “gay tax shelter”—may force the bureaucratic hand into motion. This strategy would seem to pose little risk for Company X. It has merely sold bonds into an open market, and those bonds may be purchased by altruistic investors as well as married same-sex couples. The Company has traded something of value—a promise to engage in employee policies friendly to same-sex couples—in exchange for a lower cost of capital. On the other hand, the risks for any given same-sex couple are themselves relatively small: in the example above, whichever Kent purchased the right to receive interest payments faces interest and penalties on only $1,483 of deferred taxes in the first year, or less than two percent of the value of the couple’s joint investment. Further, so long as Ms. Stone is able to write an opinion letter stating that it is “more likely than not” that the Service—or eventually the courts—will treat his investment favorably, the Kents can avoid the imposition of penalties. In that case, Mr. Kent’s

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93. Nothing requires the Kents to sell their tax advantage through arbitrage, of course. Just as many opposite-sex couples care more about their own fiscal health than any political ramifications of tax planning, so some same-sex couples—particularly upon reading this Article—may immediately wonder, “Why not simply buy the five percent bond, split the interests, and pocket the cash?” See supra note 86.

This concern is probably overstated. First, as Seto has shown, there are more straightforward ways for same-sex couples to take advantage of DOMA than through split-interest transactions. See generally Seto, supra note 15. More importantly, the benefits of social recognition will, for many couples, outweigh the loss of tax sheltering opportunities. Gonzo tax planners should not find it difficult to differentiate themselves from unscrupulous sellers of tax shelters whose clients happen to be in same-sex partnerships. Gonzo tax planners seek publicity, while tax cheats will seek to avail themselves of the audit lottery.


95. See I.R.C. § 6664(c)(1) (protecting taxpayer from imposition of penalties for underpayment of income tax arising from fraud or negligence where taxpayer has “reasonable cause” and has acted “in good faith”). Taxpayers normally satisfy I.R.C. § 6664(c)(1) by seeking an opinion letter from a tax attorney. The provision of such letters is strictly regulated by,
liability is limited indeed, so long as he can achieve a return greater than the statutory rate of interest on the $1,483 worth of taxes deferred in year one. Happily, an application of existing precedent to the aforementioned transaction suggests that Ms. Stone can in good conscience conclude that it is “more likely than not” to pass muster. 96

1. Application of Kornfeld, Gordon, and Hansen

Supposing that the Service challenges Mr. Kent in the Tax Court using Gordon and Kornfeld as precedent, the first stumbling block would be in attempting to find the “mere stopping place” used by Adam Kent to split his interests. So long as both Kents earn sufficient income on their own that they can each purchase their share of the bond, neither party needs to treat the other as an intermediary. Although in reality both Kents, being married, are likely to make significant financial contributions to each other’s welfare, this contribution is not recognized for federal tax purposes: they are required to file as separate parties. More importantly, as Massachusetts is not a community property state, each partner retains the right to use their own income as they see fit. 97

The requirement that both partners purchase their own share necessarily limits the availability of this tax shelter to marriages (and possibly domestic partnerships or civil unions) in which both partners generate sufficient income to be able to afford their own investments. 98 Because the political impact of same-sex-favored tax shelters will be greater if more families may participate, finding a way around this restriction would dramatically increase the political power of the strategy. A recent IRS ruling may have considerably expanded the number of couples who could join the Kents in investing in socially responsible bonds, due


96. By comparison, it will be relatively easy for the Service to penalize a couple who, as per Infantii’s suggestion insist upon filing jointly in the face of clear regulatory guidance to the contrary. See supra note 11-14 and accompanying text.


98. The tax structure described in this Article focuses upon bonds and split-interest tax shelters, which will be of greatest advantage to high-income taxpayers. Although beyond the scope of this Article, other “unintended consequences” of DOMA may have the potential to be employed by lower-income taxpayers in a concerted effort to increase the loss to the Treasury arising from non-recognition of same-sex couples. For instance, activists might organize informational campaigns to encourage same-sex couples to maximize the benefits of the Earned Income Tax Credit or to defer tax on gain from sale of housing. See generally Seto, supra note 15.

I have chosen to focus upon high-income taxpayers, despite their limited number, for three reasons. First, high-income taxpayers have distinct advantages in challenging the IRS, including resources and access to tax counsel. Second, by utilizing publicly-issued bonds, the transaction avoids the need for same-sex couples to file jointly in order to attract the attention of the IRS. Third, so long as criminal penalties can be avoided, high-income taxpayers are best-positioned to risk the imposition of penalties and interest should the Service prevail in a lawsuit.
LOVING COUPLES, SPLIT INTERESTS

...to California’s application of community property laws to domestic partnerships.99

Although California has recognized same-sex domestic partnerships as roughly equivalent to marriage since 2000, it was only in 2005 that the state extended its community property laws to domestic partners.100 The application of community property laws has long caused conflict in the tax courts, leading not only to such seminal cases as Poe v. Seaborn,101 but also eventually to the very process of joint filing.102 For heterosexual couples, the rule of Poe v. Seaborn is simple: married couples filing separately in community property states may pool their income collectively and file separate returns for half of the amount.103

After California applied community property to same-sex domestic partnerships, the service was confronted with the question of how such partners should report their individual incomes on federal tax returns. The IRS reacted by limiting the ruling of Poe v. Seaborn to married couples and announcing that domestic partners should report their own earned income irrespective of the application of community property.104 As a result, California domestic partners have the right to half of each other’s earned income (as community property) but are not required to identify each other to the IRS.

The operation of community property law may provide an escape from the “mere stopping place” conundrum for California couples in domestic partnerships. Assume for the moment that Adam Kent earns $200,000 per year, and Ben Kent is a stay-at-home father earning no income. To participate in the shelter above, Adam would have to transfer money to Ben to purchase a remainder interest, rendering the transaction factually similar to the one rejected by the court in Kornfeld. Were they partnered in California, however, Ben could purchase the remainder interest out of funds to which he has a legitimate individual right. The tax advantages to the Kents become even more dramatic: Adam will be able to depreciate the income interest against income taxed at the highest marginal rate, while Ben may pay much lower total tax on the remainder.

100. California Domestic Partners Rights and Responsibilities Act of 2003, ch. 421, 2003 Cal. Stat. 2586 (altering California Family Code § 297.5(m) (now § 297.5(k)) to include domestic partners within community property laws, and allowing existing domestic partners until June 30, 2005, to enter into agreements avoiding the application of community property).
101. 282 U.S. 101, 118 (1930) (holding husbands and wives filing separately in community property states may each declare half of their joint income). See also United States v. Malcolm, 282 U.S. 792, 794 (1931) (applying Poe v. Seaborn to California's community property law); Comm'r v. Harmon, 323 U.S. 44, 46-47 (1944) (refusing to apply Poe v. Seaborn to Oklahoma community property status because such status was elective).
102. For an entertaining history of the assignment of income doctrine, including the background to the seminal cases of Lucas v. Earl and Poe v. Seaborn, see Patricia A. Cain, The Story of Earl: How Echoes (and Metaphors) from the Past Continue to Shape the Assignment of Income Doctrine, in TAX STORIES: AN IN-DEPTH LOOK AT TEN LEADING FEDERAL INCOME TAX CASES 275-312 (Paul L. Caron ed., 2003).
103. Poe, 282 U.S. at 118.
Although the tax advantage would almost certainly not offset the increased tax burden placed upon the Kents by the inability to file jointly, it might at least mitigate the inequity.

Two caveats with respect to California domestic partnerships are in order, however. First, like any same-sex couple in a state recognized "non-marriage" relationship, registered domestic partners in California may be less able to protect themselves from the "constructive" imposition of § 167(e). Second, this tension between federal tax law and California family law creates a number of absurd, but potentially tragic, tax consequences for California domestic partners. At the moment, these consequences are more academic than real, in that the Service has not made much effort to enforce the Code with draconian consistency. Yet it may be unwise for registered domestic partners in California to poke at this particular sleeping tiger.

105. See infra text accompanying notes 113-14.
106. An ABA discussion paper highlights the risk that California domestic partners may face severe, if unintended, tax consequences:

Suppose A entered into a domestic partnership with B in 2005. A earns $100 per year and is in a 45% blended state and federal income tax bracket. B earns nothing. Does this mean that A pays $45 in taxes and is left with $5 and that B keeps $50 free of tax? Or will California law required [sic] B to reimburse A for one-half of the taxes? Will failure to demand reimbursement be another gift? On top of that, A may have to file a gift tax return, and pay a 45% gift tax on the $50 transferred to B ($22.50). B will have earned $50 tax-free and A will actually be out of pocket $17.60!


The author then mentions a further frustration in reconciling federal and state law based upon the inartful drafting of the California domestic partnership statute, which allows domestic partnerships among same sex couples "unrelated by blood in such a way that would prevent them from marrying." Id. at 3 n.15. The limitation on such incestuous marriages is at least partially gender specific: "Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and between uncles and nieces or aunts and nephews, are incestuous . . . ." Id.; Cal. Fam. Code § 2200 (emphasis added). Uncles and nephews or nieces and aunts are not textually barred from domestic partnership. Id.

If the IRS or Congress wished to avoid the problem of California's community property law by ignoring the transfer of wealth between such partners, it would have to create an exception to the exception to account for niece/aunt or uncle/nephew partnerships, or risk providing an incentive for such unions in order to escape gift and inheritance taxes. As more states develop alternative marriage-like relationships, each bringing with them their own peculiar statutory and common law heritages, one can imagine the complexity of the relevant Code sections and the opportunity for arbitrage or abuse expanding enormously.

The decision in In re Marriage Cases may moot the issue entirely in California, depending upon the breadth of the California Supreme Court's decision. See In re Marriage Cases, Case No. S147999 (Cal. argued on Mar. 4, 2008) (considering challenge to prohibitions against same-sex marriage). On the other hand, the Court could address only marriage law without clarifying the law relating to domestic partnerships.
So long as the court finds no "mere stopping place" for the funds, the remainder of the case law favors the Kents. Neither *Kornfeld* nor any later tax opinion has overturned the fundamental rule of *Gregory v. Helvering*:

The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted . . . . But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended. 107

Nor did *Kornfeld* overrule *Hansen*, which still stands for the proposition that split-interest deductions between related-parties are not *per se* invalid, at least in the absence of a statutory proscription, but only subject to closer scrutiny. 108

Other than the close relationship between the parties—a relationship not recognized by federal law—the Kents' proposed transaction is closer to *Hansen* than *Kornfeld*. In many ways this same-sex tax planning is less problematic than even the land-purchase in *Hansen*. The Kents purchase their interests at arms-length from a third-party at market rates, possibly for additional investment. Unlike in *Hansen*, the property being sold is designed explicitly to allow the splitting of interests. 109 Nor can the entire transaction be considered bereft of business purpose: the lower interest rate on the bonds provides consideration for the guarantee of employment policies friendly to same-sex couples.

Finally, a court will find it difficult to conveniently "step together" the transactions between Company X, the brokerage, the HRO and the Kents, because no combination of steps will result in a different outcome. If a court ignored all intervening steps between Company X and the Kents and merely determined that they had purchased split-interests directly, one Kent would still be entitled to a depreciation deduction. The critical transactions that must be stepped together—obvious in *Gordon* and *Kornfeld*—are the transfers of funds between the Kents used to purchase their collective interest in the bonds. Denial of the deduction thus relies upon somehow establishing that the Kents are not a family, yet are related parties.

2. **Can Same-Sex Couples Be Considered “Related Parties” for Tax Purposes?**

The plain language of § 167(e) and § 267(c), considered in light of DOMA, clearly excludes same-sex couples. The Kents cannot be considered “members of

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109. Compare *Kornfeld*, 137 F.3d at 1234 ("Here, however, one hundred percent ownership of the bonds was acquired from or through Prudential-Bache in a market transaction; but taxpayer presented no evidence that any brokerage firm would sell only a life estate in the bonds.") *with Hansen*, 65 T.C.M. (CCH) at *22* ("Petitioners decided to acquire estates for years at prices which they paid for out of their own funds, and shareholders decided to acquire the remainders, at prices which they paid for out of their own funds—prices as to which respondent has raised no question in respect of fairness in terms of value received.")
a family" because such members are limited only to brothers, sisters, spouses, ancestors, and lineal descendants.\footnote{110} DOMA in turn defines "spouse" as a member of the opposite sex.\footnote{111} Strictly speaking, § 267(b) itself cannot apply to the Kents.

On the other hand, while § 167(e) denies depreciation deductions to related parties as defined by § 267(b), it does not make that denial exclusive: it describes the universe of deductions not allowed, but does not imply that all others must be. Further, § 167(e)(6) specifically instructs the Secretary to prescribe regulations that will prevent avoidance through such means as cross-ownership. Faced with the potential for subsequent attempts at tax-avoidance by same-sex couples, a Tax Court might be tempted to uphold the purposes of the Code through extra-statutory judicial recognition of the Kents.\footnote{112}

Such "constructive marriage" would be simplest to contrive between couples in the several states that allow civil unions or domestic partnerships but not "marriage." Relying upon the dicta in Kornfeld relating to Ms. Permenter,\footnote{113} a judge might determine that a domestic partnership is marriage-like enough to justify treating the Kents as a single domestic unit. No statute explicitly prohibits this conclusion. DOMA defines the gender status of partners in some entity arbitrarily described as "marriage." It does not address civil unions, domestic partnerships, or any other state-sanctioned union of individuals. Limiting DOMA to its terms, a Tax Court could hold that same-sex partners in a state-sanctioned relationship qualify as related parties, despite the lack of any textual basis. Such a decision would sit uncomfortably with the Service's clear demarcation between "marriage" and other state-sponsored relationships for purposes of community property.\footnote{114} Nevertheless, it remains one method by which a court could potentially apply related-party rules to same-sex couples.

\footnote{110}{Section 267(b) defines other relationships as well, including relationships between a corporation and its majority shareholder, between two corporations in the same control group, or the grantor and fiduciary of any trust. See I.R.C. § 267(b)(2)-(4). As the transaction does not involve a trust or corporation in which the Kents have ownership, these definitions do not apply.}

\footnote{111}{1 U.S.C. § 7.}

\footnote{112}{There is no reason to suspect that any legislator who debated DOMA ever intended for it to be used by same-sex couples to escape tax burdens. Indeed, proponents of DOMA, to the extent that they addressed tax consequences at all, concentrated upon the potential costs to the federal government of recognizing same-sex marriages. See, e.g., 142 CONG. REC. S10100, S10111 (1996) (statement of Sen. Byrd) ("How much is it going to cost the Federal Government if the definition of "spouse" is changed? . . . I do not think, though, that it is inconceivable that the costs associated with such a change could amount to hundreds of millions of dollars, if not billions—if not billions—of Federal taxpayer dollars."); id. at S10121 (statement of Sen. Ashcroft) (arguing that recognition of marriage would allow same-sex couples special benefits and tax deductions at expense to the public); 142 CONG. REC. H7480, H7488 (1996) (statement of Cong. Barr) ("[I]f you do not believe it is fiscally responsible to throw open the doors of the U.S. Treasury to be raided by the homosexual movement, then the choice is very clear, oppose [an amendment substantially limiting DOMA]").}

\footnote{113}{See supra note 77 and accompanying text.}

\footnote{114}{See I.R.S. Chief Couns. Mem. 200608038, supra note 99, at 4.}
Could a judge extend such logic to encompass couples actually married in the state of Massachusetts, or any other state that may later recognize same-sex marriages? Ironically, the same judicial flexibility that allows for arguably rights-expanding rulings like *Goodridge* or *Lawrence*\(^{115}\) may rescue a Tax Court judge searching for a relationship between the Kents not founded in statutory law. Longstanding Massachusetts precedents recognize that the institution of marriage creates a “marital partnership.”\(^{116}\) It takes only a short linguistic stretch to determine that a same-sex couple, while they might not have a *marital* partnership, nevertheless have *some* partnership for purposes of Massachusetts, and by extension federal, law. With a little twisting of logic, the Kents’ ownership interests might fit within the ambit of § 267(e), which regards certain partnerships and individuals who own an interest in them as related parties.\(^{117}\)

Although a judge might strictly construe DOMA and find for the Kents, a suitably creative court might also find a way to pretend that the couple, while not federally married, are nevertheless partners. Such a victory for the Service, however, may not be a victory for DOMA.

**III. THE ADVANTAGES OF GONZO TAX PLANNING FOR ADVOCATES OF SAME-SEX MARRIAGE**

Would a ruling that the Kents were related actually constitute a loss? The investment vehicle above serves both an economic and a political purpose. The Kents may lose the *lawsuit* and have to pay interest on unpaid taxes or perhaps

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117. See, e.g., I.R.C. § 267(e)(1) (defining members of a partnership as related parties). Needless to say, any court following this path would have to construct some justification for not treating opposite-sex married couples as members of a partnership, as federal tax law distinguishes between married couples and business partnerships in important ways. See, e.g., *United States* v. *Craft*, 535 U.S. 274, 286 (2002) (distinguishing between property owned in entireties by married couples and property owned by a partnership).

A judicial determination that same-sex couples constitute business partners adds complexity to the already confusing relationship between same-sex marriage, tax policy, and DOMA. If same-sex couples are considered business partners for purposes of tax avoidance, why not apply the same consideration for purposes of income *reporting*? In other words, would later taxpayers be able to use judicial precedent to suggest that married same-sex couples, although they may not file jointly, each receive property distributions from their “non-marital” partnership exactly equal to half of the joint income of the partners?

Even more confusing would be the impact of such a decision upon *any* couples who live together but do not choose to formalize their relationship. At what stage would such couples form a partnership for tax purposes?
even penalties. But such damages are a small price to pay for legal precedent achieving a long-held goal of advocates for same-sex marriage: some federal recognition of a relationship between same-sex couples. In the context of DOMA and other acts of federal institutional denial of same-sex relationships, even recognition for the sake of tax penalties might be a step forward. Legal victory for the Kents, on the other hand, leaves DOMA proponents the task of justifying a new hole in the tax code. A decision in favor of the Kents casts doubt upon the 1996 report of the Congressional Budget Office, which stated that “enacting H.R. 3396 [DOMA] would result in no cost to the federal government.”\textsuperscript{118}

Part III outlines the potential political benefits of gonzo tax planning to same-sex couples and the broader movement for legal recognition of same-sex marriage. These benefits constitute a “heads, you lose; tails, I win” strategy, in which recognition of same-sex couples undermines the legislative case for DOMA, at least for purposes of taxation, while non-recognition results in loss of tax receipts to the federal government and considerable flexibility in the tax planning options of married same-sex couples.

Finally, this Part suggests that gonzo tax planning presents advocates for same-sex marriage with particular strategic advantages. To the extent that activists express concern with pursuing same-sex marriage rights in federal courts for fear of legislative backlash, gonzo tax planning minimizes this risk by focusing not upon constitutional rights, but upon the inherent contradictions of the law as it is.\textsuperscript{119} A gonzo tax strategy reduces the risk of legislative backlash because it poses no direct challenge to those who insist that the institution of marriage must include only one man and one woman. Rather, it challenges the federal government and the public at large to accept the costs inherent in a policy of ignoring committed relationships between same-sex couples.

A. Heads, You Lose: Political Advantages of a Judicial Loss

Any attempt to carve some “third-way” between the Defense of Marriage Act and the Internal Revenue Code merely creates new problems for those who would deny same-sex couples the opportunity to enjoy state-recognized relationships. Even limited recognition of some non-traditional marriage relationship would suggest that changes must be made around the edges of the Code. If same-sex couples in Massachusetts can be considered to be in some constructive partnership, the existence of that partnership needs to be communicated to the government.\textsuperscript{120} Having recognized that same-sex partners may use §167(e) for avoidance purposes, presumably the Secretary is now


\textsuperscript{119} See infra Part III.C.1.

\textsuperscript{120} The Kents, because they desire a test case, actively wish to communicate their transaction to the government, but once the test case is over, nothing prevents same-sex couples from joining the audit lottery. Indeed, after a judicial loss, some same-sex couples might wish to take advantage of more abusive strategies that are more difficult to detect.
required, under §167(e)(6), to establish some regulation preventing such avoidance. Any reasonably workable scheme will require the Kents to inform the IRS of their relationship. If married partners in Massachusetts must somehow be recognized in order for the IRS to prevent tax avoidance, does it make sense to exclude them from the most cost-effective reporting method: joint-filing?

Nor would a decision finding against the Kents eliminate opportunities for further gonzo tax shelters and subsequent lawsuits. The boundaries of Seto's assumption of selfishness vary considerably depending upon the precise section of the tax code, and each comes with a slightly different judicial gloss. A persistent set of tax lawyers might spend years devising investment structures that advantage same-sex couples—excluded from each and every current definition of "family"—and proceeding with patient challenges to make an ever greater muddle of the tax jurisprudence. Each case brings with it a new need for Congress or the courts to amend or interpret the Code to provide quasi-recognition of same-sex couples.

Indeed, a loss in the tax courts may itself lend considerable political capital to the campaign to recognize same-sex marriage. Limited to its facts, a loss for the Kents is not likely to translate into recognition of their union for any purpose other than avoidance of "abusive" tax shelters. Such a ruling places defenders of DOMA—often themselves proponents of original meaning in legislation—in an uncomfortable position. A consistent traditionalist may believe that marriage excludes persons in same-sex partnerships from the benefits and penalties that the tax code places on marriage, just as a consistent progressive may believe they should be included. A court decision recognizing same-sex couples as "related" for purposes of anti-abuse rules, but unrelated for any other, would introduce a new and possibly unsustainable inconsistency to the tax laws. Every court decision finding that a same-sex couple is "abusing" the Defense of Marriage Act makes the case for DOMA a little harder to put forward with a straight face.

B. Tails, I Win: Legislative Attempts to Fix the Code While Preserving DOMA

Alternatively, a Tax Court might conclude that DOMA prevents it from considering the Kents to be a married couple or any other form of related party. Such a decision presents both a political and financial victory. Precedent confirming that married same-sex couples cannot be considered "related" for purposes of federal income taxation opens a host of possibilities for avoidance

121. See I.R.C. 167(e)(6) ("The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subsection, including regulations preventing avoidance of this subsection through cross-ownership arrangements or otherwise.")
123. For the problems of redefining "family" to include other forms of domestic partnership, see supra notes 100-07 and accompanying text.
available only to same-sex couples. Gonzo tax planning then plays a dual political role. First, it may help married same-sex couples to defray the additional burdens they face from federal non-recognition of their relationships. Second, each additional act of tax planning makes a congressional response more likely. The reliance our tax system places upon marriage as a tool for identifying potentially collaborative behavior limits the options available to Congress to close this "loophole" without recognizing, in some manner, the existence of relationships between same-sex couples. Thus, the use of gonzo tax planning invites Congress to revisit—and potentially repeal—DOMA's delegitimization of same-sex relationships.

Because related-party rules serve to prevent many different types of abusive transactions, a favorable ruling for the Kents may open the floodgates. Same-sex couples might use the decision as precedent in support of attempts to sell personal property without recognizing sale on gains, defer income largely indefinitely, or claim twice the benefits otherwise allowed under certain government programs. Once a judge determines that § 267 does not apply to one same-sex couple, other transactions cannot be far behind. Defenders of DOMA must then either revise the law to close this "loophole," or justify the tax consequences.

In these later political struggles, advocates for same-sex marriage need not protest that DOMA is unfair. Arguments focusing on DOMA's unfairness seek to convince Congress and constituents of the inequity of a law adopted with vast bipartisan consensus, including the signature of a highly popular Democratic president. Gonzo strategies, on the other hand, concentrate on the fundamental and costly flaw inherent in refusing to recognize that two individuals do, in fact, love each other, or at least are sufficiently trusting and committed to each other to conspire to avoid taxation. Initially, the relative impact on the Treasury might itself be small: the number of married same-sex couples is not large, if only because Massachusetts is the only state that recognizes same-sex marriage. Nevertheless, news reports of a "gay tax shelter" will make uncomfortable

124. For couples who would be subject to a marriage penalty were their relationship to be recognized, gonzo tax planning offers a way to capitalize further upon their tax advantage.
127. According to the Massachusetts Registry of Vital Records and Statistics, 10,400 same-sex marriages were recorded between May 2004 and August 2007. [Letter on file with the Berkeley Journal of Gender, Law, and Justice].

reading for members of Congress who supported DOMA, at least in part in order to prevent the Treasury from being "raided by the homosexual movement." More importantly, if same-sex couples can arbitrage their tax advantage to the benefit of corporations rather than themselves, they can ensure that the cost of an irrational tax law exceeds that which might be inflicted through private planning alone.

Congressional proponents of DOMA are thus pierced upon the horns of a dilemma. They may either allow same-sex couples a peculiar form of tax advantage, or they may attempt to adjust the code to deny such a benefit to same-sex couples. There is, of course, one very easy "fix" to the problem: recognize the Kents as related parties. Few legislative solutions, however, do not involve a direct or indirect repeal of DOMA. As one option, Congress might amend DOMA to exclude any application to Title 18, thus allowing same-sex marriages to be recognized by the Internal Revenue Code. This itself represents a kind of victory, as recognition of same-sex couples was supposed to result in a net cost to the Treasury.

Alternatively, individuals who are part of a state-recognized same-sex relationship, such as a domestic partnership or civil union, could be added to the list of those considered related parties under § 267(c)(4). Such language might eliminate California or New Jersey same-sex partners from participation. Yet Massachusetts couples are not part of a same-sex domestic partnership: they are married. To apply a modified § 267(c)(4) to Massachusetts couples, Congress would need to develop what amounts to a form of civil union recognized only at the federal level. Moreover, creating a two-tiered system of recognition for same-sex couples may incline state courts or legislatures to mandate marriage for same-sex couples rather than civil unions.

As another alternative, the Code could be amended to create a separate status—"domestic tax partnership," for instance—that same-sex couples might

128. See supra note 112.
129. Seto addresses the option of amending the Code to apply only the negative consequences of marriage to same-sex partners, while failing to provide them with any benefits. Seto, supra note 15, at 51-52. As he points out, such measures would likely heighten the success of equal protection challenges, discourage same-sex couples from registering their relationships with authorities (in order to avoid detection), and be inconsistent with the concept of non-recognition of same-sex marriage. Id. Additionally, it is difficult to conceive of a method by which Congress could so amend the Code, or the manner in which the IRS would enforce it. As already mentioned, the IRS will have a difficult time tracking abusive transactions without allowing same-sex couples to file jointly.

Needless to say, amending the Code to be intentionally discriminatory against same-sex couples would prove as fiendishly complex as the idea is undoubtedly ugly. Further, such intentional discrimination at the federal level risks setbacks in state-level litigation. Much of the reasoning of the New Jersey Supreme Court in Lewis v. Harris rests upon the premise that, no matter the name, the legislature may provide equal access to same-sex couples without describing the relationship as a "marriage." See Lewis v. Harris, 908 A.2d 196, 221-24 (N.J. 2006). Were the federal government to use such recognition only punitively, state supreme courts already favorable to the idea of same-sex partnership might lose their wariness to finally settle the issue.
opt into in exchange for the benefits and burdens of recognition for tax purposes.\textsuperscript{130} Such recognition does not directly violate DOMA: it does not invoke the words "marriage" or "spouse." This too provides a partial victory for same-sex couples, who could at least choose to have their relationships recognized for federal tax purposes.

Recognition of same-sex couples, either whole or in part, is the ultimate goal and preferable outcome of gonzo tax planning. A tax court that recognizes the Kents as "related" for purposes of split-interest transactions leaves the Service scrambling for a way to identify potential tax abusers who are otherwise invisible to the system. On the other hand, success in the courts puts pressure on Congress to pursue actual legislative change. Either way, same-sex couples are likely to gain some recognition for their relationships at the federal level. Not only does this serve as a "foot in the door" for later victories, but it forces Congress to readdress DOMA directly in a way that direct tax protests—mass joint filing or other demonstrations—do not.

C. The Curious Novelty of Gonzo Tax Planning

Assuming that gonzo tax planning presents an opportunity to force some recognition of same-sex partnerships upon the federal government, and thus weaken the justification for DOMA, why do the Kents remain a wholly fictional couple? Although entirely unsatisfying as an answer, it may simply be that the "four persons at a bar" scenario described at the beginning of this Article has never occurred. The right alignment of tax planner, same-sex couple, and advocate for same-sex marriage has not been achieved.\textsuperscript{131} On the other hand, academic commentators have discussed the tension between DOMA and anti-abuse rules, if only rarely.\textsuperscript{132}

Although I cannot address the issue with any certainty, two distinct possibilities present themselves. First, same-sex marriage advocates may be reluctant to avail themselves of the federal courts, the only venue in which a tax challenge may be pursued.\textsuperscript{133} The second possibility is that academic commentators have tended first to assume that marriage (and its resultant

\textsuperscript{130} See Seto, supra note 15, at 52-53.

\textsuperscript{131} History has shown that although a tax arbitrage idea seems obvious once pointed out, the ideas are not always apparent. "Designing and executing a commercially appealing tax arbitrage is apparently hard enough that those who are good at it can make a nice living, even though they may have to stand by watching helplessly, when others decide to steal their ideas without paying compensation." See Daniel N. Shaviro, The Story of Knetsch: Judicial Doctrines Combating Tax Avoidance, in Caron, supra note 102, at 325.

\textsuperscript{132} See infra text accompanying notes 144-146.

\textsuperscript{133} See William C. Duncan, Avoidance Strategy: Same-Sex Litigation and the Federal Courts, 29 CAMPBELL L. REV. 29, 29-34 (2006) (providing a history of unsuccessful federal court cases seeking to require states to recognize same-sex marriage); Id. at 41-42 (describing efforts by activists to encourage federal courts to abstain from deciding case challenging DOMA and California's marriage laws); Infanti, supra note 8, at 45-47 (describing efforts by same-sex rights groups to act as "gatekeepers" for judicial and legislative protest).
benefits) is a right being denied to same-sex couples, and that their present unrecognized status must thus be a form of invidious discrimination. Gonzo tax planning is not based upon notions of rights or the necessity of equal protection (both contested concepts). Instead, gonzo tax planning focuses on exploiting tensions within a consciously designed statutory system, and does not rely upon the intellectual and ideological support for decisions such as Lawrence or Goodridge. One can accept that the prohibition of same-sex marriage is entirely constitutional, or that equal protection has nothing to do with the “animus” motivating a lawmaker or polity, and yet still conclude that the DOMA unfortunately revitalizes tax avoidance strategies largely eliminated in the Reagan and Bush I administrations.

1. Reluctance to Engage in Federal Litigation

The lack of federal cases may not be coincidental, and may reflect a conscious decision among some same-sex marriage rights advocates to concentrate upon courts and constitutions perceived to be friendlier to these litigants. Indeed, this strategy has extended so far that Lambda Legal Foundation filed a brief before the Ninth Circuit asking that the court not address federal constitutional objections brought by an individual plaintiff. This reluctance, and its applicability to tax cases, is encapsulated by a quotation from the lead attorney who worked on the Goodridge case:

“I think that what it boils down to is avoiding the federal piece” for as long as possible. “I have tried to plead with lawyers not to get overly ambitious about going into court and challenging the federal Defense of Marriage Act,” she says. “I think a lot of times these cases would arise as tax cases by wealthy individuals” who pay disproportionate sums because of the unavailability of marriage. “I can’t think of a less sympathetic prospect,” Bonauto says. “I

134. See Romer v. Evans, 517 U.S. 620, 632 (“[T]he amendment seems inexplicable by anything but animus toward the class that it affects; it lacks a rational relationship to legitimate state interests.”).
135. See Duncan, supra note 133, at 35-44 (discussing reasons same-sex marriage rights groups avoid federal litigation).
136. Id., at 41-42. The case involved is Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006) (upholding stay of federal action in favor of state lawsuits). Infanti notes a similar reluctance among “professional” activists in other cases in California. See Infanti, supra note 8, at 45 n.87.

On the other hand, respondents’ brief in In re Marriage Cases, in which Lambda Legal serves as co-counsel, raises the Smelt case as a warning to the California Supreme Court. Resp’ts’ Consol. Reply Br. on the Merits, In re Marriage Cases, Case No. S147999, at 10 (Cal. filed Aug. 17, 2007) (noting that unless the existing state marriage statutes are invalidated, the Smelt court may set aside its stay). Depending on the outcome of state-level judicial challenges, the appetite for federal litigation may change.
would like the opportunity for states to wrestle with this before we have to go into federal court." 137

The search for sympathetic courts and sympathetic plaintiffs may seem harsh, hypocritical or hopeless, 138 but it is founded on significant tactical and strategic concerns. Goodridge itself arguably contributed to a backlash: during the election cycle following the Goodridge decision, thirteen states ratified marriage amendments forbidding the recognition of same-sex marriage. 139 Advocacy groups may be right to worry that a judicial victory at the federal level might translate into support for a more draconian legislative response. 140 The voters of Alabama or Mississippi have no legislative recourse against the Massachusetts Supreme Judicial Court, and so long as its decisions are not law in their jurisdiction, the impetus behind the proposed federal constitutional amendments to prohibit same-sex marriage remains muted. 141 As Judge Wilkinson mentions in the state context, “The marriage amendment phenomenon then can only be viewed as a preemptive strike against what some hypothetical court in some hypothetical jurisdiction might some day say.” 142 But a federal decision could put flesh upon those hypothetical bones, strengthening the movement in support of a federal constitutional amendment. However depressing one may find it, the strategy of avoiding federal constitutional claims is hard to fault as an instrumental matter.

Yet gonzo tax schemes are not constitutional cases and raise no cries for equity or equality. No federal circuit, let alone a tax court, must be asked to judicially eliminate the Defense of Marriage Act from the U.S. Code. Gonzo tax schemes ask courts to affirm the language of the legislature, to determine not only that DOMA is perfectly constitutional, but that it consistently means what it says. Indeed, a human rights organization seeking to pursue a gonzo tax strategy should probably seek out some originalist, or even textualist, judges, the sort of solon unafraid to declare that a court will uphold the language of a statute even when enforcing its unintended consequences. 143 Following a successful ruling,
such activists could then set out to make DOMA an expensive, and possibly unsustainable proposition.

Nor does gonzo tax planning present the same opportunity for a legislative backlash. The Defense of Marriage Act already denies same-sex couples legal recognition at a federal level. Closing these tax loopholes requires laws that recognize some form of same-sex partnership. These responses cannot be pursued without simultaneously providing sympathetic legislators an opportunity to directly challenge the legitimacy of DOMA itself. In short, gonzo tax strategies suggest the possibility of a sort of legal jiu-jitsu, seizing for oneself an opponent’s strength and power.

2. Academic Criticism

The tension between anti-abuse rules and the Defense of Marriage Act has attracted occasional commentary in law reviews, but academics have tended to address the issue through one of two prisms. The first, typified by Patricia Cain’s article *Heterosexual Privilege and the Tax Code*, mentions same-sex tax advantages as an issue secondary to, and less important than, same-sex tax penalties. In tallying the harms faced by taxpayers in same-sex partnerships, Cain admits that these couples are not directly burdened by the anti-abuse rules, and that the economic substance doctrine and sham transaction rules might be avoided, but then concludes, “While in some cases it may be possible, with careful planning, to avoid the ‘related party’ rules and the ‘sham transaction’ theories, such planning adds a cost to the alleged benefit of being unrelated.”

If one’s intent is to construct a theory of heterosexual privilege, nothing is to be gained by an attempt to quantify advantages and disadvantages, let alone to minimize the costs and maximize the benefits. A grievance-based approach seeks precisely the opposite: to emphasize injustice by minimizing any advantage that a same-sex couple might possess. In contrast, gonzo tax planning relies upon exploiting discriminatory laws to empower and strengthen same-sex couples. Advocates for same-sex marriage should seize upon exclusion—in effect, invisibility to the tax man—as the double-edged sword that it is, wielding it against those who forged it in the first place.

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144. See generally Antonin Scalia, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, (Amy Gutmann, ed.) (1998). The legislative history shows that DOMA proponents wished to protect the Treasury from same-sex couples claiming marriage benefits. Based upon the floor speeches, it would be hard to argue that Congress ever intended same-sex couples to benefit from DOMA. Gonzo tax planning thus seems best suited for presentation to judges who find such floor speeches to be irrelevant.


146. See Seto, supra note 15; Kratzke, supra note 17. In so doing, these scholars persuasively demolish any possible contention that
Gonzo tax planning also rejects another common theme of the academic literature: the stigmatic or psychic harm of positively and openly declaring one’s relationship to be void. According to this school of thought, a lesbian who insists that she is not married in order to evade the anti-abuse rules inflicts injury upon herself by denying to the government the very existence of her loving relationship. Yet so long as the Service is subject to DOMA, any person in a same-sex partnership must make this declaration anyway. The act of challenging the Service, and by extension society, to be consistent in its nonrecognition of same-sex marriage converts the requirement to formally ignore a loving relationship into an act of defiance, and may itself ameliorate stigmatic harm. Challenging the powerful to stand by their own law is itself in the finest of heroic traditions. The current tax regime allows a defiant same-sex couple to express the same combative spirit of Thomas More. As portrayed in A Man for All Seasons, More keeps himself alive through the consistent invocation of English law, while all who hear him knows that his actions are inconsistent with his heart. The choice is whether to view compliance with an unjust law as a stigmatic harm or as an act of protest.

CONCLUSION

The Defense of Marriage Act, although not a tax law, is inconsistent with good tax policy, and this inconsistency can be exploited. This Article illustrates a transaction that would potentially allow same-sex couples to arbitrage this inconsistency with good tax policy. To the extent that they focus upon the usefulness of nonrecognition to same-sex couples, however, it is as a shield against personal taxation, rather than part of an advocacy strategy.

147. See Cain, supra note 144, at 487 (“In addition, for some couples there is something unsettling about claiming to be unrelated when, in fact, the couple experiences their relationship as real.”); Infanti, supra note 8, at 28; Knauer, supra note 2 (“Imagine the strain of trying to unscramble your affairs in order to report two completely separate lives that are in fact lived jointly. It is something that same-sex couples have to remember and keep track of throughout the year.”).

148. This spirit is best expressed when More, challenged on the meaning of his silence during his trial, patiently explains that the applicable legal maxim is “qui tacet consentire”: silence gives consent. Thus, he argues, the Court is bound to interpret his silence with respect to an oath of loyalty to the King as an affirmance.

CROMWELL Is that what the world in fact construes from it? Do you pretend that is what you wish the world to construe from it?

MORE The world must construe according to its wits. This Court must construe according to the law.


A Man for All Seasons is almost a textualist fairy tale, illustrating the defensive power of a legal principle, clearly stated and not subject to judicial interpretation, against invocations of raw power and authority. An absolute rule that silence implies consent is no more workable than a stubborn insistence that same-sex couples cannot be related parties, or should not file their taxes jointly. One can almost imagine a frustrated IRS agent (or even Senator) demanding of the Kents: “Is that you are ‘unrelated parties’ what the world in fact construes from it? Do you pretend that is what you wish the world to construe from it?”
advantage with the help of large corporations, making it a potent tool of political action. It seeks to answer Infanti's call to arms with a strategy that emphasizes empowerment, not exclusion.

Additionally, the gonzo tax-planning technique considered above, and other more complex or robust structures that might be developed, provides a vehicle for activists to challenge DOMA without raising potentially unsympathetic constitutional issues. In their lawsuit, the Kents need not argue that they are being denied a constitutional right. The tax effects of the Defense of Marriage Act do not depend upon competing views of substantive due process or an equal protection clause. Instead, gonzo tax-planning challenges opponents of same-sex marriage to recognize a simple truth: our tax code relies upon marriage as a method of identifying committed couples in long-term trust-based relationships. So long as same-sex couples have such relationships, refusing to recognize this has tangible effects measurable in dollars and cents. Further, same-sex couples excluded by laws such as DOMA can structure their economic lives such that the consequences of exclusion fall not only upon them, but also upon their fellow citizens.

Such claims are more humble than constitutional arguments. To seek to challenge DOMA as unconstitutional, same-sex marriage litigators must ask a court to state not only that their political opponents differ in opinion, but that they act irrationally or out of animus. Many activists, politicians, judges, or citizens who might otherwise be broadly sympathetic to the movement towards same-sex marriage are not yet willing to take so dramatic a step. The majority opinion in Hernandez v. Robles, the New York Court of Appeals case declining to follow Goodridge, illustrates this reluctance. In response to Chief Justice Kaye's rebuke that "I am confident that future generations will look back on today's decision as an unfortunate misstep," the majority retorted, "We do not predict what people will think generations from now, but we believe the present generation should have a chance to decide the issue through its elected officials."

149. See supra Part III.C.1.
150. The Goodridge court invalidated Massachusetts's marriage law under "rational basis" review, after finding that "The department has had more than ample opportunity to articulate a constitutionally adequate justification for limiting civil marriage to opposite-sex unions. It has failed to do so." Goodridge, 798 N.E.2d at 968. See also Romer v. Evans, 517 U.S. 620, 634-35 (rejecting Colorado's Amendment 2 in part due to its origin in "animosity"). As Judge Wilkinson notes:

[So] convinced was the [Goodridge] majority of its view that it considered the opposing arguments to lack even a "rational basis." In other words, centuries of common law tradition, legislative sanction, and human experience with marriage as a bond between one man and one woman were deemed unworthy to the point of irrationality.

Wilkinson, supra note 140, at 547 (quoting Goodridge, 798 N.E.2d at 961).
152. Id. at 34.
representatives." Tax planners have the opportunity to pick up this gauntlet by using litigation in service to legislative change.

Whatever the result of their litigation, the Kents’ story will not end with a tax court repealing the Defense of Marriage Act or finding that the Equal Protection clause requires a state to recognize same-sex marriage. Instead, the Kents’ litigation provides ammunition for future legislative battles in which proponents of same-sex marriage can address the issue without the legal necessity of implying that their legislative opponents are mean-spirited or irrational. Unlike constitutional arguments, such approaches also hold out the hope of dividing those who object to same-sex marriage on grounds of religion, tradition, or simple prejudice from those who disagree with Goodridge because of good faith differences in politics or jurisprudence. Those who cannot be convinced that the Defense of Marriage Act is constitutionally infirm may yet be persuaded that it is prohibitively expensive.

153. Id. at 12. The Court went on to emphasize the conciliatory function of legislative decisionmaking:

We therefore express our hope that the participants in the controversy over same-sex marriage will address their arguments to the Legislature; that the Legislature will listen and decide as wisely as it can; and that those unhappy with the result—as many undoubtedly will be—will respect it as people in a democratic state should respect choices democratically made.

Id.

154. See supra note 150.