

2011

Just a Matter of Fairness: What the Federal Recognition of California Registered Domestic Partners Means in the Fight for Tax Equity

Rebecca J. Kipper

Follow this and additional works at: <http://digitalcommons.chapman.edu/chapman-law-review>

Recommended Citation

Rebecca J. Kipper, *Just a Matter of Fairness: What the Federal Recognition of California Registered Domestic Partners Means in the Fight for Tax Equity*, 15 CHAP. L. REV. 613 (2011).

Available at: <http://digitalcommons.chapman.edu/chapman-law-review/vol15/iss2/10>

This Article is brought to you for free and open access by the Fowler School of Law at Chapman University Digital Commons. It has been accepted for inclusion in Chapman Law Review by an authorized administrator of Chapman University Digital Commons. For more information, please contact laughtin@chapman.edu.

Just a Matter of Fairness: What the Federal Recognition of California Registered Domestic Partners Means in the Fight for Tax Equity

*Rebecca J. Kipper**

“Never doubt that a small group of thoughtful, committed citizens can change the world; indeed, it’s the only thing that ever does.”—Margaret Mead

TABLE OF CONTENTS

INTRODUCTION	615
I. BACKGROUND	618
A. History of Outrage: The Tax Treatment of Families in the United States.....	618
i. Tax Rates Go up and Taxpayers in Community Property States Find a Way to Pay Less.....	619
ii. Disparate Tax Treatment of Similarly Situated Taxpayers Raises Ire.....	621
iii. The Supreme Court Weighs in	622
iv. Congress Saves the Day: Married Filing Jointly	623
B. New Kind of Family: California Domestic Partnership Legislation	624

* J.D. candidate 2012 Chapman University School of Law. I would like to thank Professor Francine Lipman for her invaluable help and encouragement. I would also like to thank my partner, Alexandria Rosas, for her constant love and support during this process.

i. Early Efforts at Recognition (1979–1994): City-Wide Ordinances	624
ii. We’re Going to State (1994–1999): Early Efforts at Statewide Recognition	628
iii. The March Towards Parity: The California Domestic Partner Rights and Responsibilities Act of 2003	631
C. Past and Present Collide: Domestic Partners Fight to Split Income	633
i. “Outside the Context of Husband and Wife”: The 2006 IRS Advisory and Reactions	634
ii. California Amends Its Laws to Seek Favorable Tax Treatment for Its Taxpayers	637
iii. The Squeaky Wheel Gets the Grease: The IRS Recognizes California RDPs	638
II. PRACTICAL IMPLICATIONS OF THE 2010 CCA	639
A. The Tax Man Cometh: How RDPs Should File Under the New Rules	639
B. You Can’t Please All of the People: Negative Impacts of the New Rule	640
C. Unanswered Questions	641
1. Timing Issues	641
2. Community Property/Separate Filing	641
III. GEOGRAPHIC DISPARITY	642
A. Within California	642
B. Other Community Property States	644
C. Non-Community Property States	646
IV. VALUE OF THE ADVISORY	646
A. Significance of Federal Recognition of Same-Sex Relationships	646
B. A Way Forward to Greater Federal Acknowledgment	647
CONCLUSION	650
POSTSCRIPT	650

INTRODUCTION

For Mr. Eric Rey, it was just a matter of fairness. “For the first time ever, I’m able to file federal taxes that, in a small way, acknowledges what’s going on in my relationship,”¹ he exclaimed after a historic Internal Revenue Service (IRS) Chief Counsel Advisory Memorandum (2010 CCA) was handed down on May 28, 2010.² It had been a long journey for Mr. Rey as he and his domestic partner fought for the right to split their income and won. In 2005, when California amended its domestic partnership laws to extend full community property rights to registered domestic partners (RDPs),³ he asked the IRS for guidance on how those changes affected the overall tax treatment of RDPs.⁴ The

¹ Laura Meckler, *Gay Couples Get Equal Tax Treatment*, WALL ST. J., June 5, 2010, at A3.

² I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2; *see infra* note 11 (discussing the precedential value of the 2010 CCA for the purposes of this Comment). The IRS issues many types of rulings and other advice in order to “answer inquiries of individuals . . . whenever appropriate in the interest of sound tax administration.” Treas. Reg. § 601.201(a) (2011). Revenue rulings are the most binding of these and are issued “for the guidance of taxpayers, Internal Revenue Service officials, and others concerned.” *Id.* Although they do not have “the force and effect of Treasury Department regulations,” revenue rulings “are published to provide precedents . . . and may be cited and relied upon for that purpose.” Rev. Proc. 89-14, 1989-1 C.B. 815. A private letter ruling (PLR), on the other hand, is a “written statement issued to a taxpayer . . . which interprets and applies the tax laws to a specific set of facts.” Treas. Reg. § 601.201(a) (2011). Unlike revenue rulings, PLRs cannot be cited as precedent. I.R.C. § 6110(k)(3) (West 2011). Revenue rulings usually originate from PLRs, the main difference being that revenue rulings are published officially. *See* MARTIN J. MCMAHON, JR. & LAWRENCE A. ZELENAK, *FEDERAL INCOME TAXATION OF INDIVIDUALS* ¶ 46.5[3] (2d ed. 2010) (explaining the difference between revenue rulings and “taxpayer letter rulings”). The IRS also issues Chief Counsel Advice (CCA) which is “written advice or instruction . . . prepared by . . . the Office of Chief Counsel which is issued to field . . . employees . . . and conveys any legal interpretation of a revenue position.” I.R.C. § 6110(i)(1) (West 2011). Like PLRs, CCAs cannot be used or cited as precedent. I.R.C. § 6110(k)(3) (West 2011).

³ *See infra* Part I(B) for a thorough explanation of California’s domestic partnership legislation. Throughout this Comment, I will be discussing different types of couples and how they are treated under state and federal tax laws. To refer to heterosexual, married couples, I will use the phrase “opposite-sex married couples.” In some states, such as California and Massachusetts, homosexual couples are, or were, allowed to be officially married, and I will refer to these couples as “same-sex married couples.” *See generally* Marc R. Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425, 1431–33, 1441 (2009). In many states, even if homosexual couples are not allowed to marry, they are allowed to enter into a state-recognized partnership. *Id.* at 1440. The names of these partnerships vary by state, but in California, the term used is “registered domestic partner,” or RDP. Patricia A. Cain, *Relitigating Seaborn: Taxing the Community Income of California Registered Domestic Partners*, TAX NOTES, May 1, 2006, at 561, 566 [hereinafter Cain, *Relitigating Seaborn*]. For an enlightening discussion of the naming of different families and the inevitable stigma that attaches when gay men and lesbians are forced to use names for their unions other than the term “marriage,” *see generally* Poirier, *supra*, at 1425.

⁴ Meckler, *supra* note 1, at A3. In California, all property received or earned while a couple is married, or in a registered domestic partnership, is considered part of the community which means that each spouse, or partner, owns an undivided half interest in it. For income tax purposes, the Supreme Court has held that in community property states, opposite-sex married couples can each claim one-half of community income when

IRS responded in 2006 with a highly criticized⁵ Chief Counsel Advisory Memorandum (2006 CCA) which effectively refused to recognize California's community property treatment of RDPs.⁶ Since the 2006 CCA left more questions than answers for Mr. Rey and his partner, as well as other RDPs in California,⁷ he tried again to get some assistance, and in 2007, he asked the IRS for a private letter ruling.⁸ The IRS refused to offer him any guidance.⁹ Still not willing to give up, Mr. Rey saw a glimmer of hope when President Obama was elected, so he asked the IRS once more for a ruling.¹⁰ This time, the IRS reversed its previous position and ruled that, "[a]pplying the principle that federal law respects state law property characterizations, the federal tax treatment of community property should apply to California registered domestic partners."¹¹

The ruling significantly lowered Mr. Rey's tax burden, as well as the tax burden of other similarly situated RDPs in California, and it sent ripples throughout the gay and lesbian community and the tax community at large.¹² However, the ruling ultimately has led to confusion and exposed inequities. For example, in light of the Defense of Marriage Act (DOMA),¹³ it

filing their federal income taxes. *Id.* Mr. Rey, who earned much more than his partner, could benefit by being allowed to do this "income splitting" since it would put him in a lower tax bracket if he could assign some of his income to his partner. *See infra* notes 18–31 and accompanying text.

⁵ *See, e.g.,* Dennis J. Ventry, Jr., *No Income Splitting for Domestic Partners: How the IRS Erred*, TAX NOTES, Mar. 13, 2006, at 1221–25 (explaining "that the IRS got it wrong" because the federal government's treatment of community property has nothing to do with marriage and everything to do with ownership of the property); Cain, *Relitigating Seaborn*, *supra* note 3, at 567 (critiquing that the IRS's position and refusal to give cogent guidance as contrary to its stated mission of helping all taxpayers understand and apply federal tax laws); *see also infra* notes 139–54.

⁶ I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006), at 4.

⁷ Cain, *Relitigating Seaborn*, *supra* note 3, at 567 ("The advisory's lack of reasoning gives no guidance about how to answer the multitude of additional questions raised by the existence of community property for registered domestic partners.").

⁸ Meckler, *supra* note 1, at A3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2. Although, as discussed *supra* note 2, the 2010 CCA has no precedential value, it was accompanied by a private letter ruling which also held, in part, that the "[t]axpayer must report on his individual federal income tax return one-half of the combined income that Taxpayer and Domestic Partner earn . . ." I.R.S. Priv. Ltr. Rul. 201021048 (May 28, 2010), at 4. Technically, this ruling applies only to the taxpayer requesting it, which in this case is Mr. Rey, but the IRS has applied its provisions to all same-sex partners in community property states, so I will refer to the 2010 CCA as if it does have precedential value and can be relied upon by all California RDPs. *See infra* notes 230–55. *See infra* Part III for a discussion of whether the ruling applies to other same-sex couples in California or throughout America.

¹² *See infra* Part II.

¹³ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C.A. § 7 (West 2010)). This Comment will not discuss DOMA in depth, but a cursory understanding of the law will help in appreciating the magnitude of the IRS's new

is not clear if the new rules apply only to RDPs or also to same-sex married couples.¹⁴ In addition, it is unclear whether they apply to domestic partners in other community property states.¹⁵

This Comment will show that, as a direct result of the strength of California's domestic partnership laws, the IRS, for the first time, is willing to recognize California RDPs and tax them in a manner similar to opposite-sex married couples. As a result, RDPs in California are more equal to opposite-sex married couples for tax purposes than same-sex couples in many other states. Although a common solution to the problem of tax inequity in the gay community is to call for a repeal of DOMA, this Comment will take a different approach. It will argue that the IRS's change of position regarding the community income taxation of California RDPs should be viewed as a roadmap in the struggle for tax equality because it marks the first time that the federal government is willing to recognize same-sex relationships for tax purposes. By crafting stronger domestic partnership laws, while simultaneously calling attention to the geographic disparity the new rules reintroduce into the tax system, advocates can use the 2010 CCA to achieve more tax equity for all families.

Part I will provide a history of the IRS advisories in the context of community property and domestic partnership law while illustrating how the evolution of the tax treatment of families in the United States is a direct result of judicial and legislative reactions to outcries over perceived discriminatory, geographic disparities. Part II will discuss the practical implications of the IRS advisory for California RDPs and any other taxpayers to whom it applies. Part III will examine the geographic disparity that the advisory reintroduces into the tax system. Finally, Part IV will conclude that even though the IRS's

position on the taxation of RDPs. DOMA was passed by Congress in 1996 and essentially bans the federal government from recognizing same-sex marriages for any reason. See Patricia A. Cain, *DOMA and The Internal Revenue Code* 102 (Santa Clara U. Sch. of Law, Legal Stud. Research Paper No. 09-09, Mar. 2009), available at <http://ssrn.com/abstract=1354564>. The statute reads, in part:

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.

Defense of Marriage Act § 7. DOMA has been roundly criticized by many in the tax community for the arbitrary and chaotic effect that it has on the national tax policy. See, e.g., William P. Kratzke, *The Defense of Marriage Act (DOMA) is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399, 401–02, 404 (2005) (asserting that "[i]nserting DOMA into the [Tax] Code" actually "thwarts" the tax policies that Congress pursues).

¹⁴ See *infra* Postscript.

¹⁵ *Id.*

new position results in marked geographic disparity and confusion, the advisory should be viewed as an extremely important step towards achieving tax equity because it marks the first time that the federal government has been willing to recognize same-sex couples for federal tax purposes. In addition, when viewed in light of the history of the federal income taxation of families and the fight for domestic partnerships in California, the advisory is a road-map for making even greater strides toward tax equity.

I. BACKGROUND

In order to appreciate the significance of the 2010 CCA, it is necessary to first understand the history surrounding the issues of community property, federal taxation, and domestic partnerships. Section A illustrates how geographic disparities in federal taxation can lead to state and federal changes in tax law by describing the early history of the federal taxation of married couples in the United States. Section B examines California's storied history of providing statewide recognition to same-sex couples. Finally, Section C examines how these concepts interact by exploring the IRS's (changing) positions regarding the federal recognition and taxation of California RDPs.

A. History of Outrage: The Tax Treatment of Families in the United States

Ever since the income tax system was developed, Americans have been trying to figure out ways to pay fewer taxes. And, as a corollary, when taxes are lowered for some Americans but not for all, outrage usually follows. From 1921, when the Treasury Department ratified the use of income-splitting for married taxpayers in most community property states, until 1948, when Congress "finally conceded victory to the states by nationalizing income-splitting,"¹⁶ the tax policies regarding the taxation of married taxpayers were confusing, inequitable, and "a fertile breeding ground of costly, difficult and wasteful litigation."¹⁷ The story of income-splitting is the story of a fight for government recognition of marital relationships in order to achieve tax equity for all married couples throughout the United States.

¹⁶ Stephanie Hunter McMahon, *To Save State Residents: States' Use of Community Property for Federal Tax Reduction, 1939-1947*, 27 LAW & HIST. REV. 585, 590 (2009).

¹⁷ Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1104 (1948) (quoting Stanley S. Surrey, *Family Income and Federal Taxation*, 24 TAXES 980, 987 (1946)).

i. Tax Rates Go up and Taxpayers in Community Property States Find a Way to Pay Less

California is one of nine community property states in the United States.¹⁸ In a community property state, all property acquired during the marriage is considered to be the property of the community, thus each spouse is entitled to an undivided half interest in the property.¹⁹ In all other states, known as common-law property states, property is owned only by the spouse who acquires it.²⁰ The national implications of this distinction did not become evident until a federal income tax was instituted in the United States.²¹ After the Sixteenth Amendment was adopted in 1913²² and Congress passed a statute taxing income,²³ the Treasury Department ruled that husbands and wives were to report separate income on separate returns.²⁴ This decision was not controversial under the very low tax rates of the first revenue act.²⁵ However, starting in 1916,²⁶ Congress began raising income tax rates annually in order to fund World War I,²⁷ and by

¹⁸ CAL. FAM. CODE § 751 (West 2009) (“The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing, and equal interests.”). The nine community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Cain, *Relitigating Seaborn*, *supra* note 3, at 567.

¹⁹ See 15A AM. JUR. 2D *Community Property* § 2 (2000); FAM. § 760 (“Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.”).

²⁰ See BLACK’S LAW DICTIONARY 294 (8th ed. 2004) (“The chief difference today between a community-property state and a common-law state is that in a common-law state, a spouse’s interest in property held by the other spouse does not vest until (1) a divorce action has been filed, or (2) the other spouse has died.”).

²¹ Until a federal income tax was instituted, the federal government had absolutely no interest in state defined property rights. Cain, *Relitigating Seaborn*, *supra* note 3, at 565. In this respect, differences among the states were completely irrelevant. Similarly, same-sex couples are treated vastly differently from state-to-state with respect to state created rights and interests, but none of that mattered until the IRS issued the 2010 CCA and finally recognized a state-created right granted to domestic partners. See *infra* Part IV for a further discussion of the significance of federal recognition for same-sex couples.

²² U.S. CONST. amend. XVI (“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”).

²³ Revenue Act of 1913, ch. 16, § 2, 38 Stat. 114, 166 (1913).

²⁴ George Donworth, *Federal Taxation of Community Incomes—The Recent History of Pending Questions*, 4 WASH. L. REV. 145, 147 (1929) (noting that in 1914, two separate Treasury Decisions held that income should be determined individually and specifically that husband and wife should not combine their income); see also Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1400 (1975) (describing the early Revenue Acts as being focused on taxation of individuals rather than on married couples).

²⁵ Incomes up to \$20,000 were taxed at the rate of one percent, and then the tax rate increased in one percent increments, up to a top marginal rate of seven percent on incomes over \$500,000. Revenue Act of 1913 § 2. There was a \$4000 deduction for couples and a \$3000 deduction for single taxpayers. *Id.*

²⁶ Revenue Act of 1916, ch. 463, § 1, 39 Stat. 756, 756–57 (1916).

²⁷ War Revenue Act of 1917, ch. 63, § 1, 40 Stat. 300, 300–01 (1917) (“An Act to

1918, incomes over \$4000 were taxed at a six percent rate with rate increases that topped out at sixty-five percent for incomes over \$1 million.²⁸ These sudden increases in marginal tax rates gave many taxpayers “significant economic incentives to seek tax avoidance.”²⁹ Income shifting within families became a significant method of tax avoidance.³⁰ Married taxpayers in community property states, relying on the fact that even if the husband earned all of the income it was equally owned by both spouses, began to split their income so that they could escape the higher progressive tax rates.³¹ In 1921, the Attorney General issued an official opinion holding that spouses in every community property state but California could split their income for federal income tax purposes because under state law, wives had a vested ownership interest in one-half of all community property.³² In California, on the other hand, the wife had a mere expectancy of ownership in community property, and so spouses in that state could not split their income.³³ Suddenly, and for the

provide revenue to defray war expenses, and for other purposes.”).

²⁸ Revenue Act of 1918, ch. 18, § 210, 40 Stat. 1057, 1062–64 (1918).

²⁹ Dennis J. Ventry, Jr., *Saving Seaborn: Ownership as the Basis of Family Taxation* 14 (U.C. Davis Legal Stud. Research Paper Series, Research Paper No. 166, Apr. 2009) [hereinafter *Saving Seaborn*], available at <http://ssrn.com/abstract=1374493>.

³⁰ *Id.* at 14 (“Some of the early techniques [for tax avoidance] included gifts of income and property[,] . . . a multiplying array of trusts, joint ownership of property, assignments of income and property, and family partnerships.”). In 1921, economist Thomas Adams, chair of the Treasury Department’s Tax Advisory Board, castigated “rich men [who] have recently divided their property by gift, conveying it usually to members of the family and so dividing the former income into several parts.” *Id.* at 15.

³¹ For example, under the 1918 tax rates, if a husband earned \$20,000, his tax rate was twenty-one percent which resulted in a tax of \$4200. However, if each spouse reported an income of \$10,000, the tax rate on each return would be sixteen percent, or \$1600 each. By income splitting, the couple is able to save \$1000. This practice was also roundly criticized by the federal government. Thomas Adams called the practice the “community property problem” and a “major evil” which the government should take steps to eliminate. *Id.* at 5, 15–17.

³² Community Property—Income and Estate Taxes, 32 Op. Att’y Gen. 435, 463 (1921). In this opinion, the Attorney General cited *Warburton v. White*, 176 U.S. 484 (1900), for the proposition that in discharging its duties, the federal government should adopt the property rules as codified and interpreted by the respective States. The opinion also included an exhaustive review of each community property state’s relevant property law. Community Property—Income and Estate Taxes, 32 Op. Att’y Gen. at 461. The Attorney General ultimately concluded that income splitting was available to spouses in Arizona, Idaho, Louisiana, New Mexico, Nevada, and Washington. *Id.* at 435. The Attorney General had ruled in an earlier opinion that Texas spouses could split their income. Income Tax—Community Property, 32 Op. Att’y Gen. 298, 298 (1920).

³³ Community Property—Income and Estate Taxes, 32 Op. Att’y Gen. at 456. California suddenly found itself (but not for the first time) at the center of a national debate over how federal tax law and state property law interact. See *Saving Seaborn*, *supra* note 29, at 26 (arguing that understanding California’s role in the early history of the taxation of families, especially the interplay between federal tax law and state property law, “can help us understand the current debate over the legal recognition of different family forms”). California quickly amended its laws to give wives a vested interest and asked the Attorney General for a second opinion in 1923. *Id.* at 42–43.

first time, geographic disparity existed in federal income taxation of married couples because of differences in state laws.

ii. Disparate Tax Treatment of Similarly Situated Taxpayers Raises Ire

The ruling sent shockwaves through the country as taxpayers in non-community property states demanded an immediate legislative response to “restore uniformity of treatment.”³⁴ In addition, “[c]ommunity tax payers in California were much dissatisfied with the ruling.”³⁵ Finally in 1926, a test case from California made its way to the Supreme Court. In *United States v. Robbins*,³⁶ Justice Holmes reaffirmed that income splitting was prohibited for California spouses.³⁷ However, after this ruling on the merits, Justice Holmes stated that *even if* California wives had a vested interest in the community property, spouses in that state could not split their income because Congress should be taxing income based on who has control of it.³⁸ Although his statements were arguably “dictum for all practical purposes of the case,”³⁹ the holding “was a bombshell for married taxpayers”⁴⁰ The Attorney General announced that he was “considering whether the dictum . . . of Justice Holmes applied to states other than California” and invited representatives of the community property states to file briefs.⁴¹ Hearings were held as the nation waited with bated breath as “[f]or more than a year the matter was held under advisement by the Attorney General and Solicitor General.”⁴²

Although initially the Attorney General overturned his previous position, that opinion was withdrawn two months later at the insistence of the Treasury Department, which issued a statement casting doubt on the legality of income-splitting in general and promising to bring a test case to the Supreme Court in order to get final resolution of whether California spouses could split their income. *Id.* at 41–46.

³⁴ Donworth, *supra* note 24, at 152 (internal formatting omitted). Starting in 1921 and continuing in 1924, 1934, and 1941, amendments to every Revenue Act were introduced in Congress proposing to include community property in the gross income of the spouse having management and control of it. See George E. Ray, *Proposed Changes in Federal Taxation of Community Property: Income Tax*, 30 CAL. L. REV. 397, 397–98 n.4 (1942); see also *Saving Seaborn*, *supra* note 29, at 48–52 (documenting the debate between legislators from community property and non-community property states regarding whether to tax the owner of property or the spouse having management and control of the property).

³⁵ Donworth, *supra* note 24, at 156.

³⁶ *United States v. Robbins*, 269 U.S. 315 (1926).

³⁷ *Id.* at 326–27. Essentially, the Court agreed with the earlier Attorney General opinion as to whether wives in California had a vested ownership interest in community property, concluding that they had a mere expectancy. See *supra* note 33.

³⁸ *Robbins*, 269 U.S. at 327–28.

³⁹ Donworth, *supra* note 24, at 158.

⁴⁰ *Saving Seaborn*, *supra* note 29, at 56.

⁴¹ Donworth, *supra* note 24, at 164.

⁴² *Id.*

Finally, on July 16, 1927, Attorney General Mitchell issued his opinion.⁴³ Acknowledging the utter chaos of the taxation system brought about by the decision in *Robbins*, but concluding that the absence of a judicial determination specific to each state would “produce the utmost confusion and create an intolerable situation,”⁴⁴ the Attorney General withdrew the previous opinions which held that spouses in community property states could split their income.⁴⁵ Notably, the opinion stated that the questions at issue were not appropriate for congressional action because “the nature and extent of a wife’s interest in community income are matters determined by the laws of the States . . .”⁴⁶ The opinion concluded that test cases should be initiated in each community property state in order to resolve the issue.⁴⁷

iii. The Supreme Court Weighs in

In 1930, the Supreme Court finally had its chance to decide the matter in *Poe v. Seaborn*.⁴⁸ In the landmark case, the Court held that married couples in the State of Washington could split their income for federal income tax purposes because “under the law of Washington the entire property and income of the community can no more be said to be that of the husband, than it could rightly be termed that of the wife.”⁴⁹ The *Seaborn* decision did not extend to California. In response to this, California amended its community property statute to give both spouses an equally vested right in all community property,⁵⁰ and four years later the Court extended the *Seaborn* rule to California spouses.⁵¹ Once again, spouses in community property states enjoyed an advantage over spouses in other states.

In response to *Seaborn*, non-community property states began to search for methods of lowering their residents’ tax burdens.⁵² Oklahoma was the first state to attempt to change its

⁴³ Withdrawal of Opinions Relating to the Wife’s Interest in the Community Income, 35 Op. Att’y. Gen. 265 (1927).

⁴⁴ *Id.* at 268.

⁴⁵ *Id.* at 268–69.

⁴⁶ *Id.* at 268.

⁴⁷ *Id.* at 269 (“For these reasons I feel constrained to, and do now, withdraw the two opinions referred to in order to leave you free, as has been done in similar situations, to arrange for test cases in the courts.”).

⁴⁸ *Poe v. Seaborn*, 282 U.S. 101 (1930). In companion cases decided the same day, the Court held similarly for spouses in three other community property states. *Goodell v. Koch*, 282 U.S. 118, 121 (1930) (Arizona); *Hopkins v. Bacon*, 282 U.S. 122, 125–27 (1930) (Texas); *Bender v. Pfaff*, 282 U.S. 127, 132 (1930) (Louisiana).

⁴⁹ *Seaborn*, 282 U.S. at 113.

⁵⁰ CAL. CIV. CODE § 161(a) (West 1954).

⁵¹ *United States v. Malcolm*, 282 U.S. 792, 794 (1931).

⁵² See McMahon, *supra* note 16, at 592–95 (discussing the push by non-community property states to keep their residents from leaving for community property states).

common law property regime into a community property system by allowing people to opt-in or opt-out of the community property scheme.⁵³ This solution was short-lived, however, because in 1944, in *Commissioner v. Harmon*,⁵⁴ the Court held that because of its voluntary nature, Oklahoma's regime was not enough to vest spouses with the ownership rights needed to split their income under *Seaborn*.⁵⁵ Years of judicial and legislative wrangling followed and by 1948, the issue had developed into a crisis and Congress had no choice but to respond.⁵⁶

iv. Congress Saves the Day: Married Filing Jointly

There were essentially three options for Congress to consider: it could legislatively overturn *Poe v. Seaborn* by taxing only the earner of all property regardless of how the state classified it, it could mandate joint returns for all spouses, or it could take the middle ground and create a new filing status.⁵⁷ Congress settled on the last choice, but not because of any concerns that it was the right thing to do or that it would most benefit the family unit, but because it was the only viable solution.⁵⁸ Congress enacted the Revenue Act of 1948, which established a joint return, allowing all married couples to split their income for federal income tax purposes regardless of who earned it and who owned it under state law.⁵⁹ For the first time, all married couples in the United States were treated the same for the purposes of federal income taxation.

⁵³ *Id.* at 592, 595.

⁵⁴ *Comm'r v. Harmon*, 323 U.S. 44 (1944).

⁵⁵ *Id.* at 46, 48 (“In *Poe v. Seaborn* . . . the court was not dealing with a consensual community but one made an incident of marriage by the inveterate policy of the State. . . . The important fact is that the community system of Oklahoma is not a system, dictated by State policy, as an incident of matrimony.”).

⁵⁶ See *Saving Seaborn*, *supra* note 29, at 91–92 (discussing the factors that moved the “idea of income splitting to the top of the policy agenda” by the 1946 congressional elections); Surrey, *supra* note 17, at 1104 (urging Congress to enact a nationwide income splitting plan because of the geographical discrimination between families in community property states and those in non-community property states).

⁵⁷ Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 816–17 (2008) [hereinafter Cain, *Taxing Families Fairly*].

⁵⁸ See *Saving Seaborn*, *supra* note 29, at 91 (“Income splitting accomplished the desired tax reduction without protracted and acrimonious debate over adjustments to tax rates and brackets.”). To those who urged a mandatory joint return, Chairman Millikin replied, “I may refresh your memory; we tried it several times. The only difference [with it is that you can not get the votes to make a law out of it.” Surrey, *supra* note 17, at 1105. And to those who were advocating for a reversal of *Poe v. Seaborn*, he replied, “The difficulty is that it is not a novel thought. It has been tossed in the hopper around here a number of times. But legislatively it has not been possible to do it.” *Id.*; see also Cain, *Taxing Families Fairly*, *supra* note 57, at 817 (“The point here is that the joint return . . . was adopted solely in response to the political outburst by taxpayers in non-community property states and because no other solution was thought viable.”).

⁵⁹ Revenue Act of 1948, Pub. L. No. 471, § 303, 62 Stat. 110, 111–14 (1948).

B. New Kind of Family: California Domestic Partnership Legislation

Just as in 1948, when Congress enacted a federal solution to address tax inequities among opposite-sex married couples, same-sex couples facing similar inequities today have called for a national solution.⁶⁰ The 2010 CCA, granting California RDPs federal recognition, is a step in that direction and would not have happened were it not for the strength of California's domestic partnership laws, which grant RDPs statewide recognition and all of the same rights and responsibilities granted to married couples.⁶¹

i. Early Efforts at Recognition (1979–1994): City-wide Ordinances

In 1979, Tom Brougham went to work for the City of Berkeley.⁶² As a founding member of the first gay rights group in Northern California, The Gay Liberation Front,⁶³ Brougham had been on the forefront of the fight for Berkeley to pass a historic⁶⁴ gay rights ordinance in 1978. So, he was surprised when he found out that his life partner, Barry Warren, could not receive the health and dental benefits given to married spouses of city employees.⁶⁵ He set about to craft a unique solution to this

⁶⁰ Cain, *Taxing Families Fairly*, *supra* note 57, at 817, 848–49 (asserting that “the only satisfactory solution” to the inequities that arise as a result of the current tax law is a federal legislative response such as applying “one uniform set of rules . . . to all financially interdependent couples, whether married or not, and whether recognized as couples by state law or not”); Keeva Terry, *Separate and Still Unequal? Taxing California Registered Domestic Partners*, 39 U. TOL. L. REV. 633, 652 (2008) (calling on the federal government to “create a new designation for federal income tax purposes recognizing domestic partners as a new filing category . . .”); *see, e.g., id.* at 848–49 (asserting that “the only satisfactory solution” to the inequities that arise as a result of the current tax law is a federal legislative response such as applying “one uniform set of rules . . . to all financially interdependent couples, whether married or not, and whether recognized as couples by state law or not”); Keeva Terry, *Separate and Still Unequal? Taxing California Registered Domestic Partners*, 39 U. TOL. L. REV. 633, 652 (2008) (calling on the federal government to “create a new designation for federal income tax purposes recognizing domestic partners as a new filing category . . .”).

⁶¹ *See* CAL. FAM. CODE § 297.5 (West 2010).

⁶² Leland Traiman, *A Brief History of Domestic Partnerships*, GAY AND LESBIAN REV. WORLDWIDE, Jul.–Aug. 2008, at 23.

⁶³ Will Evans, *Organization Honors Trailblazer*, DAILY CALIFORNIAN, Sept. 1, 2000, at 5, available at http://archive.dailycal.org/article/3049/organization_honors_trailblazer_.

⁶⁴ *Berkeley Council Approves Strong Gay Rights Law*, L.A. TIMES, Oct. 12, 1978, at B28 (“The Berkeley City Council has given final approval to what is believed to be the strongest homosexual rights ordinance in the nation.”).

⁶⁵ Traiman, *supra* note 62, at 23; *see also* *Interview with Tom Brougham for Out and Elected in the USA*, OUTHISTORY.ORG, http://www.outhistory.org/wiki/Tom_Brougham (last modified Apr. 12, 2009, 5:39 AM) [hereinafter *Interview*] (“Basically when I went to

problem and a year later, he introduced the concept of the domestic partnership to local gay rights groups.⁶⁶

For the next three years, Brougham refined his idea and made formal proposals to the City of Berkeley and the University of California, but “there wasn’t very much in the way of serious consideration.”⁶⁷ Then in 1982, San Francisco Supervisor Harry Britt⁶⁸ heard one of Brougham’s proposals and was inspired to take the idea back to the San Francisco Board of Supervisors.⁶⁹ On November 22, 1982, the San Francisco Board of Supervisors approved an ordinance that would create “a new class”⁷⁰ of domestic partners and require that the term be used interchangeably with the term marriage when determining eligibility for city benefits.⁷¹ Britt, who authored the measure, described it as “a significant redefinition of the law” that would provide “legal recognition to the relationships between lesbians and between gay men.”⁷² However, the celebration was short lived because Britt underestimated the public backlash.⁷³ The religious community was outraged over the proposal, and that

work for the City of Berkeley in early 1979 we noticed that everybody signs up for benefits, and I realized than [sic] my partner could not be a beneficiary. It got me thinking along the lines of what it really meant to have equal opportunity and equal benefits.”).

⁶⁶ Traiman, *supra* note 62, at 23. His idea was met with skepticism, even from within the gay community. *Interview, supra* note 65. As he said years later, “There wasn’t much discussion about relationships or family matters. There was definitely no public policy and there was no terminology It was very interesting in the early days when we tried to talk about this with people within the gay movement, there was very little interest, very little expectation that anybody could do anything about it. People would just kind of shrug and say, ‘Well, they’re married and we’re not.’ And that was pretty much the end of it.” *Id.*

⁶⁷ *Interview, supra* note 65.

⁶⁸ Harry Britt was appointed to the San Francisco Board of Supervisors on January 8, 1979 to replace Supervisor Harvey Milk who was assassinated. William Endicott, *S.F. Homosexual Named to Succeed Supervisor Milk*, L.A. TIMES, Jan. 9, 1979, at A18. His appointment was seen as an acknowledgement and a solidification of “the substantial power of homosexuals in San Francisco politics.” *Id.*

⁶⁹ *Interview, supra* note 65.

⁷⁰ Wallace Turner, *Couple Law Asked for San Francisco: Unmarried Domestic Partners to Get Insurance Coverage if Measure is Approved*, N.Y. TIMES, Nov. 28, 1982, at 31.

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation, and Collective Bargaining*, 15 WIS. WOMEN’S L.J. 93, 130 n.163 (2000) (noting that the outcry from entities opposing the ordinance was “swift and vehement”). As Brougham explains in his interview, Britt proposed the ordinance “very, very fast, and I think was under prepared for all the controversy and upset that it would cause, but he got a lot of exposure—and he fell flat on his face [I]t was considered to be the kookiest possible idea that had ever come out of San Francisco.” *Interview, supra* note 65; see also Traiman, *supra* note 62, at 23 (explaining that Britt was unprepared for the “vicious” press coverage, the fact that the religious community would become “riled up,” and the fact that the gay community would be “confused” over the measure).

outrage culminated with Roman Catholic Archbishop John Quinn personally pleading with Mayor Dianne Feinstein to veto the measure.⁷⁴ In the end, Mayor Feinstein would not sign the bill calling it ambiguous, vague, and unclear.⁷⁵ The first attempt at official recognition of same-sex relationships failed miserably.

The disaster in San Francisco would serve as a model to the gay community for how *not* to get domestic partnership legislation passed. A group was formed in Berkeley called the East Bay Lesbian/Gay Democrat Club, which quickly made getting a domestic partnership law passed its main priority.⁷⁶ In 1983, the City of Berkeley developed the Domestic Partner Task Force to be headed by Leland Traiman.⁷⁷ Also working with the task force was Brougham. In 1984, after a year of careful study, the task force wrote, and the City of Berkeley adopted, the first domestic partnership legislation that was ever enacted by a government entity.⁷⁸ Eventually, other cities throughout California began passing their own domestic partnership laws, including San Francisco⁷⁹ and Santa Cruz.⁸⁰

⁷⁴ RANDY SHILTS, *AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC* 204 (20th Anniversary ed. 2007). Almost every religious leader in the city came out against the measure. *Id.* The Episcopal bishop declared that marriage was under attack while the president of the Board of Rabbis of Northern California said he must “look askance upon any legislation that would attempt to equate nonmarried adults, heterosexual or gay, to what our society deems as a marriage between a man and a woman.” *Id.* at 205.

⁷⁵ Wallace Turner, *Partnership Law Vetoed on Coast: Bill Proposed by Homosexual Would Have Given Benefits to Unmarried Couples*, N.Y. TIMES, Dec. 10, 1982, at A17; see also SHILTS, *supra* note 74, at 204–05 (opining that Feinstein’s real reason for vetoing the measure was in reaction to the religious outrage throughout the city). Feinstein, in a letter to Britt explaining her veto, wrote, “I see no reason why San Francisco should undertake what you concede the State of California would not consider.” Cynthia Gorney, *Making It Official: The Law and Live-Ins*, WASH. POST, July 5, 1989, at C8.

⁷⁶ Interview, *supra* note 65 (“[T]he East Bay Lesbian & Gay Democratic Club was formed about then and they picked it up as a main issue. We worked as an organization. I became political action chair. We really, really worked hard on politics—did a lot of precinct walking, we did endorsement cards, we organized, we got a big mailing list, etcetera.”).

⁷⁷ Application for Leave to File Amicus Curiae Brief; Amicus Curiae Brief in Support of State of California and the Attorney General at 1–2, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); Traiman, *supra* note 62, at 23.

⁷⁸ Application for Leave to File Amicus Curiae Brief; Amicus Curiae Brief in Support of State of California and the Attorney General at 1–2, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), 2007 WL 4632424 (stating that the 1984 policy became the template for all other domestic partnership policies throughout the United States).

⁷⁹ S.F., CAL., ORDINANCE § 4001 (1989) (repealed Nov. 7, 1989). In 1989, Harry Britt, now the president of the Board of Supervisors, sponsored another domestic partnership ordinance that was signed into law, which made San Francisco the first major U.S. city to allow public registration of domestic partnerships. Katherine Bishop, *San Francisco Grants Recognition to Couples Who Aren’t Married*, N.Y. TIMES, May 31, 1989, at A17. In a sign that times were changing, this time, Mayor Art Agnos had a small signing ceremony where he called the measure, “a landmark ordinance granting official recognition to gay [and] lesbian . . . couples.” Gorney, *supra* note 75, at C8.

⁸⁰ Gorney, *supra* note 75, at C8.

However, there were limitations to the types of protections that mere city-wide ordinances could provide. For one thing, as seen in San Francisco, city-wide domestic partnership ordinances were susceptible to repeal by ballot initiatives.⁸¹ In addition, smaller cities were facing problems getting insurance companies to actually cover domestic partners once they were registered.⁸² Moreover, most family statuses and corresponding tax law treatment are conferred strictly by state law.⁸³ Because of these “inherent limitations” of local ordinances, gay rights supporters began to call for the passage of statewide domestic partnership legislation.⁸⁴ In other words, although achieving some measure of official acknowledgment of their relationships was exciting and important, without official *state* recognition, no real equality could ever be granted.

⁸¹ On the day that San Francisco’s domestic partnership law was to become effective, July 6, 1989, a minister and a rabbi walked into the office of the city registrar with a box of petitions asking that the law be put to a vote which blocked it from taking effect. Cynthia Gorney, *Protest Impedes ‘Partners’ Law: Petitioners Call for Vote on San Francisco Ordinance*, WASH. POST, July 7, 1989, at D3. On Election Day that November, voters narrowly struck down the measure. Maralee Schwartz, *Pocketbook Big Factor with Voters: Initiatives to Raise Taxes Fare Poorly*, WASH. POST, Nov. 9, 1989, at A44. The organizing efforts of conservative clergy were credited with the defeat. *Id.* After the defeat, Harry Britt went back to the drawing board, and in 1990, he wrote and introduced Proposition K, which would simply allow unmarried persons who share a home to register as domestic partners but would not grant any financial benefits. Robert Reinhold, *2 Candidates Who Beat Death Itself*, N.Y. TIMES, Oct. 30, 1990, at A20. The measure was passed into law in November 1990 after more than eight years of effort on the part of Britt and others and was timed to become effective on February 14, 1991. Michael Ybarra, *A City’s Gay Valentine: San Francisco Recognizes ‘Domestic Partners’*, WASH. POST, Feb. 15, 1991, at D2.

⁸² See Stephen Braun, *Law Lists Rights, Lacks Teeth: Intent of W. Hollywood Domestic Partnership Ordinance Clear but Impact Isn’t*, L.A. TIMES, Feb. 28, 1985, at WS1 (discussing the uncertainties surrounding West Hollywood’s domestic partnership law). The City of West Hollywood spent two months unsuccessfully searching for an insurance company willing to cover domestic partners. *Id.* Peter McAlear, the accountant heading the search, said that the city had “talked to six insurance brokers so far and they’ve all told us there’s no precedent they can look at to base their premiums on.” *Id.*

⁸³ See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (“[D]omestic relations . . . has long been regarded as a virtually exclusive province of the States.”); Rev. Rul. 58-66, 1958-1 C.B. 60 (recognizing common-law marriages for federal tax purposes if recognized under state law).

⁸⁴ Heidi Gewertz, *Domestic Partnerships: Rights, Responsibilities and Limitations*, PUB. LAW RESEARCH INST. (Fall 1994), <http://www.uchastings.edu/public-law/plri/fall94/gewertz.html> (“In an analysis of domestic partnership law, it is critical to recognize the inherent limitations on any ordinance passed by a local rather than a state government Under this analysis, the passage of state domestic partnership legislation is critical to elevating such partnerships to a greater parity with the institution of marriage.”); Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1203 (1992) (discussing that some benefits, such as the ability to file joint state tax returns, would be preempted by state statute and thus, could not be granted by a local ordinance to domestic partners).

ii. We're Going to State (1994–1999): Early Efforts at Statewide Recognition

The first attempt at California statewide recognition for domestic partnership was made in February 1994 by Assemblyman Richard Katz when he introduced a bill, AB 2810, on the floor of the State Assembly that set up the state's first domestic partnership registry.⁸⁵ The proposed registry would be open to all unmarried couples, gay and straight.⁸⁶ The bill was very modest, providing only that domestic partners who register with the Secretary of State would be afforded hospital visitation and conservatorship rights identical to those given to married couples.⁸⁷ It defined the term domestic partner to be "two adults who have chosen to share one another's lives in an intimate and committed relationship of mutual caring."⁸⁸ The legislation passed the Legislature on August 25, 1994 and was sent to Governor Peter Wilson.⁸⁹ However, Wilson, bowing to pressure from conservative religious groups⁹⁰ vetoed the measure on September 11, 1994.⁹¹ Wilson seemed to take issue with the fact that unmarried, opposite sex couples could take advantage of "substitute relationship[s]"⁹² and did not even mention the recognition and rights that domestic partnerships would provide to same-sex couples in the state.⁹³

⁸⁵ Assemb. B. 2810, 1993–1994 Assemb., Reg. Sess. (Cal. 1994).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* Notably, this is the exact same definition used in San Francisco's domestic partnership ordinance. S.F., CAL., ADMIN. CODE § 62.2(a) (2004); *see also supra* note 79.

⁸⁹ Assemb. B. 2810.

⁹⁰ *See, e.g.*, Lou Sheldon, Op-Ed., *An Assault on the Family and Taxpayers*, ORANGE COUNTY REG., Sept. 8, 1994, at B10 (calling on state residents to contact Governor Peter Wilson to urge him to veto AB 2810 because "[m]arriage and family relations are . . . disintegrated through Assembly Bill 2810" and because eventually the state would have to provide benefits to domestic partners which the state cannot afford). Reverend Louis P. Sheldon, an Anaheim, California preacher, formed the conservative Traditional Values Coalition (TVC) in 1980, which describes itself as "America's largest . . . grassroots church lobby." *About TVC*, TRADITIONAL VALUES COALITION, <http://www.traditionalvalues.org/content/about> (last visited Oct. 7, 2011). The Southern Poverty Law Center lists TVC as a hate group. Evelyn Schlatter, *The Hard-Liners*, INTELLIGENCE REP., Winter 2010, at 35, 43, *available at* <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/winter/the-hard-liners>.

⁹¹ Veto Message from Governor Peter Wilson to the Members of the California Assembly on AB 2810 (Sept. 11, 1994) [hereinafter AB 2810 Veto Message] (explaining that AB 2810 is "unnecessary to achieve its specific aims" and expressing his belief that the law would weaken the institution of marriage). Katz later accused Wilson of "caving in to election-year pressure exerted by members of the religious right." Jerry Gillam, *Bill Granting Some Benefits to Unwed Couples Reintroduced*, L.A. TIMES, Feb. 25, 1995, at A22.

⁹² AB 2810 Veto Message, *supra* note 91, at 9392.

⁹³ *Id.*

Not defeated, Katz tried again during the next legislative session when he introduced AB 627 in February 1995.⁹⁴ This bill was an exact replica of AB 2810.⁹⁵ It passed the state assembly easily the year before, but in the five months between Wilson's veto and the introduction of AB 627, Republicans had captured a majority in the assembly⁹⁶ and, as a result, the bill died in committee.⁹⁷ The next year, Katz termed out of the California assembly⁹⁸ and Democrats took back the majority,⁹⁹ so another bill was introduced. A freshman assemblyman, Kevin Murray, introduced the Murray-Katz Domestic Partnership Act.¹⁰⁰ It was "nearly identical" to the previous domestic partnership legislation.¹⁰¹ The bill passed both the judiciary and the appropriations committees, but Murray decided not to bring it to a vote and it died.¹⁰²

The same year that the Murray-Katz Act died, Assemblywoman Carole Migden also introduced domestic partnership legislation. Migden, who previously served on the San Francisco Board of Supervisors with Harry Britt when San Francisco passed its domestic partnership ordinance,¹⁰³

⁹⁴ Assemb. B. 627, 1995–1996 Assemb., Reg. Sess. (Cal. 1995).

⁹⁵ ASSEMB. COMM. ON JUDICIARY, REPORT ON A.B. 627, Assemb. 1995–1996, Assemb., Reg. Sess. (Cal. 1995), at 5, http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_0601-0650/ab_627_cfa_950328_154417_asm_comm.html ("Last session, the author introduced AB 2810 to do exactly what this bill proposes.").

⁹⁶ CAL. SEC'Y OF STATE, STATEMENT OF VOTE NOVEMBER 8, 1994 GENERAL ELECTION 55–65 (1994).

⁹⁷ CAL. ASSEMB., COMPLETE BILL HISTORY, A.B. 627, Assemb. 1995–1996, Assemb., Reg. Sess. (Cal. 1996), available at http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_0601-0650/ab_627_bill_history.html.

⁹⁸ CAL. SEC'Y OF STATE, STATEMENT OF VOTE NOVEMBER 5, 1996 GENERAL ELECTION 17–29 (1996).

⁹⁹ *Id.*

¹⁰⁰ Assemb. B. 54, 1997–1998 Assemb., Reg. Sess. (Cal. 1997).

¹⁰¹ ASSEMB. COMM. ON APPROPRIATIONS, REPORT ON A.B. 54, 1997–1998 Assemb., Reg. Sess. (Cal. 1997), at 2 ("This bill is nearly identical to AB 2810 (Katz), 1984, which passed both houses but was vetoed by the governor; and to AB 627 (Katz), 1995, which was held in Assembly policy committee.").

¹⁰² CAL. ASSEMB., COMPLETE BILL HISTORY, A.B. 54, 1997–1998 Assemb., Reg. Sess. (Cal. 1997), available at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0051-0100/ab_54_bill_19980202_history.html. The 1996 election saw Democrats taking back control of the State Assembly, the Assembly's first openly lesbian member becoming the speaker pro tem, and Carole Migden, another openly gay assemblywoman, chairing the Assembly Appropriations Committee. Dan Walters, *New Faceoff on Gay Rights*, SACRAMENTO BEE, Aug. 11, 1997, at A3, available at 1997 WLNR 6253173 [hereinafter *Faceoff*]. Although supporters of domestic partnership legislation thought that the political climate was perfect in 1997 for introducing gay-rights bills, by the end of the summer, all but three of the ten gay rights bills that had been proposed had been stalled. *Faceoff*, *supra*.

¹⁰³ Wyatt Buchanan, *For Departing Sen. Migden, "A Bittersweet Time,"* S.F. GATE, Dec. 1, 2008, http://articles.sfgate.com/2008-12-01/bay-area/17130877_1_carole-migden-domestic-partners-san-francisco-democrat ("In 1991, she was elected to the Board of Supervisors, the same year that city voters approved domestic partners rights.").

introduced AB 1059 in 1997.¹⁰⁴ The bill, which would require health insurance companies to give employers an option of covering their employees' domestic partners,¹⁰⁵ originally contained a provision to create a statewide domestic partnership registry.¹⁰⁶ But, in the face of conservative opposition, "Midgen agreed to strip out provisions calling for state recognition of domestic partnerships"¹⁰⁷ and the final bill passed the state legislature with no mention of a state domestic partnership registry.¹⁰⁸ Once again, Governor Wilson vetoed the legislation, this time blaming the lack of definition for the term "domestic partner."¹⁰⁹

Migden returned to the drawing board. Learning from prior mistakes, she reintroduced a domestic partnership bill, AB 26, in the California Legislature on December 7, 1998.¹¹⁰ The bill, which was described as being "substantially similar" to Migden's prior bill, AB 1059, was changed and amended to provide a very specific definition of the term domestic partner.¹¹¹ In addition, bowing to pressure from Governor Davis, Migden amended the bill to apply only to same-sex couples.¹¹² The bill also specified that the filing of a declaration of domestic partnership would not

¹⁰⁴ Assemb. B. 1059, 1997–1998 Assemb., Reg. Sess. (Cal. 1997).

¹⁰⁵ *Id.* The proposal would allow private employees to offer insurance to those who had registered as domestic partners under city-wide ordinances.

¹⁰⁶ ASSEMB. COMM. ON INSURANCE, REPORT ON A.B. 1059, 1997–1998 Assemb., Reg. Sess. (Cal. 1997), at 1 ("Specifically, this bill . . . [e]stablishes a domestic partnership registry operated by the Secretary of State . . . in conformity with AB 54 (Murray) which passed out of the Assembly Judiciary Committee on April 2.").

¹⁰⁷ Max Vanzi, *Assembly Approves Domestic Partner Insurance Measure*, L.A. TIMES, June 3, 1997, at A3, available at 1997 WLNR 5705297.

¹⁰⁸ *Id.* Although statewide recognition had failed again, the legislation did solve the problem that employers and municipalities who offered domestic partnership benefits were having with finding insurance companies who would insure them. *See supra* text accompanying note 82.

¹⁰⁹ Veto Letter from Governor Pete Wilson to Cal. Assem. on AB 1059 (Sept. 29, 1998) [hereinafter AB 1059 Veto] ("The lack of definition for 'domestic partner' lends itself to instability, fraud and adverse selection."). Wilson seemed to be addressing the fear of opponents of the measure that "roommates might sign up for these benefits, and the constitutional right to privacy would prevent government from determining whether their relationship was more than just casual." ASSEMB. COMM. ON INSURANCE, REPORT ON A.B. 1059, 1997–1998 Assemb., Reg. Sess. (Cal. 1997), at 4.

¹¹⁰ Assemb. B. 26, 1999–2000 Assemb., Reg. Sess. (Cal. 1999).

¹¹¹ S. JUDICIARY COMM., REPORT ON A.B. 26, S. 1999–2000, Reg. Sess. (Cal. 1999), at 1–2. According to the Judiciary Report, AB 26 "would define the legal effect of creating a domestic partnership." *Id.* at 3. This was in response to Governor Wilson's veto message of AB 1059 regarding the lack of definition for the term 'domestic partner.' *See* AB 1059 Veto, *supra* note 109. Section 9 of the Judiciary Report is entitled "AB 1059: Governor's veto message," and states, "[t]he problem of defining 'domestic partner' has been taken care of by AB 26." S. JUDICIARY COMM., REPORT ON A.B. 26, *supra*, at 14.

¹¹² Martin Wisckol, *Partner Benefit Limited to Gays*, ORANGE COUNTY REG., Sept. 7, 1999, at B1 ("The numerous modifications—including the elimination of provisions for most opposite-sex couples—came at the request of Gov. Gray Davis, who said he would otherwise not sign the bill into law.").

change or create any property interest, or change the income or estate tax liability of the partners.¹¹³ On October 2, 1999, Gray Davis signed AB 26 into law.¹¹⁴

Although same-sex partners in California had finally achieved statewide recognition, the new law was very narrow and basically afforded no benefits to domestic partners.¹¹⁵ Once advocates finally figured out how to frame the debate about rights for domestic partners in a way that worked, the Legislature began to expand those rights in a piecemeal manner. Migden, determined to secure for domestic partners the “substantive legal and economic benefits that married spouses enjoy,”¹¹⁶ introduced AB 25 in 2001, which would “confer a number of new legal rights on, domestic partners, to the same extent such rights are guaranteed to married couples.”¹¹⁷ The bill was signed into law on October 22, 2001 and was the first successful expansion of rights to California RDPs since state recognition was granted.¹¹⁸ Over the next year, five more amendments expanding benefits to California’s domestic partners were proposed and passed in the Legislature.¹¹⁹

iii. The March Towards Parity¹²⁰: The California Domestic Partner Rights and Responsibilities Act of 2003

Finally, in 2003, AB 205¹²¹ was proposed to “provide more equity to domestic partners.”¹²² Even though great strides had

¹¹³ S. JUDICIARY COMM., REPORT ON A.B. 26, *supra* note 111, at 8–9. In a section entitled “comparison to SB 75 (Murray); remaining issues to reconcile,” the report states that the author of AB 26 has agreed to amend into the bill the same amendments that had already been amended into SB 75, specifically the income tax and community property treatment of domestic partners. *Id.* at 6–7.

¹¹⁴ Assemb. B. 26, 1999–2000 Assemb., Reg. Sess. (Cal. 1999).

¹¹⁵ S. JUDICIARY COMM., REPORT ON A.B. 26, *supra* note 111, at 8–9 (excluding rights to Domestic Partners by indicating the Bill would not change or create interests in property).

¹¹⁶ ASSEMB. COMM. ON JUDICIARY, REPORT ON A.B. 25, 2001–2002 Assemb., Reg. Sess. (Cal. 2001), at 3.

¹¹⁷ *Id.*

¹¹⁸ Assemb. B. 25, 2001–2002 Assemb., Reg. Sess. (Cal. 2001).

¹¹⁹ S. B. 1049, 2001–2002 S., Reg. Sess. (Cal. 2001) (authorized San Mateo County to provide survivor benefits to domestic partners); Assemb. B. 2216, 2001–2002 Assemb., Reg. Sess. (Cal. 2002) (provided domestic partners with intestate succession); Assemb. B. 2777, 2001–2002 Assemb., Reg. Sess. (Cal. 2002) (permitted the counties of Los Angeles, Santa Barbara, and Marin to offer survivor benefits to domestic partners); S. B. 1575, 2001–2002 S., Reg. Sess. (Cal. 2002) (excludes domestic partners from provisions that void wills if they help draft); S. B. 1661, 2001–2002 S., Reg. Sess. (Cal. 2002) (grants temporary disability benefits to employees to take time off to care for domestic partners).

¹²⁰ S. JUDICIARY COMM., REPORT ON A.B. 205, 2003–2004 S., Reg. Sess. (Cal. 2003), at 2 (“This bill continues the march towards parity in rights and benefits between domestic partners, as currently defined, and married couples, under state law.”).

¹²¹ Assemb. B. 205, 2003–2004 Assemb., Reg. Sess. (Cal. 2003). In a committee, this bill was described as “recast[ing] the amendments to the Domestic Partnership Act by

been made in conferring rights to domestic partners, supporters of the new measure “point[ed] out that domestic partners are currently afforded fifteen rights under law, while married couples are provided hundreds of rights and responsibilities.”¹²³ As introduced, the bill would have allowed domestic partners to file their state income taxes as married filing jointly or married filing separate, which means that they could use a different filing status for their state and their federal returns, and it would have granted domestic partners the same community property privileges as married couples under California law.¹²⁴ However, after the Franchise Tax Board (FTB) suggested that the measure be amended to delete these provisions,¹²⁵ the bill was changed to require domestic partners to use the same filing status on their state returns as they use on their federal return, and to provide that “*earned income* may not be treated as community property for state income tax purposes.”¹²⁶ Anticipating the confusion that

various bills enacted over the last four years.” S. JUDICIARY COMM., REPORT ON A.B. 205, *supra* note 120, at 1.

¹²² ASSEMB. COMM. ON JUDICIARY, REPORT ON A.B. 205, 2003–2004 Assemb., Reg. Sess. (Cal. 2003), at 1.

¹²³ *Id.* In the summary of the bill, the author is quick to point out that the measure would still not make domestic partners and married couples equal because of federal and state laws prohibiting gay marriage. But, by extending to domestic partners most of the rights and responsibilities extended to married couples under state law, the bill “would provide a critical, urgently needed measure of equity to registered domestic partners.” In addition, the summary points out the many rights and obligations that cannot be conferred to domestic partners such as equal tax and community property treatment. *Id.*

¹²⁴ Assemb. B. 205, 2003–2004 Assemb., Reg. Sess. § 4(g) (Cal. 2003).

¹²⁵ LUANNA HASS, CAL. FRANCHISE TAX BOARD, SUMMARY ANALYSIS OF AMENDED BILL 2–3 (Aug. 18, 2003), available at http://ftb.ca.gov/law/legis/03_04bills/AB205_081803.pdf (arguing that as the bill was introduced, the tax liability changes for domestic partners would result in revenue losses of \$4.3 million by the 2005/2006 fiscal year and suggesting the bill be stripped of its equal taxation provisions); see also S. REV. AND TAX’N COMM., REPORT ON A.B. 205, 2003–2004 S., Reg. Sess. (Cal. 2003) (noting that according to the FTB the fiscal effect on California would be \$1 million in 2004, \$5 million in 2005, and \$7.5 million in 2006); but see Appropriations Committee Testimony on AB 205, 2003–2004 Assemb., Reg. Sess. (Cal. 2003) (statement of R. Bradley Sears, Williams Project Director), available at <http://wiwp.ucla.law.edu/wp-content/upload/Sears-Testimony/AB205-Apr-2003.pdf> (presenting estimates that AB 205 would actually increase state tax revenue by almost \$700,000 per year). Sears acknowledges in his testimony that his conclusions are different from the FTB’s findings of AB 205’s impact on state tax revenues. *Id.* He argues that the FTB made faulty assumptions about same-sex couples when crafting the hypotheticals that it used to compute projected income changes; specifically that same-sex couples earn much more than opposite-sex couples and that they have greater income disparity. *Id.* Second, Sears points out that the FTB’s model discards any data showing that tax liability would increase for some couples under AB 205, because it assumes that domestic partners whose tax liability goes up will dissolve their partnership and that no couples will register as domestic partners in the first place if it increases their tax liability. *Id.* This faulty analysis by the FTB is a clear example of the state recognizing same-sex couples’ relationships, but treating those relationships vastly differently when making assumptions. *Id.* It is highly unlikely that the state would ever assume that opposite-sex married couples would get divorced if being single would result in lower taxes. *Id.*

¹²⁶ Cal. Assemb. B. 205 § 4(g) (emphasis added). This provision, added only to quell

the amendments would cause, the FTB further recommended that the bill be amended to exclude all community property (and not just earned income) from community property status.¹²⁷ No further amendments were made to the bill, however, and it passed both houses of the state Legislature on September 3, 2003.¹²⁸ On September 19, 2003, Governor Gray Davis made history by signing the California Domestic Partner Rights and Responsibilities Act of 2003¹²⁹ into law saying, “[a] family is a family not because of gender but because of values, like commitment, trust and love.”¹³⁰ The law provided that “[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses.”¹³¹

C. Past and Present Collide: Domestic Partners Fight to Split Income

Just like the married taxpayers of the 1920s who saw income splitting as a way to save money on their tax bill,¹³² California RDPs (including Mr. Rey and his partner) began to wonder if the new law could help them lower their taxable income. In 2006, the IRS issued the 2006 CCA denying California RDPs the right to split their income, and, in response, California amended its domestic partnership laws in 2007.¹³³ In 2010, the IRS finally

fears of massive *state* revenue losses, was later used as justification for prohibiting California RDPs from splitting their community income for *federal* tax purposes. *See infra* notes 147, 152 and accompanying text.

¹²⁷ LUANNA HASS, CAL. FRANCHISE TAX BOARD, SUMMARY ANALYSIS OF AMENDED BILL 2-3 (Aug. 21, 2003), *available at* http://ftb.ca.gov/law/legis/03_04bills/AB205_082103.pdf. The Franchise Tax Board acknowledged that adding the provision excluding all *earned income* from community property for state tax purposes alleviated its previous concerns about the loss of state tax revenue, but it also expressed marked concern that the provision, as written, would cause confusion because not all income is earned income and some income, such as pension income, could still be treated as community property for state tax purposes. *Id.* at 1-2. The FTB suggested replacing the term “earned income” with the phrase “property or income of a domestic partner”, in order to accomplish the intent of bill’s supporters of “allow[ing] domestic partners to have the same community property privileges and burdens as those given to civil marriage partners” while eliminating any impact to the state’s income tax revenue. *Id.* at 2. The FTB’s concerns proved prophetic. *See discussion infra* note 152 and accompanying text.

¹²⁸ Cal. Assemb. B. 205.

¹²⁹ The California Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) (codified at CAL. FAM. CODE §§ 297-299.3 (West 2004)).

¹³⁰ *Law to Give Gay Partners Spousal Rights*, CHI. TRIB., Sept. 21, 2003, http://articles.chicagotribune.com/2003-09-21/news/0309210453_1_domestic-partner-domestic-partners-same-sex-couples.

¹³¹ FAM. § 297.5.

¹³² *See supra* notes 29-32 and accompanying text.

¹³³ *See* I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 1-2 (explaining amendments to California’s domestic partnership laws).

recognized RDPs and applied the rule of *Poe v. Seaborn* to their relationships.¹³⁴

i. “Outside the Context of Husband and Wife”: The 2006 IRS Advisory and Reactions

After the passage of California Domestic Partner Rights and Responsibilities Act of 2003,¹³⁵ which extended full community property rights to RDPs,¹³⁶ some observers believed that income splitting should be a viable solution for gay couples.¹³⁷ Throughout 2004 and 2005, Don Read, Mr. Rey’s tax attorney, and Pat Cain, a noted tax scholar, as well as other tax professionals, began to ask the IRS to issue a ruling concerning whether California RDPs could split their income when reporting their federal taxable income.¹³⁸ Finally, almost three years after the new law was passed, and one year after it became effective, the IRS issued some guidance.

¹³⁴ *Id.* at 2.

¹³⁵ The California Domestic Partner Rights and Responsibilities Act, ch. 421 (codified at FAM. §§ 297–299.3). See *supra* Part I(B)(3) for a discussion of the enactment of this law.

¹³⁶ See Ventry, *supra* note 5, at 1221 (arguing that California RDPs are subject to the same responsibilities, obligations, and duties under the law as spouses and therefore, all income and property received during the partnership is community property and each partner had equal ownership interests).

¹³⁷ See Cain, *Relitigating Seaborn*, *supra* note 3, at 562 (“In need of guidance[,] . . . registered domestic partners began to consider submitting private letter ruling requests to the IRS.”); Meckler, *supra* note 1, at A3 (discussing that after the law changed in California to give RDPs full community property rights, Mr. Rey realized that splitting his income with his partner would give him a “clear tax benefit” because it would put him in the lower tax bracket and saved him \$7000).

¹³⁸ See Cain, *Relitigating Seaborn*, *supra* note 3, at 562. Cain discussed how she and Read asked the IRS to issue a public revenue ruling in 2004 regarding the soon to be effective law. Specifically, Cain argued that since RDPs had the same community property rights as spouses under the new law, the IRS should extend the income-splitting rule of *Poe v. Seaborn* to California RDPs. *Id.* In addition, Read stated on the TaxProf Blog that he and Cain “contacted the Office of Tax Legislative Counsel to request that the Tax Policy office urge the IRS to issue a public revenue ruling . . . so that registered domestic partners could plan their tax affairs and tax preparers could know how to prepare their returns.” Paul L. Caron, *Pat Cain’s Role in the IRS Ruling on California Gay/Lesbian Couples*, TAXPROF BLOG (June 7, 2010), http://taxprof.typepad.com/taxprof_blog/2010/06/pat-cains-role-.html [hereinafter Don Read Interview]. When the IRS refused to respond to this request, they worked on a private letter request, filed in April 2005, which the IRS declined to issue “in the interest of general tax administration.” *Id.* In December 2005, the California Society of Certified Public Accountants also pleaded with the IRS to issue some guidance to domestic partners since filing season was a month away. Letter to Hon. Eric Solomon from California Society of CPAs (Dec. 14, 2005), available at http://www.calcpa.org/Content/Files/Litigation%20Sections/LIT_comment121405.pdf (“As 2005 comes to a close, one issue for registered domestic partners and their CPAs is determining how to report the earned income of domestic partners on each partner’s federal tax return [W]e urge you to issue public guidance as to how to address these issues as early as possible.”).

On February 24, 2006, the IRS issued an internal advisory memorandum addressing the extent to which California's new domestic partnership law was to be taken into account for federal income tax purposes.¹³⁹ The advisory, relying heavily on *Poe v. Seaborn*,¹⁴⁰ and *Commissioner v. Harmon*,¹⁴¹ concluded that California RDPs could not split their income for federal income tax purposes.¹⁴² The IRS read *Commissioner v. Harmon* as standing for the proposition that *Poe v. Seaborn* only applies when the community property system at issue is "made an incident of marriage by the inveterate policy of the state."¹⁴³ Because RDPs are not married under California law, the IRS concluded that the community property rights granted to California RDPs were not an "incident of marriage" as required by *Harmon*,¹⁴⁴ so *Poe v. Seaborn* could not apply to California RDPs.¹⁴⁵ Thus, "an individual who is a registered domestic partner in California must report all of his or her income earned from the performance of his or her personal services . . ."¹⁴⁶ The IRS also seemed to place some weight on the fact that the final domestic partnership law treated the community property of RDPs differently for *state income tax* purposes than the community property of opposite-sex married couples in California.¹⁴⁷

¹³⁹ I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006).

¹⁴⁰ *Poe v. Seaborn*, 282 U.S. 101, 110 (1930) (accepting that the state definition as to the ownership of community property and income is paramount in deciding the federal tax treatment of such property). Essentially, *Poe v. Seaborn* came to stand for the doctrine that the because the federal government, when taxing income, would only tax the owner of the income, in community property states, where each spouse had a completely vested ownership interest in all community property no matter who earned it, the IRS would tax both spouses separately on half of all community property. See *supra* notes 49–51 and accompanying text.

¹⁴¹ *Comm'r v. Harmon*, 323 U.S. 44, 46 (1944) (holding that Oklahoma's recently enacted community property statute that allowed spouses to elect whether or not to include their property in the community was a "consensual community" and thus, unlike the community regime present in *Poe v. Seaborn*, did not entitle spouses to split their income). See also *supra* text accompanying notes 54–55.

¹⁴² I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006), at 1, 4.

¹⁴³ *Id.* at 4 (quoting *Harmon*, 323 U.S. at 46–47).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* ("We do not believe that the *Poe v. Seaborn* decision applies to the application of a state's community property law outside of the context of husband and wife."). This particular reasoning is hard to follow since California's new RDP law marked the first time that full community property rights had been extended to anyone "outside the context of husband and wife." *Id.* The IRS was essentially arguing that since *Seaborn* has never applied outside the context of husband and wife, it should not here, even though it could never have been applied in the past. *Id.* For a thorough discussion of criticisms of the 2006 CCA see *infra* notes 148–54 and accompanying text.

¹⁴⁶ I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006), at 4.

¹⁴⁷ *Id.* at 2 (describing the state income tax provision as "pertinent" with "significant state tax implications").

The advisory was not well received. It was widely criticized as being “wrong-headed,”¹⁴⁸ “not well-reasoned,”¹⁴⁹ and “unpersuasive, historically inaccurate, and ultimately indefensible.”¹⁵⁰ In an editorial in a San Francisco newspaper, Don Read went so far as to call the IRS bigoted because of its reasoning.¹⁵¹ Commentators also took issue with the IRS’s reliance on the fact that California’s domestic partnership laws prohibited earned income from being treated as community property for state income tax purposes.¹⁵² The ruling was extremely disappointing to those in California who thought that the 2005 law had finally made RDPs and spouses equal.¹⁵³ Don Read and Pat Cain began discussing privately how they could challenge the ruling in court.¹⁵⁴ However, two separate developments gave everyone renewed hope: first, an amendment

¹⁴⁸ Cain, *Taxing Families Fairly*, *supra* note 57, at 846. Cain argues that the IRS was wrong in relying on the holding of *Harmon* for the proposition that only property systems which arise because of marriage qualify for income splitting because the case actually stands for the rule that property systems must be dictated by state policy (as opposed to being capable of being opted into) in order to be recognized under *Poe v. Seaborn*. *Id.* at 847. Since California RDPs are subject to the community property regime of the state automatically as an incident of registering, they fall under the rule of *Poe v. Seaborn*, and not the rule of *Harmon*. *Id.*

¹⁴⁹ Cain, *Relitigating Seaborn*, *supra* note 3, at 567. Cain explains that as soon as Oklahoma made its community property system mandatory, the IRS extended the *Seaborn* rule to the state proving that “it is the mandatory nature of the system, not its history within the state, that is crucial to the determination of whether spouses can split income.” *Id.* In addition, she points out that the IRS also misinterprets *Seaborn* in its ruling because the marital status of the couples in *Seaborn* is irrelevant to the Court. *Id.* Rather, “[i]t is the vested nature of the right that is given to the spouses by the state law that is the *ratio decidendi* of the case.” *Id.*

¹⁵⁰ Ventry, *supra* note 5, at 1221. Ventry further argues that “[i]f the legal analysis in *Seaborn* had anything to do with marriage, the IRS’s reasoning could conceivably be appropriate. But it didn’t. *Poe v. Seaborn* was about *ownership* of the community’s income from property and services, *not* about marriage.” *Id.* at 1222.

¹⁵¹ Donald H. Read, *IRS Plays Politics with the Tax Code*, S.F. GATE, Apr. 16, 2006, http://articles.sfgate.com/2006-04-16/opinion/17289714_1_domestic-partners-property-rights-community-property (“When measured against the clear legal rules governing income splitting . . . the reasoning of the IRS chief counsel’s office is so tortured and weak, one must suspect that bigotry, rather than logic, was the impetus.”).

¹⁵² See Ventry, *supra* note 5, at 1224 (calling the provision a “red herring” because the statute “does not change in any meaningful way the application of California’s community property law to ownership of income from property and services for domestic partners” and thus, for the purposes of taxing federal income tax, the prohibition is irrelevant).

¹⁵³ See Mark Schwanhausser, *IRS Guidance Differs from ‘05 State Law*, SAN JOSE MERCURY NEWS, Feb. 28, 2006, at 1 (“But critics said the IRS is ignoring the community property rights extended to registered partners under the new state law.”) [hereinafter *IRS Guidance*]. Don Read was quoted as saying, “If there’s no difference between the legal rights that spouses have in their community property and the legal rights that domestic partners have in their community property, then how can they be taxed differently?” *IRS Guidance*, *supra*.

¹⁵⁴ Don Read Interview, *supra* note 138 (“Pat and I began thinking of how the client would file his return consistently with the 2006 CCA and then file a claim for refund and, if unsuccessful, file suit for refund in [federal district court].”).

to the 2005 law was proposed in the California Senate; and second, Barack Obama was elected as President.

ii. California Amends Its Laws to Seek Favorable Tax Treatment for Its Taxpayers

On the same day that the IRS declined to grant RDPs full community property tax treatment, Carole Migden, now a State Senator, introduced what she called “the final piece”¹⁵⁵ of legislation to make RDPs fully equal to spouses in California. On February 24, 2006, Migden introduced SB 1827, the State Income Tax Equity Act.¹⁵⁶ The bill proposed to require RDPs to file their state income taxes as married couples and to apply California community property rules to RDPs exactly like the rules apply to married couples.¹⁵⁷ Migden stated that the bill was necessary because “[u]nder current law, married couples have more favorable tax treatment than domestic partners. Domestic partners share the same expenses as married couples and deserve the same tax treatment.”¹⁵⁸ On August 29, 2006, the bill passed the Legislature¹⁵⁹ and on September 29, Governor Arnold Schwarzenegger signed it into law.¹⁶⁰

The amendment was seen by some as putting the onus back on the IRS to treat RDPs like spouses for income tax purposes.¹⁶¹ But, the new rules were not without criticism, even from those who support equal rights for gay couples. Commentators called the new law a “symbolic victory,” but also predicted that it would “add to the confusion that gays and lesbians face because there are numerous differences in state and federal tax laws.”¹⁶²

¹⁵⁵ Mark Schwanhausser, *Gay Tax Bill Awaits Decision: Letting Couples File as Married Could Set Up a Showdown with Federal Law*, SAN JOSE MERCURY NEWS, Sept. 28, 2006, at 1, available at 2006 WLNR 16802877 [hereinafter Schwanhausser, *Gay Tax Bill*].

¹⁵⁶ S. B. 1827, 2005–2006 S., Reg. Sess. (Cal. 2006).

¹⁵⁷ ASSEMB. COMM. ON REVENUE AND TAXATION, REPORT ON S.B. 1827, 2005–2006 S., Reg. Sess. (Cal. 2006), at 2.

¹⁵⁸ *Id.* at 4.

¹⁵⁹ Cal. S. B. 1827. This was one of the most contentious fights to expand rights for same-sex couples as opponents of the bill recognized that the benefits conferred by this bill were “the last marital benefit still reserved for married couples.” ASSEMB. COMM. ON REVENUE AND TAXATION, REPORT ON S.B. 1827, 2005–2006 S., Reg. Sess. (Cal. 2006), at 6. The fighting over this bill became so severe on the floor of the Assembly that debate had to be paused to allow tempers to cool. Greg Lucas, *Assembly Rancor Over Domestic Partners Measure*, S.F. CHRON., Aug. 24, 2006, at B2, available at 2006 WLNR 14645786.

¹⁶⁰ Cal. S. B. 1827.

¹⁶¹ See Schwanhausser, *Gay Tax Bill*, *supra* note 155, at 1 (quoting Jean Johnston, a California tax attorney, as saying, “[t]his has taken away the ambiguities about how California is treating [community property] It is saying, ‘It’s community property, we’re taxing it like community property, and we’re throwing it over to the feds saying, so should you’”).

¹⁶² Mark Schwanhausser, *Bill Would Give Gay Couples Right to File Taxes as*

Against this backdrop, Barack Obama was elected President, which gave those fighting for tax equality hope that a new administration would have a different point of view. So, in 2009, Mr. Rey decided to ask the IRS one more time to allow him to split his income with his domestic partner.¹⁶³

iii. The Squeaky Wheel Gets the Grease: The IRS Recognizes California RDPs

On May 28, 2010, the IRS issued a Chief Counsel Advisory Memorandum which essentially reversed its previous position and extended the income splitting rule of *Poe v. Seaborn* to California RDPs.¹⁶⁴ The advisory explained that the 2006 CCA refused to allow income splitting for California RDPs because, even though the 2003 Domestic Partnership Law treated earned income (and other property) of RDPs as community property for property law purposes, it did not treat earned income as community property for state income tax purposes.¹⁶⁵ Once California passed Senate Bill 1827, however, which treats earned income as community property for state income tax purposes as well, the IRS considered California to have “extended *full community property treatment* to registered domestic partners.”¹⁶⁶ Since federal tax law relies on state property law characterizations, the advisory concluded that “the federal tax treatment of community property should apply to California

Married Couples But Landmark Victory Would Come With Tax Headaches, SAN JOSE MERCURY NEWS, Sept. 28, 2006, available at 2006 WLNR 16802046.

¹⁶³ Don Read Interview, *supra* note 138 (“[A]fter the 2008 election of President Obama and the 2009 White House website declaration of controlled support for the GLBT community, it seemed propitious to try the private ruling approach again.”); *see also* Meckler, *supra* note 1, at A3 (“When President Barack Obama was elected, Mr. Rey’s tax attorney, Donald Read, thought they should try again, citing the White House Web site’s professed commitment to ‘equal federal rights’ for gay and lesbian couples.”).

¹⁶⁴ I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2, available at 2010 WL 2137821.

¹⁶⁵ *Id.* at 1; *see also* I.R.S. Gen. Couns. Mem. 200608038 (Feb. 24, 2006), at 4 (prohibiting California RDPs from splitting their community income because the principles of *Poe v. Seaborn* do not apply “outside the context of a husband and wife” and the rights granted to RDPs are not granted to them by the state as a result of marriage). Although the 2006 CCA mentions the fact that under the 2003 law earned income is not considered community property for state tax purposes, it does not base its reasoning on that fact. *Id.* at 2. The IRS seems to be proving the commentators right who argued, after the 2006 CCA, that *Poe v. Seaborn* had nothing to do with marriage and everything to do with state property law. *See supra* notes 147–153 and accompanying text.

¹⁶⁶ I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2; *but see supra* notes 148–153 and accompanying text (arguing that the 2005 law already granted RDPs full community property treatment irrespective of the prohibition on taxing community property at the state level because federal tax law follows state property law, not state tax law).

registered domestic partners.”¹⁶⁷ For the first time ever, the federal government recognized California RDPs.¹⁶⁸

II. PRACTICAL IMPLICATIONS OF THE 2010 CCA

The change in the IRS’s official position regarding California RDPs has been greeted with joy, anger, hopefulness, and cynicism, but for average taxpayers, the new rules bring with them many questions about how the advisory affects them personally. Although it is not clear if the advisory extends to taxpayers other than California RDPs,¹⁶⁹ it is certain that the new rules will have a substantial impact on those to whom they do apply. Some of the effects of the advisory can be explained easily, but other possible impacts are still unclear, and further guidance from the IRS will probably be necessary.¹⁷⁰

A. The Tax Man Cometh: How RDPs Should File Under the New Rules

In general, the new rules mean that in calculating income for federal income tax purposes, every couple to whom the rules apply must add together all of the community income earned by both members of the couple during the filing period and then each report half of that income on his or her separate federal income tax return.¹⁷¹ Each RDP must report the entire amount

¹⁶⁷ I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2. Although the 2010 CCA can be viewed as applying new law (the 2007 amendments) to reach a new result (income-splitting for RDPs), it could also be argued that the IRS was finally ruling as it should have ruled in 2006 when it should have recognized California’s property laws regardless of the state tax treatment of community property. Arguably, the tax laws of the state were as irrelevant then as they are now. Under this analysis, the 2010 CCA, although positive from an equality standpoint, still gets the law wrong. In addition, it only adds to the confusion surrounding this issue since it is unclear upon what rules or principles the IRS is basing its reasoning in allowing RDPs to split their income.

¹⁶⁸ See Nicole C. Brambila, *Tax Break for Same-Sex Couples*, THE DESERT SUN, June 13, 2010, at B1, available at 2010 WLNR 12229527.

¹⁶⁹ This Part examines the practical implications of the new rules without regard to whether or not they apply to a specific type of taxpayer. Part III of this Comment will analyze whether or not the rulings might extend to same-sex couples other than California RDPs.

¹⁷⁰ In fact, there are so many unanswered questions that the ABA has formed a panel to study the rulings and submit comments to the IRS. Nicole Duarte, *ABA Forms Group to Examine Domestic Partner Community Property Questions*, TAX NOTES, June 21, 2010, at 118, available at http://taxprof.typepad.com/files/tax-notes-today_-2010-tnt-1...-3.pdf. Patricia Cain will be leading the group, tentatively called the Community Property Comment Project. *Id.* See *infra* notes 231–256, for a discussion of subsequent developments including guidance from the IRS regarding the new rules.

¹⁷¹ See generally LAMBDA LEGAL, THE IRS APPLIES “INCOME-SPLITTING” COMMUNITY PROPERTY TREATMENT TO CALIFORNIA’S REGISTERED DOMESTIC PARTNERS: PRELIMINARY ANSWERS TO SOME FREQUENTLY ASKED QUESTIONS (FAQS) 1–9 (2010) [hereinafter 2010 LAMBDA LEGAL FAQs] (on file with author). This publication was updated in 2011 in response to new guidance from the IRS. See *infra* note 243.

of his or her separate income.¹⁷² Under California law, community income is income that couples in a community earned while living in California or another state in which community property rights apply to them, or income from property acquired using community money while living in California, even if the property is in another state.¹⁷³ Separate income, on the other hand, is income from separate property, such as property that was owned before the domestic partnership, property earned while living in a state in which community property laws do not apply to the property, and property acquired using other separate property.¹⁷⁴

B. You Can't Please All of the People: Negative Impacts of the New Rule

For some taxpayers, such as Mr. Rey, the new rules are beneficial and will lower overall tax liability.¹⁷⁵ This is especially true if the incomes of the partners are very disparate.¹⁷⁶ For some taxpayers however, the new rules may have devastating effects. For example, some RDPs have been able to use the head of household filing status in the past if one of the partners had little to no income and could therefore qualify as a dependent.¹⁷⁷

¹⁷² Unlike married couples who can file jointly, thus also combining their separate income, domestic partners cannot use the "married filing jointly" filing status. See *Merrill v. Comm'r*, 98 T.C.M. (CCH) 25, 26–27 (2009) (holding that a taxpayer in a long-term, same-sex relationship cannot file as married filing jointly with his partner unless the taxpayer is married under the laws of the taxpayer's state even though the taxpayer's state does not recognize same-sex marriage).

¹⁷³ 2010 LAMBDA LEGAL FAQS, *supra* note 171, at 2.

¹⁷⁴ *Id.*

¹⁷⁵ Meckler, *supra* note 1, A3 (noting that Mr. Rey and his partner would have saved about \$7000 on their tax bill if the new rules had been in effect in 2007).

¹⁷⁶ For example, imagine a couple who earn \$300,000 together, but Partner A has taxable community income of \$250,000 and Partner B has taxable community income of \$50,000. If each partner has to file federal taxes separately, which was the case prior to the 2010 CCA, then, using 2010 tax rates, Partner A's tax liability is \$67,617 and Partner B's tax liability is \$8681. Since the hypothetical taxpayers are really a couple despite the erroneous "single" classification that they must adhere to, they will combine their tax liability for a total tax bill of \$76,298. However, if the taxpayers in this example can "split" their community income, as the 2010 CCA allows some taxpayers to do; each taxpayer will report half of the total taxable income, or \$150,000. Then, each taxpayer will have a tax liability of \$35,709, for a total of \$71,418. This is a total savings of almost \$5000, but, more than that, allowing same-sex partners to split their income, and hence split their tax bill, is a true reflection of the way in which same-sex couples live and conduct their affairs.

¹⁷⁷ According to current tax law, an individual can file taxes as single, married filing jointly, or head of household. I.R.C. § 1 (West 2011). For RDPs who cannot file as married, the head of household filing status has been used as a way to take advantage of a larger standard deduction and lower tax rates. 2010 LAMBDA LEGAL FAQ'S, *supra* note 171, at 2. The requirements to use the filing status are that the taxpayer be unmarried, have paid more than half the cost of maintaining a home, and have provided support for at least one qualifying person. I.R.C. § 2 (b) (West 2011). Since an RDP is considered a qualifying person (but a spouse does not), domestic partners could use the filing status as

Under the new rules, however, since each partner must report half of all community income, a primary wage earner cannot claim his partner as a dependent, and thus may not be able to use the more beneficial head of household filing status.¹⁷⁸ There is no comparable disadvantage for opposite-sex married couples because they can automatically file jointly using the married filing jointly status. Similarly, if one partner previously qualified for tax credits or educational financial aid, or any other low income program, he could lose these benefits because he now must report half of his partner's income.¹⁷⁹

C. Unanswered Questions

There are many issues that the 2010 CCA does not address and this has led to confusion for RDPs as they prepare to file their 2010 taxes. For example, it is not clear exactly when the new rules will take effect. In addition, the IRS's new position raises many questions about how RDPs are to apply the new rules to their separate tax returns.¹⁸⁰

i. Timing Issues

The 2010 CCA appears to state that the new rules are optional for calendar year 2010.¹⁸¹ However, according to the Lambda Legal guide, "some IRS representatives have informally communicated that community property treatment will be *mandatory* for calendar year 2010 taxpayers."¹⁸² RDPs may amend their prior returns from 2007, 2008, and 2009 to report community income under the 2010 CCA.¹⁸³ Because of the uncertainty surrounding this issue, Lambda Legal recommends that "RDPs should consult with their tax advisors about the risks when deciding whether to follow the new IRS position or the old IRS position for their calendar year 2010 taxes."¹⁸⁴

ii. Community Property/Separate Filing

Even though the 2010 CCA purports that its revised position on the federal tax treatment of community property of RDPs is

long as one partner had little to no taxable income.

¹⁷⁸ 2010 LAMBDA LEGAL FAQs, *supra* note 171, at 2.

¹⁷⁹ I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 3, *available at* 2010 WL 2147821.

¹⁸⁰ After this article was written, the IRS offered more concrete guidance which answered some of these questions. *See infra* Postscript notes 231–56.

¹⁸¹ *Id.* at 3.

¹⁸² 2010 LAMBDA LEGAL FAQs, *supra* note 171, at 5.

¹⁸³ *Id.* "To apply the new IRS position to a prior tax period, a same-sex couple must have been RDPs when the income, gain or loss occurred." *Id.*

¹⁸⁴ *Id.* at 6.

consistent with its treatment of opposite-sex married couples,¹⁸⁵ RDPs may not file their federal taxes jointly because of DOMA, so the treatment is really not similar at all. These disparities raise many unanswered questions for RDPs about how to actually file their taxes. For example, when California RDPs incur expenses in earning community income, each RDP may deduct half of these expenses on their separate federal income tax return, but expenses incurred earning separate income are deductible only by the RDP who earns that income.¹⁸⁶ Separating an expense into these categories will be difficult, if not impossible, in some circumstances. The IRS has suggested that California RDPs should consult IRS Publication 555 for guidance on how to apply the new rules to their separate income tax returns.¹⁸⁷ But, as Lambda Legal points out, Publication 555 “is based on the federal filing status of ‘married filing separately,’ not community property law” and, thus, does not really apply to California RDPs at all.¹⁸⁸ Until the IRS provides further guidance, RDPs will be forced to consult costly tax professionals in order to make simple tax filings.

III. GEOGRAPHIC DISPARITY

Prior to the 2010 CCA, all same-sex couples were treated the same for purposes of federal taxation; they were only recognized as individual taxpayers.¹⁸⁹ Differences in state laws resulted in different state tax treatment, but there was no geographic disparity in the federal tax treatment of same-sex couples. Now, however, although there is some argument about which same-sex couples fall under the advisory, it is clear that only some same-sex couples do.¹⁹⁰ As a result, similarly situated same-sex couples are being treated in a disparate manner because of the IRS’s position with respect to California RDPs.

A. Within California

In California, in addition to RDPs, there are many same-sex married couples who were married during the brief period that such marriages were legal.¹⁹¹ Although the 2010 CCA expressly

¹⁸⁵ I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 1; 2010 LAMDA LEGAL FAQs, *supra* note 171, at 1.

¹⁸⁶ 2010 LAMDA LEGAL FAQs, *supra* note 171, at 4.

¹⁸⁷ *Id.* at 3.

¹⁸⁸ *Id.* at 5.

¹⁸⁹ *Id.* at 1.

¹⁹⁰ *Id.* at 6–7 (explaining that the new IRS position only affects a few community property states).

¹⁹¹ In May 2008, the California Supreme Court held that existing statutes that prohibit same-sex marriage in California were unconstitutional. *In re Marriage Cases*,

applies to California RDPs, the advisory is silent as to the tax treatment of same-sex married couples.¹⁹² This has led to some confusion as to whom the new rules apply within California.¹⁹³ In fact, in August 2010, the California State Assembly went so far as to pass a joint resolution calling on the IRS to issue a revenue ruling “with respect to the federal income tax treatment of registered domestic partners and same-sex married couples.”¹⁹⁴

On one hand, same-sex married couples in California enjoy the same rights and responsibilities as RDPs and opposite-sex married couples.¹⁹⁵ Thus, based on the well settled principle that “[f]ederal tax law generally respects state property law characterizations and definitions,”¹⁹⁶ the 2010 CCA should also apply to same-sex married couples in California.¹⁹⁷ However, this analysis is complicated because of DOMA, which prohibits federal recognition of same-sex marriage.¹⁹⁸ As stated above, the IRS generally defers to state property law to determine property ownership for federal tax purposes.¹⁹⁹ Arguably, however, DOMA may create an exception to this long-standing rule

183 P.3d 384, 453 (Cal. 2008). As a result, same-sex marriage was legal in California until November 5, 2008 when California voters approved a constitutional amendment banning same-sex marriage. In those six months, approximately 18,000 same-sex couples got married. See ASSEMB. COMM. ON JUDICIARY, REPORT ON S.B. 54, 2009–2010 Assemb., Reg. Sess. (Cal. 2010), http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0051-0100/sb_54_cfa_20090708_172053_asm_comm.html.

¹⁹² I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010).

¹⁹³ See 2010 LAMBDA LEGAL FAQs, *supra* note 171, at 1 (calling the effect of the IRS’s new position on same-sex married couples in California who are not California RDPs “unclear”); Ian Lovett, *Tax Law Confusing to Same-Sex Couples*, PARK LA BREA NEWS BEVERLY PRESS, Nov. 18, 2010, at 1, available at <http://parklabreanewsbeverlypress.com/news/2010/11/tax-law-confusing-to-same-sex-couples> (“While taxes are complicated for just about everyone, same-sex couples in California must tackle something of a moving target, as both the state and federal governments continue to adjust if and how their relationships are recognized.”).

¹⁹⁴ Assemb. J. Res. 29, 2009–2010 Assemb., Reg. Sess. (Cal. 2010). In committee, the bill was described as an effort to force the IRS to “solidify their position” and “provide clarity and give all taxpayers a documented decision on which to rely.” S. COMM. ON REVENUE & TAXATION, BILL ANALYSIS ON ASSEMB. J. RES. 29, 2009–2010 Assemb., Reg. Sess. (Cal. 2010), at 4.

¹⁹⁵ See S. B. 54, 2009–2010 S., Reg. Sess. (Cal. 2010) (clarifying that all same-sex couples validly married before November 5, 2008 are entitled to recognition as spouses, and that all same-sex couples who marry outside of California after November 5 are entitled to all of the rights, benefits, and responsibilities of marriage in California with the exception of the name marriage).

¹⁹⁶ I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2 (citing *United States v. Mitchell*, 403 U.S. 101 (1930)).

¹⁹⁷ See 2010 LAMBDA LEGAL FAQs, *supra* note 171, at 6 (“Despite the uncertainty that will remain until the IRS confirms in writing the duties of California’s married same-sex taxpayers, it appears the better grounded answer is that the IRS should and will defer to California’s community property laws when they apply to same-sex married couples.”).

¹⁹⁸ Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C.A. § 7 (West 2010)).

¹⁹⁹ I.R.S. Gen. Couns. Mem. 201021050 (May 28, 2010), at 2.

resulting in the federal government being unable to recognize these state property law classifications when they arise as a result of same-sex marriage.²⁰⁰ It does not seem far-fetched that DOMA would create such an exception since DOMA itself is such a departure from long-standing doctrine that state law controls in the area of marriage. In addition, the fact that the IRS is willing to defer to state law property determinations with respect to *domestic partners* does not seem to have much bearing on whether it would extend the same treatment to *same-sex married couples*. Moreover, the 2010 CCA's glaring omission of any mention of same-sex married couples is telling. An argument can be made that if the IRS had wanted to extend the rule of *Poe v. Seaborn* to same-sex married couples, it would have done so when it issued the CCA. Finally, although the IRS seems to want to gloss over its reasoning in the 2006 CCA, the fact remains that it was unwilling to grant recognition to the state-defined property interests of RDPs, in spite of the long standing practice of deferring to state law, simply because RDPs were not married.

Adding to the confusion, and illustrating the utter absurdity of the application of tax laws to same-sex couples in the face of DOMA, *if* the IRS will not allow same-sex married couples to split their income, then same-sex married couples who are also RDPs (or who later register as RDPs) will be allowed to split their income but same-sex married couples who are not also RDPs will not be able to split their income. This will essentially create three different classes of same-sex couples in California for federal tax purposes. Unfortunately, until the IRS clarifies its position, it is unknown whether RDPs and same-sex married couples face equal community property tax treatment under the 2010 CCA, but this uncertainty alone should be almost as unsatisfactory as an outright denial of equal treatment by the IRS.

B. Other Community Property States

California is only one of nine community property states, and there is a possibility that, based on the IRS's reasoning in the 2010 CCA, domestic partners in other states may be able to split

²⁰⁰ See Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 190 (1998) ("Numerous members of Congress returned again and again to the cost of providing federal benefits to same-sex partners. The effect of DOMA on the marital provisions of the tax code was not an unintended consequence."); *but see* 2010 LAMBDA LEGAL FAQs, *supra* note 171, at 6 (dismissing the possibility that DOMA creates such an exception because the 2010 CCA demonstrates that the IRS intends to follow the rule that state law determines property ownership).

their income.²⁰¹ It was determinative to the IRS's change of position from 2006 to 2010 that California repealed its laws that treated the community property of RDPs differently than the community property of opposite-sex married couples for state income tax purposes.²⁰² This seems to suggest that if there is any difference in the way that domestic partners and opposite-sex married couples are treated by the state with respect to community property, regardless of whether that difference really affects the *ownership* of the property, the IRS will not extend equal treatment to domestic partners. Out of the other eight community property states, only two, Washington²⁰³ and Nevada,²⁰⁴ have similar domestic partnership laws to California. In both states, domestic partners are granted the same community property rights under state law as opposite-sex married couples, and it appears that the 2010 CCA will apply to domestic partners in those states.

Two other community property states, Alaska and Wisconsin, have much weaker domestic partnership laws. Wisconsin has enacted a limited domestic partnership law,²⁰⁵ but it specifically states that "the legal status of domestic partnership . . . is not substantially similar to that of marriage."²⁰⁶ Moreover, the Wisconsin Department of Revenue has put a statement on its website stating that "[d]ue to a difference between California and Wisconsin law related to domestic partners . . . [Wisconsin] domestic partners do not report one-half of marital income for . . . federal income tax purposes."²⁰⁷ Alaska offers very limited domestic partnership

²⁰¹ See 2010 LAMBDA LEGAL FAQs, *supra* note 171, at 6–7 (concluding that the IRS should treat RDPs in states other than California the same as California RDPs if the state formally recognizes same-sex domestic partners in some form *and* the state extends the *exact* same community property rights to same-sex domestic partners in the same manner that they extend to opposite-sex married couples under state law).

²⁰² See *supra* notes 165–67 and accompanying text. Even though neither Nevada nor Washington imposes a state income tax, see 2010 LAMBDA LEGAL FAQs, *supra* note 171, at 7 n.15, this should not affect the analysis. The IRS allows spouses in these states to split their income even in the absence of a state income tax. *Id.* at 7. In addition, a key factor seems to be whether the state treats domestic partners differently than opposite-sex married couples for state income tax purposes. *Id.* If there is no state income tax, then there is no difference in treatment. *Id.*

²⁰³ WASH. REV. CODE ANN. § 26.16.030 (West 2011) ("Property . . . acquired after marriage or after registration of a state registered domestic partnership by either domestic partner or either husband or wife or both, is community property.").

²⁰⁴ NEV. REV. STAT. ANN. § 122A.200 (LexisNexis 2010) ("Domestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses.").

²⁰⁵ WIS. STAT. ANN. § 770.001 (West 2010).

²⁰⁶ *Id.*

²⁰⁷ *Effect of Recent IRS Ruling on Wisconsin Domestic Partnerships*, WIS. DEP'T OF

benefits to state employees, but not to same-sex couples as a whole.²⁰⁸ It is therefore unlikely that the 2010 CCA would apply to Alaska or Wisconsin domestic partners.²⁰⁹

Finally, four community property states, Arizona, Idaho, Louisiana, and New Mexico, do not have any formal system of recognition for same-sex couples.²¹⁰

C. Non-Community Property States

Although the 2010 CCA has no extrinsic application to same-sex couples in non-community property states, the underlying implications of the rulings to all same-sex couples should not be overlooked. The interplay between same-sex couples in states where income splitting is now permissible and states in which it is not, can serve to highlight irrational disparities that arise as a result of our current tax system. This geographic disparity could be the catalyst needed to achieve nationwide tax equality for same-sex couples much as similar disparity spurred the eventual creation of the “married filing jointly” filing status in 1948.²¹¹

IV. VALUE OF THE ADVISORY

The 2010 CCA is the first time that the IRS has been willing to recognize same-sex couples for federal income tax purposes. This is especially significant in light of the federal government’s official position regarding the acknowledgement of same-sex couples (or lack thereof) as stated in DOMA. In fact, by viewing the 2010 CCA as an instrument for achieving federal recognition *in spite* of DOMA, equality advocates can use the advisory, and the reactions that it creates, to craft state and federal legislation that puts same-sex relationships on equal tax footing with opposite-sex married couples for federal income tax purposes.

A. Significance of Federal Recognition of Same-Sex Relationships

The IRS’s unwillingness to formally recognize same-sex relationships has long been a source of frustration among tax

REVENUE (last updated June 9, 2010), <http://www.revenue.wi.gov/taxpro/news/100609.html>.

²⁰⁸ Alaska Civil Liberties Union v. State, 122 P.3d 781, 794 (Alaska 2005) (concluding, under a minimum scrutiny analysis, that programs which offered valuable benefits to public employees’ spouses but not to domestic partners violated the Alaska state constitution).

²⁰⁹ See 2010 LAMBDA LEGAL FAQs, *supra* note 171, at 7 (“[S]ame-sex couples in states other than California, Nevada, or Washington appear to be unaffected by the new IRS position . . .”).

²¹⁰ *Id.* at 6 n.13.

²¹¹ See *supra* notes 57–59 and accompanying text.

scholars.²¹² The passage of DOMA, prohibiting same-sex couples from ever being able to file taxes jointly, was a sharp blow, but most of the ire from the gay community comes from the fact that gay couples are forced to file their federal taxes in a way that does not recognize the realities of their relationships.²¹³ In fact, much of the scholarship regarding tax equality for same-sex couples focuses not on the unconstitutionality of DOMA, but on methods of getting the IRS to federally recognize same-sex couples *in spite* of DOMA.²¹⁴ The willingness of the IRS to recognize *some* same-sex couples is a critical element to achieving tax equality for *all* same-sex couples, just as federal recognition for *some* married couples²¹⁵ was the impetus that eventually led to nationwide joint filing (and thus, federal recognition) for *all* married couples.²¹⁶ This is the true value of the IRS's new position. It is the first foot in the federal door without which all of the domestic partnership laws or same-sex marriage bills are completely useless except in the definition of state-created rights. Until the federal government officially recognizes those state-created rights, federal equality is not possible. Now that the IRS

²¹² See Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 781 (2004) ("The federal government . . . had thus quietly banished gay and lesbian couples to the closet by failing to acknowledge the existence of their relationships."); Cain, *Taxing Families Fairly*, *supra* note 57, at 848 ("The current administration appears committed to remaining silent about the tax treatment of same-sex couples, perhaps out of fear that any pronouncement might seem to support such relationships.").

²¹³ See, e.g., Knauer, *supra* note 200, at 134 ("[S]ame-sex partners always act as strangers under the tax code regardless of the economic or contractual realities of their relationship."); Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471, 472 (1997) [hereinafter Cain, *Taxing Lesbians*] ("[W]hen [lesbian couples] file income tax returns, they are required to fill out forms that force them into separate spheres from each other as though their lives were lived separately."); Infanti, *supra* note 212, at 789 ("Although Congress took the time to debate and decide that gay and lesbian couples should never be treated as married for federal tax purposes, it did not spend any time spelling out how to treat couples who do not qualify for the marital provisions in the Code.").

²¹⁴ See, e.g., Anthony Rickey, *Loving Couples, Split Interests: Tax Planning in the Fight to Recognize Same-Sex Marriage*, 23 BERKELEY J. GENDER L. & JUST. 145, 150, 170 (2008) (advocating for the use of obsolete split-interest tax shelters as a means of achieving federal recognition of same-sex marriages by "challeng[ing] the federal government and the public at large to accept the costs inherent in a policy of ignoring committed relationships between same-sex couples"); Matthew Fry, Comment, *One Small Step for Federal Taxation, One Giant Leap for Same-Sex Equality: Revising § 2702 of the Internal Revenue Code to Apply Equally to All Marriages*, 81 TEMP. L. REV. 545, 569–70 (2008) (concluding that even when some same-sex couples would be disadvantaged by a revision to the tax code that gave them a "hint of federal recognition," the benefits outweigh the burdens because it is "one small step in the direction of equality").

²¹⁵ In 1921 when the federal government began allowing some spouses to combine and split their income for federal income tax purposes, it was essentially recognizing some spouses for federal income tax purposes, but refusing to recognize others, all because of how state law classified their relationships. See discussion *supra* Parts I(A)(1), I(A)(2).

²¹⁶ See *supra* Part I(A)(4).

has recognized California RDPs, the fight for federal tax equality can begin.

B. A Way Forward to Greater Federal Acknowledgment

The 2010 CCA is a guidebook that lays out explicitly what it will take for the IRS to formally recognize domestic partners in community property states in order to apply the rule of *Poe v. Seaborn*. In community property states where the ruling is likely to apply, specifically California, Nevada, and Washington, the emphasis should be on forcing the IRS to clarify and codify its position.²¹⁷ The IRS must be made to unequivocally announce to whom the new rules apply. In community property states where there are weak domestic partnership laws, such as Alaska and Wisconsin, the focus should be on strengthening the current domestic partner laws to mirror those of California.²¹⁸ Finally, in those community property states with no domestic partnership laws, equality advocates must push for the creation of domestic partnership registries.²¹⁹

As the efforts of taxpayers in community property states begin to pay off and the IRS allows income splitting in more community property states, this will lead to arbitrary and irrational geographic disparity among same-sex couples throughout the country. For example, same-sex domestic partners in community property states could actually be more equal for federal income tax purposes to opposite-sex married couples in Massachusetts, where gay marriage is legal, than same-sex married couples in Massachusetts. To put that a different way, in Massachusetts, two different couples, similarly situated except one couple is heterosexual and one couple is homosexual, can go to City Hall and get married, on the same day, even at the same time, but still be treated so differently for federal tax purposes that a non-married, California RDP is

²¹⁷ This movement is already underway in California. See Assemb. J. Res. 29, 2009–2010 Assemb., Reg. Sess. (Cal. 2010). Although the advisory memorandum applies specifically to California RDPs, the IRS is being called upon to issue a more binding revenue ruling. See *supra* note 2 (explaining why an IRS revenue ruling is preferable to an internal advisory memorandum).

²¹⁸ See 2010 LAMBDA LEGAL FAQs, *supra* note 171, at 6–7 (“When a state applies its community property laws to same-sex couples in a manner similar to California’s treatment of RDPs, it is reasonable to anticipate that the IRS will, or at least should, treat these taxpayers as it now will treat California RDPs.”); see also *supra* notes 155–63 and accompanying text (discussing the final domestic partnership amendment); see also *supra* notes 201–02 and accompanying text.

²¹⁹ This is, of course, easier said than done, since such efforts are usually met with substantial resistance from certain special interest groups. However, unlike the trial-and-error approach that California, as a pioneer in domestic partnership law, had to take, current equality advocates in other states can take a short-cut by studying what worked and what did not in California. See *supra* Part I(B).

actually more equal to the heterosexual married couple than to the homosexual married couple.

There is a valid argument to be made that it is really DOMA that causes these irrational results, and that is certainly true. However, there are three good reasons why a solution to the problems of tax inequity should not focus on DOMA. First, and most obviously, DOMA is the law,²²⁰ and so pragmatically, a solution to any problem that presupposes a world without DOMA is merely wishful thinking. Second, over forty states have passed so-called “mini-DOMAs” which ban same-sex marriage on a statewide basis,²²¹ so even in a DOMA-free world, most same-sex couples would still be restricted by any policies that discriminate against same-sex married couples, as opposed to domestic partners. Finally, unlike the irrationality that results from DOMA, the disparate tax effects that will arise as the federal government allows some, but not all, same-sex couples to split their income, will not be felt uniformly by all gay couples. This is the key to using the ruling as a tool to highlight the incredible inequities that exist in the current tax system. Although a taxpayer in California and a taxpayer in New York can complain about the irrational effects of DOMA, the fact remains that they are both being treated the same under DOMA (albeit poorly). However, when a taxpayer in New York can complain that a similarly situated taxpayer in California is being given special treatment, more Americans will be willing to take heed. Just as in the 1920s and 1930s when the entire discussion was framed around the inequity and inherent unfairness resulting from the federal taxation scheme,²²² by turning the discussion into one about states’ rights and fundamental fairness, equality advocates today can elicit bipartisan support for a nationwide solution.²²³

²²⁰ There have been recent developments in several federal cases challenging the constitutionality of DOMA. *See, e.g., Gill v. Office Pers. Mgmt.*, 699 F. Supp. 2d 374, 376 (D. Mass. 2010). On July 8, 2010, a federal district court in Massachusetts ruled that section three of DOMA violated the Constitution. *Id.* at 397 (“As irrational prejudice plainly *never* constitutes a legitimate government interest, this court must hold that Section 3 of DOMA . . . violates the equal protection principles embodied in the Fifth Amendment to the United States Constitution.”). The Justice Department has appealed this decision to the United States Court of Appeals for the First Circuit. *Gill v. Office Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), *appeal docketed*, No. 10-2204 (1st Cir. Sept. 22, 2011).

²²¹ *See* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2165 (2005) (compiling a detailed listing of all of the state laws that ban same-sex marriage).

²²² *See* McMahon, *supra* note 16, at 590 (showing that in response to perceived tax inequities after the *Poe v. Seaborn* decision a “relatively small interest group captured [national tax] policy formation by casting the issue as tax discrimination against residents of common law states”).

²²³ In California, for example, the joint resolution passed by the State Assembly requesting that the IRS issue further guidance on whether the 2010 CCA applied to same-

CONCLUSION

In 1927, Mr. and Mrs. Seaborn made history when they attempted to split their income so they could save money on their tax bill, even though such tax filing had been specifically prohibited by the Treasury Department.²²⁴ Their persistence eventually led to the enactment of the “married filing jointly” filing status in 1948.²²⁵ In 1979, Tom Brougham and his partner refused to take “no” for an answer when they were denied health care benefits because they were not married.²²⁶ Their tenacity eventually resulted in California enacting the most thorough domestic partnership legislation in the country.²²⁷ And, in 2006, Mr. Eric Rey and his RDP would not back down when the federal government denied them the ability to split their income.²²⁸ Their doggedness has already led to the federal recognition of California RDPs and may be the impetus for a nationwide solution to the problems of tax inequities for same-sex couples.²²⁹ In all of these instances, American taxpayers recognized an inherent unfairness in the tax system and set about to change it. However, for same-sex couples, the fight is far from over because there is still much inequity left in the tax system. By learning from the fighters of the past, the fighters of today, and of the future, we can make the American tax system fair for all taxpayers, regardless of their sexual orientation. It is just a matter of fairness.

POSTSCRIPT

As the 2010 tax filing deadline approached, the call for guidance from the IRS on how to implement the new rules became even more pronounced.²³⁰ But, as the IRS started

sex married couples was passed unanimously with wide bipartisan support. Karen Ocamb, *California Legislature Passes Resolution Calling on the IRS to Implement Tax Equality*, LGBT POV (Aug. 9, 2010, 4:32 PM), <http://lgbtpov.com/2010/08/california-legislature-passes-resolution-calling-on-the-irs-to-implement-tax-equality>. In fact, the resolution was co-authored by Assemblyman Charles DeVore, the Tea Party candidate in the GOP Senate primary, who is normally opposed to gay marriage. *Id.* He supported the tax equity measure because it concerned the rights of the states to define their own tax policies. *Id.* Similarly, in the aftermath of *Poe v. Seaborn*, “federal tax law drove states to consider, and a number to adopt, a marital property regime that would otherwise have held little interest for them.” McMahon, *supra* note 16, at 589.

²²⁴ See *supra* notes 48–49 and accompanying text.

²²⁵ See *supra* notes 58–59 and accompanying text.

²²⁶ See *supra* notes 61–66 and accompanying text.

²²⁷ See *supra* notes 129–31 and accompanying text.

²²⁸ See *supra* notes 1–8 and accompanying text.

²²⁹ See *supra* notes 60–61 and accompanying text.

²³⁰ See, e.g., Scott James, *For Same-Sex Couples, A Tax Victory That Doesn't Feel Like One*, N.Y. TIMES, Jan. 14, 2011, at 21A [hereinafter James, *Same-Sex Couples*] (calling the confusion surrounding the 2010 CCA “a headache for tens of thousands of gay and lesbian families in California”); Francine J. Lipman & Rebecca J. Kipper, *Just a Matter of*

publishing the 2010 taxpayer guides and forms, the guidance to same-sex couples was “inconsistent and incomplete.”²³¹ Many tax professionals had assumed that the new rules would be optional for 2010 and were “stunned” when the online version of the 2010 1040 tax form stated that income-splitting for domestic partners would be mandatory.²³² In December 2010, the IRS stated in its annual tax guide, Publication 17, that RDPs in Nevada and Washington, as well as same-sex married couples in California, were definitely covered by the new rules,²³³ but this only added to the confusion because the language implied that these taxpayers could *choose* whether to report their community income.²³⁴ The tax guide also directed RDPs to seek further guidance in IRS Publication 555, Community Property; however, the publicly available version of that publication had not yet been revised to reflect the new rules for same-sex couples.²³⁵

Fairness: Tax Consequences of the Revised Community Property Treatment of California Registered Domestic Partners, A.B.A. SEC. TAX’N NEWS Q., Winter 2011, at 16, 18 (“Until the Service issues guidance on the community property income of California same-sex married couples as well as Washington and Nevada RDPs, it is unclear whether, when and to what extent community property income splitting applies to them.”). On December 31, 2010, the National Taxpayer Advocate released the 2010 Annual Report to Congress outlining areas where tax reform and IRS guidance are needed. NINA E. OLSON, TAXPAYER ADVOCATE SERV., NATIONAL TAXPAYER ADVOCATE 2010 ANNUAL REPORT TO CONGRESS 1 (2010), *available at* <http://www.irs.gov/pub/irs-pdf/p2104.pdf>. Identifying unanswered questions and uncertainty regarding the federal taxation of same-sex couples in America as one of the most serious problems faced by taxpayers, *id.* at 211–18, the report noted that “[t]he IRS has not provided answers to these questions, requiring many taxpayers to file returns without knowing which rules apply and potentially subjecting them to audits and penalties, as well as costs for tax advice.” *Id.* at 211.

²³¹ See Kathleen Pender, *Same-Sex Couples Facing Tax Woes*, S.F. CHRON., Feb. 13, 2011, at D1 [hereinafter Pender, *Tax Woes*].

²³² Pender, *Tax Woes*, *supra* note 231.

²³³ INTERNAL REVENUE SERV., U.S. DEP’T OF TREAS., PUB. NO. 17, YOUR FEDERAL INCOME TAX 5 (2010), *available at* 2010 WL 5017303 [hereinafter YOUR FEDERAL INCOME TAX].

²³⁴ *Id.* at 5 (“A registered domestic partner in California, Nevada, or Washington generally *can choose* to report half the combined community income earned by the individual and his or her domestic partner.”) (emphasis added); *see also* Patricia Cain, *RDPs and Community Income—Not Really a Choice*, SAME SEX TAX L. BLOG (Dec. 20, 2010, 2:51 PM), <http://law.scu.edu/blog/samesextax/rdps-and-community-income-not-really-a-choice.cfm> (discussing the confusion caused by the language of Publication 17). The guide has since been updated and now reads that “[a]registered domestic partner in California, Nevada, or Washington must report half the combined community income earned by the individual and his or her domestic partner.” INTERNAL REVENUE SERV., U.S. DEP’T OF TREAS., PUB. NO. 17, YOUR FEDERAL INCOME TAX FOR INDIVIDUALS 5 (2010), *available at* <http://www.irs.gov/pub/irs-pdf/p17.pdf>.

²³⁵ See Patricia Cain, *Splitting Community Income—Yes You Can!*, SAME SEX TAX L. BLOG (Dec. 12, 2010, 1:58 PM), <http://law.scu.edu/blog/samesextax/splitting-community-income-yes-you-can.cfm> (“Publication 555 . . . still includes a paragraph that was added in 2007 after the 2006 CCA was issued and it says, in direct conflict with Publication 17, that California RDPs cannot split community earned income.”); Pender, *Tax Woes*, *supra* note 231, at D1 (“The IRS says it is updating Publication 555 and will post it to www.irs.gov when complete.”).

Faced with a looming filing deadline and continued uncertainty, tax professionals in community property states decided to take matters into their own hands.²³⁶ In January 2011, a group of tax practitioners from California, including Patricia Cain, organized an informal meeting with the IRS regarding problems they were facing in implementing the new rules.²³⁷ The practitioners were able to find out exactly what the IRS wanted mailed in with each return,²³⁸ how long the IRS expected it would take to update computer systems to allow same-sex couples to e-file,²³⁹ and whether there would be any special rules for assessing penalties and interest for late or amended returns.²⁴⁰ After the meeting, while still acknowledging that “[t]here are substantive and procedural questions that have yet to be clearly answered on how exactly to file these returns,”

²³⁶ Patricia Cain, along with concerned tax professionals, were instrumental in calling attention to the problems faced by gay taxpayers attempting to file their 2010 taxes. See Scott James, *Should Gays Be Taxed the Same as Straights?*, BAY CITIZEN (June 11, 2011, 1:20 PM), <http://www.baycitizen.org/blogs/newsroom/should-gays-be-taxed-same-straight/> [hereinafter James, *Should Gays Be Taxed*] (“If Dr. Cain is the general in this fight, she has a battalion of accountants, lawyers and tax experts joining her in battle.”).

²³⁷ See generally *Discussion on 2010 Filing of RDP Community Property Returns*, SAME SEX TAX L. BLOG (Jan. 18, 2011), <http://law.scu.edu/blog/samesextax/file/Notes%20on%20IRS%20%20Practitioner%20Discussion%20about%20processing%20community%20RDP%20returns.pdf> [hereinafter *Discussion*].

²³⁸ *Id.* An IRS representative from the paper processing department explained that same-sex couples should: (1) include both partner’s W2s on each 1040, (2) not include a copy of the CCA with the return, (3) complete the worksheet from Publication 555 and staple it to both 1040s, (4) write on the top of each 1040 that the return was prepared in accordance with CCA 201021050, and (5) only include one return per envelope. *Id.*

²³⁹ *Id.*; Patricia Cain, *IRS National Office Personnel Provide Critical Advice for Community Property Same-Sex Couple Returns*, SAME SEX TAX L. BLOG (Jan. 21, 2011, 5:47 PM), <http://law.scu.edu/blog/samesextax/irs-national-office-personnel-provide-critical-advice-for-community-property-same-sex-couple-returns.cfm> (“[T]he important news is that you can e-file. Not quite yet, though. But maybe by mid-February, once IRS Release #4 has been absorbed by the tax software folks.”). In March, just one month before the tax-filing deadline, Turbo Tax announced that it would not be able to fully support same-sex couples who were required to split their income under the new rules. See Patricia Cain, *Announcement From Turbo Tax For Community Income Couples*, SAME SEX TAX L. BLOG (Mar. 12, 2011, 11:19 AM), <http://law.scu.edu/blog/samesextax/announcement-from-turbo-tax-for-community-income-couples.cfm>; Kathleen Pender, *TurboTax Delays New Software For Same-Sex Couples*, S.F. CHRON., Mar. 15, 2011, at D1 [hereinafter Pender, *TurboTax*].

²⁴⁰ *Discussion*, *supra* note 237, at 3. The IRS stated that they were developing procedures for restricting penalties in some cases, however interest is statutory and cannot be alleviated. *Id.* This issue mainly affects California couples because they are allowed to file amended returns for 2007, 2008, and 2009. However, if one partner previously reported little or no income in prior years and then files an amended return claiming half of the community income, the apparent under-reporting can trigger penalties. See Patricia Cain, *The Senate Eight*, SAME SEX TAX L. BLOG (June 22, 2011, 1:10 PM), <http://law.scu.edu/blog/samesextax/the-senate-eight.cfm> [hereinafter Cain, *The Senate Eight*]. In April 2011, the IRS added a section to its penalties and interest rules specifically addressing California RDPs and allowing for penalties to be waived in these cases. I.R.M. 20.1.2.2.6.1 (Apr 19, 2011).

Cain wrote that, “we are now on a very important step forward in resolving many of the unanswered questions.”²⁴¹ Armed with this new guidance, tax practitioners in community property states set out to educate same-sex couples about the new rules for filing their taxes.²⁴²

On February 24, 2011, the IRS released the revised version of Publication 555, which included some guidance to same-sex couples regarding the effect of the 2010 CCA.²⁴³ According to the revised guide, the income-splitting rules applied to RDPs in California, Nevada, and Washington as well as same-sex married couples in California.²⁴⁴ Further, the guide made it clear that the rules were not optional for 2010.²⁴⁵ In addition, the guide offered tips for same-sex couples on how to physically file their returns under the new rules.²⁴⁶

Even with the new guidance, however, same-sex couples throughout California, Nevada, and Washington were finding it difficult to accurately file their taxes under the new rules.²⁴⁷ Many taxpayers had to “ditch their old tax preparers or software and hire accountants who specialize in same-sex taxes.”²⁴⁸ Taxpayers were forced to apply for extensions because the

²⁴¹ Patricia Cain, *IRS National Office Personnel Provide Critical Advice for Community Property Same-Sex Couple Returns*, SAME SEX TAX L. BLOG (Jan. 21, 2011, 5:47 PM), <http://law.scu.edu/blog/samesextax/irs-national-office-personnel-provide-critical-advice-for-community-property-same-sex-couple-returns.cfm>.

²⁴² See James, *Should Gays Be Taxed*, *supra* note 236 (discussing tax lawyer Deb Kinney and her peers who “[b]etween personal appearances and online seminars . . . reached about 6000 gay taxpayers and their accountants to instruct them about the recent IRS change”).

²⁴³ INTERNAL REVENUE SERV., U.S. DEPT OF TREAS., PUB. NO. 555, COMMUNITY PROPERTY 1, 2, 9 (2010), available at <http://www.irs.gov/pub/irs-pdf/p555.pdf> [hereinafter COMMUNITY PROPERTY]. As a result of this official guidance from the IRS, Lambda Legal revised its FAQs. LAMBDA LEGAL, THE IRS APPLIES “INCOME-SPLITTING” TO CALIFORNIA’S REGISTERED DOMESTIC PARTNERS AND SAME-SEX SPOUSES: PRELIMINARY ANSWERS TO SOME FREQUENTLY ASKED QUESTIONS (FAQS) 1–9 (2011), available at http://data.lambdalegal.org/publications/downloads/fs_the-irs-applies-income-splitting-community-property.pdf; see also *supra* notes 171, 177–97 and accompanying text.

²⁴⁴ COMMUNITY PROPERTY, *supra* note 243, at 2.

²⁴⁵ *Id.* (“These rules apply to RDPs in Nevada, Washington, and California in 2010 because they have full community property rights in 2010.”).

²⁴⁶ *Id.* at 9–10.

²⁴⁷ See James, *Same-Sex Couples*, *supra* note 230, at 21A (discussing the problems that same-sex filers encountered while trying to file their 2010 federal income taxes). Ironically, Mr. Rey, the taxpayer at the center of the 2010 CCA, “faced a barrage of bureaucracy” when he tried to file his taxes under the new rules that he helped precipitate. *Id.*

²⁴⁸ Pender, *Tax Woes*, *supra* note 231, at D1; see also Scott James, *From I.R.S. To Gay Couples, Headaches and Expenses*, N.Y. TIMES, June 11, 2011, at 35A [hereinafter James, *Headaches and Expenses*] (“Interviews with more than a dozen Bay Area tax preparers and same-sex couples have revealed that the new rule has proved to be cumbersome and expensive. It is too complex for do-it-yourself tax filing computer software, and many couples were forced to hire tax professionals.”); *supra* note 239.

implementation guidance was issued so late.²⁴⁹ About 300 same-sex taxpayers in California “had their returns rejected with terse letters signed by an enigmatic I.R.S. employee named J. Bell from Fresno.”²⁵⁰ In addition, many taxpayers who did manage to file on time faced penalties for under-reporting their income.²⁵¹ Further, there remained serious questions regarding “who should pay self employment taxes and be given social security credits for the community earnings of a self-employed partner.”²⁵² In response to these problems, a group of eight Senators, including California Senators Barbara Boxer and Dianne Feinstein, wrote a letter to the Commissioner of the IRS explaining the hurdles their gay constituents were facing and asking the IRS to provide more guidance.²⁵³

²⁴⁹ Pender, *TurboTax*, *supra* note 239, at D1 (quoting Patricia Cain as saying “I’ve had some people e-mail me who are angry at TurboTax because they have been waiting (for guidance). Professionals are charging more now. Many of them are already booked and will only take clients on extension”).

²⁵⁰ See James, *Headaches and Expenses*, *supra* note 248, at 35A. In a public apology, the IRS later blamed a processing error for these letters and stated that it “sincerely regrets any inconvenience to taxpayers.” *Id.*

²⁵¹ See James, *Same-Sex Couples*, *supra* note 230, at 21A. Mr. Rey’s partner was assessed \$20,000 in penalties and interest when he filed amended tax returns per the new rules. *Id.* The IRS issued revised guidance for abating penalties for same-sex couples affected by the new rules, *see supra* note 240, however, in many cases, receiving the abatement requires additional, costly correspondence with the IRS. See Cain, *The Senate Eight*, *supra* note 240.

²⁵² See Cain, *The Senate Eight*, *supra* note 240. In March 2011, a group of tax professionals, including Patricia Cain and Donald Read, sent a letter to the IRS urging them to revise Publication 555 to correct “a misstatement of the law . . . relating to self-employment tax for certain . . . same-sex couples.” See Memorandum from Donald H. Read, Patricia A. Cain, Pan Haskins, and Karen K. Stogdill to William J. Wilkins, Chief Counsel, Internal Revenue Serv., and Richard E. Byrd, Jr., Commissioner, Wage and Investment Division, Internal Revenue Serv. (Mar. 2, 2011), *reprinted in* Document No. 2011-5066, Tax Analysts, Inc.

²⁵³ See News Release, U.S. Senator Patty Murray, Senators Murray, Cantwell Urge IRS to Fix Tax-Filing Problems Faced by Same-Sex Couples (June 21, 2011), http://murray.senate.gov/public/index.cfm?p=NewsReleases&ContentRecord_id=5623d453-b792-4c83-a9cc-2eaa8b6f3932. The letter noted that:

[i]t is . . . imperative that the IRS address the specific problems encountered by couples in California, Washington, and Nevada, where state community property laws apply. In each of these States, same-sex couples who are married or in registered domestic partnerships must pool and then divide their incomes to calculate their tax liability. The federal tax system, however, currently has no means of linking an individual’s tax return to that of his or her spouse or domestic partner. As a result, underpayment penalties may be wrongly assessed or the system may incorrectly register that overpayments have been made. Similarly, when one person is self-employed, social security credits and tax liabilities may be wrongly attributed to the taxpayer who is not self-employed. These administrative difficulties threaten to add additional, unacceptable burdens to couples that already went to great lengths to file accurate returns.

Id.

In September 2011, the IRS issued three information letters in response to inquiries from gay taxpayers who were struggling to apply the new rules.²⁵⁴ In a sign that the message was getting through, two of the letters noted that the IRS was “aware that the extension of community property laws to same-sex couples in California has caused some taxpayers to incur increased tax return preparation fees and has raised some additional legal and compliance issues.”²⁵⁵ Also in September 2011, the IRS issued an extensive Q&A document designed to supplement Publication 555 and answer many of the questions taxpayers and tax practitioners still had about the new rules.²⁵⁶

There are still unanswered questions and uncertainty surrounding the implementation of the 2010 CCA.²⁵⁷ Some of these issues arise as a direct result of DOMA rather than because of how the IRS is implementing the new rules.²⁵⁸ However, some tax practitioners who have been struggling to apply the new rules are becoming frustrated because they believe that there are many smaller, sub-regulatory changes that the IRS could make *now* that would improve processing for same-sex couples.²⁵⁹ For example, there are many places in the code where the word “spouse” is merely descriptive rather than normative, such as where the reason for the designation is not based on

²⁵⁴ I.R.S. Info. Ltr. 2011-066 (July 27, 2011), *available at* <http://www.irs.gov/pub/irs-wd/11-0066.pdf>; I.R.S. Info. Ltr. 2011-0068 (July 27, 2011), *available at* <http://www.irs.gov/pub/irs-wd/11-0068.pdf>; I.R.S. Info. Ltr. 2011-63 (June 22, 2011), *available at* <http://www.irs.gov/pub/irs-wd/11-0063.pdf>.

²⁵⁵ I.R.S. Info. Ltr. 2011-066 (July 27, 2011), *available at* <http://www.irs.gov/pub/irs-wd/11-0066.pdf>; I.R.S. Info. Ltr. 2011-0068 (July 27, 2011), *available at* <http://www.irs.gov/pub/irs-wd/11-0068.pdf>.

²⁵⁶ *Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California*, IRS.GOV, <http://www.irs.gov/newsroom/article/0,,id=245869,00.html> (last updated Sept. 16, 2011).

²⁵⁷ See, e.g., Patricia A. Cain, *Planning For Same-Sex Couples in 2011* (Santa Clara Univ. Sch. of Law, Accepted Paper No. 14-11, 2011), *available at* <http://ssrn.com/abstract=1860217>.

²⁵⁸ See Amy S. Elliott, *IRS's Definition of Marriage-Where It Stands Now*, Document No. 2011-4459, Tax Analysts, Inc., *available at* <http://law.scu.edu/blog/samesextax/file/Amy%20Elliott%20story%20on%20DOMA.pdf> (analyzing the various tax issues affected by DOMA); Patricia Cain, *My Birthday Present*, SAME SEX TAX L. BLOG (June 11, 2011, 5:53 PM), <http://law.scu.edu/blog/samesextax/my-birthday-present.cfm> (“The IRS wants to do the right thing. It wants to tax each citizen on the right amount of income under existing law. That is its job. However, the IRS is seriously hampered from promulgating rules that apply to same-sex couples by . . . DOMA.”).

²⁵⁹ See Patricia Cain, *IRS Guidance on Tax Reporting for Community Property RDPs*, SAME SEX TAX L. BLOG (Sept. 19, 2011, 10:08 AM), <http://law.scu.edu/blog/samesextax/irs-guidance-on-tax-reporting-for-community-property-rdps.cfm> (disagreeing with the IRS's position regarding self-employment tax reporting for same-sex couples and concluding that “[i]f the IRS persists in its current position . . . then the only way to resolve this is through litigation”). Deb Kinney believes that on some issues, the IRS is “hiding behind DOMA” in its refusal to help same-sex taxpayers. Telephone Interview with Deb Kinney, DLK Law Group (Nov. 9, 2011) [hereinafter Kinney Interview].

spousal privilege or a marriage deduction.²⁶⁰ According to some tax experts, the IRS does not have to construe these sections as only applying to opposite-sex married couples.²⁶¹ In addition, there are huge processing issues still affecting same-sex couples under the new income splitting rules that can be fixed even under DOMA.²⁶²

As predicted, the new rules have drawn national attention to the inequities that exist in the taxation of same-sex couples. There is still much to be done in the fight for tax equality. However, as in the past, the story of the implementation of the 2010 CCA is the story of a small group of dedicated individuals stepping up to force the government to treat all taxpayers fairly.

²⁶⁰ Kinney Interview, *supra* note 259. An example of this is the self-employment tax issue. For self-employment tax purposes, section 1402 of the Tax Code allocates self-employment earnings to the “spouse” who manages the business despite the fact that half of those earnings are allocated to the other spouse for income tax purposes. I.R.C. § 1402(a)(5)(A) (2010). Citing DOMA, the IRS has refused to apply this exception to cover same-sex couples because the statute uses the word “spouse.” *See supra* note 252. However, according to some analysts, the word “spouse” in section 1402 is arguably equivalent to the word “taxpayer” because there was no intent or reason to create special rules for splitting self-employment taxes only for spouses when that code section was enacted. Thus, the IRS does not have to require same-sex couples in community property states to split the self-employment tax. Rather, the IRS could construe that code section generally and apply it to same-sex couples allowing them to retain all of their social security tax credits. *See* Kinney Interview, *supra* note 259; Patricia Cain, *Community Property RDPs and Self-Employment Taxes*, SAME SEX TAX L. BLOG (Apr. 12, 2011, 10:56AM), <http://law.scu.edu/blog/samesextax/community-property-rdps-and-self-employment-taxes.cfm>.

²⁶¹ *See* Cain, *Community Property RDPs and Self-Employment Taxes*, *supra* note 260; Cain, *The Senate Eight*, *supra* note 240 (“But even with DOMA on the books, it is possible to construe basic tax principles in a way that recognizes the reality of couples who are married or in a state-recognized relationship that carries the same benefits and burdens of marriage.”).

²⁶² *See supra* note 251. According to Deb Kinney, many of the delays and processing errors could be fixed if the IRS would “link” or “relate” the returns filed by same-sex couples, the returns that two taxpayers in a same-sex partnership file. This would allow one partner’s tax liability to be offset by the other partner’s estimated taxes which would dramatically decrease the interest and penalties that same-sex couples are facing as a result of the implementation of the new rules. Further, developing this internal linking mechanism would allow couples to e-file using commercial tax software. *See* Kinney Interview, *supra* note 259.