DOMA and the Internal Revenue Code
Patricia A. Cain, Inez Mabie Distinguished Professor of Law, Santa Clara University

The Defense of Marriage Act (DOMA) provides that under federal law, same-sex marriages will not be recognized. Yesterday, a federal district court essentially ruled that DOMA is unconstitutional. In this lawsuit, filed by Gay and Lesbian Advocates and Defenders (GLAD) on behalf of multiple plaintiffs, four same-sex married couples challenged the refusal by the IRS to accept their joint income tax returns. They went through all the proper steps to mount this challenge. That is, they filed as single taxpayers, as required by DOMA, and then filed amended returns claiming that DOMA was unconstitutional. The IRS denied the refunds that the amended joint returns would have produced and so the plaintiffs filed suit in federal district court seeking their refunds. For these four couples, filing jointly would have provided a tax benefit.

But, as any two-earner married couple knows, joint filing does not always reduce tax costs. Although many people believe marriage produces tax benefits, the truth is that the treatment of married couples under the federal tax law was not designed as a handout of federal benefits to married couples.

Before 1948, the federal tax laws were substantially marriage-neutral. All that changed in 1948, not because married couples were viewed as in need of tax benefits, but because the community property rules, as applied in Poe v. Seaborn, had created geographical discrimination. Community property spouses could split their incomes and thus pay lower taxes. Joint returns ended that discrimination. The 1948 Act added a marital deduction for gift and estate tax purposes to further ease the discrimination against non-community property state spouses.

As rates have been adjusted over time, a marriage tax penalty has resulted for two-earner couples. But the income-splitting benefits for one-earner couples remains. So the GLAD plaintiffs, married in Massachusetts and resembling the one-earner couples who benefit from the joint return, claimed that their marriages should be as valid under the Internal Revenue Code as any other marriage. And the court agreed.

What does this mean for other taxpayers? This is a hard question. The challenge to DOMA was pursued as an “as applied” challenge. The court did not strike down DOMA on its face, or even as applied to the Internal Revenue Code overall. It just struck it down “as applied” to these plaintiffs. Chief Justice John Roberts has opined recently on whether or not an “as applied” challenge might in reality be a facial challenge (See Doe v. Reed, 2010 WL 2518466) and he may have more to say on that topic once this case reaches the Supreme Court, which undoubtedly it will.

But in the meantime, consider these questions:
1. This is the only ruling on DOMA and tax law. Shouldn’t all married same-sex couples in Massachusetts who would benefit from joint filing file protective refund claims immediately? What about married same-sex couples in other states?

2. The court did not address the question of which married same-sex couples the federal government should respect. It didn’t have to. It was an “as applied” challenge. The plaintiffs in this case were all Massachusetts residents, whose marriages were recognized under state law. But what about married couples whose marriages were valid in the state of celebration but who reside in states where the marriage is not recognized?

3. Is this ruling retroactive (as most constitutional rulings are)? Should estates press refund claims on the basis that the marital deduction should have been available for a same-sex spouse? What about couples who have divorced and paid either income or gift taxes on the assumption that Section 1041 did not apply?

4. In California tax return preparers are mired in the review of past returns of their same-sex couple clients because the IRS recently released a CCA saying that the partners (or spouses) could split their incomes under Seaborn. Should they pursue those refund claims applying Seaborn – or should they file amended joint returns?

5. In the absence of DOMA, should the IRS rule that other marriage equivalent relationships (e.g., registered domestic partnerships in California, Nevada, Washington, and Oregon and civil unions in New Jersey) should also be treated as spouses?

Tax law needs to be clear and consistent. People need to know what rules apply to them. Married couples want to plan for a future, for shared finances, for retirement. Knowing whether their marriages are recognized is crucial. Good tax law owes them that certainty. Whether or not this district court got it right under the constitution will be decided by appellate courts above. But the IRS and Congress owe all of America, including same-sex married couples, more stability than the current situation affords them.