



**Prying Open the Closet Door:
The U.S. Defense of Marriage Act
And Tax Treaties**

by Anthony C. Infanti

Reprinted from *Tax Notes Int'l*, November 29, 2004, p. 765

TAX NOTES INTERNATIONAL

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ISSN 1048-3306

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Prying Open the Closet Door: The U.S. Defense of Marriage Act and Tax Treaties

by Anthony C. Infanti

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Following U.S. President George W. Bush's endorsement of a constitutional ban on same-sex marriage,¹ a conservative, "pro-family" organization² wrote the IRS Commissioner earlier this year to alert him about "a potential fraudulent tax scheme."³ The orga-

nization was alarmed by "rebellious state and local officials reportedly permitting persons of the same sex to marry in flagrant disobedience of applicable laws defining marriage as a union between a male and a female," and was further alarmed by the prospect that these "married" same-sex couples (their quotes, not mine) might attempt to file joint federal income tax returns.⁴ The organization urged the commissioner to deter these individuals from attempting to evade income tax by threatening to investigate and prosecute any same-sex couples who attempt to file joint returns.⁵

The IRS responded to the organization's letter in mid-June. In that letter, the IRS went beyond the narrow circumstances that alarmed the conservative organization and spoke more generally about the ability of married same-sex couples to file joint federal income tax returns. Citing section 3 of the Defense of Marriage Act (DOMA),⁶ which precludes the recognition of same-sex marriages for purposes of federal law, the IRS reassured the organization that:

[e]ven though a state may recognize a union of two people of the same sex as a legal marriage for the purposes within that state's authority, that recognition has no effect for purposes of federal law. A taxpayer in such a relationship may not claim the status of a married person on the federal income tax return.⁷

Putting aside the questionable constitutionality of DOMA,⁸ the IRS was technically correct in making this

¹President Bush announced his support for a constitutional ban on same-sex marriage after the Massachusetts Supreme Judicial Court issued a decision legalizing same-sex marriage, see *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (2003), and the city of San Francisco began to issue marriage licenses to a deluge of same-sex couples. Elisabeth Bumiller, "Same-Sex Marriage: The President; Bush Backs Ban in Constitution on Gay Marriage," *The New York Times*, Feb. 25, 2004, at A1; Dean E. Murphy, "San Francisco Forced to Halt Gay Marriages," *The New York Times*, Mar. 12, 2004, at A1. (San Francisco issued more than 4,100 marriage licenses to same-sex couples before the California Supreme Court ordered it to cease issuing such licenses, and an additional 2,600 couples had made appointments for a license before the order was issued.) The marriage licenses issued by San Francisco to these same-sex couples were recently invalidated by the California Supreme Court. Dean Murphy, "California Court Rules Gay Unions Have No Standing," *The New York Times*, Aug. 13, 2004, at A2.

²The organization, Public Advocate of the United States, Inc., has described itself in the following terms:

A small but creative band of young conservatives with a network of volunteers, Public Advocate confronts the lies and disinformation of the liberal establishment in Washington and the so-called Homosexual Lobby as it uses federal legislation to create a special class of American at the expense of the traditional family. We are . . . [a]gainst same sex marriage, for the Boy Scouts, support the traditional marriage amendment to the U.S. Constitution, in favor of abolishing the pornographic National Endowment for the Arts which uses public monies to sponsor 'art', exposing wasteful spending and supporting tax cuts, opposing so-called Gay Rights and homosexual propaganda in general.

Public Advocate of the United States, Public Advocate: Protectors of Fatherhood, Motherhood, Children, and the American Family, at <http://www.publicadvocateusa.org> (last visited July 28, 2004).

³Letter from Eugene A. Delgaudio, president of Public Advocate of the United States Inc., to IRS Commissioner Mark W. Everson (Apr. 13, 2004), available at <http://www.publicadvocateusa.org/news/article.php?article=89> (last visited July 28, 2004).

⁴*Id.*

⁵*Id.*

⁶Defense of Marriage Act, Pub. L. No. 104-199, section 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. section 7).

⁷Letter from the IRS to Eugene A. Delgaudio (June 14, 2004), available at <http://www.publicadvocateusa.org/news/article.php?article=95> (last visited July 28, 2004). For reporting on the letter, see Allen Kenney, "IRS: Joint Filing Not Allowed for Same-Sex Married Couples," *Tax Notes*, June 21, 2004, p. 1466.

⁸Compare Mark Strasser, "Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence," 64 *Brook. L. Rev.* 307 (1998) (arguing that the Full Faith and Credit Clause and Due Process Clause prohibit Congress from enacting DOMA), Mark Strasser, "Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On

(Footnote continued on next page.)

statement — but only because the statement was confined to the tax treatment of domestic same-sex marriages. Having taken a parochial view of the issue (as only too often proves to be the case),⁹ both the conservative organization and the IRS ignored the fact that the United States is not the only place where same-sex couples are seeking (and have been granted) the right to marry. Whether the IRS's statement about the inability of married same-sex couples to file joint federal income tax returns will hold true when viewed from a wider, international perspective is an interesting question that has yet to be answered.

I. DOMA and Tax Treaties

On May 17, 2004, Massachusetts became the first U.S. state to allow same-sex couples to marry.¹⁰ Although the legalization of same-sex marriage in Massachusetts¹¹ has received much attention in the United States, Massachusetts is not the only (nor was it the first) jurisdiction in the world to accord legal recognition to same-sex marriages. In 2001 the Netherlands became the first country to extend the right to marry to same-sex couples.¹² The Netherlands' lead

was then followed by Belgium and Canada in 2003.¹³ Based on indications from its current ruling party, it appears that Spain will soon likewise extend the right to marry to same-sex couples.¹⁴

A. Treaty Nondiscrimination Articles

In addition to same-sex marriage (or the potential for same-sex marriage), those four countries (Belgium, Canada, the Netherlands, and Spain) share at least one other trait in common: Each of them has entered into a bilateral income tax treaty with the United States.¹⁵ Each of these treaties contains an aptly titled "nondiscrimination" article, which is a standard provision found in all U.S. income tax treaties.¹⁶

As the Treasury Department has explained, the basic purpose of the treaty nondiscrimination articles is to "assure[] that nationals of a Contracting State . . . will not be subject, directly or indirectly, to discriminatory taxation in the other Contracting State."¹⁷ Treasury has further clarified that, in this context, "nondiscrimination means providing national treatment."¹⁸

DOMA, the Hawaii Amendment, and Federal Constitutional Constraints," 48 *Syracuse L. Rev.* 227 (1998) (arguing that DOMA violates the Bill of Attainder Clause), and Mark Strasser, "Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution," 58 *U. Pitt. L. Rev.* 279 (1997) (arguing that enactment of DOMA exceeds Congress's power under the Full Faith and Credit Clause, violates the right to interstate travel, and does not meet the relevant standard for displacing state domestic relations law) [hereinafter Strasser, "Loving the Romer"], with Lynn D. Wardle, "Williams v. North Carolina, Divorce Recognition, and Same-Sex Marriage Recognition," 32 *Creighton L. Rev.* 187, 223-33 (1998) (arguing that Congress had the constitutional authority to enact DOMA).

⁹See generally Anthony C. Infanti, "Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the U.S. International Tax Regime," 35 *Vand. J. Transnat'l L.* 1105, 1136-37 (2002) ("The United States, which generally views itself as a leader rather than a follower in international tax matters, has not . . . devoted much attention to foreign tax systems when developing its domestic tax laws. Moreover, at the academic level, comparative tax law has been 'slighted' by U.S. scholars." (footnotes omitted)); Victor Thuronyi, "What Can We Learn From Comparative Tax Law?" *Tax Notes*, Apr. 26, 2004, p. 459 (urging American tax lawyers to take an interest in learning about the tax laws of other countries).

¹⁰Pam Belluck, "Hundreds of Same-Sex Couples Wed in Massachusetts," *The New York Times*, May 18, 2004, at A1.

¹¹The right to marry was extended to same-sex couples by the Massachusetts Supreme Judicial Court based on an interpretation of the due process and equal protection clauses of the Massachusetts Constitution. See "Opinions of the Justices to the Senate," 802 N.E.2d 565, 566 (2004); *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).

¹²Kees Waaldijk, "The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries," 38 *New Eng. L. Rev.* 569, 572-581 (2004).

¹³*Id.* at 581-84; Clifford Krauss, "Canadian Leaders Agree to Propose Gay Marriage Law," *The New York Times*, June 18, 2003, at A1; Clifford Krauss, "Gay Canadians' Quest for Marriage Seems Near Victory," *The New York Times*, June 15, 2003, section 1, at 3.

¹⁴Isambard Wilkinson, "Spain's New Premier Plans Social Revolution," *Daily Telegraph* (London), Apr. 16, 2004, at 14; "Bishops Criticize Spain's Plan to Legalize Gay Marriage; Government Eyes Draft Law," *The Boston Globe*, July 21, 2004, at A8.

¹⁵Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Dec. 18, 1992, U.S.-Neth., *Doc 93-31463*, 93 *TNI 106-16* [hereinafter U.S.-Netherlands treaty]; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Feb. 22, 1990, U.S.-Spain, *Doc 93-31216*, 90 *TNI 26-54* [hereinafter U.S.-Spain treaty]; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and on Capital, Sept. 26, 1980, U.S.-Can., *Doc 93-31275*, 91 *TNI 29-34* [hereinafter U.S.-Canada treaty]; Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, July 9, 1970, U.S.-Belg., *Doc 93-30417*, 86 *TNI 21-46* [hereinafter U.S.-Belgium treaty].

¹⁶Richard E. Andersen, "Analysis of United States Income Tax Treaties," para. 20.01[1] (2004), available at 1998 WL 1038794, at *1 ("Each of the U.S. income tax treaties in force includes a non-discrimination article."); Sanford H. Goldberg and Peter A. Glicklich, "Treaty-Based Nondiscrimination: Now You See It Now You Don't," 1 *Fla. Tax Rev.* 51, 51 (1992) ("A broad nondiscrimination provision appears in every income tax treaty that the United States has entered into in the last quarter century.").

¹⁷U.S. Dept. of Treasury, "Technical Explanation of United States Model Income Tax Convention" Art. 24, *Doc 96-25868*, 96 *TNI 186-17* (1996) [hereinafter technical explanation of U.S. model treaty].

¹⁸*Id.*

Although the wording of the nondiscrimination articles in the U.S.-Belgium, U.S.-Canada, U.S.-Netherlands, and U.S.-Spain treaties is not identical, article 28(1) of the U.S.-Netherlands treaty provides a general sense of the scope of the relevant nondiscrimination provision:

Nationals of one of the States shall not be subjected in the other State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.¹⁹

The U.S.-Netherlands treaty defines the term “national” to include “all individuals possessing the nationality or citizenship of one of the States.”²⁰

B. The Unanswered Question

A question that is bound to arise is how to square this treaty prohibition against discriminatory treatment of foreign nationals with DOMA’s codification of discrimination against same-sex couples. It is easy to imagine the series of events that will draw the relationship between DOMA and tax treaties into question. To continue using the Netherlands as an example, picture a gay or lesbian couple comprised of two Dutch citizens. This couple was married in the Netherlands, and they continued to reside there after their marriage. The couple has now, for whatever reason, come to the United States and remained here long enough for each of them to be classified as a

resident alien for U.S. federal income tax purposes.²¹ After completing their first full year of U.S. residency, the couple has concluded that it would be advantageous to file a joint federal income tax return because they would benefit from a marriage “bonus.”²²

²¹Either because they are lawfully admitted for permanent residence in the United States (i.e., they each hold a green card) or because they remain in the United States long enough to meet the substantial presence test in section 7701(b). See section 7701(b)(1)(A)(i)-(ii). Section references are to the Internal Revenue Code of 1986, as amended, except as otherwise noted.

Normally, the saving clause included in U.S. tax treaties would permit the United States to tax its citizens and residents (including this same-sex couple) as if the treaty had never entered into force; however, the saving clauses in each of the treaties mentioned above except the nondiscrimination article of the treaty from their ambit. U.S.-Netherlands treaty, *supra* note 15, art. 24, paras. 1-2; U.S.-Spain treaty, *supra* note 15, art. 1, paras. 3-4; protocol to the U.S.-Canada treaty, June 14, 1983, U.S.-Can., art. XIII, para. 1, *Doc 93-31275, 91 TNI 29-34*; protocol to the U.S.-Canada treaty, Mar. 17, 1995, U.S.-Can., art. 17, para. 1, *Doc 95-30114, 95 TNI 90-11* [hereinafter 1995 U.S.-Canada protocol]; U.S.-Belgium treaty, *supra* note 15, art. 23, para. 1(a).

²²Although the Congressional Budget Office recently estimated that most same-sex couples would experience a marriage “penalty” if they were permitted to marry and if that marriage were recognized for federal tax purposes, it also indicated that some same-sex couples would experience a marriage “bonus.” Cong. Budget Office, “The Potential Budgetary Impact of Recognizing Same-Sex Marriages” 3 (2004), available at <ftp://ftp.cbo.gov/55xx/doc5559/06-21-SameSexMarriage.pdf> (last visited Aug. 9, 2004); see also Brief for Appellee at 8, 20, *Mueller v. Commissioner*, 2002-2 U.S.T.C. (CCH) para. 50,505 (2002) (No. 02-1189), available at 2002 WL 32169930 (indicating that a single-earner same-sex couple would have saved nearly US \$1,900 in tax if they had been permitted to file jointly). (For a discussion of Mueller’s protest of the code’s discrimination against gay and lesbian couples, see Anthony C. Infanti, “Tax Protest, ‘A Homosexual,’ and Frivolity: A Deconstructionist Meditation,” 24 *St. Louis U. Pub. L. Rev.* ___ (forthcoming 2005)). For those wishing a further explanation of the difference between a marriage “bonus” and a marriage “penalty,” Dorothy Brown has described the difference as follows:

A marriage penalty occurs whenever a couple pays higher federal income taxes as a result of their marriage than they would pay if they remained single and filed individual returns. A marriage bonus occurs whenever a couple pays lower federal income taxes as a result of marriage than they would pay if they remained single and filed individual returns. Marriage penalties are the greatest where there are two wage earners; marriage bonuses are the greatest where there is only one wage earner.

Dorothy A. Brown, “The Marriage Bonus/Penalty in Black and White,” 65 *U. Cin. L. Rev.* 787, 787 (1997). A leading treatise adds, “Because the rate brackets for a married couple filing jointly are less than twice as wide as those . . . for unmarried persons, many couples pay more taxes than they would if they could file as unmarried persons. These ‘marriage penalties’ are greatest for spouses whose incomes are equal and decline and eventually become ‘marriage bonuses’ as spouses’ incomes become more unequal.” 4 Boris I. Bittker and Lawrence Lokken, “Federal Taxation of Income, Estates and Gifts” para. 111.3.2, at S111-44 (3rd ed. Supp. 2004) (footnote omitted).

¹⁹U.S.-Netherlands treaty, *supra* note 15, art. 28, para. 1; see also U.S.-Spain treaty, *supra* note 15, art. 25, para. 1 (“Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.”); U.S.-Canada treaty, *supra* note 15, art. XXV, para. 1 (“Citizens of a Contracting State, who are residents of the other Contracting State, shall not be subjected in that other State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which citizens of that other State in the same circumstances are or may be subjected.”); U.S.-Belgium treaty, *supra* note 15, art. 24, para. 1 (“A citizen of one of the Contracting States who is a resident of the other Contracting State shall not be subjected in that other Contracting State to more burdensome taxes than a citizen of that other Contracting State who is a resident thereof.”).

²⁰U.S.-Netherlands treaty, *supra* note 15, art. 3, para. 1(g)(i); see also U.S.-Spain treaty, *supra* note 15, art. 3, para. 1(g)(i), (“any individual possessing the nationality of a Contracting State”). In the case of Belgium and Canada, the nondiscrimination article speaks in terms of citizenship rather than nationality. See *supra* notes 15, 19.

Normally, two married citizens or resident aliens would be entitled to file a joint federal income tax return.²³ But, as mentioned at the beginning of this article, section 3 of DOMA provides that, when interpreting any federal law, “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.”²⁴ As a result, when the joint return provisions in the code are read in conjunction with DOMA, it appears that a married same-sex couple (including a married same-sex couple comprised of two resident aliens) is barred from filing a joint federal income tax return.²⁵

For our Dutch couple who would benefit from a marriage bonus, this treatment appears to be both different from and more burdensome than the treatment afforded to most married U.S. citizens. However, the nondiscrimination article in the U.S.-Netherlands treaty clearly prohibits the United States from taxing Dutch citizens — including a Dutch same-sex couple — in a different or more burdensome fashion than it taxes its own citizens *in the same circumstances*.²⁶ Whether the treaty nondiscrimination

article will actually dictate a different result from that ostensibly dictated by DOMA will turn on the interpretation and application of the italicized qualifier — “in the same circumstances.”²⁷

1. ‘In the same circumstances.’ As a commentator has noted, this qualifier “does not require a complete identity of circumstances.”²⁸ This view finds implicit support in the legislative histories of the U.S.-Belgium and U.S.-Canada treaties (the legislative histories of the U.S.-Netherlands and U.S.-Spain treaties merely repeat, and do not elaborate on, the language of the treaty) as well as in Treasury’s Technical Explanation of the U.S. Model Income Tax Convention.²⁹ Furthermore, explicit support for this view can be found in the commentary to the model tax treaty published by the Organization for Economic Cooperation and Development.³⁰ In the OECD

of title 26 for the sake of economy — Congress was able with a few short words to change the meaning of certain terms throughout title 26 (as well as every other title of the U.S. Code) without having to search for each instance of the terms and thus risk the possibility of missing some instances of the terms (which would create undue confusion in the application of the law). Consequently, the code, as modified by DOMA, *directly* results in the denial of joint filing status to same-sex couples.

²⁷Andersen, *supra* note 16, para. 20.02[1][b][i], available at 1998 WL 1038795, at *6 (“One of the most important questions with respect to the nondiscrimination article in general is on what basis should comparison be made. Under treaties resembling the 1981 U.S. Model, the standard for nationals is whether they are ‘in the same circumstances.’”); Goldberg and Glicklich, *supra* note 16 at 63-65 (“A more important and more often disputed question is the meaning of the phrase ‘in the same circumstances’. . . .”).

²⁸Andersen, *supra* note 16, para. 20.02[1][b][i], available at 1998 WL 1038795, at *6.

²⁹Staff of the Joint Comm. on Tax’n, “Proposed Income Tax Convention Between the United States and Belgium” art. 24, *Doc 93-30566E*, 87 *TNI 53-11* (1970) (“The proposed convention . . . provides that one country cannot discriminate by imposing more burdensome taxes on its residents who are citizens of the other country . . . than it imposes on its comparable taxpayers.” (emphasis added)); U.S. Dept. of Treasury, “Technical Explanation of the Convention Between the United States of America and Canada With Respect to Taxes on Income and on Capital” art. 25, *Doc 93-30576*, 85 *TNI 37-33* (1984) (“Paragraph 1 provides that a citizen of a Contracting State who is a resident of the other Contracting State may not be subjected in that other State to any taxation or requirement connected with taxation which is other or more burdensome than the taxation and connected requirements imposed on similarly situated citizens of the other State.” (emphasis added)); technical explanation of U.S. model treaty, *supra* note 17, art. 24 (“Each of the relevant paragraphs of the Article provides that *two persons that are comparably situated must be treated similarly.*” (emphasis added)).

³⁰In the past, U.S. courts have looked to the OECD commentary for guidance when faced with ambiguous treaty language (such as this qualifier in the nondiscrimination article) that is patterned after the language used by the drafters of the OECD model treaty. *E.g.*, *Nat’l Westminster Bank PLC v. United States*, 44 Fed. Cl. 120, 124-25, *Doc 1999-23444*, 1999 *WTD 132-33*

²³Section 6013(a). Note that, even if only one of the members of the couple is a citizen or resident alien for U.S. federal income tax purposes, an election can be made to treat the other member of the couple as a resident alien so that a joint federal income tax return may be filed. Section 6013(g).

²⁴Defense of Marriage Act, Pub. L. No. 104-199, section 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. section 7).

²⁵See *supra* note 7 and accompanying text.

²⁶It is worth noting that the IRS has privately ruled that the nondiscrimination article in the tax treaty between the United States and the United Kingdom was not violated when U.K. nationals who were resident aliens of the United States were unable to claim the investment tax credit with respect to a vessel that they operated — solely because they were not U.S. citizens. The investment tax credit was disallowed because the vessel was not documented under U.S. law, which limited registration of vessels to those owned by U.S. citizens. The IRS took a narrow view of the nondiscrimination article and held that it would not apply because the Coast Guard regulations that limited registration to U.S. citizen owners *indirectly* resulted in the denial of the investment tax credit and were, therefore, outside of the scope of the treaty. In the IRS’s view, only other or more burdensome taxation resulting *directly* from a provision in the Internal Revenue Code or Treasury regulations could trigger application of the treaty’s nondiscrimination article. TAM 8139004 (May 29, 1981).

Disregarding the IRS’s unwarrantedly formalistic reading of the nondiscrimination article, see *supra* note 18 and accompanying text, its ruling in this technical advice memorandum is distinguishable from the instant situation — despite DOMA’s codification outside of title 26. The Coast Guard regulations in the technical advice memorandum were not promulgated in an effort to change the meaning of any terms in the code. In contrast, DOMA was enacted by Congress with the precise intent to fix the meaning of terms that Congress had used in the code. Anthony C. Infanti, “The Internal Revenue Code as Sodomy Statute,” 44 *Santa Clara L. Rev.* 763, 782 (2004). DOMA was codified outside

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commentary, the phrase “in the same circumstances” is liberally interpreted to mean “in substantially similar circumstances both in law and in fact.”³¹

With these interpretations in mind, we can now continue with our example and consider which U.S. citizens are “in the same circumstances” as a married same-sex couple comprised of two citizens of the Netherlands. In making the comparison, we have several options to choose from: Is a married Dutch same-sex couple resident in the United States substantially similar to two married opposite-sex U.S. citizens, two

married same-sex U.S. citizens domiciled in Massachusetts, or two unmarried same-sex U.S. citizens domiciled in one of the other 49 states (because, at present, same-sex marriage is legal only in Massachusetts)?³²

2. Comparison. As a factual matter, the Dutch couple is substantially similar to each of the U.S. couples mentioned above. In each case, we are dealing

(1999); *Taisei Fire & Marine Ins. Co. v. Commissioner*, 104 T.C. 535, 547-51, *Doc 95-4474*, 95 *TNI* 86-8 (1995), *acq.* 1996-1 IRB 5. In this case, each of the treaties is based on the OECD model treaty. Staff of the Joint Comm. on Tax'n, “Explanation of Proposed Income Tax Treaty (and Proposed Protocols) Between the United States and Canada” at Introduction, *Doc 93-30573*, 85 *TNI* 37-31 (1984) (“The proposed treaty is similar to . . . the model income tax treaty of the Organization of Economic Cooperation and Development”); U.S. Dep’t of Treasury, “Technical Explanation of the Convention Between the United States of America and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income” at introduction, *Doc 93-31955*, 93 *TNI* 212-11 (1993) (“Negotiations took as their starting point the U.S. Treasury Department’s draft Model Income Tax Convention . . . , the Model Double Taxation Convention on Income and Capital, published by the OECD in 1977 . . . , and other Conventions of both States.”); U.S. Dept. of Treasury, “Technical Explanation of the Convention Between the United States of America and the Kingdom of Spain for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income” at introduction, *Doc 93-31217*, 90 *TNI* 25-71 (1990) (“The United States and Spain negotiated the treaty on the basis of the U.S. Model Convention . . . , several recently negotiated treaties of the two countries, and the Organization for Economic Cooperation and Development’s . . . Model Double Taxation Convention on Income and on Capital published in 1977 . . . , from which much of the U.S. Model is derived.”); U.S. Dept. of Treasury, “Technical Explanation of U.S.-Belgium Income Tax Convention” art. 24, *Doc 93-30566A*, 87 *TNI* 53-11 (1970) (“[t]his Article is substantially similar to the nondiscrimination Article of the OECD Model Convention”).

³¹OECD, “Model Convention With Respect to Taxes on Income and on Capital,” commentary on art. 24 at para. 3 (2003) [hereinafter OECD model treaty]. Although the commentary cited above is the commentary to the most recent version of the treaty, the language of the pertinent portion of the nondiscrimination article of the OECD model treaty has not undergone any substantive change since the OECD model treaty was first published in 1963. Compare OECD model treaty, *supra*, art. 24, para. 1 (“Nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances, in particular with respect to residence, are or may be subjected.”), with OECD, “Draft Income and Capital Tax Convention,” art. 24, para. 1 (1963) (“The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.”); see also OECD model treaty, *supra*, commentary on art. 24 at para. 3 (indicating that the addition of the phrase “in particular with respect to residence” was merely a clarification and not a substantive change to the nondiscrimination article).

³²I have chosen not to address separately the possibility of comparing the Dutch couple with two same-sex U.S. citizens married in Belgium, Canada, the Netherlands, or (soon) Spain. First, in the case of Belgium and the Netherlands, such a scenario would only be possible under very limited circumstances. To be married in Belgium or the Netherlands, at least one member of the couple must be a citizen or resident of Belgium or the Netherlands. Waaldijk, *supra* note 12, at 577, 583. Even marriage in Canada, which is possible for U.S. citizens who are not residents of Canada, will prove an unlikely possibility in most cases because of issues of cost, distance, and practicality (for example, having all of your guests join you in a distant location). See, e.g., City of Toronto, “Marriage License Requirements,” at http://www.city.toronto.on.ca/depts/legserv_marriage.htm#hrsop (last visited Aug. 15, 2004) (“There are no residency or citizenship requirements.”). Second, even if such a scenario were more likely to occur, the marriage would probably not be recognized anywhere in the United States — even in states where same-sex marriage is otherwise possible and even absent DOMA — because of the prevalence of state laws or constitutional amendments declaring same-sex unions to be against the strong public policy of the state. See *Restatement (Second) of Conflicts of Law*, section 283(2) (1969) (“A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.”); see also Strasser, “Loving the Romer,” *supra* note 8 at 292 (“The current system does not allow forum shopping to defeat the responsibilities of marriage. Because the interstate recognition of marriages involves choice of law, and because of the content of each state’s choice-of-law rules, only the exception involving obnoxiousness to the domiciliary state’s law may invalidate a marriage.”); Human Rights Campaign, “Marriage/Relationship Laws: State by State,” at <http://www.hrc.org> (last visited Aug. 15, 2004) (“On the other hand, 40 states have laws or constitutional amendments that purport to ban marriage between same-sex couples. Legislation to amend state constitutions to prohibit the performance and/or recognition of marriage between same-sex couples also has been introduced in 25 states in 2004. Additionally, citizen-initiated measures to amend the state constitution are pending in six states.”). The only couples who would need to travel to another country to marry would be those not domiciled in Massachusetts, where same-sex marriage is already legal. Because many of the remaining 49 states have laws or constitutional amendments declaring same-sex unions to be against the strong public policy of the state, these couples’ marriages would very likely be deemed invalid throughout the United States. The same would not be true of the marriage of the Dutch couple, because their marriage would have been valid in both the state where it was contracted and in the state with the most significant relationship to the spouses and the marriage at the time of the marriage (in both cases, the Netherlands). Given the limited (practical and legal) possibility of foreign marriages of U.S. citizens and the likelihood that those marriages would be considered invalid in the United States (even aside from the application of DOMA), I decided that a comparison of the Dutch couple with two same-sex U.S. citizens married in Belgium, Canada, the Netherlands, or (soon) Spain would be inappropriate and unhelpful to the instant discussion.

with two individuals who have decided to make an emotional and financial commitment to each other. They have decided to make a life together and to support each other. Even in the United States, the equivalence of the commitments is increasingly recognized on a social level. In fact, “an overwhelming majority” of Americans feel that gays and lesbians should be given “equal access to the specific obligations, responsibilities and recognitions of marriage” — even if not to the institution of marriage itself.³³ The difference in the gender composition of these couples is, therefore, simply irrelevant to the assessment of the factual similarity of the couples.³⁴

As a legal matter, the Dutch couple is also substantially similar to each of the U.S. couples in terms of taxation. All of these couples are subject to tax in the United States on their worldwide income — the U.S. couples because of their U.S. citizenship and the Dutch couple because of its U.S. residency.³⁵ Consequently, there can be no doubt that, from a tax perspective, the

Dutch couple is also “in the same circumstances” as each of the enumerated U.S. couples for treaty nondiscrimination purposes.³⁶

3. Contrast. Despite these similarities, the Dutch couple does diverge from two of the three U.S. couples in terms of the legal status accorded by the state to their relationships.

Let us begin by contrasting the legal status of the Dutch couple with that of the U.S. unmarried same-sex couple. In terms of legal status, these couples are in drastically different positions. The members of the Dutch couple have taken on an entire set of legal rights and obligations by seeking state sanction of their relationship. In contrast, the members of the U.S. unmarried same-sex couple have (voluntarily or involuntarily) foregone attaching these same legal rights and obligations to their relationship. From a narrowly legal perspective, the unmarried couple is really not much different from any two strangers who pass each other on the street. As a result, in terms of the legal rights and obligations attached to their relationship, it does not seem any more appropriate to equate a married same-sex couple with an unmarried same-sex couple than it does to equate a married opposite-sex couple with an unmarried opposite-sex couple. The legal rights and obligations that exist between them differ so significantly that it would be difficult to argue that either set is “in the same circumstances.”

The same-sex couple from Massachusetts seems to be a closer match because they are also married.

³³Nat'l Gay & Lesbian Task Force, “Recent National Polls on Same-Sex Marriage and Civil Unions” 1 (2004), available at http://www.thetaskforce.org/downloads/RecentNationalMarch_2004.pdf (last visited Aug. 25, 2004).

³⁴Although section 6013(a) speaks in the gendered terms of “husband” and “wife,” this provision appears to be aimed at married couples in general because it could not have been enacted with any specific intent to exclude same-sex married couples from its ambit. Same-sex marriage became a realistic possibility only in 1993, when the Hawaii Supreme Court issued its decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Congress reacted to that decision by enacting DOMA in 1996. See Infanti, *supra* note 26 at 780-83. Section 6013(a) was not amended either at or after the enactment of DOMA. Furthermore, the original predecessor of section 6013(a), which also used the terms “husband” and “wife,” was enacted in 1918, nearly eight decades before DOMA and when the gay rights movement in the United States was yet to be born. Revenue Act of 1918, ch. 18, section 223, 40 Stat. 1057, 1074 (1919); see also Richard C.E. Beck, “The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed,” 43 *Vand. L. Rev.* 317, 333 (1990) (“In contrast to the situation in Europe, joint returns were introduced in the United States after separate returns, in 1918.”); Lily Kahng, “Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Liability,” 49 *Vill. L. Rev.* 261, 263 n.6 (2004) (“The option to file a joint return for married couples was introduced in 1918, shortly after the introduction of the income tax in 1913.”).

Moreover, the fact that the current administration may not agree with another country’s extension of the right to marry to same-sex couples should not affect the comparability of same-sex couples and opposite-sex couples as a factual matter. See *supra* note 1 (reporting on President Bush’s support of a constitutional amendment prohibiting same-sex marriage). In contrast to the Full Faith and Credit Clause of the U.S. Constitution, which has been interpreted to embody a public policy exception, see Anthony C. Infanti, “*Baehr v. Lewin*: A Step in the Right Direction for Gay Rights?” 4 *Law & Sexuality* 1, 32-33 (1994), tax treaty nondiscrimination articles contain no generalized public policy exception that the administration could rely on to attribute an inferior status to gay and lesbian relationships.

³⁵Treas. reg. section 1.1-1(b) (as amended in 1974).

³⁶See OECD model treaty, *supra* note 31, commentary on art. 24 at para. 3 (“The expression ‘in the same circumstances’ would be sufficient by itself to establish that a taxpayer who is a resident of a Contracting State and one who is not a resident of that State are not in the same circumstances.”); technical explanation of U.S. model treaty, *supra* note 17, art. 24, para. 1 (“whether or not the two persons are both taxable on worldwide income is a significant circumstance for this purpose”); Rev. Rul. 74-239, 1974-1 C.B. 372 (a dual status taxpayer and a U.S. citizen are not similarly situated because the dual status taxpayer is subject to U.S. federal income tax on her worldwide income for only the part of the year when she is a resident alien while the U.S. citizen is subject to U.S. federal income tax on her worldwide income for the entire year); Goldberg and Glicklich, *supra* note 16 at 63-65 (indicating that the IRS has not always taken a consistent approach in choosing between a “reciprocal” or a “source-jurisdiction” comparison, but indicating that the federal courts use a source-jurisdiction comparison); see also *id.* at 72 (“[T]he Service believes, for example, that legal rather than factual similarity is required (for example, being taxed under the same regime). That interpretation leaves little room, as a practical matter, for Article 24(1) [of the 1981 U.S. Model Income Tax Treaty] to apply in the United States except to resident aliens.”).

For this reason, *Hofstetter v. Commissioner*, 98 T.C. 695 (1992), which concerned a nonresident alien (married to another nonresident alien) who asserted a right to the alternative minimum tax exemption for joint filers under the nondiscrimination article in the income tax treaty between the United States and Switzerland, is distinguishable.

Nevertheless, the marriage of the Massachusetts couple is recognized only in Massachusetts. Under section 2 of DOMA, no other U.S. state is required to recognize their marriage, and under section 3 of DOMA, the federal government emphatically refuses to recognize their marriage.³⁷ In contrast, the marriage of the Dutch couple is recognized throughout the Netherlands and at all levels of government.³⁸ The marriage is also recognized in the same way and, with two small exceptions that need not concern us, to the same extent as an opposite-sex marriage.³⁹ Again, the legal rights and obligations that exist between the two couples differ so significantly that it would be difficult to argue that they are “in the same circumstances.”

That brings us to the final possibility — comparing the Dutch couple with a U.S. married opposite-sex couple. The legal status of these two couples is substantially similar. Both of these couples have satisfied their respective countries’ requirements for entering into a civil marriage. And both of those couples enjoy the recognition of their marriages throughout their respective countries and at all levels of government in those countries. Thus, the Dutch couple seems to be substantially similar to the U.S. married opposite-sex couple both in law and in fact.

4. A tentative answer. If that line of reasoning is accepted by the IRS or the courts, then the nondiscrimination article in the U.S.-Netherlands treaty would appear to require the United States to accord the Dutch couple the same treatment as a U.S. married opposite-sex couple.⁴⁰ The plain language of the nondiscrimination article, which expressly prohibits

imposing on the Dutch couple any taxation or connected requirement that is “other” or “more burdensome” than the taxation or connected requirements imposed on the U.S. married opposite-sex couple, seems to dictate this result. Furthermore, the result is consistent with Treasury’s explanation that, in this context, nondiscrimination means “national treatment.” In other words, the treaty appears to require the IRS to recognize the Dutch same-sex couple’s marriage and to allow them to file a joint federal income tax return.

Whether the IRS’s statement about the inability of married same-sex couples to file joint federal income tax returns will hold true when viewed from a wider, international perspective is an interesting question that has yet to be answered.

Interestingly, the treaty also appears to require U.S. states and localities to recognize the couple’s marriage for tax purposes. Even though the nondiscrimination article is found in a treaty that, on its face, purports to apply only to federal income taxes, its scope is not so limited. The nondiscrimination article in the U.S.-Netherlands treaty applies to *any* tax imposed at the national, state, or local level in the United States.⁴¹ The nondiscrimination articles in the U.S.-Belgium and U.S.-Spain treaties are similarly worded, encompassing not only federal but also state and local taxes.⁴² The nondiscrimination article in the U.S.-Canada treaty, however, extends only to federal taxes (income and otherwise); it does not purport to apply to state and local taxes.⁴³

³⁷Defense of Marriage Act, Pub. L. No. 104-199, sections 2(a), 3(a), 110 Stat. 2419, 2419 (1996) (codified at 28 U.S.C. section 1738C and 1 U.S.C. section 7, respectively). The same analyses apply to quasi-marital statuses such as civil unions or domestic partnerships.

³⁸Waldijk, *supra*, note 12 at 572-77.

³⁹The two small exceptions concern intercountry adoption and the presumption of paternity. *Id.* at 574-77. It appears that the difference in treatment between same-sex and opposite-sex couples with regard to intercountry adoption was implemented because of a concern about negative reaction from countries sending children to the Netherlands for adoption. *Id.* at 574. Because of developments in South Africa, which now permits adoption by same-sex partners, that exception may soon be abolished. *Id.* at 574-75. The difference in treatment with regard to the presumption of paternity was made because any assumption that a child born in a same-sex marriage descended from both members of the couple would stretch reality. *Id.* at 575-76.

⁴⁰See OECD model treaty, *supra* note 31, commentary on art. 24 at para. 10 (“when a tax is imposed on nationals and foreigners in the same circumstances, it must be in the same form as regards both the basis of charge and the method of assessment, its rate must be the same and, finally, the formalities connected with the taxation (returns, payment, prescribed times, etc.) must not be more onerous for foreigners than for nationals”).

⁴¹U.S.-Netherlands treaty, *supra* note 15, art. 28, para. 7 (“The provisions of this Article shall, notwithstanding the provisions of Article 2 (Taxes Covered), apply to taxes of every kind and description imposed by one of the States or a political subdivision or local authority thereof.”). Note that if a recently signed protocol to the treaty is ratified, then article 28, paragraph 7 will be renumbered article 28, paragraph 6. Protocol to the U.S.-Netherlands treaty, Mar. 8, 2004, U.S.-Neth., art. 5, para. (b), *Doc 2004-4882, 2004 WTD 46-8*.

⁴²U.S.-Spain treaty, *supra* note 15, art. 25, para. 6 (“The provisions of this Article shall, notwithstanding the provisions of Article 2 (Taxes Covered), apply to taxes of every kind and description imposed by a Contracting State or a political subdivision or local authority thereof.”); U.S.-Belgium treaty, *supra* note 15, art. 24, para. 4 (“The provisions of this article shall apply to taxes of every kind whether imposed at the National, State, or local level.”).

⁴³1995 U.S.-Canada protocol, *supra* note 21, art. 13, para. 2 (“Notwithstanding the provisions of Article II (Taxes Covered), this Article shall apply to all taxes imposed by a Contracting State.”).

C. Later-in-Time Rule

In light of the differing results dictated by the treaty nondiscrimination provisions and DOMA, a secondary question remains concerning the priority of the treaty nondiscrimination provisions over DOMA.

Section 894(a) of the code provides that “[t]he provisions of this title shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer.”⁴⁴ Section 7852(d), in turn, gives content to this “due regard” standard by providing that, “[f]or purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law.”⁴⁵ When Congress enacted the current versions of sections 894(a) and 7852(d) in 1988, its purpose was to displace a seemingly more deferential standard and to codify in its stead the judicially created “later-in-time” rule.⁴⁶

Under the later-in-time rule, when a statute and a treaty conflict, “the one last in date will control the other.”⁴⁷ The aphoristic nature of that statement is somewhat deceiving, because application of the later-in-time rule is not simply a matter of comparing a date of ratification with a date of enactment. As an initial matter, the Supreme Court has held that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”⁴⁸ Consequently, there is an initial presumption of harmony between a later statute and an earlier treaty.⁴⁹

In that situation, a construction of DOMA that would avoid a direct conflict with the treaty nondiscrimination provisions does, in fact, exist. By its own terms, section 3 of DOMA applies 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.”⁵⁰ Section 3 of DOMA prescribes a definition of marriage that only purports to apply to congressional enactments and interpretations of congressional enactments. The ambit of this “narrow”⁵¹ rewriting of the definition of marriage could easily be confined by the courts to the domestic statutes and interpretations of those statutes expressly mentioned in the text of DOMA. That interpretation would leave international obligations untouched, and would allow the treaty nondiscrimination provisions to coexist with DOMA.

Because the treaty nondiscrimination provisions and DOMA dictate different results for the Dutch couple, one could plausibly argue that the two actually do conflict. Given DOMA’s enactment *after* the Senate ratified the nondiscrimination articles in each of the U.S.-Belgium, U.S.-Canada, U.S.-Netherlands, and U.S.-Spain treaties,⁵² one might be tempted to conclude that, under this interpretation, DOMA would override the treaty nondiscrimination provisions (at least for the time being).⁵³ However, the Supreme Court long ago “limited and clarified the later-in-time rule by providing that ‘[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.’”⁵⁴

The Court has elaborated on this rule of construction by stating that “[l]egislative silence is not suffi-

⁴⁴Section 894(a).

⁴⁵Section 7852(d).

⁴⁶See Anthony C. Infanti, “Curtailing Tax Treaty Overrides: A Call to Action,” 62 *U. Pitt. L. Rev.* 677, 683-84 (2001).

⁴⁷*Whitney v. Robertson*, 124 U.S. 190, 194 (1888). For a discussion of the later-in-time rule and an argument that Congress actually lacks the power to enact legislation that overrides inconsistent treaty provisions, see Infanti, *supra* note 46.

⁴⁸*Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); see also *Restatement (Third) Foreign Relations Law of the United States* section 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with . . . an international agreement of the United States.”).

⁴⁹See *infra* note 55, where it is made clear that Congress intended the initial presumption of harmony to survive the 1988 revision of sections 894(a) and 7852(d).

⁵⁰1 U.S.C. section 7.

⁵¹H.R. Rep. No. 104-664, at 31 (1996), reprinted in 1996 *U.S.C.C.A.N.* 2905, 2935 (“If Hawaii or some other State eventually recognized homosexual ‘marriage,’ Section 3 will mean simply that that ‘marriage’ will not be recognized as a ‘marriage’ for purposes of federal law. Other than this narrow federal requirement, the federal government will continue to determine marital status in the same manner it does under current law.”).

⁵²See *supra* notes 15, 19.

⁵³The United States and Belgium held negotiations on a new treaty in the late 1980s, and the United States has more recently held negotiations with Canada concerning a new protocol to its treaty. John Venuti *et al.*, “Current Status of U.S. Tax Treaties and International Agreements,” 33 *Tax Mgmt Int’l J.* 434, 437 (2004). If the Senate were to ratify a new nondiscrimination article with similar provisions in the future, the treaty nondiscrimination provision would then be later in time.

⁵⁴Infanti, *supra* note 46, at 685 (quoting *Cook v. United States*, 288 U.S. 102, 120 (1933)); see also *Restatement (Third) Foreign Relations Law of the United States* section 115 cmt. a (1987) (“The courts do not favor a repudiation of an international obligation by implication and require clear indication that Congress, in enacting legislation, intended to supersede the earlier agreement or other international obligation. The fact that an act of Congress does not expressly exclude matters inconsistent with international law or with a United States agreement does not necessarily imply a Congressional purpose to supersede the international law or agreement as domestic law.”).

cient to abrogate a treaty.”⁵⁵ For example, in *Trans World Airlines Inc. v. Franklin Mint Corp.*, the

⁵⁵*Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 252, *reh'g denied* 467 U.S. 1231 (1984); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-203 (1999) (“Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so. There must be ‘clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty.’” (quoting *United States v. Dion*, 476 U.S. 734, 740 (1986)) (citations omitted)); *Roeder v. Islamic Republic of Iran*, 195 F. Supp.2d 140, 175 (D.D.C. 2002), *aff'd* 333 F.3d 228 (D.C. Cir. 2003), *cert. denied* 124 S. Ct. 2836 (2004) (“The Supreme Court has unequivocally held that ‘legislative silence is not sufficient to abrogate a treaty’ or a bi-lateral executive international agreement. When a later statute conflicts with an earlier agreement, and Congress has neither mentioned the agreement in the text of the statute nor in the legislative history of the statute, the Supreme Court has conclusively held that it can not find the requisite Congressional intent to abrogate” (quoting *Trans World Airlines*, 466 U.S. at 252) (citations omitted)).

When it codified the later-in-time rule in section 7852(d) in 1988, Congress indicated its belief that whenever a conflict exists between a later statute and an earlier treaty, the conflict should be “resolved in favor of the statute — without regard to whether Congress had expressed an intent to override the treaty or had even considered the impact of the statute on the treaty.” *Infanti*, *supra* note 46 at 685. Whether this interpretation will be given effect is an open question. By the late 1800s, the later-in-time rule came to be viewed as an interpretation of the Supremacy Clause of the U.S. Constitution. Jules Lobel, “The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law,” 71 *Va. L. Rev.* 1071, 1104-1110 (1985); *see also Restatement (Third) Foreign Relations Law of the United States* section 115 reporter’s note 1 (1987) (“The principle that United States treaties and federal statutes are of equal authority, so that in case of inconsistency the later in time should prevail, was derived early from the Supremacy Clause, Article VI of the Constitution.”). Because we are dealing with a matter of constitutional interpretation, it will be interesting to see whether the Court will allow Congress to substitute its own judgment for that of the Court in determining the circumstances under which a later tax statute will supersede an earlier tax treaty. *See Martha A. Field*, “Sources of Law: The Scope of Federal Common Law,” 99 *Harv. L. Rev.* 883, 896 n.60 (1986) (“Congress always has power to alter a federal common law rule that is not constitutionally based. Moreover, even common law inferred from constitutional provisions is not always beyond Congress’s power to change. But Congress sometimes lacks power to alter common law derived from the Constitution, because sometimes such law is constitutionally required.”).

Further complicating the question are the other, conflicting signals sent by Congress at the time that it codified the later-in-time rule in section 7852(d). In the very same committee report in which Congress rejected the need clearly to express an intent to override tax treaties, it paradoxically retained the “initial presumption of harmony between . . . earlier treaties and later statutes,” S. Rep. No. 100-445, at 321, reprinted in 1988 *U.S.C.C.A.N.* 4515, 4833, which is based on the same presumption “that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law, or by making it impossible for the United States to carry out its obligations.” *Restatement (Third) Foreign Relations Law of the United States* section 115 cmt. a (1987). Then, piling paradox upon paradox, the conference committee report, which adopted the Senate’s position, stated that:

(Footnote continued in next column.)

Supreme Court refused to find a legislative override of the Warsaw Convention (regarding international air transportation), when Congress had made no mention of the treaty either in the enacted statute or in its legislative history.⁵⁶ The Court has reiterated “this ‘firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action’ . . . in a number of cases.”⁵⁷

Applying this long-standing limitation on the later-in-time rule to this case, DOMA still should not override inconsistent tax treaty obligations — even if DOMA and the treaty nondiscrimination provisions are construed to be in conflict with each other. Although DOMA was enacted after the Senate ratified the relevant nondiscrimination provisions, neither DOMA⁵⁸ nor its legislative history⁵⁹ makes any mention of tax treaties.⁶⁰ Because Congress failed to clearly express an intent to override inconsistent tax treaty obligations when it enacted DOMA (and, for that matter, failed even to indicate that it had tax treaties in mind at all when it enacted DOMA), DOMA should not be given priority over tax treaties under the later-in-time rule. Instead, the nondiscrimination articles of the U.S.-Belgium, U.S.-Canada, U.S.-Netherlands, and U.S.-Spain treaties should be applied to require U.S. federal (and, where appropriate, state and local) taxing authorities to recognize the marriages of

[A]s is true of current section 894(a), the agreement’s provision adds no operative rules to be applied in determining the relationship of the Code (or other tax law) and a treaty, but rather states the constitutional principle that such determinations are relevant in determining tax liabilities. Where the relationship of treaties and statutes must be determined, the agreement simply provides for giving the treaty that regard which it is due under the ordinary rules of interpreting the interactions of statutes and treaties.

H.R. Conf. Rep. No. 100-1104, at 12, reprinted in 1988 *U.S.C.C.A.N.* 5048, 5072.

⁵⁶*Trans World Airlines*, 466 U.S. at 252.

⁵⁷*Infanti*, *supra* note 46 at 685 (quoting *Trans World Airlines*, 466 U.S. at 252); *see also McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963); *Blanco v. United States*, 775 F.2d 53, 61 (2d Cir. 1985); *Torres v. Immigration & Naturalization Serv.*, 602 F.2d 190, 195 (7th Cir. 1979); *United States v. White*, 508 F.2d 453, 456 (8th Cir. 1974); *Ungo v. Beachie*, 311 F.2d 905, 907 (9th Cir.), *cert. denied* 373 U.S. 911 (1963).

⁵⁸Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

⁵⁹H.R. Rep. No. 104-664 (1996), reprinted in 1996 *U.S.C.C.A.N.* 2905.

⁶⁰*Cf. Trans World Airlines*, 466 U.S. at 252 (“Neither the legislative histories of the Par Value Modification Acts, the history of the repealing Act, nor the repealing Act itself, make any reference to the Convention. The repeal was unrelated to the Convention; it was intended to give formal effect to a new international monetary system that had in fact evolved almost a decade earlier.”).

resident alien same-sex couples who are citizens of one of those four countries.

II. Conclusion

As commentators have noted, “claims of discriminatory taxes prove difficult to evaluate.”⁶¹ That difficulty is exacerbated by the fact that “[n]either the Treasury Department nor Congress seems to have a strong commitment to nondiscrimination”⁶² — even though the nondiscrimination articles “include rather

sweeping terms, they appear to be read narrowly.”⁶³ Nonetheless, a tenable argument can — and should — be made that, notwithstanding DOMA, the nondiscrimination articles of the U.S.-Belgium, U.S.-Canada, U.S.-Netherlands, and U.S.-Spain treaties require the recognition for tax purposes of same-sex marriages contracted by citizens of those countries. A perceived lack of receptivity to claims of discrimination, particularly claims of sexual orientation discrimination, is no reason to remain silent; indeed, it is a reason to protest the discrimination all the more vocally. ♦

⁶¹Goldberg and Glicklich, *supra* note 16 at 59.

⁶²*Id.* at 108.

⁶³*Id.*