INTRODUCTION .................................................. 607

I. THE TREATMENT OF SAME-SEX COUPLES IN THE
   UNITED STATES ........................................... 612
   A. Among the Different States ........................ 612
   B. On the Federal Level: DOMA ...................... 615
      i. Tax Implications ................................. 617
   II. NEW YORK RULE ..................................... 620
      A. Fairness ......................................... 623
         i. Tax Consequences of the New York Rule ..... 625
         ii. Impact of the New York Rule on Same-Sex
              Couples ....................................... 626
         iii. Illustrations: Unified Credit ............... 629
             a. Same-Sex Couple ............................ 630
             b. Heterosexual Married Couple ............. 632
      B. Intent .............................................. 634
   III. RULE IN A MAJORITY OF STATES: THE UNIFORM
        PROBATE CODE ..................................... 636
   IV. WHAT SHOULD NEW YORK DO? ........................ 638
      A. Similarly Situated .............................. 639
      B. A Call for Change ............................... 641

CONCLUSION .................................................. 643

INTRODUCTION

Most adult citizens of the United States, regardless of color, creed,
gender, sexual orientation, or religion, are subject to both federal and
state taxes. In light of this fact, it is not surprising that tax planning is
often in the front of many people’s minds when thinking about their
future. Whether it be a married couple taking advantage of spousal tax


Special thanks to Professor Melanie Leslie for her guidance and for directing my attention
to such an important issue.

1 See 26 U.S.C. §§ 1-2704, 2801 (statutes governing taxation) (Internal Revenue Code
statutes can be found in Title 26 of the United States Code).
exemptions, or a single individual juggling two jobs to make ends meet, or to pay off student loans, taxes affect us all. Tax planning plays a central role in the lives of American citizens. Tax planning has become an especially important issue for same-sex couples, as they are denied the right to marry, and thus cannot benefit from marital benefits on the federal level.

Courts throughout this country have recognized the extent of marriage benefits on many different levels. Indeed, in *Hernandez v. Robles*, the New York Court of Appeals explained the extent of state marital benefits in New York:

> It is undisputed that the benefits of marriage are many. The diligence of counsel has identified 316 such benefits in New York law, of which it is enough to summarize some of the most important: Married people receive significant tax advantages, rights in probate and intestacy proceedings, rights to support from their spouses both during the marriage and after it is dissolved, and rights to be treated as family members in obtaining insurance coverage and making health care decisions. Beyond this, they receive the symbolic benefit, or moral satisfaction, of seeing their relationship recognized by the State.

When discussing marital benefits, it is crucial to emphasize a major roadblock affecting marriage equality; namely, the Defense of Marriage Act. The Defense of Marriage Act (DOMA) was passed by Congress in 1996, explicitly defining marriage at the federal level as the 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 wife.” As a result of this legislation, same-sex couples are restricted from taking advantage of federal spousal tax exemptions, because same-sex marriage is not recognized on the federal level.

Another troubling issue facing same-sex couples, and one which is closely tied in with the tax system in place in the United States, is that of probate. Probate is a legal process that takes place after an individual’s

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3 *Hernandez*, 855 N.E.2d at 6. See *infra* text accompanying notes 53-56 for a discussion of federal spousal benefits; see also sources cited *infra* note 53; *Coleman*, *infra* note 48, at 501-02 (for an in-depth list of federal spousal benefits).


5 See *infra* Part I.B.i.
death in order to handle the decedent’s assets. During this process, the decedent’s will is examined for validity, her property and assets are appraised, outstanding debts and taxes are paid, and her property is distributed as per the terms of her will. If the decedent dies without a will (“intestate”), then this distribution is most often determined by state law. Indeed, this is an issue that all Americans face, and many seek to avoid the probate process because of delay and expense.

Probate is especially troublesome for same-sex couples, as their wills are often extremely ripe for contest. Family members of a gay or lesbian individual can be disapproving of the gay “lifestyle,” and thus may be more likely to contest the will of their gay or lesbian family member on account of this disapproval. Members of the gay community can face the significant hurdles discussed throughout this Note when they attempt to transfer their assets to their partners upon their death.

Many Americans seek to avoid probate by a number of legal mechanisms, including the use of joint bank accounts, joint ownership, inter vivos or revocable living trusts, Totten trusts and payable-on-death trusts, among others. The use of joint bank accounts with a

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6 Probate is defined as the “judicial procedure by which a testamentary document is established to be a valid will; the proving of a will to the satisfaction of the court.” BLAek’s Law DICTIONARY 1321 (9th ed. 2009). See Joel C. Dobris, Stewart E. Sterk & Melanie B. Leslie, Estates and Trusts 46 (Foundation Press, 3d ed. 2007). If the deceased has not left a will, her closest relative will most likely petition to become her “personal representative,” or “administrator.” If the decedent has left a will naming an “executor,” the executor will most likely petition for “letters testamentary,” which entitle the executor to serve as the decedent’s personal representative. Id.

7 Dobris, Sterk & Leslie, supra note 6, at 46.

8 Id. at 47.

9 Id. at 471.

10 Id.

11 Id.

12 See supra text accompanying note 8.

13 The term “trust” is defined as:

The right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the trustor) at the request of another (the settlor) for the benefit of a third party (the beneficiary). For a trust to be valid, it must involve specific property, reflect the settlor’s intent, and be created for a lawful purpose. BLACK’S LAW DICTIONARY 1647 (9th ed. 2009) (emphasis in original).

14 See Adam Chase, Tax Planning for Same-Sex Couples, 72 DENV. U. L. REV. 359, 399 (1995). A joint bank account is defined as:

A bank or brokerage account opened by two or more people, by which each party has a present right to withdraw all funds in the account and, upon the death of one party,
right of survivorship\textsuperscript{15} is one of the most common ways to avoid probate.\textsuperscript{16} As noted above, gay and lesbian individuals have an added incentive to avoid probate on account of their wills being extremely ripe for contest.\textsuperscript{17} This point is exacerbated by the fact that an overwhelming majority of states withhold marital privileges from same-sex couples.\textsuperscript{18} This means that an individual in a same-sex relationship is not assured an intestate share of the property of his or her partner.\textsuperscript{19} This notion will be explored in depth throughout this Note.

In the face of such financial insecurity, same-sex couples must go through extensive tax planning to try and ensure transfers of property between partners upon death, as well as to avoid being overburdened by high taxes. As a result, many same-sex couples open joint bank accounts together in the hope of ensuring a way to not only share money with each other, but also to have that money go to the surviving partner in

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\textsuperscript{15} Right of survivorship is defined as "[a] joint tenant's right to succeed to the whole estate upon the death of the other joint tenant." BLACK'S LAW DICTIONARY 1440 (9th ed. 2009).

\textsuperscript{16} In this scenario, two people deposit money into a joint bank account, each having the right to withdraw the funds, and upon the death of one of the joint bank account-holders, the other automatically owns the decedent's share of the account. See supra note 14.

\textsuperscript{17} See supra text accompanying notes 9-11.

\textsuperscript{18} See infra Part I.

\textsuperscript{19} See Dobris, Sterk & Leslie, supra note 6, at 471; see also generally Susan N. Gary, Adapting Intestacy Laws to Changing Families, 18 LAW & INEQ. 1 (2000).
the event of death. 20 Unfortunately, navigating around the laws for joint bank accounts is not an easy task. Indeed, joint bank account rules among the different states are inconsistent, “unsettled, conflicting, and confusing.” 21

Currently, in the State of New York, the deposit by an individual of funds into a joint bank account with the right of survivorship is presumed to be a gift of one-half of the money to the other account-holder. 22 This means that if two individuals own a joint bank account in New York, and one deposits $20,000, the deposit is presumed to be a gift of $10,000 (one-half) to the other account-holder. Throughout this Note I will show that this rule is not only ill-conceived, unfair, and illogical, but is also discriminatory against same-sex couples. This New York rule stands in contrast to the Uniform Probate Code’s (UPC) 23 stance on joint bank accounts, which is that the depositor of money into a joint bank account owns the full amount he or she deposits. 24 At least half of the states have adopted the stance of the UPC, 25 a stance which not only makes more logistical sense and speaks directly to the intent of depositors, but which is also far less discriminatory than the rule in New York.

Part I begins with a look into the social climate of the United States, examining how same-sex couples are treated (legally) throughout the different states and on the federal level. I provide this examination in order to lay a foundation from which to highlight the dire consequences of the New York rule governing joint bank accounts. Part II

20 This is on account of right-of-survivorship rules surrounding joint-bank accounts. See infra note 23 and accompanying text.
22 N.Y. BANKING LAW § 675(a) (McKinney 2010):

[Deposits into joint bank accounts] shall become the property of such persons as joint tenants and the same, together with all additions and accruals there, shall be held for the exclusive use of the persons so named, and may be paid or delivered to either during the lifetime of both or to the survivor after the death of one of them, and such payment or delivery and the receipt or acquittance of the one to whom such payment or delivery is made. . . .

23 The Uniform Probate Code is defined as “[a] 1969 model statute that modernizes the rules and doctrines governing intestate succession, probate, and the administration of estates. It has been extensively amended many times since 1969 and has been enacted in a majority of states.” BLACK’S LAW DICTIONARY 1670 (9th ed. 2009).
then discusses the New York approach in detail, starting with the basic framework of the rule—which we will see is actually a presumption—and the case law involved. The specific tax consequences of the rule are then examined, followed by an in-depth discussion of the impact on same-sex couples. Within this Part, I include a number of illustrations to highlight the vast differences between the impact of the New York rule on a heterosexual married couple versus a similarly situated same-sex couple. Part III presents the UPC’s approach to joint bank accounts, followed by Part IV, which proposes a solution to the problem surrounding these accounts in New York. Finally, I present my conclusion.

I. THE TREATMENT OF SAME-SEX COUPLES IN THE UNITED STATES

A. Among the Different States

Lambda Legal, a legal organization working for the civil rights of the lesbian, gay, bisexual, and transgendered community (hereinafter LGBT), has compiled a “safety scale,” outlining the position of the rights of same-sex couples throughout the states.\(^\text{26}\) This “safety scale” summarizes the different rights available to, and denied to, same-sex couples among the fifty states and the District of Columbia. As of February 2, 2011, only five states and the District of Columbia provide equal treatment for same-sex couples and allow same-sex couples to marry.\(^\text{27}\) Three states provide protections of marriage with a “label of inferiority such as civil union or domestic partnership.”\(^\text{28}\) While these states do grant same-sex couples the same protections of marriage, they refuse to recognize the partnership as a “marriage.” This may seem like mere semantics to some; however, the refusal to grant a “marriage” to a


\(^{27}\) See LAMBDA LEGAL, supra note 26. The five states are Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont.

\(^{28}\) Id. These states are Illinois, New Jersey and Washington. See also HUMAN RTS. CAMPAIGN FOUND., ANSWERS TO QUESTIONS ABOUT MARRIAGE EQUALITY 5-6 (2009), available at http://www.hrc.org/documents/HRC_Foundation_Answers_to_Questions_About_Marriage_Equality_2009.pdf for a discussion on why civil unions and domestic partnerships are not an adequate substitute for same-sex marriage.
same-sex couple, and to only allow inferior titles of "civil union" or "domestic partnership" to such a couple, is evidence of discrimination within itself. Indeed, three states' constitutions explicitly bar same-sex couples from marriage, but provide inferior labels such as domestic partnerships or civil unions.\textsuperscript{29} There is no logical explanation to grant same-sex couples the same protections of a legal "marriage" and yet refuse to term it so, other than the homophobic view that homosexuals are second-class citizens undeserving of a title ("marriage") reserved for heterosexual individuals. It is also important to note that even in states where same-sex couples are afforded the same state marital protections as heterosexual married couples, their union is still not recognized on the federal level because of DOMA.\textsuperscript{30} Therefore, same-sex couples living in these states benefit from state marital benefits, but not federal marital benefits.

The protections offered to same-sex couples in the remaining states only decrease from there. As of February 2, 2011, five states offer same-sex couples "some protections through a lesser legal status" than a civil union or domestic partnership,\textsuperscript{31} and eight states and Puerto Rico bar same-sex couples from marriage without offering a lesser status to recognize those couples.\textsuperscript{32} Furthermore, "the constitutions of twenty-five states, half of the country, not only ban marriage for same-sex couples, but also either provide no protections for same-sex couples or contain provisions causing even more harm to same-sex couples . . . ."\textsuperscript{33} This means that in those states, same-sex couples have absolutely no legal recognition, and thus cannot enjoy any form of marital benefit.

\textsuperscript{29} See Lambda Legal, supra note 26. These states are California, Nevada, and Oregon.


\textsuperscript{31} See Lambda Legal, supra note 26 (emphasis added). These states include Colorado, Hawaii, Maine, Maryland, and Wisconsin.

\textsuperscript{32} Id. These states (and territories) include Delaware, Indiana, Minnesota, North Carolina, Pennsylvania, Rhode Island, West Virginia, Wyoming, and Puerto Rico.

\textsuperscript{33} See Darmer & Chang, supra note 26, at 24 (listing the twenty-five states discussed above: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin); see also Lambda Legal, supra note 26 (which has the number of states with constitutional amendments banning same-sex marriage at twenty-seven: Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia).
Unlike heterosexual marriages, states do not need to recognize same-sex marriages performed in other states, a concept that will be explored in the next Part. In fact, only four states recognize same-sex couples’ out-of-state marriages. As previously noted, only five states and the District of Columbia offer equal treatment between same-sex and heterosexual couples, and allow same-sex couples to marry. This issue poses logistical and emotional hurdles to same-sex couples upon the death of a partner.

As a consequence, this means that in the remaining forty-five states, an individual in a same-sex relationship is not assured an intestate share of his or her partner’s property. Take, for example, Jeanne and Debbie. They have been in a monogamous, committed lesbian relationship for fifteen years. They live together, share incomes, and essentially live just as a counterpart heterosexual married couple would live. They had a commitment ceremony in front of family and friends, declaring their love and commitment to each other fifteen years ago. They live in Texas, one of the states in this country that bars same-sex marriage. Debbie passes away suddenly, before making a will. Debbie would have wanted to leave everything to Jeanne, but as she did not make a will legally stating this fact, the state of Texas controls intestate succession. The simple fact is this: if Jeanne and Debbie were legally “married,” most of Debbie’s property would automatically pass to Jeanne upon Debbie’s death. However, since they live in a state that does not recognize or grant same-sex marriage, their fifteen-year relationship has no bearing on the distribution of Debbie’s property, and her property will mostly likely pass to her heirs. To make matters worse, when taken into consideration with the federal estate tax and

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34 See U.S. CONST. art. IV, § 1; see infra text accompanying notes 43-52 for a discussion of DOMA and the Full Faith and Credit Clause.
35 See LAMBDA LEGAL, supra note 26. The four states are Maryland, New Mexico, New York, and Rhode Island.
36 See supra text accompanying note 27.
37 Intestate is defined as “1. Of or relating to a person who has died without a valid will[;] 2. Of or relating to the property owned by a person who died without a valid will[;] 3. Of or relating to intestacy . . . .” BLACK’S LAW DICTIONARY 898 (9th ed. 2009).
38 See DOBRIS, STERK & LESLIE, supra note 6, at 471; see also generally Gary, supra note 19; E. Gary Spitko, The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion, 41 ARIZ. L. REV. 1063 (1999).
39 See supra note 33 for the list of states that ban same-sex marriage through constitutional amendments.
40 See DOBRIS, STERK & LESLIE, supra note 6, at 471; see also generally Gary, supra note 19.
41 See DOBRIS, STERK & LESLIE, supra note 6, at 471.
unified credit, a financial burden looms over Jeanne's head as she is confronted with the death of her partner.

B. On the Federal Level: DOMA

As outlined above, the state of same-sex marriage recognition in this country is murky, confusing, and extremely unfortunate. DOMA makes matters even worse for same-sex couples in the United States. By limiting the definition of “marriage” to apply only to heterosexual married couples on the federal level, DOMA excludes same-sex couples from the multitude of benefits that accompany marriage, as discussed above. It is important to note, however, that DOMA does more than just define who can legally marry on the federal level. Specifically, while certain states do allow same-sex marriage, DOMA makes clear that states are not required to recognize same-sex marriages granted in other states. Indeed, the second provision of DOMA allows states to refuse to give full faith and credit to other states’ decisions by not recognizing same-sex marriages that were performed in other states. For example, Pennsylvania and Texas are legally entitled to refuse to recognize a same-sex marriage performed in Massachusetts. In other words, the full faith and credit clause does not apply to same-sex marriage. As Matthew Fry points out in 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, “[w]ith this provision, DOMA invalidates the longstanding American common law notion that a marriage valid in one state is valid throughout all the states.”

Furthermore, the first provision of DOMA explicitly defines marriage as the 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 wife."49 This definitional provision makes it clear that after the passage of DOMA, marriage is limited to heterosexual marriage for all federal purposes.50 This definition of marriage has far-reaching consequences beyond just barring the recognition of same-sex marriage. Indeed, "DOMA goes far beyond simply defining marriage; it deprives same-sex couples of all federal benefits to which married couples are entitled."51 Same-sex marriage is not recognized on the federal level and thus, even when same-sex partners are "married" in a state which will grant their marriage, they cannot benefit from federal spousal benefits.52

Marital status is a factor in determining or receiving many federal benefits. In fact, as of December 31, 2003, the General Accounting Office (GAO) had identified 1138 federal statutory provisions "in which marital status is a factor in determining or receiving benefits, rights, and privileges."53 Taxation is obviously one of these federal provisions. When transferring wealth and property between each other during their marriage, heterosexual married couples are completely free of federal income, gift, or estate taxes.54 As long as DOMA remains

50 See Fry, supra note 47, at 556.
51 Id.
52 See supra text accompanying notes 2-3 and infra notes 53-54 (discussing the vast extent of federal spousal benefits).
54 Christopher T. Nixon, Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as are Currently Granted to Married Couples?: An Analysis in Light of Horizon-
valid law—that is, until it is repealed by Congress or found to be unconstitutional—the Internal Revenue Service (IRS) simply cannot legally extend “marital” tax benefits to same-sex couples that are validly married on the state level.\textsuperscript{55} Even in states where same-sex marriage, or some form of legal recognition, is available, same-sex married couples are denied federal spousal benefits.\textsuperscript{56} Simply put, even when same-sex couples live in a state in which they are allowed to marry, “married” same-sex couples \textit{do not} benefit from any spousal benefits on a federal level.

\textbf{i. Tax Implications}

For same-sex couples, even those married in one of the five states (or the District of Columbia) permitting same-sex marriage, the marital


\textsuperscript{55} See Fry, supra note 47, at 556; see also Mark Strasser, Some Observations about DOMA, Marriages, Civil Unions, and Domestic Partnerships, 30 CAP. U. L. REV. 363, 364 (2002).

\textsuperscript{56} See Gary J. Gates, M.V. Lee Badgett & Deborah Ho, Marriage, Registration and Dissolution by Same-Sex Couples in the U.S. 2-5 (July 2008), available at http://www.law.ucla.edu/williamsinstitute/publications/Couples%20Mar%20Regis%20Diss.pdf (stating that as of Spring 2008, more than 85,500 same-sex couples had formalized their relationships in some legal fashion in the United States, and also noting that “more than 40\% of same-sex couples have married, entered a civil union, or registered their relationships” in the states that provide legal recognition.); see also Human Rts. Campaign Found., supra note 28, at 2, which provides ten facts about marriage equality in the United States, based on an analysis of the 2000 census:

1. Same-sex couples live in 99.3 percent of all counties nationwide.
2. There are an estimated 3.1 million people living together in same-sex relationships in the United States.
3. Fifteen percent of these same-sex couples live in rural settings.
4. One out of three lesbian couples is raising children. One out of five gay male couples is raising children.
5. Between 1 million and 9 million children are being raised by gay, lesbian and bisexual parents in the United States today.
6. At least one same-sex couple is raising children in 96 percent of all counties nationwide.
7. The highest percentages of same-sex couples raising children live in the South.
8. Nearly one in four same-sex couples includes a partner 55 years old or older, and nearly one in five same-sex couples is composed of two people 55 or older.
9. More than one in 10 same-sex couples is composed of two people 65 or older.
10. The states with the highest numbers of same-sex senior couples are also the most popular for heterosexual senior couples: California, New York and Florida.
tax deduction is not available for federal gift and estate tax purposes. This fact makes tax planning extremely difficult for same-sex couples with “estates large enough to warrant federal transfer tax planning.” In her paper *Same-Sex Marriage*, Virginia F. Coleman highlights one of the hurdles faced by same-sex couples that is discussed in depth throughout this Note:

[T]he transfer of assets from one [spouse in a same-sex marriage] to the other, in order to ensure full use of the unified credit at the first death, cannot be effortlessly accomplished as it can be between opposite sex spouses (at least if they’re both U.S. citizens). A transfer to a same-sex spouse over and above the annual exclusion will constitute a taxable gift using unified credit or generating a gift tax, which of course largely negates the purpose of the transfer in the first instance.  

Consider the hypothetical discussed above involving Jeanne and Debbie. Upon Debbie’s death, Jeanne will not only face the risk of not being assured an intestate share of Debbie’s property, but she will also face numerous gift and estate taxes that a heterosexual widow or widower would not be burdened with.

As a result of DOMA, same-sex couples are excluded from enjoying federal marital tax exemptions. Same-sex couples—whether “married,” because they are fortunate enough to live in one of the five states (or the District of Columbia) that grant same-sex marriage, or not

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58 Id.  
59 See supra Part I.A.  
60 A gift is defined as “[t]he voluntary transfer of property to another without compensation.” *Black’s Law Dictionary* 757 (9th ed. 2009). The gift tax is defined as “[a] tax imposed when property is voluntarily and gratuitously transferred. Under federal law, the gift tax is imposed on the donor, but some states tax the donee.” Id. at 1595.  
61 Estate is defined as “[t]he amount, degree, nature, and quality of a person’s interest in land or other property.” *Black’s Law Dictionary* 626 (9th ed. 2009). The estate tax is defined as “[a] tax imposed on the transfer of property by will or by intestate succession. — Also termed death tax . . . .” Id. at 1595 (emphasis in original).  
62 See Fry, supra note 47, at 558; see also Nixon, supra note 54, at 47 (noting that married couples can transfer wealth and property between each other during their marriage remaining completely free of federal income, gift, or estate taxes); see also 26 U.S.C. §§ 61, 63, 102(a) (2006) (gifts excluded from gross income, and thus, from taxable income for married couples); 26 U.S.C. § 1041 (2006) (all transfers of property between spouses during marriage are treated as gifts for purposes of income taxation); 26 U.S.C. § 2523 (2006) (providing a 100% marital deduction for lifetime gifts between spouses).
"married" because they live in one of the remaining forty-five states—and heterosexual married couples are taxed very differently and at different rates, despite being similarly situated. It is also important to note that individuals in a same-sex partnership must file taxes as individuals; their relationships are not accounted for. This means that every tax season, individuals in same-sex relationships are required to report their income to the IRS as if they were unrelated strangers. Whereas heterosexual married couples often voluntarily report their monetary record to the IRS, as well as life events such as marriage, divorce, birth of a child, sale of property, and death, same-sex couples have to report to the IRS as though they are living separate lives. Federal law forces same-sex partners to "fabricate information regarding their economic reality in order to file as single and possibly even as single parents."

This creates numerous burdens on same-sex couples that heterosexual married couples do not have to struggle with. These burdens include temporal and financial components, as they increase the time and money necessary for estate planning in the face of being ineligible for marital tax exemptions. In order for same-sex couples to arrive at the same place, and achieve the same benefits that heterosexual married couples receive automatically, complex and expensive estate planning is required. This also places a heavy emotional burden on same-sex couples, as they are forced to essentially live a lie through their tax returns and face a society that refuses to acknowledge their relationship.

In his article Tax Planning for Same-Sex Couples, Adam Chase, a prominent tax lawyer, eloquently describes the centrality of tax law in our society, and the difficulties faced by the gay community in this area:

63 See Fry, supra note 47, at 568 (emphasis added).
64 Id.; see also Nixon, supra note 54, at 46.
66 Id.
67 Fry, supra note 47, at 568.
68 Id.; see Margaret W. Hickey, Estate Planning for Cohabitants, 22 J. AM. ACADEM. MARRIAGE LAW. 1, 2 (noting other benefits that DOMA restricts from same-sex couples that "opposite sex" married couples enjoy); see also Chase, supra note 14, at 360 (highlighting the contrast in treatment between same-sex couples and heterosexual married couples).
69 See Fry, supra note 47, at 569 (quoting Robert Emond, Does the Equal Protection Analysis in Lawrence Make Bans on Same-Sex Marriage Unconstitutional?, 26 T. Jefferson L. Rev. 447, 458 (2004)) ("[t]o put this in perspective, all of the benefits denied to a homosexual couple of twenty years can be instantly had by a heterosexual couple that just met and got married in a drive through chapel in Las Vegas.").
Tax law touches almost every aspect of human conduct. We are taxed from cradle to grave, and even then our estates—if we have them—are subject to tax. Accordingly, prudent tax planning involves a comprehensive view of life’s many stages and transactions, encompassing both the expected and unexpected. For a married couple whose legal status carries substantial automatic tax preferences and protections, the task of tax planning is less difficult than for a similarly situated lesbian or gay couple that must resort to complex legal arrangements in an attempt to achieve parity. . . . As compared to same-sex couples, married couples are given preferential treatment by the government, employers, insurers, and private organizations. In response to this discrimination, lesbian and gay couples have entered creative legal relationships, some of which have substantial tax ramifications.\(^{70}\)

While many people, regardless of sexual orientation, enter into extensive tax planning and wish to avoid the hassles of probate, tax planning is especially important for same-sex couples, as they are not entitled to the federal benefits of marriage.\(^{71}\) Marriage grants heterosexual couples special legal and social advantages “affecting their taxes, intestate succession, health care, insurance, organizational memberships, and their means of holding real estate. In contrast, lesbian and gay couples involved in long-term, intimate relationships are denied these and other privileges.”\(^{72}\) As noted earlier, gifts between spouses (money, property, etc.) are not subject to the gift tax.\(^{73}\) An important benefit of this exemption is that such transfers between spouses do not affect the couple’s unified credit.\(^{74}\) This concept will be explored in a later section,\(^{75}\) but for now it is important to note that this is yet another tax benefit that same-sex couples are restricted from enjoying.

### II. New York Rule

Same-sex couples often utilize joint bank accounts with a right of survivorship in order to ensure that their money will pass to the other upon death. New York was the first state to pass a law authorizing pay-

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70. Chase, supra note 14, at 361.

71. See Dobris, Sterk & Leslie, supra note 6, at 471; see also generally Gary, supra note 19.

72. See Chase, supra note 14, at 360.

73. See supra note 54 and accompanying text.

74. Unified estate-and-gift tax credit is defined as “[a] tax credit applied against the federal unified transfer tax. . . . Often shortened to unified credit.” Black’s Law Dictionary 1599 (9th ed. 2009) (emphasis in original).

75. See infra Part II.A.i-iii.
ment to the survivor of funds deposited into a joint bank account.\textsuperscript{76} This law was set forth in section 675 of the N.Y. Banking Law,\textsuperscript{77} and has since been interpreted through extensive case law. Since the statute's inception in 1909, it has "authorized a reasonably reliable method of making a nontestamentary transfer of bank deposits at death . . . . But it did more: it decided that upon the opening of such an account in proper form the deposit 'shall become the property of such persons as joint tenants.'"\textsuperscript{78} In New York State, the opening of a joint bank account constitutes prima facie evidence of an intent to create a joint tenancy.\textsuperscript{79} Therefore, it is presumed that parties that open a joint bank account are creating a joint tenancy.\textsuperscript{80} Put another way, the current rule in New York regarding joint bank accounts is actually a presumption; namely, it is presumed that the account-holders are joint tenants. The practical impact of this presumption is that the deposit of funds into a joint bank account with the right of survivorship is presumed to be a gift of one-half the deposited amount to the other account-holder.\textsuperscript{81}

A joint tenancy is a "tenancy with two or more co-owners who take identical interests simultaneously by the same instrument and with the same right of possession."\textsuperscript{82} In regard to joint bank accounts in New York, the presumption of joint tenancy means that each account-holder is entitled to half of the funds in the account, regardless of the amount of money each individual contributed to the account. This means that if a depositor of a joint bank account deposits $10,000 into a joint bank account, it is presumed that the deposit of $10,000 is a gift of $5000 to the other account-holder. Even if there is one sole donor, the other account-holder gains title to half of the entire fund.

This presumption of a joint tenancy in joint bank accounts has been the cause of much confusion throughout New York courts. In fact, the New York Surrogate Court recognized the abundant problems sur-

\begin{footnotes}
\item[76] N.Y. Banking Law § 675(a) (McKinney 2010); see supra note 22 for the full text of the statute.
\item[77] Formerly N.Y. Banking Law § 239, subdiv. 3 \textit{(repealed by 1964 N.Y. Laws 773)}.
\item[79] N.Y. Banking Law § 675(b).
\item[80] N.Y. Banking Law § 675(a).
\item[81] \textit{Id.}; see \textit{Filfiley}, 63 Misc. 2d at 827.
\item[82] "A joint tenancy differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share (in some states, this right must be clearly expressed in the conveyance—otherwise, the tenancy will be presumed to be a tenancy in common)." \textit{Black's Law Dictionary} 1603 (9th ed. 2009).
\end{footnotes}
rounding joint bank accounts in *In re Filjiley*, which will be discussed in Part II.B of this Note. Nevertheless, after the New York Court of Appeals—**in Kleinberg v. Heller**—upheld a surrogate court's ruling on the presumption of a joint tenancy in joint bank accounts, this presumption remains the rule. In effect, the concurring judge in *Kleinberg* explained that section 675 of the N.Y. Banking Law has a presumption of joint tenancy with a right of survivorship.

Inherent in this joint tenancy presumption in New York is a right of survivorship. A right of survivorship ensures that upon death, the money in the account automatically transfers to the surviving co-holder. This aspect of joint bank accounts in New York is very enticing to same-sex couples, as it ensures that whatever money is shared in their joint bank account will automatically pass to the surviving partner upon death. After the passage of DOMA, same-sex couples are restricted from enjoying protections from the federal government in the form of tax benefits or automatic intestate succession, even if they are married on the state level. Therefore, a joint bank account with the right of survivorship is about as much of an assurance that their money will pass to the other upon death that a same-sex couple can get.

The right of survivorship discussed above is destroyed if there is a withdrawal of more than one-half of the joint account by one depositor without the other depositor's consent or ratification. In this event, the other is entitled to the amount in excess of the moiety. As expressed by the concurring judge in *Kleinberg*, "[i]t is well established, again by judicial decree in the absence of statutory proviso, that, where a joint tenant withdraws more than his or her moiety . . . there is an absolute

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83 Filjiley, 63 Misc. 2d at 825.
85 *Id.* at 840-41 (Fuchsberg, J., concurring). Before *Kleinberg*, *Moskowitz v. Marrow*, 251 N.Y. 380 (1929), established the proposition that under a joint tenancy with right of survivorship, there is a rebuttable presumption that each co-holder owns equal half-shares during their lifetimes.
86 N.Y. BANKING LAW § 675 (McKinney 2010); see *Filjiley*, 63 Misc. 2d at 824-25; see also *Kleinberg*, 38 N.Y.2d at 840; *supra* note 15 and accompanying text.
88 See *supra* text accompanying notes 43-75.
89 Ratification is defined as "1. Adoption or enactment, esp. where the act is the last in a series of necessary steps or consents [;] 2. Confirmation and acceptance of a previous act, thereby making the act valid from the moment it was done . . . ." *BLACK'S LAW DICTIONARY* 1376 (9th ed. 2009).
90 *Kleinberg*, 38 N.Y.2d at 842; *Filjiley*, 63 Misc. 2d at 827-28. Moiety is defined as "[a] half of something (such as an estate)." *BLACK'S LAW DICTIONARY* 1096 (9th ed. 2009).
right in the other tenant, during the lifetime of both, to recover such excess."\textsuperscript{91} In other words, a co-holder of a joint bank account may only withdraw half of the funds in the account, regardless of how much he or she deposited. If more than half of the funds are withdrawn by an account-holder, the other has an automatic cause of action to recover the amount of excess of the half.

Take, for instance, James and Steven. James and Steven live in New York and have a joint bank account. The sum of deposits in the account to this day equals $400,000. Under section 675 of the N.Y. Banking Law and \textit{Kleinberg}, both James and Steven own half of this amount.\textsuperscript{92} They therefore both own $200,000, which is considered their "moiety." Upon Steven's death, James would acquire ownership of Steven's half of the account ($200,000). Therefore, James would automatically own the full amount of $400,000. However, assume that Steven does not die, and James withdraws $250,000 from their joint bank account without Steven's consent or ratification of the terms of the account. This amount is $50,000 over James's moiety of $200,000. This withdrawal in excess of his moiety destroys the right of survivorship inherent in the joint account. Therefore, upon the death of either Steven or James, there is no longer an automatic transfer of ownership of the full amount of funds. Also, Steven has a legal right to recover the $50,000 of excess that James withdrew from the account. These facts are true regardless of the relationship status of James and Steven. James and Steven could be in a same-sex relationship, they could be cousins, or simply business partners. The presumption affirmed in \textit{Kleinberg} applies the same way in each scenario.

\textbf{A. Fairness}

The implications of the presumption surrounding joint bank accounts in New York are troublesome for a number of logistical and moral reasons, not to mention that they simply go against common sense. Why should a deposit into a joint bank account be considered a gift of one-half the deposited amount to the other account-holder? Consider the above hypothetical of James and Steven. They have a joint

\textsuperscript{91} \textit{Kleinberg}, 38 N.Y.2d at 842.

\textsuperscript{92} Specifically, it is presumed that they are joint tenants, and their deposits are considered a gift of one-half the amount of the deposit to the other account-holder. See, e.g., \textit{Kleinberg}, 38 N.Y.2d at 840-41; \textit{Filfiley}, 63 Misc. 2d at 827; Adams v. Hickey, 828 N.Y.S.2d 105 (N.Y. App. Div. 2006) (presumption that a deposit by one account-holder into a joint bank account is a gift of one-half of the deposit to the other account-holder).
bank account holding $400,000, giving them each a $200,000 moiety/ownership of the account. This holds true regardless of the amounts that either James or Steven deposited. If James deposited $1, and Steven deposited $399,999, they still both have an individual ownership of $200,000.\textsuperscript{93} Steven, even though he deposited $399,999 into the account, only has a legal right to $200,000. Unless he obtains consent from James, or the terms of the joint bank account are ratified, Steven can only withdraw $200,000 from an account in which he deposited $399,999. If he is to withdraw any amount over $200,000, James has a legal right to recover the amount of excess. In common sense terms, this does not seem fair.

Think of it in the reverse as well. James has only deposited $1 into the joint bank account, and yet, he has legal ownership of $200,000. While this is a great scenario for James, one has to ask if this makes any sense at all. Why is there such a rule that would benefit James so greatly, and risk hurting Steven to the same extent? Why not just have a rule which states that one owns the amount which he or she deposits into a joint bank account?\textsuperscript{94} Under such a rule, Steven would be entitled to the full amount which he deposited ($399,999) and would not be penalized if he were to withdraw any amount over this sum.

It is important to note that this type of joint bank account—one with a right of survivorship under section 675 of the N.Y. Banking Law—is not the only type of joint bank account created by the New York legislature. The other type of joint account in New York is one “for convenience,” which is a simple agency account.\textsuperscript{95} In this type of account, the depositor is not considered to have made a gift of one-half of the deposit to the other account-holder. Here, each account-holder may access and withdraw funds, but the co-holder has no ownership interest in the depositor’s money, and there is no right of survivorship.\textsuperscript{96} Therefore, if one of the owners of a joint bank account dies, the other owner of the account does not enjoy automatic ownership of the decedent’s deposits. There must be explicit intent present to open a joint account “for the convenience of the depositor” in order for these guide-

\textsuperscript{93} Specifically, James’s deposit of $1 would be considered a $0.50 gift to Steven, and Steven’s deposit of $399,999 would be considered a gift of $199,999.50 to James. Therefore, each owns $199,999.50 plus $0.50, equaling $200,000.

\textsuperscript{94} This is the Uniform Probate Code’s stance, which is discussed \textit{infra} Part III.

\textsuperscript{95} N.Y. \textsc{banking law} § 678 (McKinney 2010).

\textsuperscript{96} \textit{Id.}; \textit{see} Mahle, \textit{supra} note 25, at 64.
This simple agency account may seem like a reasonable solution for Steven and James, as there is no presumption that a deposit into the account is a gift of one-half the deposited amount to the other account-holder. However, what if Steven and James want the right-of-survivorship function of a joint bank account? Or what if there is no evidence that the account was created for convenience? In these cases, a simple agency account would not be a reasonable alternative to a joint bank account in New York State. Steven is stuck in a situation where any deposit he makes into the joint bank account is considered a gift of one-half the deposited amount to James, and vice versa. Importantly, regardless of their relationship to each other, the impact of this rule has serious tax implications for both Steven and James. Moreover, if Steven and James are in a same-sex relationship, this rule is discriminatory, as they are unable to receive spousal tax benefits on the federal level. These two important consequences of the New York rule on joint bank accounts are explored below.

i. Tax Consequences of the New York Rule

The main issue with the rule set forth in section 675 of the N.Y. Banking Law is that since the deposit of funds into a joint bank account is considered a gift of one-half the deposited amount to the other account-holder, it is subject to the federal gift tax. The federal gift tax has

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97 See N.Y. BANKING LAW § 678; see also Mahle, supra note 25, at 64.


99 See N.Y. BANKING LAW §§ 675, 678; see also Storozyński v. Storozyński, 874 N.Y.S.2d 575 (N.Y. App. Div. 2009). In Storozyński, two joint bank accounts held in the names of the decedent and his former wife showed that the decedent created the accounts for convenience and not with the intention of conferring a present beneficial interest on his wife. The presumption of joint tenancy was held to be rebutted, and the wife was not entitled to the funds in the account.

100 See supra text accompanying notes 57-74.
an annual exclusion amount of $13,000. This means that in New York, any amount deposited into a joint bank account over $26,000 is taxable, for the deposit is considered a gift of one-half the deposited amount to the other account-holder.

This impacts all people who are not married, but wish to avoid probate by having joint bank accounts with a right of survivorship. This is especially a problem for the gay community, however, because the option of marriage is not even on the table. Therefore, gifts between same-sex couples do not count as gifts between spouses, and are thus subject to tax.

ii. Impact of the New York Rule on Same-Sex Couples

As noted throughout this Note, the transfer of assets between partners can prove to be extremely difficult for same-sex couples. Gays and lesbians often face significant hardships in their life, one of which is seeking acceptance from their families. Families are often unhappy when a family member is a member of the LGBT community, even to the point where they are unwilling to accept their son/daughter’s lifestyle, or even admit it to themselves. This unfortunate fact was most famously illustrated in In re Guardianship of Kowalski. Sharon Kowalski was struck by a drunk driver in 1983 and sustained serious bodily injuries, including brain damage. Karen Thompson, her same-sex partner, filed a petition to become Sharon’s legal guardian. Sharon’s father filed a similar petition, and the father won guardianship. Karen was barred from visiting her partner in the hospital and at the Kowalskis’ home because Sharon’s father refused to believe his daughter was gay.

102 This number is derived from doubling the annual gift tax exclusion amount of $13,000, since the deposit of funds into a joint bank account is considered a gift of one-half the deposited amount to the other account-holder ($13,000 x 2 = $26,000); see IRS PUBLICATION 950, supra note 101, at 6; see generally 26 U.S.C., subtit. B, ch. 12 (2006); see, e.g., N.Y. BANKING LAW § 675; Kleinberg, 38 N.Y.2d at 840-41 (for the presumption of joint tenancy surrounding joint bank accounts).
104 Kowalski, 478 N.W.2d at 791.
and denied Karen any visitation rights. Karen continued to fight for guardianship of the woman she loved, and after seven years and $225,000 in litigation expenses, she was eventually named as Sharon's legal guardian. Although this Note does not address the issue of visitation or guardianship rights—rather it focuses on tax and probate issues facing same-sex couples—this case illustrates how difficult it can be for same-sex couples to face an un-accepting family. The significance of this point in the scope of this Note is that if an heir has difficulty accepting the testator's way of life—namely, his or her sexual orientation—the testator's will is extremely ripe for contest.

As previously noted, only five states and the District of Columbia grant same-sex marriages. In the remaining forty-five states, same-sex couples cannot enjoy the marital privileges enshrined in property law. A person's home is often the most valuable asset passed on at his or her death. While property is transferred between heterosexual spouses with extreme ease, and without tax implications, this is unfortunately not the case for same-sex couples. As Fry points out:

While the estate of a decedent leaving a house to a heterosexual widow would be allowed a 100% marital deduction, causing the estate and the surviving spouse to face no taxation whatsoever for the transfer of a home she lived in or co-owned, the estate of the same-sex decedent will be taxed on fifty percent of the fair market value of the property he or she co-owned.

Individuals in same-sex relationships in the forty-five states that outlaw same-sex marriage are simply not assured of an intestate share of

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106 Kowalski, 478 N.W.2d at 791.
107 See Kurt Chandler & Carol Byrne, 'I . . . Will Not Let Her Down: Thompson Takes Kowalski Home to Stay, MINNEAPOLIS STAR-TRIB., Apr. 29, 1993, at A1; see also Gallanis, supra note 103, at 1517.
108 See DOBRIS, STERK & LESLIE, supra note 6, at 471.
109 See LAMBDA LEGAL, supra note 26. These states include: Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont.
110 See supra text accompanying note 38.
111 See Fry, supra note 47, at 558.
112 Id.
their partner’s property. To make matters worse, the surviving partner is also burdened by gift and estate taxes upon their partner’s death.

As previously stated, utilizing a joint bank account with a right of survivorship is a common way for same-sex couples to avoid probate. In New York, however, with the rule governing joint bank accounts, every time a partner deposits money into the account, anything over $13,000 will be taxed. On the other hand, heterosexual, or “straight,” married couples enjoy an unlimited gift tax exclusion for gifts between spouses. Additionally, married couples are exempt from both estate taxes and gift taxes for all property transferred between spouses. Since same-sex couples are denied the right to marry on the federal level, they cannot not enjoy this spousal tax benefit.

While the Internal Revenue Code provides a 100% marital deduction for inter vivos gifts to a heterosexual married spouse, any transfer between same-sex partners will likely be considered a taxable gift if it is not excluded by the annual deduction amount.

The implications of the rule surrounding joint bank accounts in New York are both burdensome and discriminatory towards same-sex couples. When depositing money into a joint account, same-sex couples in New York risk facing gift taxes, which they would not face in

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113 Id. See generally, e.g., Gary, supra note 19; Spitko, supra note 38 (discussing the general issue of same-sex couples not being assured an intestate share of their partner’s property).
114 See supra Part I.B.i.
116 See IRS PUBLICATION 950, supra note 101, at 6.
118 Id.; see IRS PUBLICATION 950, supra note 101, at 6.
120 See Sanford J. Schlesinger & Martin R. Goodman, Estate Planning Update, in 40TH ANNUAL ESTATE PLANNING INSTITUTE, at 41, 153 (PLI Tax Law and Estate Planning, Course Handbook Series No. 351, 2009) (noting that on May 14, 2008, Governor David Paterson’s office in New York issued a memorandum ordering state agencies to recognize same-sex marriages performed in other states and countries, even though New York itself does not recognize same-sex marriages). Keep in mind, however, that this has no bearing on federal taxes, for same-sex marriage is not recognized on a federal level under DOMA.
121 An inter vivos gift is defined as “[a] gift of personal property made during the donor’s lifetime and delivered to the donee with the intention of irrevocably surrendering control over the property.” BLACK’S LAW DICTIONARY 758 (9th ed. 2009).
122 See Fry, supra note 47, at 558.
states that approach joint bank accounts in a fashion similar to the Uniform Probate Code.\textsuperscript{123} This is troublesome on its face, but becomes even more so when looking at further consequences of the New York rule. For example, since the deposit of one partner in a same-sex couple into a joint bank account is considered a gift in New York, every time he or she makes a deposit, the couple’s unified credit is affected. In 2009, the amount a person may gift during life without tax, excluding gifts of up to $13,000 per person per year, was $1,000,000.\textsuperscript{124} Furthermore, the unified credit available for estate tax purposes in 2009 was $1,455,800 with an applicable exclusion amount of $3,500,000.\textsuperscript{125} This exclusion amount essentially means that only estates valued over $3,500,000 are subject to the estate tax. A unified credit is an amount that eliminates or reduces both the gift tax and the estate tax.\textsuperscript{126} This amount must be subtracted from any gift tax that a person owes, as will be illustrated below.\textsuperscript{127} Therefore, the rule set forth in section 675 of the N.Y. Banking Law, and explained in \textit{Kleinberg}, puts all people with joint bank accounts who do not enjoy spousal tax exemptions at a clear disadvantage, as it decreases a person’s unified credit.

iii. Illustrations: Unified Credit

A unified credit applies both to the gift tax as well as the estate tax.\textsuperscript{128} In other words, it is called a unified credit because the federal gift and estate taxation are integrated into one unified tax system. A taxpayer subtracts the unified credit from any gift tax that he or she owes.\textsuperscript{129} The importance of this point is highlighted when looking at the whole picture, for any unified credit that you—as a taxpayer—use “against your gift tax in one year reduces the amount of credit that you can use against your gift tax in a later year. The total amount used during life against your gift tax reduces the credit available to use against your estate tax.”\textsuperscript{130} In 2009, the unified credit for gift tax purposes was set at $345,800, with an applicable exclusion of $1,000,000.\textsuperscript{131} Fur-

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\item[123] \textsc{Unif. Probate Code} \S 6-211(b) (amended 2006), 8 U.L.A. 438 (1997).
\item[124] 26 U.S.C. \S 2505 (2006); see IRS \textsc{Publication} 950, \textit{supra} note 101, at 6.
\item[125] See IRS \textsc{Publication} 950, \textit{supra} note 101, at 5; see also 26 U.S.C. §§ 2001-2704 (2006).
\item[126] The unified estate-and-gift tax is defined as: “The federal transfer tax imposed equally on property transferred during life or at death.” \textsc{Black's Law Dictionary} 1597 (9th ed. 2009).
\item[127] See IRS \textsc{Publication} 950, \textit{supra} note 101, at 7-8.
\item[128] \textit{Id.} at 4.
\item[129] \textit{Id.} at 7-8.
\item[130] \textit{Id.} at 4-5.
\item[131] \textit{Id.} at 5.
thermore, for estate tax purposes, the unified credit was set at $1,455,800 with an applicable exclusion of $3,500,000.\textsuperscript{132} As discussed earlier, the gift tax applies to transfers of property by gift. As Publication 950 of the IRS explains, "[y]ou make a gift if you give property (including money), or the use of or income from property, without expecting to receive something of at least equal value in return."\textsuperscript{133} The gift tax applies to any gift over $13,000.\textsuperscript{134} Since the rule in New York makes it clear that a deposit into a joint bank account is presumed to be a gift of one-half the deposit to the other account-holder, the previously described gift tax applies whenever a deposit of over $26,000 is made into a joint bank account.\textsuperscript{135} As pointed out numerous times before, gifts between spouses are exempt from the gift tax.\textsuperscript{136} To better understand how these rules apply in practice, and how the New York rule governing joint bank accounts is discriminatory against same sex couples, I will provide illustrations of equal tax scenarios of both a same-sex couple and a heterosexual married couple living in the state of New York.

a. Same-Sex Couple

Consider the following hypothetical: Susan and Emily are a same-sex couple living in New York. They have been living together for five years, and if the opportunity were available to them, they would get married.\textsuperscript{137} In 2009, they open a joint bank account. Susan deposits $200,000 into the account. In New York, the deposit is considered a gift of one-half the deposited amount to Emily.\textsuperscript{138} Therefore, $100,000 would be considered a gift for tax purposes. Recall that $13,000 was the annual gift tax exclusion in 2009;\textsuperscript{139} thus, any gift more than this amount is subject to the gift tax. For the purposes of this hypothetical, assume that neither Susan nor Emily have given any other gifts in 2009.

To consider how much of her deposit into the joint bank account is subject to tax, Susan would subtract $13,000 (the annual exclusion amount) from $100,000 (her "gift" to Emily). The amount subject to

\begin{itemize}
\item \textsuperscript{132}Id.
\item \textsuperscript{133}Id.
\item \textsuperscript{134}See 26 U.S.C. § 2505 (2006).
\item \textsuperscript{135}$26,000/2 = 13,000$.
\item \textsuperscript{136}See IRS Publication 950, supra note 101, at 6; see also 26 U.S.C. § 2505.
\item \textsuperscript{137}New York, however, does not grant same-sex marriages.
\item \textsuperscript{138}Kleinberg v. Heller, 38 N.Y.2d 836, 840-41 (1976) (Fuchsberg, J., concurring) (for the presumption of joint tenancy surrounding joint bank accounts).
\item \textsuperscript{139}See IRS Publication 950, supra note 101, at 6; see also 26 U.S.C. § 2505.
\end{itemize}
tax is $87,000. Susan would then have to figure out how much the gift tax is on $87,000 by following the instructions for Form 709,\textsuperscript{140} issued by the IRS. The gift tax on $87,000 is $18,000.\textsuperscript{141} Susan would then apply the unified credit. Recall that in 2009, the unified credit for gift tax purposes was set at $345,800, with an applicable exclusion amount of $1,000,000.\textsuperscript{142} Therefore, the unified credit that Susan can use against the gift tax in a later year is: $345,800 - $18,200, totaling $327,600.

Any unified credit that Susan uses against her gift tax in one year reduces the amount of credit she can use against her gift tax in a later year.\textsuperscript{143} Therefore, in 2010, her unified credit for gift tax purposes is only $327,600. If she were to make an identical deposit of $200,000 into her joint bank account with her partner Emily, her unified credit would decrease even further to $309,400. Every year, Susan’s unified credit is decreased simply by depositing money in a joint bank account she shares with her partner, Emily.

This tax burden is exacerbated by the fact that the total amount of unified credit Susan uses in her life against her gift tax reduces the available credit she has to use against her estate tax.\textsuperscript{144} Recall that in 2009, the unified credit for estate tax purposes was set at $1,455,800, with an applicable exclusion of $3,500,000.\textsuperscript{145} Therefore, there would be no estate or gift tax on the first $1,455,800 of Susan’s taxable gifts and transfers at death,\textsuperscript{146} assuming that she had not used any of her unified credit for gift tax purposes. But as a consequence of the New York rule, she has used her unified credit, and she will eat up even more credit for every year she deposits an amount above the annual gift exclusion of $13,000 into her joint bank account with Emily. In fact, if Susan consistently deposited $200,000 into the joint bank account every year, Susan’s unified credit for gift tax purposes would run out in exactly nineteen years, assuming that the annual exclusion and unified credit

\begin{footnotes}
\item[140] Dept of the Treasury, Internal Revenue Service, Instructions for Form 709, Cat. No. 16784X (2009), available at http://www.irs.gov/pub/irs-pdf/i709.pdf [hereinafter Instructions for Form 709]. Form 709 must be filed with the IRS when the gift tax applies. For purposes of this Note, this is when the total gifts made to the same person within the same calendar year exceed the annual exclusion amount of $13,000.
\item[141] Calculated from Instructions for Form 709. Id.
\item[142] See IRS Publication 950, supra note 101, at 4-5.
\item[143] Id.
\item[144] Id. at 5.
\item[145] Id.
\item[146] Id.
\end{footnotes}
amount were to remain the same. Therefore, at death, Susan’s estate will be taxed much more than if her deposits into the joint account she shares with her partner were not considered a gift of one-half the amount deposited to the other account-holder.

As noted above, Susan’s unified credit for gift tax purposes would run out in nineteen years if she were to consistently deposit $200,000 into her joint bank account with Emily every year. In this scenario, Susan no longer has any unified credit for gift tax purposes that she can use against her estate tax as a result of the New York rule explained in Kleinberg. Granted, the annual exclusion amount for the estate tax is $3,500,000, and many will argue that this consequence of the New York rule only affects a very small number of wealthy same-sex couples in New York. However, if Susan and Emily have $5,000,000 in assets upon Susan’s death, Emily will face a financial burden of estate taxes that a heterosexual married couple would never have to face. Ultimately, $1,500,000 of Susan’s estate is subject to tax, and simply as a result of sharing a joint bank account in New York over the duration of their relationship, there is no amount of unified credit left over from the gift tax that can be used against the estate tax.

b. Heterosexual Married Couple

Mark and Jody are a heterosexual married couple living in New York. Like Susan and Emily, they have been together for five years, but were married in March of 2009. After their wedding, they opened a joint bank account. Mark deposited $200,000 into the account. Under section 675 of the N.Y. Banking Law and the surrounding case law, this deposit would be considered a gift of one-half the deposited amount to Jody. However, since Mark and Jody are legally married, Mark’s “gift” to Jody is exempt from the gift tax. For purposes of this hypothetical, assume, as in the hypothetical for Susan and Emily, that neither Mark nor Jody have given any other gifts in 2009.

147 The applicable unified credit and exclusion amounts for federal gift and estate taxes are subject to change every year. Indeed, the estate tax was repealed in 2010 and reinstated in 2011 at an applicable exclusion amount of $1,000,000. For the purposes of all hypotheticals, however, assume that the stated tax rates remain the same every year.

148 See supra text accompanying note 147.

149 The value of Susan’s estate minus the applicable exclusion amount: $5,000,000 - $3,500,000 = $1,500,000.

Unlike Susan, Mark would not have to consider how much of his deposit into the joint bank account is subject to tax, because of the spousal exclusion. He also would not have to consult the instructions for Form 709 to figure out how much the gift tax is on his deposit. Unlike Susan, Mark would also not have to apply the unified credit because there is no gift in his scenario that is subject to tax. Therefore, Mark’s unified credit for gift tax purposes is left intact, and there is no reduction in his unified credit available to use against his estate tax. Specifically, Mark’s unified credit for gift tax purposes remains unchanged at $345,800,151 and does not reduce the credit that is available for Mark to use against his estate tax ($1,455,800 with an applicable exclusion amount of $3,500,000).152

Also, if Mark were to pass away with an estate worth $5,000,000, as did Susan in the previous hypothetical, Mark and Jody benefit from the estate tax marital deduction.153 This means that Mark’s estate, and his wife Jody, face no taxation upon Mark’s death.154 Aside from the tax benefits that Mark and Jody receive simply from their marriage being recognized on the federal level, recall that they are also assured of an intestate share of their spouse’s property; a luxury that Susan and Emily could only dream of.155

The differences between the hypotheticals of a same-sex couple living in New York and a heterosexual married couple living in New York, with each couple using a joint bank account, are stark. As a result of the New York rule surrounding joint bank accounts, Susan and Emily are at a clear financial disadvantage, for they are not entitled to federal spousal tax exemptions because they are denied the fundamental right to marry.156 Although a rule stating that a deposit into a joint bank account is presumed to be a gift of one-half the deposited amount to the other account-holder is not discriminatory on its face, there is a clear disparate impact, negatively affecting the lives of gay and lesbian couples in New York.

Furthermore, Susan and Emily face much more than a financial disadvantage as a result of this rule. The amount of time required for

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151 See IRS Publication 950, supra note 101, at 4-5.
152 Id. at 5.
154 Id. See Fry, supra note 47, at 558.
155 See Dobris, Sterk & Leslie, supra note 6, at 471; see also generally Gary, supra note 19.
tax planning is arguably increased, as there is no option for a tax exemption as is available for Mark and Jody. Emotional consequences are also likely to ensue as a result of this rule. Upon Susan’s death, Emily has to deal with financial consequences of the New York rule on top of mourning the loss of her life partner. In addition to funeral expenses—and an estate tax which a heterosexual married couple would not have to face—Emily has to deal with the death of her partner at the risk of having to enter probate battles with un-accepting family members of Susan. She may lose the house she lived in with Susan for over twenty years because Susan’s property did not automatically pass to Emily upon her death, as it would if they were a heterosexual married couple. In Emily’s world, not only is she discriminated against on the federal level as a result of DOMA, but she is discriminated against on the state level as a result of the presumption explained in Kleinberg.

Indeed, a rule such as the one affirmed in Kleinberg negatively affects all non-married individuals in New York who wish to share money through a joint bank account, and it begs the question as to why New York has such a rule in the first place.

B. Intent

The problems with the New York presumption that joint bank account-holders are joint tenants, and that their deposits are considered a gift of one-half the deposited amount to the other account-holder, become even more clear when one looks at the matter of intent. As mentioned in the beginning of Part II of this Note, the troubles surrounding joint bank accounts in New York have even been addressed by the state’s surrogate court, in Filfiley. The court held:

The majority of the States have adopted a statutory “contract” status for joint bank deposits. The deposit agreement provides for withdrawals by one only, by both together or by either joint tenant. The deposit agreement would make provision only for survivorship. In short, the contract between the depositors evidences the relationship. Such States have few problems. . . . Nevertheless, a statutory joint deposit in New York results in a “joint tenancy”, for it must be concluded that the Legislature used that term in the statute understandably. . . . It

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157 See Dobris, Sterk & Leslie, supra note 6, at 471; see also generally Gary, supra note 19.
158 See Dobris, Sterk & Leslie, supra note 6, at 471; see also generally Gary, supra note 19.
has caused difficulties for the courts not evident in other States which have adopted other legal concepts.\textsuperscript{160}

One must ask: why, then, does the presumption remain? As evidenced by the above quote, the issues surrounding joint bank accounts in New York are problematic enough to be discussed in a surrogate court opinion. The surrogate court has gone as far as to say that the Legislature's presumption of "joint tenancy" has caused many problems "not evident in other States which have adopted other legal concepts."\textsuperscript{161} So why doesn't the New York Legislature change the law? Unfortunately, the legislative history of section 675 of the N.Y. Banking Law does not provide us with many answers; indeed, it highlights yet another problem: depositor intent. The legislative history states:

Ninety percent of . . . people surveyed didn't know that the law presumes that a joint account is shared equally by both parties and either person named on the account can sue for half the money. Most people assume that the other person would only get the money when they died, or that no one had any claim to the account so long as they held the book. Both of these assumptions are wrong.\textsuperscript{162}

The New York State Legislature knows that the vast majority of people are unaware of the joint tenancy presumption surrounding joint bank accounts. The Legislature's answer to this problem was to simply require banks to require the depositor of a joint bank account to sign a statement explaining the law governing such accounts.\textsuperscript{163} This does not address, however, the depositor's intent. The majority of people in New York assume that their deposits are not considered gifts of one-half the deposited amount to the other account-holder, and that the other account-holder does not have a legal right to half of the account. The

\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textsc{New York State Legis. Ann.} 334 (1983); see \textit{Filfiley}, 63 Misc. 2d at 825, where the court recognized that the average depositor does not intend to make a gift of one-half to the other:

Joint tenants of real property usually intend joint tenure and user and survivorship.
The average donor depositor usually intends survivorship but not always or even usually does he intend to transfer present ownership to any extent to his donee-depositor.
Yet present ownership is a principal incident of a joint tenancy.

\textsuperscript{163} \textsc{New York State Legis. Ann.} 334 (1983).
logical explanation for such an assumption is that it is not the deposi-
tor's *intent* to make such a gift.\textsuperscript{164}

In order to make the argument that it is best to change the current
rule in New York to one which accurately reflects a depositor's intent, it
is necessary to look at the UPC. The UPC, which has been adopted in
the majority of states, approaches joint bank accounts with the view that
each depositor owns the amount which they deposit.

III. RULE IN A MAJORITY OF STATES: THE UNIFORM
PROBATE CODE

With respect to joint bank accounts, the UPC states that:

During the lifetime of all parties, an account belongs to the parties in
proportion to the net contribution of each to the sums on deposit,
unless there is clear and convincing evidence of a different intent. As
between parties married to each other, in the absence of proof other-
wise, the net contribution of each is presumed to be an equal
amount.\textsuperscript{165}

Unlike the rule in New York, at least twenty-five states have
adopted this section of the UPC, holding that ownership exists in pro-
portion to net contributions to the sum of the deposit.\textsuperscript{166} This basically
means that a person owns the amount which he or she deposits. This
approach correctly aligns with the intent of depositors, unlike the New
York approach. Looking at the comments to section 6-211 of the
UPC, it is quite clear that the *intent of depositors* guided the drafting of the
rule:

This section reflects the assumption that a person who deposits funds
in an account normally *does not intend to make an irrevocable gift of all
or any part of the funds represented by the deposit*. Rather, the person
usually intends no present change of beneficial ownership. The sec-
tion permits parties to accounts to be as definite, or as indefinite, as
they wish in respect to the matter of how beneficial ownership should
be apportioned between them.\textsuperscript{167}

\textsuperscript{164} The Uniform Probate Code's approach to joint bank accounts reflects this exact point.
This approach is discussed *infra* Part III.
\textsuperscript{165} UNIF. PROBATE CODE § 6-211(b) (amended 2006), 8 U.L.A. 438 (1997).
\textsuperscript{166} See Mahle, *supra* note 25, at 63.
added).
Account-holders in joint bank accounts do not intend to make a gift to the other account-holder when they make a deposit. They intend, rather, to retain ownership of their money. In New York, however, the legislative history shows that section 675 of the N.Y. Banking Law was not drafted with depositor intent in mind. The legislation surrounding joint bank accounts in New York is branded with the presumption of a "joint tenancy," while not only disregarding what account-holders intend to do with such an account, but also recognizing that such account-holders actually do not intend to create a joint tenancy upon opening a joint bank account. The UPC, however, sees this issue very clearly. As the comments to section 6-211 of the UPC state, the "theory" behind the section is that "the basic relationship of the [account-holders] is that of individual ownership of values attributable to their respective deposits and withdrawals, and not equal and undivided ownership that would be incident of joint tenancy." Account-holders do not intend for their deposits to count as a gift of one-half the deposited amount to the other account-holder, as the rule in New York presumes.

A potential issue with adopting such a rule is that if one account-holder does not actually deposit money into the account, they do not actually own any of the funds in the joint bank account. This issue will most often affect a married couple in which one spouse is the sole money earner, and the other spouse has no wages to deposit into the account. This would also hold true for same-sex couples that share their finances, but live in a state which prohibits same-sex marriage, and thus are not considered spouses even on a state level. However, a rule such as the one enumerated in the UPC, unlike the one currently in force in New York, does not carry any tax burdens upon owners of joint

168 Id.
169 Id.
170 See supra note 162 and accompanying text.
171 N.Y. BANKING LAW § 675 (2010).
172 See supra text accompanying notes 162-64 (emphasis added).
174 Id.
175 N.Y. BANKING LAW § 675(a); see Kleinberg v. Heller, 38 N.Y.2d 836, 840-41 (1976) (Fuchsberg, J., concurring) (for the presumption of joint tenancy surrounding joint bank accounts).
176 See Mahle, supra note 25, at 63.
177 Id.
bank accounts, such as the federal gift or estate tax. Therefore, the UPC does not adversely discriminate against same-sex couples who cannot benefit from federal spousal tax benefits. Furthermore, the UPC mirrors the intent of joint bank account holders, whereas New York does not.

In states that have not adopted the UPC, some “variation of the common law” is used in forming the states’ joint bank account rules.\textsuperscript{178} The question in these common law states seems to turn on whether or not there is a presumption of a present gift from the depositor to the other account-holder.\textsuperscript{179} Many states, unlike New York, do not have such a gift presumption. Therefore, “giving someone access to one’s earnings does not imply a gift of any amount.”\textsuperscript{180} For example, Delaware has a presumption that unless there is clear intent on behalf of the account-holders, the opening of a joint bank account is not a gift.\textsuperscript{181} In any event, it is essentially irrelevant whether or not a heterosexual married couple with a joint bank account lives in a common law state or a state which follows the UPC for tax purposes. Regardless of whether or not money deposited into a joint bank account between spouses is considered a gift, gifts between spouses are not subject to tax.\textsuperscript{182}

IV. What Should New York Do?

If New York were to adopt the UPC’s stance on joint bank accounts, same-sex couples (as well as anyone else) would no longer face a gift tax problem when depositing money into a joint bank account. The UPC’s approach to joint bank accounts does not result in discriminatory effects against same-sex couples. With no presumption of a gift of one-half to the other, joint account-holders own the amount which they deposit, while still having access to the full amount in the account unless there is clear and convincing evidence of a different intent.\textsuperscript{183} It is likely that a same-sex couple in a loving, committed relationship would make it clear that their intent is not to have proportional ownership of their account based on their deposit amounts, but to have equal ownership of the funds.\textsuperscript{184} Where heterosexual married couples in New

\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{180} Id. at 64.
\textsuperscript{181} Id.
\textsuperscript{182} See supra note 54 and accompanying text.
\textsuperscript{183} See UNIF. PROBATE CODE § 6-211(b) (amended 2006), 8 U.L.A. 438 (1997).
\textsuperscript{184} See infra Part IV.A.
York enjoy federal spousal tax exemptions, it is only fair that similarly situated same-sex couples who are denied the right to marry can benefit from the UPC’s lack-of-gift presumption, and avoid having their deposits subject to the gift tax.

A. Similarly Situated

In a myriad of different ways, same-sex couples and heterosexual married couples are similarly situated.\(^{185}\) For example, it has been shown that same-sex couples and heterosexual married couples share many of the same values, such as “equity, stability, loyalty, intimacy and love.”\(^ {186}\) Indeed, the majority of same-sex couples are involved in committed, intimate, long-term, caring relationships that are “virtually indistinguishable from those entered into by [a majority of married couples].”\(^ {187}\) Love and affection are not measurable factors, and thus there is no real way to compare the degree of love and affection felt between same-sex couples and heterosexual married couples.\(^ {188}\) However, there are empirical factors that indirectly indicate that “the strength and commitment of same-sex couples’ relationships are just as strong as in married couples’ relationships.”\(^ {189}\) Furthermore, it has been shown that same-sex couples and heterosexual married couples enter into similar economic arrangements.\(^ {190}\) For instance, in ways similar to heterosexual married couples, many same-sex couples cohabitate and share their finances and resources.\(^ {191}\) As Christopher T. Nixon points out, “[t]he only real differences between the two relationships [heterosexual married couples and same-sex couples] are that one involves two individuals of opposite sexes and the other involves two individuals of the same sex; one relationship is legally recognized in today’s society while the other is not.”\(^ {192}\) Indeed, the similarities between same-sex

\(^{185}\) See Nixon, supra note 54, at 45.

\(^{186}\) Id.; see Mark Strasser, Judicial Good Faith and the Baehr Essentials: On Giving Credit Where It’s Due, 28 Rutgers L.J. 313, 366 (1997).

\(^{187}\) Nixon, supra note 54, at 45 (quoting Harlon L. Dalton, Reflections on the Lesbian and Gay Marriage Debate, 1 Law & Sexuality 1, 4 (1991)).

\(^{188}\) See id.

\(^{189}\) Id. (noting that these factors include the large number of same-sex couples that remain together, the desire to further their commitment by raising a child, and the “massive gay and lesbian political and civil rights seminars for the recognition of same-sex couples’ relationships”).

\(^{190}\) See Nixon, supra note 54, at 46; see also Marc A. Fajer, Toward Respectful Representation: Some Thoughts on Selling Same-Sex Marriage, 15 Yale L. & Pol’y Rev. 599 (1997).

\(^{191}\) See Nixon, supra note 54, at 46; see also Fajer, supra note 190.

\(^{192}\) See Nixon, supra note 54, at 46.
couples and heterosexual married couples are starting to be recognized through case law as well.

The Supreme Courts of Connecticut and Iowa have recognized sexual orientation as an "immutable" characteristic, much like gender, race, or religion. The Supreme Court of Iowa in Varnum v. Brien points out that just like heterosexual couples, gay and lesbian couples are also "in committed and loving relationships, many raising families," and concluded that "official recognition of their status provides an institutional basis for defining their fundamental relational rights and responsibilities." This case points out the fact that there are many similarities between same-sex couples and heterosexual couples, both in their commitment levels and their desires for their futures. Indeed, when discussing the alternative that is sometimes available to same-sex couples in certain states (such as a civil union), Varnum states that "[v]iewed in the complete context of marriage, including intimacy, civil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual." From this opinion, as well as the opinion in Kerrigan v. Commissioner of Public Health, it is more than plausible to conclude that like heterosexual couples, same-sex couples desire, and actually deserve, the financial protections available in federal marriage. The fact that heterosexual married couples and same-sex couples are similarly situated, especially with regard to how they share their finances, is yet another reason why New York should change its approach to joint bank accounts to an approach similar to that of the UPC.

There is no reason to think that Susan and Emily, the same-sex couple living in New York discussed above in Part II.A.iii.a, have no desire to share their money just as Mark and Jody, the heterosexual couple living in New York, are able to do. Indeed, it has been shown that heterosexual and same-sex couples approach finances in very similar

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193 Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008); see Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (invalidating an Iowa statute permitting marriage only between members of the opposite sex); see also Bennett Klein & Daniel Redman, From Separate to Equal: Litigating Marriage Equality in a Civil Union State, 41 Conn. L. Rev. 1381 (2009).
194 Varnum, 763 N.W.2d 862.
195 Id. at 883; see also Darmer & Chang, supra note 26, at 33.
196 Varnum, 763 N.W.2d at 885 (emphasis added).
197 See generally Kerrigan, 957 A.2d 407.
198 See supra text accompanying notes 190-91.
199 See supra text accompanying notes 137-49.
200 See supra Part II.A.iii.b.
It goes against the concept of fairness that same-sex couples are taxed at very different rates than heterosexual married couples even though they are similarly situated. A clear solution to the problem lies at the federal level: “Congress [should] treat same-sex couples who have entered into marriages, civil unions, or a state’s equivalent, the same as it treats heterosexual married couples.” As long as DOMA remains good law, heterosexual married couples and similarly situated same-sex couples will wrongly continue to be taxed at different rates. Indeed, “unless and until DOMA is ruled unconstitutional or repealed, there will be a federal concept of marriage under which the sex of the spouses is determinative.”

B. A Call for Change

DOMA may prevent Susan and Emily from marrying each other on a federal level, thus barring them from many federal tax benefits, but it is the presumption of a joint tenancy surrounding joint bank accounts in New York that poses a further financial burden. Susan and Emily should be able to live in the state of New York without being discriminated against, albeit through disparate impact, as a result of the rule governing joint bank accounts. As long as this rule stands, Susan and Emily’s joint bank account will be subject to the gift tax, and their unified credit will be adversely affected.

However, if New York were to adopt the UPC’s stance on joint bank accounts—and were to hold that a depositor into a joint bank account owns the amount which he or she deposits, while still having access to the full account—Susan and Emily would not be further burdened. Their deposits into their joint bank account would not be considered gifts to each other, and would therefore not incur any amount of gift tax. Therefore, their unified credit would remain intact, and they would have more credit to use against their estate tax upon the death of

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201 See supra notes 190-91.
202 See Fry, supra note 47, at 568; see also Nixon, supra note 54, at 46.
203 See Fry, supra note 47, at 569.
205 See Coleman, supra note 48, at 500.
208 See supra text accompanying note 207.
one partner. This would cut down on their financial burden, as well as the temporal burden of having to spend time and energy on a tax plan just to have a joint bank account in their home state of New York. Furthermore, if New York were to adopt the UPC's stance on joint bank accounts, Susan and Emily would be able to have peace of mind knowing that their financial burdens would be decreased upon one of their deaths. This point is incredibly important considering that they already face the emotional consequences that come with the risk of will contest and not being assured an intestate share of the other's property.\textsuperscript{209}

Same-sex couples such as Susan and Emily are not the only people burdened by the current rule surrounding joint bank accounts in New York. Recall the discussion of Steven and James in Part II.\textsuperscript{210} If Steven wants to withdraw more than $200,000 of the $400,000 in the account he shares with James, even if Steven deposited $399,999 into the account, a potentially serious problem arises. Kleinberg clearly states, when "a joint tenant withdraws more than his or her moiety . . . there is an absolute right in the other tenant, during the lifetime of both, to recover such excess."\textsuperscript{211} This means that Steven does not have a right to withdraw the amount of his deposit over $200,000. Even though he deposited $399,999, if he withdraws any amount over $200,000 without James's consent, James has an immediate cause of action to recover the amount of excess. This aspect of the joint tenancy presumption affirmed in Kleinberg affects everyone, regardless of sexual orientation or relationship status. Depriving an individual of the right to withdraw the money that he or she deposited into a joint bank account—without the risk of being forced to hand that money back over to the co-holder of the account—is unfair, illogical, and against the simple principles of property which enshrine our culture.

Finally, New York should adopt a rule similar to the UPC with respect to joint bank accounts for the simple fact that it is not the intent of depositors to create a joint tenancy when opening a joint bank account.\textsuperscript{212} Rather, depositors intend to retain ownership of the money which they deposit into such an account.\textsuperscript{213} Depositors do not as-

\textsuperscript{209} See Dobris, Sterk & Leslie, supra note 6, at 471.
\textsuperscript{210} See supra text accompanying notes 92-94.
\textsuperscript{211} Kleinberg, 38 N.Y.2d at 841.
\textsuperscript{212} See New York State Legis. Ann. 334 (1983); see supra text accompanying notes 162-75.
sume, or intend, that their deposits would count as a gift of one-half to the other, as the law stands in New York.

CONCLUSION

Considering a deposit into a joint bank account a gift of one-half the deposited amount to the other account-holder, as New York does, creates unnecessary federal gift tax consequences, ultimately negatively affecting one's unified credit. This approach to joint bank accounts also deprives a co-holder of a joint bank account from withdrawing more than the amount which he or she deposited, because the other co-holder has an absolute right to recover the excess of the moiety. In addition, the New York approach wrongly ignores the intent of depositors. Until New York recognizes the severe deficiencies with its presumption surrounding joint bank accounts, same-sex couples such as Susan and Emily will continue to face unwarranted discrimination, and all joint bank account holders will face illogical rules preventing them from fully owning their own money. As the UPC dictates, co-holders of joint bank accounts should own the amount which they deposit, while still having access to the full account.