Federal Tax Consequences of Civil Unions

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I. INTRODUCTION

On July 1, 2000, Vermont's Civil Union law took effect. In the following twelve months, Vermont officials recorded 2,479 civil unions. Only 502 of these unions occurred between couples who are residents of Vermont. Such couples, although not called "spouses" under the law, experience all the same benefits and burdens of marriage that Vermont spouses experience within the state of Vermont. In addition, the only way to dissolve a civil union is through a judicial proceeding exactly like a divorce. Extra-territorial recognition of civil unions is as yet an unresolved issue. Federal recognition of civil unions has also not yet been tested.

In 1996, Congress enacted the Defense of Marriage Act (DOMA), which provides, in part that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex.

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• Aliber Family Chair in Law, University of Iowa. Special Thanks to my research assistant, Melissa Goodman, for timely and efficient research.

1 Carey Goldberg, QUIET ANNIVERSARY FOR CIVIL UNIONS, N.Y. TIMES, July 31, 2001, at A14.
2 Id.
3 Id.
5 §1204(d). "The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union." Id.
6 Although there are no reported cases yet, the Georgia Court of Appeals has a case before it that raises the issue of whether a lesbian couple united in a civil union are "related" under Georgia law. Burns v. Burns, No. 00-CV-19891-1 (GA Super. Ct. JAN 30, 2000). Recognition of the relationship would allow the couple to enjoy joint visitation with the two children of one the partners, visitation that had been restricted by the divorce court. See id. The trial court ruled that the mother of the children was in violation of the custody and visitation order which prohibited her from visiting her own children while in the company of an unrelated adult. See id.
Thus, if and when any state recognizes same-sex marriage, "same-sex spouses" will not be recognized as "spouses" for purposes of federal tax law if DOMA remains good law.8

Some have argued that DOMA is unconstitutional.9 Testing DOMA's constitutionality, however, is problematic. Since no state in fact recognizes same-sex marriage, there are no same-sex spouses to challenge the application of the law to them. Given the Supreme Court's narrow view of "standing,"10 some have opined that the provision cannot yet be tested.11

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8 The second provision in DOMA is codified at 28 U.S.C. § 1738C (2001), which provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

This article is not directly concerned with this provision since it applies to state recognition rather than recognition by the federal government. However, a couple residing in a state other than Vermont may argue for federal recognition of their civil union. In that event, recognition by the domiciliary state would become an issue in their federal tax claims.


11 See, e.g., Brett P. Ryan, Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA, 22 U. HAW. L. REV. 185, 224 n.280
In this article, I describe the application of federal tax law to taxpayers who are recognized as spousal equivalents under Vermont's civil union laws. If DOMA does not apply to such taxpayers, and there are certainly strong arguments that it does not, then federal tax law will have to take into account the aspects of civil union relationships that I describe in this article. On the other hand, if the IRS argues that DOMA does apply to any of the situations described in this article, then the taxpayer in such a case will have standing to challenge the constitutionality of DOMA.

Vermont couples who fit within any of the situations I delineate in this article should be interested in the possible tax outcomes that I describe. In addition, public interest lawyers, interested in furthering the cause of lesbian and gay equality, should familiarize themselves with the intricacies of the tax law that I discuss in this article. Vermont couples who are parties to a civil union are in an ideal position to challenge the discriminatory aspects of federal tax law and perhaps the constitutionality of DOMA as well. Same-sex couples in other states may also be able to mount such challenges so long as their states recognized the legally binding nature of their relationships, or, through state law, assign to them responsibilities and benefits similar to those assigned to spouses.

II. STATE LAW SOMETIMES DETERMINES FEDERAL TAX CONSEQUENCES

A. Family Relationships

There is no federal law of marriage and domestic relations. Federal tax law, however, often relies on concepts such as marriage, divorce,
parent-child relationships, stepchildren, children by adoption, mothers-in-law, and other family relationships. In order to determine who fits within these categories, federal tax law must rely on state family law. Thus, for example, the relationship of husband and wife is determined by state, rather than federal, law.

The IRS explains:

[t]he marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws. Therefore, if applicable state law recognizes common-law marriages, the status of individuals living in such relationship that the state would treat them as husband and wife is, for Federal income tax purposes, that of husband and wife.

The foregoing position of the Internal Revenue Service with respect to a common-law marriage is equally applicable in the case of taxpayers who enter into a common-law marriage in a state which recognizes such relationship and who later move into a state in which a ceremony is required to initiate the marital relationship.

As a technical matter, parties to a civil union are not married. Thus, they cannot file joint returns. Even if they were married, DOMA would

16 E.g., § 71 (relating to taxation of alimony paid pursuant to a divorce or separation agreement).
17 E.g., § 2 (relating to head of household filings if child is a member of the household); § 32 (EITC is increased if taxpayer and child share same principal place of abode); §§ 151-152 (deductions for personal exemptions).
18 Id.
19 Id.
20 A person who supports a mother-in-law, father-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law, can claim a dependency exemption without having to rely on the more limited “member of the household” test contained in I.R.C. § 152(a)(9). § 152(a)(8). Support of an in-law might also qualify the taxpayer for head of household filing status. § 2(b)(1)(A)(ii).
21 See supra note 14. The Internal Revenue Code does not contain general definitions of family relationships. In some instances, regulations and rulings fill in the blanks. See Rev. Rul. 84-89, 1984-1 C.B. 5, holding that the term “child” for head of household filing purposes includes “foster child.” Treas. Reg. §1.152-2(C)(4)(1973) defines foster child as a child “who is in the care of a person or persons (other than the parents or adopted parents of the child).”
23 Id.
24 See I.R.C. § 6013 (permitting “a husband and wife” to file a joint return).
prevent their marriage from being recognized for purposes of federal tax law.\textsuperscript{25} Nonetheless, since parties to a civil union are treated the same as spouses under Vermont law\textsuperscript{26}, a party to a civil union will have “stepparent” and “in-law” relationships that unmarried taxpayers generally do not have.\textsuperscript{27} In addition, if two lesbians have registered their civil union and one of them then gives birth to a child, the other partner can argue that she is presumed to be the other parent, relying on a statutory provision that presumes a husband to be the parent of a child born to his wife.\textsuperscript{28} For example, if Betty and Alice are parties to a civil union in Vermont and then Alice gives birth to a child, Vermont law will presume that Betty is the other parent. In this event, since Betty is recognized as a parent under state law, she should also be recognized as a parent under federal tax law.

In the remainder of this section, I will describe several situations in which Vermont Civil Union law creates family relationships that can make a difference under the federal tax laws. In all of the situations I describe below, either DOMA does not apply because it is limited to true same-sex marriage cases or it does apply in which case the taxpayer has standing to challenge DOMA’s constitutionality. Although I do not develop the constitutional argument in this section, I suggest here that each fact situation presents an extremely strong case for recognition of the family relationship because the relationship is \textit{real}. Vermont law creates \textit{real} family relationships with \textit{real} consequences.

\textsuperscript{25} See U.S.C. § 7 (defining “spouse” and “marriage” as referring only to opposite sex relationships).

\textsuperscript{26} VT. STAT. ANN. tit. 15, § 1204(a) (2000).

\textsuperscript{27} See discussion in part II(A)(1) and (2) infra.

\textsuperscript{28} See, e.g., VT STAT. ANN. tit. 15, § 308 (2001), which provides:

A person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if:

(1) the alleged parent fails to submit without good cause to genetic testing as ordered; or

(2) the alleged parents have voluntarily acknowledged parentage under the laws of this state or any other state, by filling out and signing a Voluntary Acknowledgement of Parentage form and filing the completed and witnessed form with the department of health; or

(3) the probability that the alleged parent is the biological parent exceeds 98 percent as established by a scientifically reliable genetic test; or

(4) the child is born while the husband and wife are legally married to each other.
I do not mean to suggest that same-sex committed relationships outside Vermont are not "real." I simply mean to stress the fact that the legal consequences of a civil union are different from the legal consequences that flow from other domestic partner relationships. In Vermont, the state imposes legal responsibilities on married couples and similarly, on couples who are parties to a civil union. By contrast, a domestic partner couple in other states may have contracted for similar responsibilities, but those responsibilities are imposed as a matter of contract law, not as a matter of state family law.

Even if the couple has not contracted for such responsibilities, they may feel those responsibilities as moral obligations. Moral obligations, in my view, can be as "real" as those imposed by state law. The IRS, however, takes a different view of the matter. For example, no matter how morally obligated I may feel to support my indigent mother, the IRS will treat my support payments to her as taxable gifts to the extent they exceed $10,000 a year. That is because, in the view of the IRS, moral obligations do not equal state-imposed obligations of support.

Since even the IRS would have to agree that obligations imposed by state family law are "real," parties to a Vermont Civil Union are ideally situated to challenge any nonrecognition of their relationships by federal

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31 In most states such contracts will be enforceable. See eg. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976). But see Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979) (holding that it is against public policy to enforce cohabitant agreements because cohabitation is against public policy; marriage is the preferred relationship). No same-sex case has directly challenged Hewitt, although it is difficult to apply its public policy rationale, support of marriage, to a case involving a same-sex couple who cannot marry in any event. Some states require cohabitation agreements to be in writing. See, e.g., TEX. BUS. & COM.CODE ANN. § 26.01(a), (b)(3) (Vernon 1987); Zaremba v. Cliburn, 949 S.W.2d 822 (Tex. App. 1997) (applying statute to gay male couple).
32 But see the newly enacted California Domestic Partner statute at Family Code §297(b)(2), which imposes a mutual obligation of support for basic living expenses. While this statute has yet to be construed, the language clearly sets forth an obligation of support.
33 See, e.g., Rev. Rul. 54-343, 1954-2 C.B. 318 (father's payments of hospital bills and living expenses of son and son's family held as taxable gifts); Rev. Rul 82-98, 1982-1 C.B. 141 (parent support of adult disabled child held as taxable gifts). See Robert G. Popovich, Support Your Family, but Leave out Uncle Sam: A Call for Federal Gift Tax Reform, 55 Md. L. REV. 343 (1996); see also Patricia A. Cain, Same-Sex Couples and the Federal Tax Laws, 1 L. & SEXUALITY 97 (1991) (arguing that support payments by one partner for the joint consumption of both partners should not be viewed as taxable gifts because they are not transfers of property and such payments do not constitute the sort of estate depleting transfers that the gift tax was intended to cover).
A taxpayer who is a party to a civil union in Vermont is not just "similarly situated" to a married taxpayer in Vermont, but rather is in exactly the same situation as a married taxpayer. Thus, to deprive a Vermont taxpayer of any benefit linked to one of the family relationships I describe in this article raises a plausible equal protection claim.

1. Parent-child Relationships

There are no Code provisions or published regulations or rulings that define son or daughter, child or stepchild. Tax authorities may think the definitions of these terms are obvious, but in a changing world, nothing is obvious about family relationships. For good reason, the IRS has always relied on state law definitions of family relationships. In recent years, state law definitions have become hotly contested. The availability of modern reproductive technology has contributed to the contest. Gay and lesbian families have also contributed their share to the ongoing debate over who is a family.

a. Presumption of Parenthood.

As noted above, Vermont law provides that a "person alleged to be a parent shall be rebuttably presumed to be the natural parent of a child if... the child is born while the husband and wife are legally married to each other." The civil union statute explicitly provides that:

[the] rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

Thus, as asserted above, if Alice and Betty enter into a civil union and then Alice gives birth to a child, Betty should be presumed to be the other

35 See discussion in part III infra.
36 See VT. STAT. ANN. tit. 15, § 1204(a) (2001)
37 See discussion in part III. infra.
39 See, e.g., Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (recognizing that two mothers can assert competing parenthood claims when one is the gestational mother and the other is the genetic mother); see also Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (1998).
40 See, e.g., Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 GEO. L. J. 459 (1990); Fred A. Bernstein, This Child Does Have Two Mothers... and a Sperm Donor with Visitation, 22 N.Y.U. REV. L. & SOC. CHANGE 1 (1996).
parent. Although the parentage statute states that the presumption is rebuttable, the statute provides no hint as to how the presumption might be rebutted. In the most recent Vermont case dealing with this presumption, the majority ruled that biological evidence of non-paternity will not rebut the presumption once the parent-child relationship is established and child support payments have been ordered by a divorce court. To make sense of the parentage statute as embossed by the civil union statute, one must conclude that biology is irrelevant to the determination of parentage. The Vermont Supreme Court has expressed a similar view.

"Indeed, the presumption of paternity has assumed even greater significance today, as alternative methods of conception unrelated to the "biology" of the presumed parent have become more common." To clarify the parent-child relationship, same-sex partners will probably be advised to go through an adoption to resolve the question of whether the nonbiological parent is a parent under Vermont law. Alternatively, the nonbiological parent might ask for a statutory declaration of paternity. Although the adoption process is likely to be speedier in Vermont than in other states since Vermont will treat adoptions within a civil union the same as stepparent adoptions, the process will still take some time. When children are born late in the tax year, it might not be possible to finalize an adoption by year’s end. In such cases, relying on the presumption of parentage will be necessary in order to establish a parent-child relationship for tax filing purposes.

In cases in which the second mother is the primary breadwinner, the ability to claim the child as her own creates important tax savings. In the previous example, assume that Betty agreed to support Alice during her pregnancy and through childbirth. Assume further that their daughter Kath was born on December 17, just two weeks before the end of the tax year. Because Betty and Alice are not married for federal tax purposes, Betty will file as a single taxpayer. However, if she can establish that Kath is her daughter, Betty will be able to file using the more favorable head of household rates.

45 Id. at 910.
46 Id.
47 Such declarations have been obtained by second parents in California lesbian couples who argue that under California’s judicially created doctrine of intentional parenthood, the second parent, without whom the biological mother would never have agreed to give birth, is an intentional parent. See, e.g., In re Petition of Carhart and Hollingsworth, No. F054887 (Cal. Super. Ct., June 11, 1999).
48 See VT STAT. ANN. tit. 15, § 1204 (2001)
49 See I.R.C. § 6013 (2001) (limiting filing of joint returns to a "husband and wife").
A person qualifies as head of household\(^{50}\) if she: (1) shares a home with her own child or certain related individuals\(^{51}\) and (2) maintains the home by providing over half the cost of maintenance during the tax year, and (3) the child or other related individual lives in the home for more than half the year.\(^{52}\) The head of household rates are midway between joint return rates and the rates for single taxpayers.\(^{53}\) Thus, they provide some benefit of income splitting between Betty and her child, Kath. Furthermore, since Betty is the primary breadwinner, she will be providing over half the costs of maintaining the home for the year. In this event, Alice, even if she has taxable income for the year, will not qualify for head of household status.\(^{54}\)

Federal tax law ought to recognize Betty as the parent of Kath because Vermont law recognizes the relationship.\(^{55}\) In a similar fact situation, the California State Board of Equalization recognized the parent in Betty’s position as a parent for head of household filing status under California income tax laws.\(^{56}\) California uses federal definitions for filing status.\(^{57}\) Thus, the argument presented to the Board of Equalization is the same argument that Betty would rely on for her federal taxes. The argument is simple: state law determines the parent-child relationship and federal law must recognize any such relationship.

Other tax benefits accrue to parents in Betty’s position. They include the child tax credit\(^{58}\) and the earned income tax credit.\(^{59}\) Neither of these credits are available to a taxpayer who merely supports a minor child.

\(^{50}\) I.R.C. § 2(b) (2001).

\(^{51}\) While an unrelated individual, such as a domestic partner’s child, can be claimed as a dependent for federal income tax purposes under I.R.C. § 152(a)(9)’s “member of the household” test, only related individuals can qualify a taxpayer for head of household status. I.R.C. § 2(b) (2001).

\(^{52}\) Treasury Regulations provide that if the child is born during the year, then the half year provision is satisfied so long as the “household constitutes the principal place of abode of such [child] for the remaining ... part of such taxable year.” Treas. Reg. § 1.2-2(c)(1) (1971).


\(^{54}\) § 2(b).

\(^{55}\) VT. STAT. ANN. tit. 15, § 1204(a) (2001).


Rather, the taxpayer must be related to the child as a parent or stepparent. Alternatively, the child may be an “eligible foster child.”

Perhaps the greatest benefit to children in recognizing this parent/child relationship lies in the tax treatment of employer-provided health benefits. Vermont employers who provide benefits to an employee’s children will include Kath as a beneficiary on Betty’s policy. In most such fact situations, Kath, whether adopted by Betty or not, will likely qualify as Betty’s dependent under Section 152(a)(9), the “member of the household” test. However, recognition of the parent-child relationship would make the “member of the household” test irrelevant. Thus, any employer-provided medical benefits for Kath would clearly be nontaxable to Betty if Kath is recognized as Betty’s child. Any such payments for the benefit of Alice, however, would be taxable unless Alice satisfied the “member of the household” test. This is because parties to a civil union are not a recognized category for federal tax parties. The tax issues raised by employer-provided health benefits will be discussed further in Part III of this article.

b. Stepparents.

The stepparent/stepchild relationship is also sufficient to qualify Betty for head of household filing status, the child tax credit, and the earned income tax credit provided she meets its other requirements. Under Vermont law, Betty would be a stepparent as to any of Alice’s children including those born before the beginning of their civil union relationship. DOMA might appear more directly relevant here because

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60 §§ 32(c)(3)(B)(i)(I) and (II). The relationship test under Section 32 applies to Section 24 as well. See § 24(c)(1)(C).

61 § 32(c)(3)(B)(i)(III). Treasury Regulation promulgated under Section 152 defines a foster child as a child “who is in the care of a person or persons (other than the parents or adopted parents of the child).” Treas. Reg. § 1.152-2(C)(4) (1973). Kath would not qualify as Betty’s foster child since she is in the care of her parent, Alice, as well as in the care of Betty.

62 This test is likely to be met in the case of Alice, Betty and Kath since the facts assume they all live in the same household and Betty is the one supporting both Alice and Kath. See I.R.C. § 152(a)(9) (2001).

63 See § 152(a)(1) (a child of the taxpayer is a dependent so long as the taxpayer provided over half the support for the child).

64 See generally § 152.

65 For Example, Betty’s income must fall below the “earned income amount.” I.R.C. § 32 (2001).

66 VT. STAT. ANN. tit. 15, § 1204(b) (2001). provides that (stating [a] party to a civil union shall be included in any definition or use of the terms “spouse,” “family,” “immediate family,” “dependent,” “next of kin,” and other terms that denote the spousal relationship, as those terms are used throughout the law).
the IRS could argue that the only way to recognize Betty as a stepparent is to view the union with Alice as a marriage, something that DOMA arguably forbids.

In response, Betty might argue that since a "stepparent" is not defined by the Internal Revenue Code, the IRS should recognize the relationship if it is recognized under state law. She might also argue that the purpose of DOMA was to prevent same-sex spouses (and arguably spousal equivalents) from enjoying federal tax benefits that are intended to support the marriage relationship. The House Report in support of passage of DOMA stated:

Government currently provides an array of material and other benefits to married couples in an effort to promote, protect, and prefer the institution of marriage. While the Committee has not undertaken an exhaustive examination of those benefits, it is clear that they do impose certain fiscal obligations on the federal government. For example, survivorship benefits paid to the surviving spouse of a veteran of the Armed Services plainly cost the federal government money.

If Hawaii (or some other State) were to permit homosexuals to "marry," these marital benefits would, absent some legislative response, presumably have to be made available to homosexual couples and surviving spouses of homosexual "marriages" on the same terms as they are now available to opposite-sex married couples and spouses. To deny federal recognition to same-sex "marriages" will thus preserve scarce government resources, surely a legitimate government purpose.67

Thus, when passing DOMA, Congress had in mind federal tax benefits that directly benefit spouses rather than benefits that are directed at children.68 Head of household status, the child tax credit, and the increased EITC for a parent with a child are all examples of federal tax benefits that were enacted for the benefit of dependent children.69

68 See id.
69 "The income of a head of household who must maintain a home for a child, for example, is likely to be shared with the child to the extent necessary to maintain the home, and raise and educate the child. This, it is believed, justifies the extension of some of the benefits of income splitting." H.R. REP. NO. 82-586, at 11 (1951), reprinted in 1951 U.S.C.C.A.N. 1781, 1790. For a thorough discussion of the legislative provision as
As further support for her position, Betty might cite to the Vermont statute on liability of stepparents to support their stepchildren which provides:

A stepparent has a duty to support a stepchild if they (sic) reside in the same household and if the financial resources of the natural or adoptive parents are insufficient to provide the child with a reasonable subsistence consistent with decency and health. The duty of a stepparent to support a stepchild under this section shall be coextensive with and enforceable according to the same terms as the duty of a natural or adoptive parent to support a natural or adoptive child including any such duty of support as exists under the common law of this state, for so long as the marital bond creating the step relationship shall continue.0

Since she is obligated to support Alice's children, head of household reporting status for Betty would be justified as a matter of policy. Vermont law makes Betty more than a temporary visitor in a household with a child or children.1 It gives her a legal relationship to Alice's children and imposes support obligations on her with respect to them.2

Indeed, it would be to the advantage of the federal fisc to recognize the stepparent relationship in some cases. For example, the EITC, which is a refundable credit for low-income taxpayers, is restricted to the parent in the household who has the higher income.3 The higher the income, the lower the credit due to its phaseout at higher levels of income.4 Thus, if Betty's salary is above the "phaseout amount" and Alice's is not, recognition of Betty's stepparent relationship would disqualify the household from receiving any benefit from the EITC.

Finally, the taxation of employer-provided medical benefits again becomes relevant. The tax code defines a stepchild as a dependent of the taxpayer, provided the taxpayer provides over half the support for the child.5 Otherwise, the taxpayer would have to rely on the "member of the household" test, which requires the child to be a member of the taxpayer's

originally enacted and also as amended in 1954, see Grace v. Commissioner, 51 T.C. 685 (1969).

71 Id.
72 Id.
73 I.R.C. § 32(c)(1)(C) (2001) ("[i]f 2 or more individuals would... be treated as eligible individuals with respect to the same qualifying child... only the individual with the highest modified adjusted gross income... shall be treated as an eligible individual").
74 § 32(b).
75 § 152(a)(2).
household for the entire taxable year. Although temporary absences, including visitation of the child’s other parent under a custody agreement, will not prevent a child from qualifying as a member of the household, such questions about temporary absences need not arise if the child is recognized as the taxpayer’s stepchild.

2. In-law Relationships.

Dependency exemptions can be claimed for a limited number of related individuals including in-laws. Dependency exemptions are also available for persons unrelated to the taxpayer, but these unrelated persons must qualify under a stricter dependency test known as the “member of the household” test. Under the “member of the household” test, not only must the taxpayer provide over half the support of the claimed dependent, but the claimed dependent must also be a member of the taxpayer’s household for the full tax year. Thus, the major difference is that a taxpayer who supports a related person (including certain “in-laws”) can claim a dependency exemption for that person regardless of where that person lives. In addition, if the related dependent lives with the taxpayer during the year in a home maintained by the taxpayer, then the taxpayer can qualify for head of household filing status. For example, if Alice and Betty have no children, but Betty is supporting Alice and Alice’s younger sister, then Betty can claim them both as dependents. Alice is a dependent under the “member of the household” test. The sister, however, is a sister-in-law under Vermont law. Supporting her sister-in-law in Betty’s own household should qualify Betty for head of household filing status.

As with the stepparent/stepchild relationship, in-law relationships are not possible unless Alice and Betty are treated as spouses. Vermont law

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76 Treas. Reg. § 1.152-1(b) (1971).
77 Id.
79 § 152(a)(9).
80 Id. In addition, to be claimed as a dependent, the person must not have income above the “exemption amount.” § 151(d).
81 Compare § 152(a)(9) (requiring the person to be claimed as a dependent to have the taxpayer’s home as his principal place of abode) with § 152(a)(8) (not containing a residency requirement).
82 See § 2(b).
83 Assuming that neither Alice nor her sister has a gross income in excess of the exemption amount.
84 See Treas. Reg. § 1.152-1(b) (1971).
85 VT STAT. ANN. tit. 15, § 1204(b) (2001).
treats them as spouses and so creates the "in-law" relationship. \(^8\) "In-law" relationships are nowhere defined in the Internal Revenue Code or related rulings and regulations. Thus, it would be appropriate to rely on state law.\(^8\) However, the IRS can argue that DOMA prevents recognition of the relationship in the absence of an opposite-sex marriage.\(^8\) In that case, the constitutionality of DOMA is at issue and Betty has standing to pursue the challenge.\(^9\)

B. Property Rights

"State law creates legal interests and rights. The federal revenue acts designate what interests or rights, so created, shall be taxed."\(^9\) This statement is consistent with the general rule that, in applying federal law, federal courts will turn to state law whenever federal law is silent about a relevant topic.\(^9\) While the Commissioner is not bound by lower state court decisions that determine individual property rights unless he is a party to that decision,\(^9\) the Commissioner must nonetheless follow the substantive property law of a state in the absence of a federal rule to the contrary.\(^9\)

Nowhere is this rule that state property law controls tax consequences\(^9\) more evident than in the cases dealing with the property

\[8\] VT. STAT. ANN. tit. 15, § 1204(b).
\[88\] See Rev. Rul. 58-66, 1958-1 C.B. 60 (stating that state land is recognized in the administration of Federal income tax laws).
\[90\] See discussion in part III infra.
\[91\] Morgan v. Commissioner, 309 U.S. 78, 80 (1940) (holding that a power of appointment is a general power for federal estate tax purposes if under state law the holder of the power could point to herself, her estate, or her creditors); see also U.S. v. Mitchell, 403 U.S. 190, 197 (1971) ("In the determination of ownership, state law controls.")
\[92\] 28 U.S.C. § 1652 (2001) provides "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."
\[93\] See Commissioner v. Estate of Bosch, 387 U.S. 456 (1967); see also Scott v. Commissioner, 226 F.3d 871 (7th Cir. 2000) (holding that a state probate determination that lesbian partners owned property equally is not determinative in a federal estate tax proceeding in which Commissioner asserted that decedent owned 100% of the property).
\[95\] State property law can also determine the judicial outcome in constitutional law questions dealing with property, such as takings and due process claims. See, e.g., Board of Regents v. Roth, 408 U.S. 564, 577 (1972), stating:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or
interests of married couples. Early on, the state community property system in California did not sufficiently vest a wife in the earnings of her husband to avoid taxing the earnings one hundred percent to the husband even though he had assigned half of the earnings to her. The community property laws of the state of Washington, by contrast, did sufficiently vest both spouses in the earnings to allow husbands and wives to split the income between them for federal income tax purposes. This differential treatment of community property and common law states together with Congress’s attempts to minimize the differences is the primary reason that the joint return filing option now exists.

Federal law can trump state property law and it has done so numerous times with respect to community property. For example, federal law can limit a community property spouse’s rights upon divorce in railroad retirement benefits and in military retired pay. Similarly, federal law can assign community property retirement plans to a surviving second spouse, thereby divesting the estate of the first spouse of her community share of the plan. So long as the federal outcome does not constitute an unconstitutional taking of vested property rights, the federal law will control.

understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.


Carolyn C. Jones, Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s, 6 L. & HIST. REV. 259, 266 (1988).


It is difficult at first glance to understand why E.R.I.S.A.’s preemption of state community property law did not constitute a taking. If Mrs. Boggs truly had been vested in her community share of her husband’s retirement plan, as it stood at her death, then the effect of the E.R.I.S.A. rule was to divest her estate of a vested interest in property by taking away her ability to convey by will to whomever she wished. Boggs, 520 U.S. at 833; see e.g., Babbitt v. Youpee, 519 U.S. 234 (1997); Hodel v. Irving, 481 U.S. 704 (1987). Apparently, the takings issue was debated at oral argument in Boggs. Randall Gingiss, The E.R.I.S.A. Foxtrot, 18 VA. TAX REV., 417, 464 (1998). One possible explanation for why the Court did not view ERISA pre-emption as resulting in a taking in Boggs is that the
Because Vermont's civil union law creates vested property rights in the partners, federal tax law ought to recognize those property rights and assess the tax burdens on the partners accordingly. In addition, parties to a civil union are responsible for each other's support, pursuant to state law. The parties are not bound by private contract which can make a difference under federal tax law.

1. Support Obligations

Alice and Betty have entered into a civil union. Betty is the sole breadwinner, earning $100,000 a year, net of taxes. If Betty spends more than $10,000 of her annual earnings on Alice a gift tax question arises. However, since the state of Vermont imposes an obligation on Betty to support Alice, none of her annual wealth transfers to Alice will be taxed as gifts so long as they are made for support.

"Support" for tax purposes includes payments for more than the bare necessities of life. In addition, support can include capital expenditures.

Court does not always view each spouse as fully vested in his or her half of the community property. Despite its decision in Poe v. Seaborn, 282 U.S. 101 (1930), the Court has often held that community property may be viewed for tax purposes as owned by only one of the spouses. See, e.g., Fernandez v. Wiener, 326 U.S. 340 (1945) (ruling on Louisiana law); United States v. Rompel, 326 U.S. 367, 370 (1945) (ruling on Texas law). In Rompel, the Court held that a 1942 estate tax provision that taxed one hundred percent of the community property upon the death of the first spouse was constitutional. The Court reasoned that each spouse has sufficient control over one hundred percent of the property during his or her respective lifetime to warrant taxing the full property when death ends that control.

103 See, e.g., Vermont's equitable distribution statute, which, although it applies only at divorce, nonetheless can be viewed as creating current property rights in each spouse or partner. 15 VT. STAT. ANN. tit. 15, § 751 (2001). See infra at part II (B)(2) for a discussion of whether rights via equitable distribution are treated as vested rights for income tax purposes.

104 VT. STAT. ANN. tit. 15, § 1204(c).


106 VT. STAT. ANN. tit. 15, § 1204(c) (2001).

107 The legal obligation imposed by the Vermont statute would preclude a finding of a "donative intent," necessary to conclude the wealth transfers were gifts. See Commissioner v. Duberstein, 363 U.S. 278, 285 (1960) (stating "if the payment proceeds primarily from 'the constraining force of any moral or legal duty,' . . . it is not a gift").

108 Gen. Couns. Mem. 33,701 (Dec. 7, 1967) (Stating "the term 'support,' should not be limited to those items which may be regarded as necessities"). The issue of what qualifies as support usually arises in the context of a dependency exemption where the taxpayer must prove more than a 50% contribution to the dependant's support. For an illustration in this regard see Gen. Couns. Mem. 33,701 (Dec 7, 1967), Priv. Ltr. Rul.
such as a television set and an automobile. Relying on Vermont’s requirement that she support Alice, Betty should be able to provide food, clothing, housing, and some entertainment and travel without worrying about gift taxes.

Should Alice and Betty split up and Betty continue her support obligation to Alice by paying alimony, another tax question arises: are the post-divorce alimony payments to Alice taxable income or not? Alice and Betty cannot rely on Sections 71 and 215 to claim that the payments are income to Alice and deductible by Betty because those sections clearly only apply to ex-spouses. However, the two should be able to rely on a 1917 United States Supreme Court decision that pronounces alimony paid by husband to wife nontaxable income because it arises not from contract, but from the relationship.

2. Equitable Division of Property at Divorce

In 1984, Congress added Section 1041 to the Internal Revenue Code providing that property transfers between spouses incident to divorce trigger no income tax liability on the part of either spouse. Before this statute took effect, spouses had to contend with the realization rule set forth in United States v. Davis in 1962.

In Davis, the Supreme Court held that property transfers incident to divorce constituted a bargained-for exchange and were thus subject to taxation. As applied, the Davis rule taxed the transferor of appreciated property (i.e., Mr. Davis) as though he had sold it in exchange for Mrs.

6703284770A (Mar. 28, 1967), and Priv. Ltr. Rul. 6610204770A (Oct 20, 1966), all of which define support to include payments for the benefit of the taxpayer's adult daughter in the form of a wedding dress and accessories, trousseau, reception, honeymoon, flowers for the church, reception, and bridal party.

I have argued elsewhere, in the absence of an obligation to support, such expenditures for joint consumption should not be treated as taxable gifts. Patricia A. Cain, Same-Sex Couples and the Federal Tax Laws, 1 L. & SEXUALITY 97, 123-29 (1991). However, not everyone agrees with my position.

While section 215 does not mention the word “spouse” or “ex-spouse,” it does refer to section 71, I.R.C. § 215(b) (2001), which defines alimony as a payment received by a spouse. § 71(b)(1)(A).


370 U.S. 65, 67-68 (1962) (holding Mr. Davis taxable on the gain realized when he transferred appreciated stock in exchange for Mrs. Davis’ release of inchoate marital rights).

Id.
Davis's release of her marital rights.\textsuperscript{116} The decision was silent as to the tax consequences to the transferee, (i.e., Mrs. Davis). The IRS, however, ruled shortly thereafter that a wife who receives property at divorce in exchange for her inchoate marital rights is not taxed.\textsuperscript{117}

In the period between \textit{Davis} and the enactment of section 1041,\textsuperscript{118} the taxability of property settlements was determined on a case by case basis with close attention paid to state law.\textsuperscript{119} The question in each such case was whether a realization event had occurred.\textsuperscript{120} For example, if the property division consisted solely of a severance of joint tenancy property into tenancies in common, there would be no taxable event.\textsuperscript{121} Furthermore, partitioning one jointly owned parcel of land into two separately owned parcels would not be viewed as a taxable exchange.\textsuperscript{122}

To the extent state property law defined the rights of spouses in a way that closely resembled that of joint tenants, divorcing spouses could argue that rearranging their joint property interests was simply not a realization event. The argument worked best in community property states where earlier precedent could be cited in support of the non-realization argument.\textsuperscript{123} Then common law states began to characterize non-community marital property as equally vested in husband and wife during the marriage so that divisions at divorce could be viewed as nontaxable divisions of jointly owned property.\textsuperscript{124} Although, not all states were

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} Rev. Rul. 67-221, 1967-2 C.B. 63. No rationale was given for this ruling. One possible justification is that the "rights" that Mrs. Davis released were rights that she would have otherwise enjoyed tax-free, e.g., the right of support and the right to inherit.

\textsuperscript{118} This period was roughly between 1962 and 1984.

\textsuperscript{119} See Rev. Rul. 81-292, 1981-2 C.B. 158 (asking whether division of property incident to divorce when a state is not a community property state is a taxable event).

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} Rev. Rul. 56-437, 1956-2 C.B. 507 (severance of joint tenancy in stock followed by issuance of two separate stock certificates).


\textsuperscript{123} \textit{E.g.}, Walz v. Commissioner, 32 B.T.A. 718, 719 (1935) (division of community property at divorce not a taxable event upon which a loss could be recognized); \textit{see also} Carrieres v. Commissioner, 64 T.C. 959, 964-68 (1975), \textit{acq. in result}, 1976-2 C.B. 1, \textit{aff'd per curiam}, 552 F.2d 1350 (9th Cir. 1977) (unequal division is partly taxable, partly not taxable); Rev. Rul. 76-83, 1976-1 C.B. 213 (equal division of community property at divorce is not a taxable event).

\textsuperscript{124} \textit{E.g.}, Collins v. Oklahoma Tax Comm'n, 446 P.2d 290, 295-97 (Okla. 1968) (characterizing property as equally vested to prevent taxation in \textit{Collins v. Commissioner}, 338 F. 2d 353 (10th Cir. 1968)); \textit{In re Question Submitted Concerning C.R.S. 1963, 41-1-5, 517 P.2d 1331, 1335 (Colo. 1974) (characterizing property as equally vested to prevent taxation in \textit{Imel v. United States}, 523 F.2d 853 (10th Cir. 1975)).
willing to view marital property as equally vested, the United States Supreme Court clearly wanted the tax decision to be made on the basis of state property law.

Finally, the Internal Revenue Service issued a ruling in which it agreed to treat approximately equal divisions of property at divorce as non-taxable nonrealization events. General Counsel Memorandum 37,716 explains in part the I.R.S.'s rationale for treating married couples differently from unrelated individuals:

[W]e believe that the interest of each spouse is in the martial property as an entity. A divorce decree merely severs the interest that each spouse held in the marital property. Cofield v. Koehler, 207 F.Supp. 73 (D. Kan. 1962). This is true regardless of whether the marital property is community property or jointly held property.

As further justification for treating married couples differently, the General Counsel Memorandum stated:

Note that there is no such larger entity to be partitioned in an equal in value division of property held by unmarried co-owners. At the time of divorce, all marital property is disposed of. It would be rare if, upon divorce, married co-owners would divide some of their jointly held property while retaining a joint interest in other property. Unmarried co-owners, however, may sever their interest in some jointly owned property while retaining a joint interest in other property. This difference is an important factor in explaining the reason for the discrepancy in the treatment of married and unmarried persons. Also important is the longstanding judicial precedent for treating divisions of property held by married persons as nontaxable.

Vermont’s equitable distribution statute will apply at the “divorce” of parties to a civil union. If the parties agree to, or a judge enforces, an

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125 E.g., Wallace v. United States, 439 F.2d 757, 759-61 (8th Cir. 1971) (applying Iowa law).
126 Collins v. Commissioner, 393 U.S. 215 (1968) (remanding the Oklahoma case to the appellate court after the Oklahoma Supreme Court had issued its ruling on the property law issues).
approximately equal division of their property, then all of the case law and administrative rulings that applied to spouses before Section 1041 was enacted in 1984 ought to apply to taxpayers who dissolve a civil union. The property division should not be a taxable event.

III. CHALLENGING THE TAX CODE

The previous parts of this article have demonstrated ways in which the Internal Revenue Code, as it is currently drafted, might apply to taxpayers who are parties to a civil union. The arguments I have made in favor of applying positive tax rules to such couples are based on Vermont law that creates rights and responsibilities that the federal tax law ought to recognize and honor.

A more serious problem lies in the fact that even if federal tax law were to recognize the rights and responsibilities of partners committed in a civil union, it does not generally recognize the committed relationship of any two people unless they are spouses in a marriage. Parties to a civil union are ideally situated to argue that the tax code's discrimination against same-sex couples is unconstitutional. Because parties to a civil union are treated just like spouses, they necessarily meet the "similarly situated" requirement for challenging a statute on equal protection grounds. They can argue that every time a taxing statute extends a benefit (or a burden) to a spouse, that benefit (or burden) ought to be extended to taxpayers in a committed civil union.

A primary hurdle for any such challenge, however, is that it is levied at a tax statute. The taxing power is explicitly granted in the Constitution and tax statutes enjoy a heavy presumption of constitutionality. As one court recently explained:

[a] tax statute’s “presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.” . . . “The burden is on the one attacking the legislative arrangement to negate every conceivable basis which might support it.” . . . Finally, the rational basis justifying a statute against an equal protection claim need not be stated in the statute or

133 "[T]he Equal Protection Clause is 'essentially a direction that all persons similarly situated shall be treated alike.'” New York State Club Assoc. v. New York, 487 U.S. 1, 17 (1988) (citing Cleburne v. Living Ctr., Inc., 473 U.S. 432, 439 (1985)).
134 U.S. CONST. art. I. § 8, cl. 1.
135 Regan v. Taxation with Representation, 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.").
in its legislative history; it is sufficient that a court can conceive of a reasonable justification for the statutory distinction.\textsuperscript{136}

Vermont couples, relying on their civil union status, however, should be able to bring strong equal protection challenges. For example, a Vermont couple might challenge the taxability of employer-provided health care benefits. As the Tax Code is currently drafted, employer-provided health care benefits are excluded from taxable income to the extent they benefit the taxpayer, the taxpayer's spouse, or the taxpayer's dependents.\textsuperscript{137} But, payments to same-sex partners, even those subject to Vermont's civil union law, are not exempt from tax.\textsuperscript{138} This differential tax rule not only punishes same-sex couples who rely on one partner's employment to fund their health plan, but it also places an undue burden on employers who provide such services by requiring them to keep a separate set of records for married employees and for those who are parties to a civil union.

What can possibly be the justification for such a provision? Conceivable justifications might include (1) administrative ease - marriage is a bright line, or (2) approval of marriage and disapproval of civil unions. However, it is difficult to make the argument that administrative ease justifies the discrimination since the primary burden of distinguishing between tax-free and taxable payments is placed on the employer.\textsuperscript{139} Besides, in Vermont, civil unions create a bright line as well. Moreover, the second justification appears to be nothing more than an expression of hostility toward same-sex couples. Such animus should not be sufficient to justify a statute even under rational basis analysis.\textsuperscript{140} Indeed, such animus, which is evident throughout its legislative history,\textsuperscript{141} is also an insufficient justification for DOMA.

\textbf{IV. CONCLUSION}

Although most civil rights litigators tend to shy away from tax law, Vermont's civil union statute gives public interest lawyers a unique opportunity to fight for the equal rights of committed same-sex couples.

\textsuperscript{136} Estate of Kunze v. Commissioner, 233 F.3d 948, 954 (7th Cir. 2000) (citations omitted).
\textsuperscript{137} I.R.C. § 105(b) (2001).
\textsuperscript{138} \textit{See id.} (referring only to medical expenses incurred for medical care of a "spouse," which is defined as only including "a person of the opposite sex who is a husband or wife," 1 U.S.C. § 7 (2001)).
\textsuperscript{139} \textit{See} I.R.C. § 3402 (2001).
\textsuperscript{140} \textit{See} Romer v. Evans, 517 U.S. 620, 635 (1986).
First, the Internal Revenue Service should be required to recognize the reality of same-sex civil unions in the state of Vermont. Second, taxpayers who are parties to civil unions should take advantage of their unique standing to challenge the discriminatory provisions of the Internal Revenue Code provisions that benefit spouses, but appear to exclude civil union couples. There is no rational justification for such differential treatment in a world in which civil unions are otherwise treated the same as marriage. One could hope that a successful civil union challenge to the tax code would also encourage legislators and administrators to rethink the role of all families in the allocation of federal tax burdens.