Married Filing Jointly: Federal Recognition of Same-Sex Marriages under the Internal Revenue Code

Christopher J. Hayes
Notes

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by

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Introduction

Throughout the long march of history, gay men and lesbians in virtually every culture have tried to celebrate and protect their relationships in the same ways that heterosexual couples do.¹ From the thirteenth century until the twentieth century, however, Western societies suppressed expressions of love and commitment among lesbians and gay men with almost unparalleled virulence.² No living tradition of public recognition of committed lesbian and gay relationships survived in most of the West.³

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² BOSWELL, SAME-SEX UNIONS, supra note 1, at 262-79; ESKRIDGE, supra note 1, at 35-37; Eskridge, supra note 1, at 1469-74.

³ BOSWELL, SAME-SEX UNIONS, supra note 1, at 262-79; Eskridge, supra note 1, at 35-37; Eskridge, supra note 1, at 1469-74.
Part of the struggle of the modern American gay rights movement, which began in the 1960s, has been the attempt to win the right to marriages recognized in civil and religious society. Every judicial


Interestingly, even most gay and lesbian Americans were probably unaware of these cases at the time. See Joan Steinau Lester, Why Gays Will Vote for Mr. Faithless, S.F. Examiner, June 23, 1996, at B11.


Rabbis affiliated with the Reconstructionist movement of Judaism have also performed same-sex commitment ceremonies for years. David W. Dunlap, Rabbis Endorse Gay Marriage, S.F. Chron., Mar. 29, 1996, at A8. The Central Conference of American Rabbis, which represents the Reform movement, has not taken a position on religious ceremonies but recently voted to support civil marriage, which some member rabbis (both proponents and opponents) view as a precursor to endorsing religious ceremonies. Id. Some Buddhist temples have also taken public stances in favor of same-sex marriage. Elaine Herscher, When Marriage Is a Tough Proposal, S.F. Chron., May 15, 1995, at A1, A10.

At the same time, other religious organizations have become increasingly vocal in their opposition to gay marriage, whether civil or religious. When the city of San Francisco began to offer civil ceremonies that include an exchange of vows to domestic partnership registrants, it drew sharp criticism from Catholic Archbishop William Levada:

I believe that a “ceremony of recognition” of gay and lesbian relationships symbolizes an attempt to redefine the basic human institution of marriage established by nature and creation. . . . The participation of civic officials in such a ceremony will be deeply offensive to many citizens and will be rightly seen as an attack on the sanctity of marriage.

David Fuller, S.F. to Marry 150 Gay Couples, S.F. Chron., Mar. 23, 1996, at A1, A13. Another local cleric also interpreted the purely civil ceremony as an offensive sacrilege and belittled the need of lesbian and gay couples for a recognized legal status:

Recently, the San Francisco Board of Supervisors, in a contemptuous and brazen attempt to turn the social order upside-down, foisted upon city residents a new civil ceremony for homosexual and lesbian “marriage.” . . . [which will] further the social disaster that already surrounds us. . . .

. . . The devastation of human life here in San Francisco [i.e., by the AIDS crisis] has only further proven the catastrophic results of abandoning the church's
challenge to the denial of recognition was turned back\textsuperscript{6} until 1993, when the Supreme Court of Hawaii held in \textit{Baehr v. Lewin} that the statutory restriction of marriage to heterosexual couples presumptively violated the state constitutional guarantee of equal protection of the law.\textsuperscript{7} Although the case, now styled \textit{Baehr v. Miike}, is on remand

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As for those who seek to lovingly and compassionately care for the basic needs of others, numerous and very adequate statutory provisions already exist to accommodate hospital visitation, common title to property, inheritance, health care, power of attorney and many other legal necessities.


More notoriously, the Southern Baptist Convention passed a resolution this year urging its members to boycott the Walt Disney Company largely because it offers health benefits to the same-sex domestic partners of its employees, a policy the Baptists characterized as “promotion of homosexuality [over] its historic commitment to traditional family values.” \textit{Southern Baptists Call for Boycott of Disney}, S.F. CHRON., June 13, 1996, at A2.

For other religious groups, the issue has caused unreconciled controversy. The Conservative movement of Judaism has neither taken a position on civil marriage nor sanctioned performance of religious ceremonies, but some rabbis have performed services of union anyway. Tuller, \textit{supra}, at A13 (quoting Rabbi Alan Lew of Congregation Beth Sholom in San Francisco). The Evangelical Lutheran Church in America has spent several years attempting to formulate an official position on human sexuality, but seems hopelessly torn between advocates and opponents of gay Lutherans. Arthur S. Leonard, \textit{Law & Society Notes}, 1995 LESBIAN/GAY L. NOTES 124. The experience in Presbyterian, Episcopal, and Methodist churches has been similar. \textit{ESKRIDGE, supra} note 1, at 47. Before the recent explosion of media interest in the issue of same-sex marriage, these denominations had already been divided over the ordination of openly lesbian and gay clergy. \textit{See Don Lattin, Heresy Charge Dropped Against Episcopal Bishop, S.F. CHRON.,} May 16, 1996, at A1 (reporting that retired Bishop Walter Righter, who had ordained an openly gay deacon, was only the second bishop in the 206-year history of the Episcopal Church to be charged with heresy; also noting similar controversies over ordination in the United Methodist Church and the Presbyterian Church U.S.A.); \textit{Ex-Archbishop of Canterbury Ordained Gays, S.F. CHRON., May 17, 1996, at A16} (reporting that Lord Robert Runcie, who as Archbishop of Canterbury was head of the Church of England and of the worldwide Anglican Communion to which the Episcopal Church belongs, had knowingly ordained gay priests in spite of official Church policy against such ordinations, which he deemed “ludicrous”); \textit{Methodist Bishops Back Church Law Against Gays, S.F. CHRON., April 24, 1996, at A5} (reporting that the 67-member Council of Bishops of the United Methodist Church voted to continue a ban on ordination of gays and lesbians, but acknowledged that there are “serious differences” on the issue within the denomination).


to give the State of Hawaii the opportunity to justify its marriage statute under the strict scrutiny test, most observers expect that the state will fail to do so, opening the door for same-sex marriage in Hawaii.

Already a major tourist destination, Hawaii would undoubtedly become a favored site for lesbian and gay honeymooners, much as Nevada and Mexico once were havens for Americans in need of a quick divorce. But when these honeymooners get home, will they still be married in the eyes of the law? And will even newly married gay and lesbian Hawaiians have to wonder whether their marriages will be recognized by the Internal Revenue Service, the Social Security Administration, the Immigration and Naturalization Service, the Department of Veterans’ Affairs, or the local post office?

The question whether the Full Faith and Credit Clause of the federal Constitution would compel other states to recognize same-sex marriage is a difficult one that has already been addressed by a number of other authors. Federal recognition is another matter en-

proposed for the federal constitution. HAW. CONST. art. I, § 3. Although the Baehr court declined to declare that same-sex marriage was a fundamental right because the trial court had dismissed the action on the pleadings before evidence was taken, it announced that classifications based on sex would be to strict scrutiny. Baehr, 852 P.2d at 67. The statutory restriction of marriage to heterosexual couples would thus be presumed unconstitutional unless the state could establish at trial after remand that a compelling state interest supported the restriction and that it was narrowly drawn to avoid unnecessary abridgment of the constitutional rights of same-sex couples. Id.


9. Herscher, supra note 5, at A10. Indeed, Gov. Ben Cayetano has publicly stated that Hawaii has no compelling interest in preventing same-sex marriage, alarming conservative state legislators and other opponents of same-sex marriage. Leonard, supra note 8, at 35. Conservative legislators reportedly attempted to intervene in the case, fearing that the state will not adequately defend its marriage statute. Id. The Hawaii Supreme Court has already denied permission to intervene to representatives of the Mormon Church, holding that it neither had shown that the state would inadequately defend the case nor was in danger of being forced to perform same-sex marriages. Baehr v. Miike, 910 P.2d 112, 114-16 (Haw. 1996).

10. U.S. CONST. art IV, § 1 (providing that “Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State” and that “Congress may . . . prescribe . . . the Effect thereof”); see also 28 U.S.C. § 1739 (1994) (providing that “[a]ll nonjudicial records . . . of any State, Territory, or Possession of the United States . . . shall have the same full faith and credit in every court and office within the United States and its Territories or Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken”).

11. Jennifer Gerarda Brown, Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage, 68 S. CAL. L. REV. 745 (1995); Barbara J. Cox, Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We
tirely; although many federal benefits and obligations depend on marriage, federal deference to state determinations of marital status is almost complete.12 Federal recognition will depend upon a number of factors, including congressional intent and national uniformity. In many cases, federal authorities may be called upon to decide important questions of marriage recognition before the state full-faith issue has wended its way through the courts.


Some states are already preparing to resist same-sex marriages by enacting statutes purporting to deny recognition to same-sex marriages. In other states, however, legislation has been killed. See infra notes 185-87.

12. See, e.g., Boyter v. Commissioner, 668 F.2d 1382, 1385 (4th Cir. 1981) (adopting the Government's argument that "under the Internal Revenue Code a federal court is bound by state law rather than federal law when attempting to construe marital status").
Another issue was raised on September 21, 1996, when President Clinton signed the so-called Defense of Marriage Act ("DOMA") into law.\(^\text{13}\) This statute, driven into law by election-year politics,\(^\text{14}\) expressly bars recognition of same-sex marriages for any federal program or law.\(^\text{15}\) However, it will soon face a vigorous constitutional challenge in the courts,\(^\text{16}\) and even if it is held to be constitutional, it may not produce the precise results that its sponsors intended with respect to income and estate taxation.\(^\text{17}\) It is thus unlikely to be the final word on the subject.

This Note argues that the Internal Revenue Service should recognize same-sex marriages performed in Hawaii (or any state that follows Hawaii's lead) for purposes of federal income, estate, and gift taxes. Federal recognition would further the historic congressional intent not only to defer to state-law determinations of marital status, but also to interpret and enforce the Internal Revenue Code uniformly and consistently throughout the United States. Federal recognition would also further the states' authority to regulate marriage, a traditional part of the states' police powers, without the uninvited interference of federal authorities. Until the litigation over the full-faith issue


\(^{14}\) See Carolyn Lochhead, *Senate Battle on Restricting Gay Marriages*, S.F. CHRON., July 12, 1996, at A3 (quoting Sen. Kennedy's opinion that DOMA is "a mean-spirited form of legislative gay-bashing designed to inflame the public four months before the November election"). Supporters insist that DOMA came before Congress this year because of "the Hawaii decision and . . . activists who want to have same-sex marriages throughout the country." *Id.* (quoting Sen. Nickles). The fact remains, however, that the Hawaii Supreme Court rendered its decision setting the constitutional standard in *Baehr v. Lewin* three years ago, and its final review of the trial court's decision is still one if not two more years away. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); Henry J. Reske, *A Matter of Full Faith*, A.B.A. J., July 1996, at 32, 33; *see also id.* at 32 (characterizing the flurry of legislative activity this year as "a remarkable rush to ban same-sex marriages").

\(^{15}\) DOMA sec. 3 (to be codified at 1 U.S.C. § 7). The act is simple and precise: DEFINITION OF "MARRIAGE" AND "SPOUSE." In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

*Id.*

\(^{16}\) See Reske, supra note 14, at 32 (discussing avenues for constitutional challenge on the full-faith issue). The Lambda Legal Defense and Education Fund, which is cocounsel in the *Baehr v. Miike* case, has already announced its intention to pursue a constitutional challenge. Todd S. Purdum, *Heat on Clinton for Gay Marriage Ruling*, S.F. EXAMINER, Sept. 22, 1996, at A2. The prospects for such a challenge were considerably strengthened earlier this year when the U.S. Supreme Court declared that legislation motivated by antipathy toward gay men and lesbians could not survive even rational basis review under the Equal Protection Clause. Romer v. Evans, 116 S. Ct. 1620, 1627-29 (1996).

\(^{17}\) See infra Part IV.
and the Defense of Marriage Act is completed, and even if it is ultimately determined that states would not owe full faith and credit to Hawaii same-sex marriages, uniform federal recognition would provide a simple, predictable, and litigation-free resolution to the problem of dealing with marriages that may be recognized in some states but not in others. Finally, federal recognition would serve important federal policies by avoiding the revival of the long-settled issues of income-splitting and taxation of marital property transfers concerning the interaction of federal taxation law and state marital property law. The Defense of Marriage Act, at least as currently drafted, would not prevent the resurgence of these important problems.

Part I will summarize the tax benefits conferred on married couples by the Internal Revenue Code. Part II will discuss the legislative history of Code provisions that recognize marital status and how they reveal congressional intent to defer to state-law determinations. Part III will review past administrative and judicial attempts to resolve conflicting determinations of marital status. Finally, Part IV will explain why federal and state policies will best be served by recognition of same-sex marriages under the federal taxation laws and why the Defense of Marriage Act will thwart long-standing policy goals.

I. Advantages of Marriage to Federal Taxpayers

The lay person who is familiar with the so-called "marriage penalty" may wonder why the betrothed gay or lesbian taxpayer would

18. As the Tax Court once explained:

A married couple filing a joint return is taxed on their total combined income and, as for all taxpayers, the marginal tax rate increases as total income increases. Reflecting income splitting enacted in 1948, the rate schedule for married couples filing jointly is somewhat lower than it is for single persons. Consequently, if one partner of the marriage produces all or most of the income, he or she pays less tax than if single. However, if both spouses work, the second income is piled on the first, and is thus in a higher marginal tax bracket than if it stood alone. Because the higher tax bracket can more than negate the lower rate schedule for couples filing jointly, when two people who earn somewhat comparable salaries decide to marry, they unhappily discover that their total tax bill is higher than it was before they were wed.


The marriage penalty has declined in recent years, particularly with the flattening of tax brackets under the Internal Revenue Code of 1986. For example, under the 1993 rates, a single taxpayer with a taxable income of $50,000 would pay $11,127.00 in federal income tax, while a married individual filing separately with the same taxable income would pay $11,764.25, for a "penalty" of $637.25. See Omnibus Budget Reconciliation Act of 1993 (Revenue Reconciliation Act of 1993) § 13201(a)-(e), Pub. L. No. 103-66, 1993 U.S.C.C.A.N. (107 Stat.) 312, 457-61 (codified at I.R.C. § 1 (1994)). However, married taxpayers with the same gross income as their single counterparts typically have more disposable income because of their ability to share necessary expenses; they are thus more
voluntarily seek to have the Internal Revenue Service recognize the marriage at all. The answer is that for most taxpayers, the financial benefits of married status far outweigh the cost of the marriage penalty.\textsuperscript{19} Legally married taxpayers can transfer property and wealth to each other completely free of income, estate, and gift taxes.\textsuperscript{20} They do not incur income taxes when they take advantage of certain fringe benefits offered by their spouses' employers,\textsuperscript{21} such as health insur-

likely to be able to reduce their taxable income by itemizing deductions, such as for home mortgage interest, state and local taxes, charitable contributions, medical expenses, and retirement savings. See I.R.C. §§ 163(h), 164, 170, 213, 219 (1994); see also Jennifer Steinhauer, \textit{Studies Find Big Benefits in Marriage}, \textit{N.Y. Times}, Apr. 10, 1995, at A8 (citing sociological research showing that "married couples were generally more financially well off than couples who simply lived together, because they were much more likely to pool money and invest in the future than were couples who merely cohabitated").


\textsuperscript{20} Virtually all transfers of property are treated as gifts for purposes of income taxation. I.R.C. § 1041(a)-(b) (1994). Gifts are excluded from gross income, and thus from taxable income. I.R.C. §§ 61, 63, 102(a) (1994). Moreover, gifts and bequests to spouses are fully deductible for purposes of gift and estate taxation. I.R.C. §§ 2056(a), 2523(a) (1994).

\textsuperscript{21} Some employers choose to offer these benefits to same-sex partners of their employees, and some employees choose to take them despite the additional tax incurred. There are now more than four hundred employers that offer domestic partnership benefits, according to the consulting firm Common Ground. Arthur S. Leonard, \textit{Domestic Partnership & Marriage Notes}, 1995 \textit{LESBIAN/GAY L. NOTES} 168, 168; see also Steven Briggs, \textit{Domestic Partners and Family Benefits: An Emerging Trend}, 45 \textit{LAB. L.J.} 749 (1994).

The tax incurred can be substantial. In the five published private letter rulings on the subject, the Internal Revenue Service has consistently maintained that the imputed value of any fringe benefit constitutes "wages" that are subject to income tax (paid by the employee), FUTA (federal unemployment tax paid by the employer), and FICA (Social Security tax paid by both employer and employee). Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996) (health insurance benefits); Priv. Ltr. Rul. 94-31-017 (May 4, 1994) (tuition reduction benefits); Priv. Ltr. Rul. 92-31-062 (May 7, 1992) (health insurance benefits provided by municipality; not addressing FICA or FUTA); Priv. Ltr. Rul. 91-09-060 (Dec. 6, 1990) (health insurance benefits; declining to discuss FUTA because the employer was a municipality exempt from FUTA); Priv. Ltr. Rul. 90-34-048 (May 29, 1990) (health insurance benefits).

Although significant, these tax costs can be offset by other considerations. Employers should have no difficulty deducting the cost of domestic partner benefits from their own income taxes under the broad provision for "all the ordinary and necessary expenses [for] carrying on any trade or business, including . . . a reasonable allowance for salaries or other compensation . . . ." I.R.C. § 162 (1994).

For employees, the tax costs of a benefit may be significantly cheaper than purchasing the same service on the open market, as I know from personal experience. While in law
ance, tuition discounts offered by educational institutions, meals and lodging, employee discounts, and reimbursements for moving expenses, which together form a significant proportion of employee compensation. Spouses can take a one-time exclusion of $125,000 of the gain from the sale of a jointly owned principal residence if at least

generated by school, I was covered by the group health plan and vision plans of my husband's employer, for which he paid additional tax of more than one-third of the imputed income. An equivalent individual health plan would have cost us at least three to four times as much as the additional tax, and was significantly cheaper than even the reduced-rate, bare-bones student health plan I would otherwise have been required to purchase. Moreover, group plans typically allow enrollment without screening for preexisting conditions; many people would not be able to find an equivalent individual plan at any price because of such screening.


25. See I.R.C. §§ 132(a)(1)-(2), (b), (c), (h)(2) (1994).

26. See I.R.C. §§ 132(g), 217 (1994). Although exclusion of moving expense reimbursement from gross income is technically available for moving expenses of any individual who shares the employee's old and new residences "and is a member of the taxpayer's household," § 217(b)(2), employers often refuse to cover half the moving expense of a lesbian or gay employee with a domestic partner. See, e.g., Arthur S. Leonard, Domestic Partnership Notes, 1995 LESBIAN/GAY L. NOTES 71, 71-72 (reporting that the U.S. Department of the Interior approved only half of an employee's otherwise eligible expenses in purchasing a new home because her same-sex domestic partner, with whom she purchased the new home, was not recognized as her spouse).

Moreover, the Commissioner might conceivably attempt to deny the exclusion for the expenses attributable to an employee's gay or lesbian partner. The Commissioner might contend that congressional intent in using the phrase "member of the taxpayer's household" was to exclude any person whose relationship to the taxpayer violates local law (such as laws against sodomy or fornication) as violative of public policy. The Commissioner successfully took just such a position in the case of a taxpayer who attempted to take a dependency exemption for a woman with whom he lived in an adulterous relationship as a member of his household under I.R.C. § 152(a)(9). Turnipseed v. Commissioner, 27 T.C. 758 (1957); see infra notes 82-92 and accompanying text. Congress ratified this decision by enacting I.R.C. § 152(b)(5) (1994), which excludes from the definition of "household" any person whose relationship with the taxpayer violates local law. See infra notes 93-101 and accompanying text.

Of course, this argument carries little force in the jurisdictions that have decriminalized sodomy and fornication. Moreover, § 152(b)(5) applies only to the definition of "dependent" claimed under § 152(a)(9), both by the express language of the statute and by the legislative history. H.R. REP. No. 775, 85th Cong., 1st Sess. 7-8 (1957). By contrast, § 217(b) specially defines its beneficiaries so as to exclude some dependents (such as a college student whose principal abode is at the campus) and to include some nondependents (such as an elderly or infirm relative of independent financial means who can no longer care for himself).

27. Private-sector employee benefits account for more than 27% of total compensation; insurance plans alone account for 6% of total compensation. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT COST INDEXES AND LEVELS 1975-89, at 9 (1989).
one spouse is over the age of 55. Divorcing spouses can divide their property without adverse tax consequences and they can choose in advance which spouse will pay taxes on alimony payments. In some cases, the joint return produces a tax savings. Despite the marriage penalty and the minimal additional tax costs of joint filing, most taxpayers would readily file jointly in order to receive these benefits.

II. Congressional Intent to Defer to State-Law Determinations of Domestic Relations

For more than eighty years, Congress has given nearly exclusive control over access to the tax benefits of marriage to the states, through their regulation of marriage. As the burden of federal income taxation has increased, Congress has gradually added provisions to the tax laws that regulate the recognition of marriage for tax purposes. However, every aspect of congressional regulation relates either to the timing of changes in marital status or to the recognition of community property interests; at no time before 1996 has Congress ever refused to recognize a state-law determination of marital status. Analysis of these ad hoc provisions reveals a consistent congressional

30. See I.R.C. §§ 71, 215 (1994). Typically, the payor spouse lists the alimony payments as an itemized deduction; the payee spouse must then include the payments as taxable income. Since the spouse receiving alimony is usually in a lower tax bracket than the spouse who pays it, these provisions allow the divorcing spouses to reduce their combined tax liability, thus allowing the payor spouse to make larger payments.
31. The tax savings is produced when one spouse has a substantially higher income than the other, such as when only one spouse has taxable income. By splitting their incomes, part of the higher-earning spouse's income is shifted for tax purposes to the lower-earning spouse, to be taxed at his lower marginal rate. See Boyer v. Commissioner, 668 F.2d 1382, 1383 n.1 (1981) (quoting Boyer v. Commissioner, 74 T.C. 989 (1980)); see also Harvey S. Rosen, The Marriage Tax Is Down but Not Out, 40 Nat'l Tax J. 567, 571 (1987).
32. The additional tax costs of marriage are purely hypothetical for most taxpayers. See Cain, supra note 19, at 98-99. They include "(1) joint and several tax liability on a joint return; (2) the inability to recognize losses on sales between spouses; and (3) numerous tax attribution rules that treat spouses as a unitary taxpayer." Id. (footnotes omitted).
34. The exception, again, was this year's passage of the Defense of Marriage Act, which was intended to apply to the entire realm of federal law. Id. sec. 3 (to be codified at 1 U.S.C. § 7).
intent to give the greatest possible deference to regulation of marriage by the states.

A. Timing of Personal Exemptions

When Congress enacted the first modern income tax in 1913, it barely recognized marital status at all. The 1913 act levied a one percent tax on an individual's "net income" (analogous to today's "taxable income"). The 1913 act had simple provisions for itemized deductions and for exclusions from gross income. It allowed a personal exemption of $3,000 for an unmarried individual, while married couples had to share a $4,000 exemption, regardless of whether one or both spouses had sufficient separate income to be required to file a return. The act referred to "husband" and "wife" without defining the terms; Congress apparently found it self-evident that marital status would be determined exclusively under state law. Congress preserved this structure when it revised the income tax laws to increase revenues for World War I.

36. Id. § II(A)(1), 38 Stat. at 166. A more progressive "additional tax" applied to net incomes exceeding $20,000. Id. § II(A)(2), 38 Stat. at 166.
37. Id. § II(B), 38 Stat. at 167-68.
38. Id. § II(C), 38 Stat. at 168. The act refers to a "deduction" rather than an "exemption," the term used in later acts and in the present Internal Revenue Code. There was no provision for joint returns.
39. Id.
40. Floor debates on the bill did not directly address the issue at all. Section II(C) was approved without debate during the reading of the bill on the floor of the house. 50 Cong. Rec. 1236 (1913). There was only brief commentary on the size of the exemptions. 50 Cong. Rec. 1247 (1913) (statement of Rep. Gillett). The only remotely relevant amendment, which was defeated and was likely offered more as a political statement than as a serious proposal, would have relieved women from all income taxation whatsoever if they resided in states that denied them the right to vote. 50 Cong. Rec. 1255-57 (statements of Rep. La Follette and Rep. Heflin).

Otherwise, hearing testimony and floor debates did not address the issue of marital status at all; most of the testimony and debates concerned the tariff provisions of the bill. Tariff Schedules: Hearings Before Subcomm. No. 2 of the Senate Comm. on Finance on Finance on H.R. 3321, 63d Cong., 1st Sess. 336-37 (1913); Tariff Schedules: Briefs and Statements Filed with the Senate Comm. on Finance on Finance on H.R. 3321, 63d Cong., 1st Sess. 1955-2142 (1913); 50 Cong. Rec. 1236-64, 1299-1311, 5678-81 (1913) (House floor debates); id. at 3766-76, 3805-22, 3829-90, 4379-81, 4416-20, 4611-13 (1913) (Senate floor debates). (Testimony before the House Ways and Means Committee was not preserved.)

41. The Revenue Act of 1916 increased the tax rates, but otherwise left the structure of the 1913 act in place. Act of Sept. 8, 1916 (Revenue Act of 1916), ch. 463, § 1, 39 Stat. 756, 756-57. Again, the vast majority of the hearing testimony was on the tariff provisions of the act; only one witness testified on the income tax. To Increase the Revenue: Hearings Before the Subcomm. of the Senate Comm. on Finance on H.R. 16763, 64th Cong., 1st Sess. 287-97 (1916) (testimony of Rep. Elston). The only remotely relevant floor debate concerned whether to have a separate personal exemption for each family member rather than a flat exemption for a married couple, and whether to allow the full exemption for taxpay-
The Revenue Act of 1921 created a need for more scrutiny of marital status. Unlike the previous tax laws, the 1921 Revenue Act gave some married taxpayers a higher personal exemption than they would have enjoyed if single. Along with the higher exemption, Congress enacted the first timing provision: marital status would be determined as of the last day of the taxable year; moreover, taxpayers who were widowed during the year were permitted to take the higher marital exemption. The timing provision came at the request of the Treasury Department, which reportedly had adhered to this policy despite the lack of statutory authority. After three years, Congress


The principal innovation of the Revenue Act of 1918 (actually enacted in early 1919) was the joint return. Revenue Act of 1918, ch. 18, § 223, 40 Stat. 1057, 1074 (1919). Unlike the present-day joint return, the 1919 joint return was little more than a convenience; the aggregate income was taxed at the same rate as an individual's income of the same level. Id. Again, most of the testimony and floor debates concerned war expenses. See generally To Provide Revenue for War Purposes: Hearings Before the Senate Comm. on Finance on H.R. 12863, 65th Cong., 2d Sess. (1918); 57 CONG. REC. 249-56, 291-312, 386-98, 491-518, 542-72, 609-21, 648-71, 701-23, 734-53, 758-834, 2452-64, 2973-3035, 3117-39, 3179-94, 3265-71 (1918).


43. Individuals could claim a personal exemption of $1,000. Married couples could claim a personal exemption of $2,500; however, if their net income exceeded $5,000, the personal exemption was reduced to $2,000. As under previous laws, husband and wife had to share the exemption if they filed separate returns. Id. § 216(c), 42 Stat. at 243.

44. Id. § 216(f), 42 Stat. at 243.

45. As Dr. T.S. Adams, a tax advisor to the Treasury Department who had drafted § 216(f), testified to the Senate Finance Committee:

We have no rule under existing law as to what happens if a man has a child born during the year, or if he dies during the year. We have been using this rule [referring to proposed § 216(f)]. There has been no law for it, and we thought we had better get it in the statute.

Internal Revenue: Hearings Before the Senate Comm. on Finance on H.R. 8245, 67th Cong., 1st Sess. 64 (1921) [hereinafter Hearings on H.R. 8245]. This provision was apparently considered so trivial that it was not even mentioned in the committee reports on the bill. S. REP. NO. 275, 67th Cong., 1st Sess. 15 (1921) (discussing other provisions in § 216); H.R. REP. NO. 350, 67th Cong., 1st Sess. 12 (1921) (omitting any mention of the provision, then numbered as § 222).
amended the timing provision to prorate the higher marital exemption for the portion of the taxable year in which the taxpayer was married, out of a professed concern for fairness. For several decades, Congress left the prorated marital exemption virtually unchanged despite regular updates to the tax statutes and the enactment of the first Internal Revenue Code in 1939. In 1943 Congress dropped the proration provision, authorizing the marital exemption for couples married as of July 1 of the taxable year. Finally, in 1944, Congress revived the year-end determination that it had originally enacted in 1921. The same statute created the standard deduction, with a nearly identical provision for year-end recogni-

Interestingly, another provision allowed to nonresident aliens only a $1,000 exemption with no additional exemptions for spouse or dependents. Revenue Act of 1921 § 216(e); Hearings on H.R. 8245, supra, at 63, 240-41; S. Rep. No. 275, supra, at 15-16. Dr. Adams supported this provision largely because "we have no test of the veracity of the foreign citizen. We can not tell whether he has 10 children or 4 children, or whether he is unmarried or living with his wife." Hearings on H.R. 8245, supra, at 63. He thus was not concerned about determining marital status as such.

A minor change was also made to clarify that filing of joint returns was optional; it was approved without debate in the Senate. Revenue Act of 1921 § 223(b); Hearings on H.R. 8245, supra, at 74 (testimony of Dr. Adams); S. Rep. No. 275, supra, at 17; H.R. Rep. No. 350, supra, at 13; 61 Cong. Rec. 5955 (1921).

46. Revenue Act of 1924, ch. 234, § 216(c), (f)(2), 43 Stat. 253, 272-73. This change was made on the floor of the Senate at the behest of the Finance Committee without any debate at all. 65 Cong. Rec. 7127 (1924). The Finance Committee's report on the bill explained only that the change was "obviously a more equitable rule than that provided in the existing law whereby the amount of these credits [sic] is determined by the status of the taxpayer on a single day rather than during the entire taxable period." S. Rep. No. 398, 68th Cong., 1st Sess. 25 (1924). The House agreed to the change without significant comment in its conference report. H. Rep. No. 844, 68th Cong., 1st Sess. 19 (1924).


Beginning with the Revenue Act of 1932, the dependent exemption was prorated as well. Internal Revenue Code of 1939 § 25(b), 53 Stat. at 18; Revenue Act of 1936 § 25(b), 49 Stat. at 1670; Revenue Act of 1934 § 25(b), 48 Stat. at 693; Revenue Act of 1932 § 25(e), 47 Stat. at 184.


50. Individual Income Tax Act of 1944, ch. 210, sec. 10, § 25(b)(2), 58 Stat. 231, 238. Dependent exemptions were available whenever the taxpayer had provided more than half of the dependent's support, but for the first time were restricted to specified relatives of the taxpayer and expressly excluded alimony payments to "a wife." Id. sec. 10, § 25(b)(3), 58 Stat. at 239.
tion of marital status and an additional requirement that the spouses live together. 51

None of these statutes, including the major revisions in 1921, 1924, 1939, and 1943 and a dozen other regular revisions, placed any condition other than timing and cohabitation on the recognition of marital status.

B. The Community Property Problem

The first real challenge to the congressional design came from taxpayers in the community property states. 52 Relying on the community property doctrine that each spouse has a vested, undivided one-half interest in all income and property acquired by either spouse during the marriage, married residents of community property states began to file tax returns showing half the community income on each spouse's return, even when only one spouse earned most or all of the income (as was most common at the time). 53 Because of the increasingly progressive tax rates in place by the 1920s, this income-splitting produced a substantial tax savings for married couples in community property states that was unavailable to those in other states. 54

For three decades, Congress struggled with the community property problem. Throughout this period, Congress acknowledged that no solution was permissible unless it respected the community property system, which was an integral part of the regulation of marriage in the community property states and was much older than the federal income tax. The first attempt at a solution came in 1921, when a provision that would have taxed community income to the husband alone was defeated. 55 Congress took no further action until 1926 despite the

51. Id. sec. 9, § 23(aa)(4), 58 Stat. at 237.
53. The Attorney General concluded in 1920 and 1921 that this method of income splitting was legal in every community property state except California, where state courts had held that the wife's interest did not vest until the termination of the community by dissolution or the husband's death. T.D. 3138 (1921), reprinted in 61 Cong. Rec. 5909, 5912-13 (1921) (applying to the states other than Texas); T.D. 3071 (1920), reprinted in 61 Cong. Rec. 6584-88 (1921) (applying to Texas); see also Spreckels v. Spreckels, 158 P. 537, 539 (Cal. 1916) (holding that the husband during the marriage was "the sole and exclusive owner of all the community property, and that the wife had no title thereto, nor interest therein, other than a mere expectancy as heir, if she survived him").
55. As originally drafted by the House Ways and Means Committee, section 208 of the Revenue Act of 1921, ch. 136, 42 Stat. 227, would have taxed community income to "the spouse having the management and control of the community property" (i.e., the husband). 55. H. Rep. No. 350, supra note 45, at 11; 61 Cong. Rec. 5292 (1921) (statement of Rep. Black of Texas). The Treasury Department supported the proposal. Hearings on
urging of Treasury Secretary Andrew W. Mellon to enact the provision that had been rejected in 1921. From 1926 to 1930, Congress enacted legislation intended to preserve the status quo until the Supreme Court could decide the issue. The legislative impasse was

H.R. 8245, supra note 45, at 231. There was scant debate of the provision on the floor of the House because the Rules Committee prohibited amendments unless offered by the majority of the Ways and Means Committee, rendering debate futile. 61 Cong. Rec. 5292-93 (1921) (statements of Rep. Black and Rep. Green of Iowa, the floor manager from the Ways and Means Committee). There was vigorous opposition on the floor of the Senate, where members from community property states characterized the provision as an "attempt to overturn the community-property system," and as "reckless disregard of the statutes of eight states [which] are attempted to be repealed." 61 Cong. Rec. 5909, 5914 (1921) (statements of Sen. Ashurst of Arizona); see also id. at 5917-22 (statements of Sen. Broussard of Louisiana); id. at 6872-77 (statement of Sen. Randell of Louisiana). After initially voting to accept the provision, the Senate finally voted to delete it so that it could be reconsidered in the conference committee with the House, upon the acquiescence of the chair of the Finance Committee. 61 Cong. Rec. 5922, 7229 (1921) (statements of Sen. Broussard and Sen. Penrose). The House agreed to delete the provision, which surprisingly generated no further debate in the House or the Senate when the conference report was approved. 61 Cong. Rec. 8020 (1921) (statement of the House managers); id. at 8113 (statement of Sen. Simmons).

Interestingly, there had been no opposition in the Finance Committee from Senator Jones of New Mexico, who seemed to be unaware that he represented a community property state and made no comment at all either in committee or on the Senate Floor. Hearings on H.R. 8245, supra note 45, at 2, 231, 283-86; 61 Cong. Rec. 5914 (1921). 56. The issue was not raised during the debates on the Revenue Act of 1924, ch. 234, 43 Stat. 253, despite the continued urging of Treasury Secretary Andrew W. Mellon to adopt the proposal that had been rejected in 1921. See 67 Cong. Rec. 551 (1925) (reprinting a Nov. 10, 1923 letter from Sec. Mellon to Rep. Green); 65 Cong. Rec. 2427-73, 2486-2531, 2566-35, 2666-2726, 2775-2800, 2841-2867, 2898-2926, 2948-2974, 2994-3019, 3031, 3100-22, 3170-99, 3257-90, 3330-82, 3901, 9528-51 (1924) (debates in the House); id. at 6972, 7064, 7072, 7123, 7208, 7337-64, 7439, 7529, 7532, 7594, 7622, 7668, 7691, 7739, 7836, 7838, 7934, 7934-7988, 8011, 8171, 8195, 8454, 8268 9395-9421 (1924) (debates in the Senate).

57. While Congress was considering the Revenue Act of 1926, ch. 27, 44 Stat. 9, the Supreme Court decided the first test case from a community property state, United States v. Robbins, 269 U.S. 315 (1926). Robbins involved the Commissioner's attempt to tax the community income of a California couple entirely to the husband under the revenue laws effective in 1917, increasing their taxes by $6,788.03. Id. at 325. The Court held that because California law defined the wife's interest as a mere expectancy and not a vested interest, the income was properly taxed to the husband alone; the Court refused to rule prospectively what the result would be in the other community property states. Id. at 325-27. In response, the House-Senate conference committee added a provision to the pending bill that validated tax returns as actually filed before 1925 by residents of community property states in an apparent attempt to preserve the status quo while additional test cases made their way to the Court. Revenue Act of 1926 § 1212, 44 Stat. at 130. There was little debate of the provision before final passage. See 67 Cong. Rec. 4422 (statement of Rep. Barbour of California).

Congress had to wait more than four years for the Court to act. When the Court did act, it again refused to decide the real issue, ruling instead only that a California couple could not achieve income-splitting by contracting with each other to grant the vested joint interests that California community property law did not provide. Lucas v. Earl, 281 U.S.
only intensified by the Court's 1930 decisions in *Poe v. Seaborn* that the Revenue Acts gave the Commissioner of Internal Revenue no power to tax community income as if it were the wage-earner's alone,\(^{58}\) and in *Lucas v. Earl* that residents of common-law states could not, by contract or otherwise, similarly split their income.\(^{59}\)

Congress took no further action for twelve years after the decisions in *Earl* and *Seaborn*,\(^{60}\) until economic changes forced the issue. Rising federal taxes brought about by New Deal programs and the costs of World War II made the difference in tax burdens between common-law and community property jurisdictions too great to ig-

\(^{58}\) 111, 113-15 (1930). Shortly thereafter, when Congress next revised the revenue laws, it continued to omit the proposal to expressly tax community income to the husband. Revenue Act of 1928, ch. 852, § 22(a), 45 Stat. 791, 797. Because the Treasury Department was holding 100,000 returns for calendar years 1927 and 1928 for residents of the other community property states, Congress also enacted a joint resolution to extend the statute of limitations until the Court adjudicated the question. Act of June 16, 1930, Pub. Res. No. 88, 46 Stat. 589, 589; H.R. REP. No. 1608, 71st Cong., 2d Sess. 1-4 (1930).

The long-awaited decision finally came in *Poe v. Seaborn*, 282 U.S. 101 (1930). In *Seaborn*, the Court held that a couple from the State of Washington could split their income because the community property law of that state gave both spouses equal and vested interests in the community property. *Id.* at 108-11, 118. The Court also held that Congress's repeated refusal to adopt the proposed community property provision evinced an intent to adopt the Attorney General's construction of the Revenue Acts, which was that residents of community property states other than California were entitled to income-splitting. *Id.* at 114-16; see T.D. 3138 (1921), *reprinted in 61 CONG. REC. 5909, 5912-13 (1921) (applying to the states other than Texas); T.D. 3071 (1920), *reprinted in 61 CONG. REC. 6584-88 (1921) (applying to Texas).*

\(^{59}\) 282 U.S. at 114-15. The Earls resided in California, the only community property state whose courts had construed the wife's interest in community property to be a mere expectancy rather than a vested interest. Because the *Earl* case concerned tax years 1920 and 1921, 281 U.S. at 113, the Court did not consider the 1927 statutory revision declaring the interests of the spouses to be "present, existing, and equal." Act of Apr. 28, 1927, ch. 265, 1927 Cal. Stat. 484 (presently codified as CAL. FAM. CODE § 751 (West 1995)). That provision was motivated by the desire to obtain the benefits of income-splitting for California taxpayers. *See* William A. Reppy, *Retroactivity of the 1975 Community Property Reforms*, 48 S. CAL. L. REV. 977, 1089 (1978). In any case, the California Supreme Court had declared that the new statute could not be applied retroactively to community property acquired before 1927. Stewart v. Stewart, 269 P. 439, 442 (1928).

The Court glossed over its decision in *Earl* when it decided *Seaborn* later the same year. Presumably, the Court was concerned in *Earl* that a contrary result would allow high-earning taxpayers in every state to split their income among an indefinite number of nonworking dependents (such as a spouse, children, or elderly dependents), thus rendering the entire income tax unworkable. *Cf.* 61 CONG. REC. 5918 (1921) (statement of Sen. Smoot during debate on the Revenue Act of 1921 raising a similar specter). Community property law split the income only in half.

nere. Common-law states, particularly those that bordered on community property states, began to enact community property laws.61

In 1942, Congress amended the gift and estate tax provisions of the new Internal Revenue Code of 1939 to tax the proceeds of life insurance policies and gifts of community property as if one spouse (usually the husband) were the sole owner, unless the other spouse could show that at least part of the insurance policy or the gift had been purchased with her separate property, or with property "received as compensation for personal services actually rendered by the [other] spouse."62 This law only made things worse by imposing on residents of community property states an onerous "tracing" requirement to keep documentary proof of community ownership of their assets, which they might have acquired long before the enactment of this law in 1942.63 Moreover, in some cases the estate tax exceeded 50% of the decedent's gross estate; if the decedent willed his one-half interest in the community property to someone other than the surviving spouse, the surviving spouse had to pay part of the estate tax out of her own one-half interest in the community property, despite receiving nothing from the estate itself.64 Finally, the 1942 Revenue Act did nothing to solve the income-splitting problem.65 This led five common-law states to adopt community property laws by 1947, despite the extreme difficulty of the transition from the common-law system.66

Congress finally reached a lasting solution in 1948 when, as part of a major postwar tax reduction, it authorized married residents of every state to split their incomes.67 At the same time, it repealed the flawed community property provisions of the Revenue Act of 1942,

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63. S. Rep. No. 1013, supra note 31, pt. 1, at 26, 1948 U.S.C.C.A.N. at 1188-89. This provision was in direct conflict with the longstanding presumption in community property states that an asset acquired during the marriage was community property unless it could be traced to separate property (i.e., acquisition by gift or inheritance). See GAIL BOREMAN BIRD, CASES AND MATERIALS ON CALIFORNIA COMMUNITY PROPERTY 60 (1994).


66. Id.

replacing them with provisions for “gift-splitting” and for a 100% marital deduction under the estate and gift taxes.68

Congress made this massive change in the taxation of marital property with virtually no change in the recognition of marital status; the Revenue Act of 1948 changed prior law only by explicitly providing that divorce and legal separation under a court decree would render a taxpayer single for tax purposes.69 As with the changes in personal exemptions over the years, congressional actions reveal a consistent intent to defer to the marital regulation provided by state law.70

C. Modern Statutory Provisions for Determination of Marital Status

A number of other provisions of the Internal Revenue Code also demonstrate a consistent congressional intent to defer to state-law determinations of marital status. First, the Revenue Act of 1934 included the first provision for nonrecognition of losses on transactions between a taxpayer and a member of the taxpayer’s family.71 The definition clause of the new provision provided only that “the family of an individual shall include . . . his . . . spouse.”72

Second, in 1942 Congress provided divorced couples with the option of choosing which spouse would pay the income tax on alimony payments.73 At the same time, Congress added a new, purely semantic provision defining the terms “wife” and “husband” to include the terms “former wife” and “former husband.”74 This provision persists without material change in the current code.75

Finally, the Internal Revenue Code of 1939 established joint and several liability for both spouses when filing an incorrect or fraudulent joint return.76 There was no definition of marital status for purposes of filing joint returns until 1943.77 The language of this definition paralleled the language of the provision for marital personal exemptions.78 The language of both provisions was amended into essentially

70. Once again, this consistency was broken only this year by the Defense of Marriage Act, Pub. L. No. 104-199 (1996).
72. Id. § 24(a)(6)(D), 48 Stat. at 691.
73. Revenue Act of 1942, ch. 619, sec. 120(a)-(c), §§ 22(k), 23(u), 171, 56 Stat. 798, 816-18. Since the spouse receiving alimony is usually in a lower tax bracket that the spouse who pays it, these provisions allowed the divorcing spouses to reduce their combined tax liability.
74. Id. sec. 120(g), § 3797(a)(17), 56 Stat. at 818.
78. Id. sec. 103, § 25(b)(3), 58 Stat. at 31.
its modern form in 1948, when a similar provision was added for the new standard deduction.\textsuperscript{79} According to committee reports, Congress intended these provisions, as well as the alimony provision, to be construed uniformly nationwide.\textsuperscript{80} The provisions appear without material change in the present Internal Revenue Code.\textsuperscript{81}

D. "Relationships in Violation of Local Law": The \textit{Turnipseed} Case

Congressional intent to defer to the domestic relations laws of the states was perhaps most clearly illuminated by Congress's reaction to the curious case of \textit{Turnipseed v. Commissioner.}\textsuperscript{82} In 1954, when Congress enacted a major revision of the Internal Revenue Code,\textsuperscript{83} it created a new category of personal exemption for any person who was "a member of the taxpayer's household" and "over half of whose support . . . was received from the taxpayer."\textsuperscript{84} According to committee reports, Congress expected this provision to be used "most frequently [for] foster children or children in the home awaiting adoption." However, the statutory language was intentionally drafted to allow the exemption for \textit{any} individual, "irrespective of the relationship of

\begin{itemize}
  \item \textsuperscript{79} Revenue Act of 1948, ch. 168, secs. 201, 302(c), 303, §§ 23(aa)(6), 25(b)(2), 51(b)(5), 62 Stat. 110, 113, 115, 116.
  \item \textsuperscript{80} S. Rm,. No. 1013, \textit{supra} note 31, pt. 1, at 50, 1948 U.S.C.C.A.N. at 1212.
  \item \textsuperscript{81} \textit{See} I.R.C. § 7703(a) (1994) (applicable to the standard deduction of § 63 and the personal and dependent exemptions of §§ 151-152). With minor grammatical differences, the same language determines whether a couple may file a joint return. I.R.C. § 6013(d)(1)-(2) (1994).
  \item The current code also has a special provision considering as unmarried certain legally married but separated individuals who support dependent children, thus entitling them to the advantageous head-of-household filing status. I.R.C. § 7703(b) (1994). Unlike the other provisions, however, this special provision has nothing to do with recognition of the marital relationship; in many or most cases, the other spouse will not have dependent children, and thus will be required to file as "married filing separately." \textit{See}, e.g., Patterson v. Commissioner, 57 T.C.M. (CCH) 248, 249 (1989) (construing I.R.C. § 143, recodified in 1986 as I.R.C. § 7703).

  \item A few other provisions of the code contain special definitions of marital status to prevent unintended, fraudulent, or duplicative claims of tax credits and exemptions. \textit{See} I.R.C. § 21(e)(3) (1994) (for dependent care services credit), § 152(a)(9) (1994) (to prevent a taxpayer from claiming both the dependent and the spouse exemptions for the same person).


  \item 27 T.C. 758 (1957).


  \item \textsuperscript{84} \textit{Turnipseed}, 27 T.C. at 759-60 & n.1 (citing I.R.C. of 1954 § 152(a)(9), 68A Stat. at 44 (current version at I.R.C. § 152(a)(9) (1994))).
\end{itemize}
such individual to the taxpayer," as long as the taxpayer provided at least half the individual’s support.85

Meanwhile, unbeknownst to Congress, Leon Turnipseed and Tina Johnson “lived openly together as man and wife,”86 beginning some time in 1953. Mr. Turnipseed provided all her support, and they had a child in 1954. So when Mr. Turnipseed filed his 1954 income tax return, he claimed the new dependent exemption for Ms. Johnson.87 The problem was that Ms. Johnson was married to another man.88 The Commissioner of Internal Revenue disallowed the exemption because Mr. Turnipseed and Ms. Johnson were “living in adulterous cohabitation,”89 a crime under Alabama law.90

The Tax Court upheld the disallowance, despite its conclusion that every express statutory requirement for the dependency exemption was satisfied.91 The court put a restrictive gloss on the language of the statute and the committee reports, opining that “Congress never intended [the statute] to be construed so literally as to permit a dependency exemption for an individual maintaining an illicit relationship in conscious violation of the criminal law.”92

Apparently afraid that another adulterous taxpayer might succeed where Mr. Turnipseed had failed,93 Congress quickly added to pending legislation a provision that automatically disallowed the exemption if “the relationship between such individual and the taxpayer is in violation of local law.”94 The House Ways and Means Committee was apparently unaware of the Turnipseed case until after the Tax Court filed its decision on February 7, 1957 (coincidentally the same day that the Ways and Means Committee concluded its hearings on the pending bill), for there is no mention of the case in the hearing

86. Turnipseed, 27 T.C. at 759.
87. Id.
88. Id. Ms. Johnson had married David Johnson in 1947. They were separated in 1949, after having two children. Mr. Johnson made only $52 in support payments to his wife in 1950, and none at all in the succeeding years; Ms. Johnson worked to support the two children until she moved in with Mr. Turnipseed. Id.
89. It appears that neither the Tax Court nor Congress was concerned about the misbehavior of David Johnson, who today would be characterized as the classic “deadbeat dad.”
90. Id. at 760.
91. Id. at 761 n.3 (citing 14 ALA. CODE § 16 (1940)).
92. Id. at 761.
93. Id. at 760.
94. See Ensminger v. Commissioner, 610 F.2d 189, 191 (4th Cir. 1979).
transcripts. The committee was certainly aware of *Turnipseed* by the time it reported the bill to the House on July 9, 1957. By that time the committee had added a provision clearly intended to adopt the result in *Turnipseed*, but it explained the provision vaguely and without reference to *Turnipseed* itself or its specific facts:

Some of the more important unintended benefits which this bill will remove are ... the contention that the present definition of a dependent includes those living in the household of the taxpayer even though their relationship to the taxpayer is an illegal one ...

... On this point it makes clear that a person who is not a close relative but is living with the taxpayer may not be claimed as a dependent, if the relationship between the taxpayer and the individual is an illegal one under the applicable local law. For example, this would make it clear that an individual who is a "common-law wife" where the applicable State law does not recognize common-law marriages would not qualify as a dependent of the taxpayer. This qualification applies only to the definition of a dependent under section 152(a)(9).

Although the bill did not become law for more than a year, no clarifying legislative history was ever developed. Indeed, lawmakers and Treasury officials seemed afraid to discuss it openly. When the Senate Committee on Finance held hearings in early 1958, the only witness who testified about the provision, a deputy secretary of the Treasury, said tersely that it "stops certain abuses of the dependency allowance." The Finance Committee’s report repeated the vague explanation of the House report almost verbatim.

Because of the vagueness of this legislative history, the courts have consistently interpreted the provision in light of the facts of the *Turnipseed* case, denying dependent exemptions in cases involving adultery or even mere cohabitation by unmarried adults. The courts
have been careful to rely on express provisions of local law, with only rare lapses in dictum.\(^{100}\) Congress has left the language of the "local law" provision unchanged for more than 35 years, thereby acquiescing in these interpretations.\(^ {101}\)

**III. Administrative and Judicial Attempts to Resolve Conflicting Determinations of Marital Status**

Establishing a principle of respect for state-law determinations of marital status has not eliminated the need to determine whether particular taxpayers should be considered married. It is perhaps inevitable in a federal system, in which the individual states have authority to define domestic relationships, that authorities in different states may come to conflicting conclusions about the marital status of mobile citi-

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\(^{100}\) The Tax Court has twice cited *Turnipseed’s* restrictive gloss on the catch-all dependency exemption in § 152(a)(9) to assert that it was intended to allow dependent exemptions only for foster children and children awaiting adoption, despite Congress's narrower restriction in § 152(b)(3), enacted after *Turnipseed*, that the exemption should be denied only when there is a relationship in violation of local law. *Protiva v. Commissioner*, 29 T.C.M. (CCH) 1318, 1820 (1970); *Hamilton v. Commissioner*, 34 T.C. 927, 929 (1960). However, *Protiva* and *Hamilton* are dictum on this point. In *Protiva*, the taxpayer claimed dependent exemptions for the children of his housekeeper, whom he provided with room, board, and living expenses. *Protiva*, 29 T.C.M. (CCH) at 1319. In *Hamilton*, the taxpayer claimed a dependent exemption for the housekeeper herself, whom he similarly provided with room, board, and expense money. *Hamilton*, 34 T.C. at 928. There was no sexual relationship between the taxpayer and the housekeeper in either case. The Tax Court held in both cases that the taxpayer's expenses were employment compensation for the housekeeping services, and not "support" of dependents within the meaning of § 152(a). *Protiva*, 29 T.C.M. (CCH) at 1321; *Hamilton*, 34 T.C. at 929. Since "support" rather than compensation is required to claim any dependent exemption, the Tax Court's restrictive interpretation of § 152(a)(9) in these cases was unnecessary to its decisions.

\(^{101}\) Interestingly, Congress made no amendment to the dependent exemption when it enacted the Defense of Marriage Act.
zens. Although the Full Faith and Credit Clause was perhaps intended to solve just such problems by requiring each state to recognize the others’ determinations of marital status, it has not done so in every case. Furthermore, the courts have often been required to determine the effect of domestic relations decisions rendered in foreign jurisdictions, which are entitled to mere “comity” rather than full faith and credit.

The courts have developed a body of case law to address this problem, which most commonly arose when an unhappily married person traveled to Nevada, Florida, Mexico, or elsewhere for a quick divorce that her home state refused to recognize. However, the courts were unable to agree on a solution before the problem was eliminated by the liberalization of divorce laws. Nevertheless, the decisions elucidate the problems that would be presented by a same-sex marriage that is recognized by the state that rendered it but not by the state of the couple’s current residence. An examination of these cases demonstrates that a solution is possible that would best serve the congressional intent to respect local determinations of marital status and to promote nationally uniform rules of taxation, even if the Full Faith and Credit Clause does not require the state of residence to respect the determination in question.

A. Resolution of Conflicting State Determinations of Marital Status

When confronted with conflicting state-law determinations of marital status, the courts and the Commissioner of Internal Revenue have been surprisingly uniform in respecting taxpayers’ reliance on disputed changes in marital status made in states other than the taxpayers’ state of residence. Since 1958, the Commissioner has respected common-law marriages that are validly contracted in the taxpayers’ original state of residence, even when the taxpayers move to a state that refuses to recognize the marriage.

102. See, e.g., Williams v. North Carolina, 325 U.S. 226, 247 (1945) (Rutledge, J., dissenting) (noting that although North Carolina refused to recognize Williams’s Nevada divorce and thus convicted him of bigamy for his subsequent Nevada marriage, Nevada continued to recognize the divorce and remarriage); id. at 265 n.6 (Black, J., dissenting) (noting that states with miscegenation statutes frequently refused to recognize interracial marriages that were validly performed in other states).

103. Id. at 254-55 (Rutledge, J., dissenting).


A different issue is presented when an out-of-state divorce is questionable under the law of the state of residence. However, the Tax Court has resolved this issue in favor of recognizing the divorce. In *Campbell v. Commissioner*, the Commissioner disallowed the deduction claimed by a taxpayer for his alimony payments. Although the taxpayer and his former wife were New York residents, they obtained a divorce in Florida when the wife traveled there for that sole purpose with the taxpayer's consent. The Commissioner contended that New York would not recognize the Florida divorce because the taxpayer's former wife had not acquired domicile in Florida. The Tax Court dismissed this contention, finding that the Florida decree was a valid basis for the alimony deduction in the absence of a controlling New York determination on the question. In so doing, the court relied on a congressional committee report stating that the alimony provision was intended to produce "uniformity in the treatment of... alimony regardless of variance in the laws of different States." In several later cases, courts have recognized an out-of-state divorce even when the state of residence has declared the divorce void. In *Feinberg v. Commissioner*, the Commissioner disallowed deductions for alimony payments made by another unhappily married New York taxpayer, George Feinberg. George and his wife Anna Feinberg had voluntarily separated pursuant to a formal written agreement, under which George would make support payments. Six weeks later, George commenced a divorce action in Florida, serving the complaint by publication on Anna, who did not appear. After the decree was granted ex parte, George moved to New Jersey, where he remarried. Anna then obtained a declaratory judgment from a New York court that the Florida decree was void, and that she was still George's spouse. The Tax Court upheld the Commissioner's disallowance of the alimony payment deductions, but the Third Circuit reversed, relying on a previous determination by the Commissioner that alimony deductions would be allowed for taxpayers who "have acted in good faith in relying on [Mexican] divorces" and "remarried in reliance upon the foreign decree," even when state courts might not recognize the decree as valid.

106. 15 T.C. 355 (1950).
107. *Id.* at 355-56.
108. *Id.* at 359.
109. *Id.* at 359, 361.
110. *Id.* at 360 (quoting H.R. REP. No. 2333, 77th Cong., 2d Sess. 72 (1942)).
111. 198 F.2d 260 (3d Cir. 1952).
112. *Id.* at 262.
113. *Id.* at 261.
114. *Id.* at 261-62.
115. *Id.* at 263 (quoting Gen. Couns. Mem. 25,250, 1947-2 C.B. 32). The Commissioner presumably attempted to distinguish the General Counsel Memorandum on the ground...
Other courts have followed the *Feinberg* result over the Commissioner's opposition. In *Spalding v. Commissioner*,116 Charles Spalding had been separated from his first wife Elizabeth Spalding in 1962. After their separation, Elizabeth resided in Connecticut and Charles resided in New York. In 1964 Charles obtained an *ex parte* divorce in Nevada after having Elizabeth personally served with the divorce complaint. She nevertheless challenged the divorce decree in the courts of New York, which declared it void in 1968. Shortly thereafter, however, Charles was remarried to Amy Spalding in California. They lived there together until 1969, when Amy died.117

Charles, acting as Amy's executor, claimed the marital deduction on Amy's estate taxes. The Tax Court upheld the Commissioner's disallowance of the marital deduction, citing the New York declaration that his divorce from Elizabeth was void.118 The Second Circuit reversed, noting that the tax was levied not on Charles but on Amy, who was a party to neither the Nevada divorce nor the New York declaratory judgment, and who had married Charles in good faith.119 The court further noted the lack of any declaration by California courts that Amy's marriage was void. If any state's determination should prevail, the court reasoned, it should be that of California, where Amy was married, where she resided during the marriage, where she died, and where her estate was probated.120 In support of this result, the court noted that it promoted nationwide uniformity of recognition of a jurisdiction's marriage and divorce decrees, as well as serving a public policy of recognizing "the living marriage and not the atrophied one."121

The Second Circuit had reached the same result earlier in *Wondsel v. Commissioner*,122 a case similar on its facts to *Feinberg*, involving a New York taxpayer whose Florida divorce had been declared void by the New York courts.123 The *Wondsel* court reasoned that because Florida would not be required under the circumstances to honor New York's judgment under the Full Faith and Credit Clause, the Florida
divorce decree was of sufficient validity to support the taxpayer's deduction for alimony payments.\textsuperscript{124}

These decisions have recognized the problem inherent when the Commissioner must choose among conflicting state determinations. Failure to respect a determination obtained from the issuing state in good faith and in conformity with its laws would interfere with the national uniformity of taxation intended by Congress, because a taxpayer's marital status for tax purposes could change simply by moving from a state that recognized the determination to one that did not, perhaps years after a marriage or divorce had taken place. Failure to respect such determinations would show insufficient "[f]ederal deference in matters within the state police power," which the federal government owes to the states because of "the essential character of state government within our federal system" and not because of a mere "policy of comity."\textsuperscript{125} Finally, federal recognition of the state domestic relations decisions on which individuals have relied to arrange their affairs serves federal policy by making tax determinations simple, predictable, harmonious with the taxpayers' expectations, and respectful of the taxpayers' relationships, without harm to the fisc or resort to litigation.

B. Resolution of Conflicts Between Determinations of Foreign Authorities and State Courts

The courts have faced a more difficult question in determining whether to recognize the domestic relations decisions rendered by foreign jurisdictions, which are entitled to no more than "comity," rather than the greater deference to which state decisions are entitled because of considerations of federalism even when they may not be entitled to full faith and credit. True to the aphorism that "hard cases make bad law,"\textsuperscript{126} taxpayers who have obtained divorces in foreign jurisdictions have encountered highly divergent treatment in the nation's courts. The Supreme Court has not yet spoken to resolve these differences, nor has the Commissioner settled on a clear, uniform method for resolving such questions. The decided cases and rulings nonetheless clarify the interests at stake, which will simplify the development of a uniform rule for the tax treatment of same-sex marriages.

Soon after Congress created a deduction for alimony payments in 1942,\textsuperscript{127} the question arose whether the Commissioner should allow

\textsuperscript{124} Id. at 341.

\textsuperscript{125} Ensminger v. Commissioner, 610 F.2d 189, 191 n.4 (4th Cir. 1979) (citing National League of Cities v. Usery, 426 U.S. 833, 842-43 (1976)).


\textsuperscript{127} See supra notes 73-75 and accompanying text.
deductions for alimony payments made pursuant to Mexican divorce decrees. At the time, many American states refused to recognize the validity of Mexican divorce decrees granted to American citizens. In 1947 the Commissioner ruled that alimony payments made in good faith pursuant to a Mexican divorce decree would be recognized, even if the validity of the Mexican decree was questionable under state law. In the particular case that prompted the ruling, both spouses had consented to the Mexican divorce decree.

The Commissioner elaborated on this position in 1957 at the request of a taxpayer who had obtained a Mexican divorce decree and remarried later the same year. The taxpayer's first wife then filed an action in their state of residence attacking the validity of the Mexican decree, which did not award alimony, and demanding a legal separation with alimony pendente lite. The state court issued an interlocutory decree declaring the Mexican decree void and awarding alimony pendente lite, which the taxpayer agreed to pay pending a final disposition. The Commissioner ruled that his 1947 decision to recognize Mexican divorces was not intended to preclude Internal Revenue Service recognition of a later state decree purporting to void the Mexican decree.

The Ninth Circuit considered a much different situation in Gersten v. Commissioner. Lucille Gersten had obtained an interlocutory decree of divorce from Albert Gersten in the superior court of California, where they both resided. Under the law at that time, the parties to the divorce proceeding remained under the jurisdiction of the court. No final divorce decree could be granted until a year had passed since the interlocutory decree, and any remarriage by either party within that time was declared void by statute. Albert nonetheless obtained a Mexican divorce only seven months later, married Bernice Gersten on the same day, and filed a joint return with her for the same taxable year. Apparently Lucille would have paid less tax that year by filing as Albert's spouse than otherwise, and she insisted on doing so. The Ninth Circuit held that the divorce and remarriage were void by operation of law, even though no California court

129. See Montemurro v. INS, 409 F.2d 832 (9th Cir. 1969) (noting that California refused to validate Mexican divorces); Dwyer v. Folsom, 139 F. Supp. 571 (E.D.N.Y. 1956) (holding Mexican divorce decree invalid).
131. Id.
133. 267 F.2d 195 (9th Cir. 1959).
134. Id. at 199-200.
135. The court's explanation on this point is not clear. However, the court considered it important to announce that "[t]he community rights of the former marriage are still in
had made a judgment to that effect. The \textit{Gersten} court did not even mention the contrary positions taken by the Commissioner in the 1947 or 1957 rulings, although it could have distinguished them and reached the same result on the ground that Albert was under the continuing personal jurisdiction of the California court.

The Second Circuit reached the opposite result in \textit{Estate of Borax v. Commissioner}. After their marriage faltered, Herman and Ruth Borax executed a written separation agreement, under which Herman made support payments to Ruth and their child. Six years later, Herman obtained an \textit{ex parte} divorce in Mexico and immediately married Hermine Borax. Ruth then obtained a declaratory judgment from a New York court that Herman’s Mexican divorce and subsequent remarriage were void. Herman nonetheless continued to live with Hermine and to make support payments to Ruth. Several years later, the Commissioner discovered the New York judgment and reopened Herman’s tax returns, disallowing his alimony deductions, his joint return with Hermine, and his claimed exemptions for Hermine’s parents and her children. In a long opinion by Judge Thurgood Marshall, the court held that the Mexican divorce should be recognized for tax purposes. Recognition would promote certainty and uniformity of federal treatment of the foreign jurisdiction’s divorces, the court noted; since states were free to accept or reject the Mexican divorce, reliance on one state court’s declaration of invalidity would undermine certainty and uniformity. Furthermore, recognition would allow federal courts to avoid resolving conflicts in domestic relations that are beyond their competence. Recognition would also promote congressional intent to tax genuine support payments to the recipient; since Congress had amended the Internal Revenue Code to treat support payments as alimony if made pursuant to a written separation agreement regardless of the marital status of the parties under state law, the Mexican decree should be entitled to recognition as well. Finally, the court reasoned that since Congress intended that the marital status provisions of the code be construed uniformly, Herman’s divorce should be recognized for purposes of the joint return and dependency exemptions as well. The court acknowledged that

existence.” \textit{Id.} at 200. Since Albert intended to abandon his community property rights by filing jointly with Bernice, the they must have benefited Lucille.

\begin{itemize}
\item 136. \textit{Id.}
\item 137. 349 F.2d 666 (2d Cir. 1965), \textit{cert. denied}, 383 U.S. 935 (1966).
\item 138. \textit{Id.} at 668-69.
\item 139. \textit{Id.} at 670.
\item 140. \textit{Id.}
\item 141. \textit{Id.}
\item 142. \textit{Id.} at 670-71; see I.R.C. of 1954 § 71(a), 68A Stat. at 19.
\end{itemize}
the price for its "rule of validation" was to subject Ruth to the tax consequences of a divorce that she did not want.\textsuperscript{144}

Dissatisfied with the results in both \textit{Borax} and \textit{Wondsel}\textsuperscript{145} and unable to obtain review in the Supreme Court,\textsuperscript{146} the Commissioner announced that the Internal Revenue Service would simply ignore them.\textsuperscript{147} Instead, issuing a purported "clarification" of his 1947 position,\textsuperscript{148} the Commissioner said that when a state court declares another jurisdiction's divorce decree to be void, "the Internal Revenue Service will \textit{usually} follow the later court decision rather than the prior divorce decree."\textsuperscript{149} In the case that prompted the ruling, the taxpayer had obtained a Mexican divorce in 1961 and subsequently remarried. The taxpayer's first wife sought and obtained a declaratory judgment from an American court that the divorce and remarriage were void.\textsuperscript{150} The Commissioner held that the state court's declaration of voidness would be respected. The Commissioner offered no guidance about the factors that would determine whether to follow the state court declaration or the prior divorce beyond distinguishing his prior opinion on the ground that the Mexican divorce decree involved in that case was questionable under state law but had never actually been declared void.\textsuperscript{151}

The Commissioner's position became even more nuanced in Revenue Ruling 71-390.\textsuperscript{152} The taxpayer who requested the ruling was separated from his wife under a decree of separate maintenance in state \textit{X}, where they lived. He later obtained a divorce in Mexico, which his wife did not contest, and remarried in state \textit{Y}. The Mexican divorce decree did not incorporate the terms of the prior decree of separate maintenance. The taxpayer's first wife subsequently sought and obtained an order for increased support from state \textit{X}. However, she did not inform state \textit{X} about the Mexican divorce, because state \textit{X} would have refused to order further support if it found that the Mexican divorce decree was valid. The Commissioner ruled that since state

\begin{itemize}
\item \textsuperscript{144} The principal adverse consequence was taxation of her alimony payments. \textit{Id.} at 669-70.
\item \textsuperscript{145} See \textit{supra} notes 122-124 and accompanying text.
\item \textsuperscript{147} Rev. Rul. 67-442, 1967-2 C.B. 65.
\item \textsuperscript{148} Gen. Couns. Mem. 25,250, 1947-2 C.B. 32; see \textit{supra} note 115 and accompanying text.
\item \textsuperscript{149} \textit{Id.} (emphasis added).
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.} The Commissioner apparently considered it relevant that the taxpayer's first spouse had "promptly challenged" the divorce in "a state court with personal jurisdiction of the parties and jurisdiction of the subject matter of the action." \textit{Id.} However, the ruling does not expressly hold that these factors were determinative.
\item \textsuperscript{152} 1971-2 C.B. 82.
\end{itemize}
X had not declared the divorce void, its validity could not be questioned, so the taxpayer's second marriage would be recognized. The Commissioner also ruled that the new support order was valid, even though state X would not have issued the order if it had known about and recognized the Mexican divorce. Paradoxically echoing the logic applied by Judge Marshall in *Borax*, the Commissioner emphasized that "the factual status of whether the parties are living apart rather than their exact marital status in law" should be determinative.

Despite their disagreement on doctrinal issues, these cases and rulings can be harmonized on their facts. First, when the parties involved obviously wanted to be divorced but had obtained legally inconsistent decrees merely to adjust the amount of alimony payments, the divorces and the alimony actually paid were recognized. Second, when the taxpayer and the spouse disagreed about the divorce and recognition would financially penalize one but nonrecognition would penalize the other, the result causing the least financial harm would be reached, at least in the absence of fraudulent conduct. Third, as with conflicts among state determinations, the adjudicator would make the decision that promotes nationwide uniformity and

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153. *Id.*


155. Three decisions concerning parties whose desire to be divorced was obvious resulted in recognition of the divorce or separate maintenance and of whichever support order the taxpayer actually paid. Rev. Rul. 71-390, 1971-2 C.B. 82 (recognizing both Mexican divorce decree obtained by husband and legally inconsistent American order of separate maintenance obtained by wife when apparent intent and practical effect was merely to increase support payments); Rev. Rul. 57-113, 1957-1 C.B. 106 (same); Gen. Couns. Mem. 25,250, 1947-2 C.B. 32, 33 (recognizing a Mexican divorce of questionable validity when both parties consented).

156. In *Estate of Borax v. Commissioner, 349 F.2d at 666*, the taxpayer would have lost alimony deductions, the ability to file a joint return with his new wife, and exemptions for several dependents if his divorce were not recognized; if it were recognized, his first wife would owe tax on her past alimony payments, but no other penalty. *Id.* at 668-70. Although the taxpayer obtained his Mexican divorce *ex parte*, he did so only after six years of legal separation pursuant to a formal written agreement that he continued to honor, including the alimony provision. *Id.* at 668.

Although the facts are less clear in *Gersten v. Commissioner, 267 F.2d 195 (9th Cir. 1959)*, it appears that the taxpayer obtained the Mexican divorce in order to fraudulently deprive his first wife of her community property rights. *Id.* at 200. Given his blameworthy conduct, the court was not concerned that Albert might lose the right to file a joint return with either his first wife or his second wife for the taxable year in question. *Id.*

Finally, although few facts are recited in Rev. Rul. 67-442, 1967-2 C.B. 65, the Commissioner appears to have inferred that the Mexican divorce was nonconsensual and possibly fraudulent from the wife's immediate and successful action in state court for a declaratory judgment that the Mexican divorce was void.
certainty if it does not sacrifice equity.\textsuperscript{157} Finally, although there is little concern about deference to a foreign jurisdiction’s exercise of its police powers, federal policy is nonetheless advanced by recognizing taxpayers’ good-faith attempts to order their affairs.\textsuperscript{158}

**IV. Proposal: Uniform Federal Recognition of Same-Sex Marriages**

When the Internal Revenue Service receives its first tax return from a legally married same-sex couple, it will also be confronted with two novel legal issues: What effect, if any, will the Defense of Marriage Act\textsuperscript{159} have? And if DOMA does not resolve every issue, how should the Internal Revenue Code and past judicial and administrative decisions guide the Commissioner’s treatment of the return?

The best solution—considering the longstanding goals of nationwide uniformity, certainty, deference to state regulation of marriage, and respect for taxpayers’ good-faith efforts to order their domestic matters—would be to recognize same-sex marriages that are valid in the state where performed.

**A. Constitutionality of the Defense of Marriage Act**

A full exposition of the constitutional infirmities of DOMA is unfortunately beyond the scope of this Note, which went to press as DOMA was enacted into law.\textsuperscript{160} However, the following issues relevant to the topic of this Note are bound to be raised.

The first substantive provision of DOMA purports to excuse the states from any obligation to recognize same-sex marriages under the Full Faith and Credit Clause of the federal Constitution.\textsuperscript{161} Propo-
ments of DOMA claim that this provision merely exercises congressional power under the Full Faith and Credit Clause\(^{162}\) to "prescribe . . . the effect beyond a state’s borders of public acts, records, and judicial proceedings.\(^{163}\)

Such an interpretation glosses over the careful wording of the Clause and represents an unprecedented assertion of congressional power under the Clause. The first sentence casts the full-faith duty of the states in mandatory language with the word "shall." The second sentence does not authorize Congress to excuse this duty; it merely allows Congress to prescribe the methods of proving and act entitled to full faith, and the effect of the proof.\(^{164}\)

This reading finds support in the four statutes before DOMA that Congress enacted under the authority of the Clause. The two older statutes simply provide methods of proving acts subject to the duty of full faith and credit.\(^{165}\) The two newer provisions, which relate to interstate recognition of child custody and child support orders, go beyond prescribing methods of proof; however, when Congress enacted them it expressly relied not only on its Full Faith and Credit Clause power, but also on its Due Process Clause and Commerce Clause powers.\(^{166}\) Unlike these statutes, DOMA rests percariously on the supposition that the Full Faith and Credit Clause alone gives Congress the power to exempt the states from the otherwise mandatory duty to recognize each other’s acts.

The second substantive provision of DOMA declares that only a marriage between a man and a woman will be recognized for purposes of any federal program.\(^{167}\) Both this provision and the full-faith ex-

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\(^{162}\) U.S. Const. art. IV, § 1. The Clause provides:

Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

\(^{163}\) Id.

\(^{164}\) See supra note 162.


\(^{167}\) DOMA see. 3 (to be codified at 1 U.S.C. § 7). In full, the nonrecognition provision reads as follows:

**Definition of "Marriage" and "Spouse."** In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various...
emption are vulnerable to the Supreme Court's decision in *Romer v. Evans*,\(^1\) which held that the Equal Protection Clause forbade a Colorado constitutional amendment that nullified all state legislative, executive, and judicial action designed to protect the rights of lesbians and gay men. The Court held that even under the deferential "rational basis" test, a law imposing a "special disability" on gay men and lesbians as a class violated the Equal Protection Clause.\(^2\)

It is unclear how far the Court will extend the principles of *Evans*, however. Many observers see an unreconciled contradiction between *Evans* and *Bowers v. Hardwick*,\(^3\) although the latter case upholding Georgia's criminal sodomy statute was decided only as a substantive due process case and not as an equal protection case.\(^4\)

On one hand, under the *Evans* standard, the Court might view the vitriolic Congressional debate over DOMA as strong evidence of legislative animosity against lesbians and gay men. Legislative bigotry was the Court's chief concern in *Evans*, even though it could be demonstrated only inferentially with respect to voters supporting the Colorado referendum.\(^5\) On the other hand, the Court might be swayed by arguments that Western moral teaching has invariably and unalterably defined the marital relationship as heterosexual, and that a law reinforcing that moral tradition must beat the rational basis test.\(^6\) Such arguments have persisted withstanding persuasive scholarly research demonstrating that most societies have accepted and even celebrated same-sex relationships, including Western society before the Middle Ages.\(^7\)

Because DOMA violates the Equal Protection Clause and exceeds the limited power conferred on Congress by the Full Faith and Credit Clause, it should be held unconstitutional.

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administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

*Id.*

169. *Id.* at 1627-29.
174. See generally Boswell, *Christianity*, supra note 1; Boswell, *Same-Sex Unions*, supra note 1; Eskridge, *supra* note 1; Eskridge, *supra* note 1.
B. Coressional Deference to State Regulation of Marriage

Assuming that DOMA will be held unconstitutional, the path to recognition of same-sex marriages by the Internal Revenue Service is relatively clear. Despite the nearly continuous legislative struggles over the regulation of the incidents of marriage (particularly community property rights) through the 1940s, the legislative history of the Internal Revenue Code reflects no debate on what kinds of marriages Congress intended to recognize, and certainly none on same-sex marriages.\footnote{175}{See supra Part II.}

However, the scant legislative history should not be mistaken for silence. Whenever an important issue of marriage or the incidents of marriage has been raised, Congress almost invariably chose to give the greatest possible deference to state regulation of marriage. First, despite the unfair advantage of income-splitting available only to residents of community property states, Congress refused for more than twenty years to adopt any solution that would derogate the community property system.\footnote{176}{See supra notes 52-60 and accompanying text.} A lasting solution was finally achieved by the adoption of optional income-splitting for all married taxpayers, which respects both the community property and common-law systems.\footnote{177}{See supra notes 60-70 and accompanying text.}

Second, when faced with a perceived abuse of the dependent exemption, Congress chose to give the broadest possible deference to state regulation of domestic relations by prohibiting the dependent exemption for household members whose relationship to the taxpayer "is in violation of local law," rather than defining detailed federal exceptions to the dependent exemption.\footnote{178}{See supra subpart II.D (discussing the Turnipseed case). Congress had other options, of course. For example, it could have specified the sexual relationships that would disqualify a household member from being claimed as a dependent, giving the states no latitude for adjusting the definition to contemporary standards in an area traditionally subject to their police powers.}

Moreover, Congress could have required taxpayers to meet some other test in addition to being validly married, as it has done with other programs, but did not.\footnote{179}{Two reported decisions purport to address the issue of recognition of same-sex relationships for purposes of federal benefits. Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982), cert. denied, 458 U.S. 1111; McConnell v. Nooner, 547 F.2d 54 (8th Cir. 1976) (per curiam). In Adams, Anthony Sullivan was an Australian national who began a relationship with Frank Adams, an American citizen, in 1971. See Sullivan v. INS, 772 F.2d 609, 611 (9th Cir. 1985) (Pregerson, J., dissenting). In 1975 Sullivan's visa expired and he was in danger of deportation. However, Sullivan and Adams obtained a marriage license from the county clerk in Boulder, Colorado, and had a wedding ceremony performed by a minister. Adams thereupon petitioned the Immigration and Naturalization Service to classify Sullivan as his}
no provisions whatsoever that classify taxpayers on the basis of their sexual orientation or the sex of their spouses.\textsuperscript{180} Congress also declined to provide for an independent federal determination whether a particular marriage qualifies for recognition under the general provisions of the tax laws.\textsuperscript{181}

spouse, which would have qualified him for preferential admission to the United States.\textit{Adams}, 673 F.2d at 1038.

The \textit{Adams} court held that there are two elements under the Immigration and Nationality Act for recognition of spouses: “whether the marriage is valid under state law” and “whether that state-approved marriage qualifies under the Act.” \textit{Id.} The court assumed for purposes of its decision that the Adams-Sullivan marriage was valid under Colorado law (a proposition that the court found dubious at best). \textit{Id.} at 1039. The court then held that Congress intended to deny recognition to same-sex marriages, basing its decision on three factors: that Congress did not “indicate[,] an intent to enlarge the ordinary meaning of” the term “marriage” beyond its “ordinary meaning” of “a relationship between a man and a woman”; that other provisions of the Act prohibited homosexuals from immigrating to the United States; and that Congress has plenary authority to regulate immigration by “rules that would be unacceptable if applied to citizens.” \textit{Id.} at 1039-42 (citing Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (codified at 8 U.S.C. § 1182(a)(4)); S. REP. No. 748, 89th Cong., 1st Sess. 18-19, reprinted in 1965 U.S.C.C.A.N. 3328, 3343).

In \textit{McConnell}, Richard Baker was a veteran who received educational benefits from the Veterans Administration under the GI Bill. He and his partner, James McConnell, obtained a marriage license from a county clerk in Minnesota; a minister then performed a marriage ceremony for them. Baker then petitioned the Veteran’s Administration to increase his educational benefits on the ground that McConnell was his dependent spouse. 547 F.2d at 55.

The \textit{McConnell} court looked to the statutory provision that marital status for purposes of veterans benefits should be determined “according to the law of the place where the parties resided at the time of the marriage or the law of the place where the parties resided when the right to benefits accrued.” \textit{Id.} at 55 (quoting Act of Sept. 2, 1958, Pub. L. No. 85-857, 72 Stat. 1109 (codified at 38 U.S.C. § 103(c))). Baker and McConnell had already been denied the right to marry by the Minnesota Supreme Court. Baker v. Nelson, 191 N.W.2d 185, 185-87 (Minn. 1971), appeal dismissed for want of substantial federal question, 409 U.S. 810 (1972). The \textit{McConnell} court thus held that they were collaterally estopped from relitigating the issue against the Veterans Administration.

The precedential value of both these decisions is questionable, however, because neither case involved a marriage that was recognized by any state. No federal court has yet faced a litigant who was legally married to a person of the same sex.

180. Section 152(b)(5) of the Internal Revenue Code, which denies dependency exemptions if “the relationship between [the claimed dependent] and the taxpayer is in violation of local law,” is no exception. The provision was enacted in response to a single man’s claimed dependent exemption for a married woman with whom he had a sexual relationship; the reported cases deal exclusively with heterosexual couples. \textit{See supra} subpart II.D; \textit{cf. Adams}, 673 F.2d at 1040 (noting that express provisions of the Immigration and Nationality Act prohibited immigration of homosexuals to the United States).

181. \textit{See I.R.C.} §§ 6013(d), 7701(a)(17), 7703 (1994); \textit{cf. Adams}, 673 F.2d at 1040 (noting that express provisions of the Immigration and Nationality Act as then in effect prohibited immigration of homosexuals to the United States); \textit{McConnell}, 547 F.2d at 55 (quoting statutory provision on recognition of marriages). There are special provisions for purposes of the dependent care credit and the “catch-all” dependency exemption; however, these provisions do not, on their face, distinguish on the basis of sexual orientation. \textit{See I.R.C.}
It might also be argued that there exists a public policy against recognizing same-sex marriages. Tax benefits (including those pertaining to marriage) generally are a matter of legislative grace; within basic constitutional restraints, Congress may choose to grant or deny them as it pleases.\textsuperscript{182} However, the Supreme Court has declared that the public policy exception is narrow and applies only when declared explicitly by Congress or by a state.\textsuperscript{183} Assuming that DOMA is declared unconstitutional,\textsuperscript{184} there would remain no explicit federal policy on sexual orientation, on same-sex marriages, or on the relevance of either with respect to taxation. This absence would remove any basis for a claim that a federal public policy bars recognition of same-sex marriages.

State public policies are more problematic. In direct response to the prospect of same-sex marriages in Hawaii, at least ten states as of this writing have enacted laws that proclaim a public policy against same-sex marriages and refuse to recognize them when performed outside the state.\textsuperscript{185} Four more states already had such laws.\textsuperscript{186} Similar legislation was proposed this year in at least sixteen other states.\textsuperscript{187}


\textsuperscript{183} Lilly v. Commissioner, 343 U.S. 90, 96-97 (1952).

\textsuperscript{184} See \textit{supra} subpart IV.A.


\textsuperscript{186} \textit{La. Civ. Code Ann.} arts. 89, 96 (West 1993); \textit{Tex. Fam. Code} \S 1.01 (West 1993); \textit{Utah Code Ann.} \S 30-1-2 (Michie 1995); \textit{Va. Code Ann.} \S 20-45.2 (Michie 1992). Article 89 of the Louisiana Civil Code dates to 1870, by far the oldest such statute. The remaining provisions date to the 1970s, 1980s, and 1990s.

However, even the existence of an express public policy in some states against recognition of same-sex marriages should not cause the Internal Revenue Service to deny recognition. Since at least one state will have a public policy favoring same-sex marriage and a number of states will likely be neutral, it would violate the principle of nationwide uniformity to make federal tax recognition depend upon the accident of the taxpayer's state of residence.\textsuperscript{188}

Because the legislative history of the Internal Revenue Code evinces an intent to defer almost completely to state domestic relations law, because Congress declined to add any additional qualification beyond a legally recognized marriage, and because there is no nationwide public policy against same-sex marriage,\textsuperscript{189} the Internal Revenue Service should conclude that congressional intent is consistent with federal tax recognition of same-sex marriage.


\textsuperscript{189} Again, this assumes that DOMA is declared unconstitutional. \textit{See supra} subpart IV.A.
C. Avoiding Conflicts Between State Property Rights and Federal Taxation Obligations

A finding of congressional intent to defer to state recognition of same-sex marriage is also supported by consideration of the consequences of nonrecognition. The prospect of a marriage that may be recognized under applicable state law but not under federal law may revive important taxation problems that Congress has already solved for opposite-sex couples. Even if the Defense of Marriage Act is held constitutional, it cannot solve these important problems.

(1) The Income-Splitting Problem

If any states willingly recognize Hawaii same-sex marriages, the community property states of California and Washington are among the most likely to do so. These states are relatively close to Hawaii, and both have large gay and lesbian communities whose members are likely to travel to Hawaii in large numbers to be married if the bar to same-sex marriages is lifted. Moreover, the political climate surrounding recognition of same-sex marriages is likely more conducive in those two states than in most other states.

Recognition by Washington or California would bring same-sex spouses into the community property system. Even if the Internal Revenue Service denied "married" filing status to same-sex spouses under DOMA, the community property laws would entitle them to split their incomes on separate returns. This would create significant administrative problems, because the Service would be forced to match up the pairs of separate returns to determine whether same-sex couples were filing properly. Many of these "quasi-married" couples would probably be confused about the extent to which the Service considered them married, and whether they could file as married.

This revival of income-splitting would erode uniformity even among states that willingly recognize same-sex marriages, because residents of common-law states, including Hawaii, would not be entitled to income splitting if the Service were not required to recognize their same-sex marriages.

(2) The Problem of Marital Property Settlements—Davis and Farid-Es-Sultaneh

Failure by the Internal Revenue Service to recognize a same-sex marriage that is valid under state law would also revive the Davis/Farid problem of marital property transfers. In Farid-Es-Sultaneh v.

191. Id. at 118.
Doris Farid-Es-Sultaneh made an antenuptial agreement with S.S. Kresge under which she released all marital property rights in exchange for appreciated stock in the S.S. Kresge Company. Kresge's basis in the stock was about $0.15 per share, but the fair market value of the stock was about $10.67 per share. The Second Circuit held that Ms. Farid-Es-Sultaneh's basis in the stock was its fair market value; since her marital property rights were valuable, she did not receive the stock as a gift, in which case she would have taken it subject to Mr. Kresge's transferred basis. Accordingly, when Ms. Farid-Es-Sultaneh sold the stock she had to pay capital gains taxes only on the amount by which the stock exceeded $10.67 per share, and not on the much higher amount by which it exceeded $0.15 per share.

*United States v. Davis* involved a property settlement incident to divorce. The taxpayer-husband transferred appreciated securities to his wife in exchange for her release of her marital property rights. Following *Farid*, the Court held that the transfer was not a gift, and that the taxpayer-husband realized a gain on the exchange, on which he was obligated to pay capital gains taxes.

The problem posed by the *Davis/Farid* rule was that it drew an artificial distinction between transfers that took place during the marriage (which were regarded as gifts, thus not taxable events to the transferor, and imparting a transferred basis to the recipient under section 1015) and transfers incident to a change in marital status (which were regarded as transfers for value, thus taxable events to the transferor, and imparting a transferred basis of fair market value under section 1012). While it was in effect, the rule created a considerable enforcement burden for the Internal Revenue Service: transferor-spouses rarely seemed to be aware of *Davis* and thus failed to report their taxable gains on the transfer of appreciated property, while transferee-spouses always seemed to be aware of *Farid* and thus computed their gains or losses by using the fair market value at the time of receipt. This created a whipsaw, with no gain being reported by either spouse. Moreover, the *Davis/Farid* rule caused different treatment of residents of common-law and community property jurisdictions, because the latter could avoid its application simply by characterizing property transfers incident to divorce as divisions of the property of the marital community.

192. 160 F.2d 812 (2d Cir. 1947).
193. *Id.* at 813.
195. *Id.* at 66-67.
196. *Id.* at 67-68, 71-73.
198. *Id.* at 87.
Congress finally solved this problem in 1984 by enacting section 1041, which overruled both *Davis* and *Farid* by providing that all property transfers between spouses either during marriage or incident to divorce would be treated as gifts.199 But if the Commissioner refuses (under DOMA or otherwise) to recognize same-sex spouses as "married" for purposes of the Internal Revenue Code, the *Davis/Farid* problem will be revived. State-recognized marriage for same-sex couples will bring with it the same valuable marital property rights enjoyed by all married couples. Unless the Internal Revenue Service recognizes same-sex spouses as married for tax purposes, it will once again be saddled with close policing of significant property settlements to avoid a whipsaw.

D. Nationwide Recognition Promotes Federal Policy

Nationwide tax recognition of same-sex marriages would promote several traditional federal policy goals. First, it would promote nationwide uniformity and certainty of tax treatment, without differences depending on the state where taxpayers were married, the state where they are domiciled, their decisions to move to another state, or their domicile’s system of marital property regulation.200

Second, nationwide recognition coupled with the repeal or judicial invalidation of DOMA201 would restore the traditional federal deference to state regulation of marriage. Not until 1996 did Congress dare to invade this province of state police power, a fact noted by many legislators debating DOMA.202 DOMA attempts to deprive the states of their power to create a nationally recognized marriage. DOMA proponents contend, of course, that DOMA increases the state power to regulate marriage by allowing the states to choose which marriages they wish to recognize.203 But any such aggrandize-


201. See supra subpart IV.A.


203. See sources cited supra note 200.
ment can come only at the expense of the principles of federalism that bind our nation together. 204

Finally, recognition of same-sex marriages for federal taxation purposes would further the policy of recognizing taxpayers' good-faith attempts to order their domestic matters. Regardless of what position the government takes, gay and lesbian couples will continue to build their lives together, and when so doing most will combine their financial resources at least to some degree. Tax recognition of this financial interdependence will simplify matters both for taxpayers and for the Internal Revenue Service, particularly with regard to taxation of wealth transfers, characterization of joint assets, and deductions of joint expenses.

**Conclusion**

Human relationships, including same-sex relationships, are as old as humanity and will endure longer than any system of government or taxation. As the modern federal income tax evolved during the twentieth century, Congress has repeatedly adjusted the tax laws to conform to the needs of married taxpayers, and has abandoned its efforts to make those taxpayers conform to congressional wishes.

So it shall ultimately be for taxpayers in same-sex marriages. With the enactment of the Defense of Marriage Act 205 and with corresponding legislation in many of the states 206 the stage has been set for a battle by gay and lesbian taxpayers that may last ten years or longer. 207 However, legislative and judicial attitudes toward gay men and lesbians have changed dramatically over the last three decades, and they shall continue to do so. Slowly but surely, Congress and the state legislatures will realize that the needs of the fisc and of the taxpayer will best be served by recognizing the marriages of gay and lesbian citizens.

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206. See supra notes 185-87 and accompanying text.
207. Reske, supra note 14, at 34.