

# The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages

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# THE NOT-SO-MERRY WIVES OF WINDSOR: THE TAXATION OF WOMEN IN SAME-SEX MARRIAGES

Lily Kahng†

*In United States v. Windsor, the Supreme Court invalidated the Defense of Marriage Act definition of marriage as “between one man and one woman,” heralding its subsequent recognition, in Obergefell v. Hodges, of a constitutional right to same-sex marriage. Windsor cleared the way for same-sex couples to be treated as married under federal tax laws, and the Obama administration promptly announced that it would recognize same-sex marriages for tax purposes. Academics, policymakers, and activists lauded these developments as finally achieving tax equality between same- and different-sex married couples. This Article argues that the claimed tax equality of Windsor is illusory and that the only way to achieve actual equality is to eliminate taxation on the basis of marital status.*

*Focusing on the taxation of women in same-sex marriages, the Article explores what lies beneath the putative equality gains that result from according same-sex married couples the same status as different-sex married couples. The Article predicts, based on demographic statistics and other sociological and economic research relating to income levels, wealth holdings, child rearing, and employment patterns, that women in same-sex marriages will be less likely than other married people to reap the benefits, and more likely to suffer the detriments, of marriage taxation. In analyzing why women in same-sex marriages are likely to suffer adverse consequences from their new tax status as married, the Article builds on prior critical and feminist tax literature showing how the tax law—though purportedly neutral in its treatment of*

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† Professor of Law, Seattle University Law School. I am grateful to Steven Arkin, Kevin Clermont, Mary Louise Fellows, Barbara Holden-Smith, James Puckett, Andrew Weissmann, and participants of the Fordham Law School Faculty Workshop, the Seattle University Law School Summer Faculty Workshop, the 2014 University of Washington Tax Symposium, the 2014 ClassCrits Conference, the 2015 Annual Meeting of Law & Society Association, the 2015 AALS Workshop on Shifting Foundations in Family Law, and the 2015 AALS Workshop on Next Generation Issues of Sex, Gender and the Law for their helpful comments. I also thank Catherine Connell, Seattle University Law librarian Kelly Kunsch and Cornell Law librarians Amy Emerson and Kathleen Hartman for their valuable research assistance.

married couples—privileges traditional marriages in which men are the primary income earners and wealth holders, and adversely affects married women's incentives and abilities to be workers, income producers, and wealth holders. The Article argues that the tax law, through the fictitious construction of the married couple as an irreducible economic unit, continues to reward this anachronistic model of marriage and to penalize other, more egalitarian models of marriage. The Article proposes that taxation on the basis of marital status be curtailed through the abolition of the joint return and through other reforms. More broadly, the Article demonstrates how taxation is a powerful tool by which the state regulates intimate relationships, and it highlights the need for a careful and critical evaluation of other marriage laws as they extend their reach to same-sex relationships.

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## INTRODUCTION

In its 2013 decision in *United States v. Windsor*,<sup>1</sup> the Supreme Court took a momentous step toward a constitutional right to same-sex marriage. The Court held that Thea Speyer's bequest of her entire estate to her wife, Edith Windsor, qualified for the estate tax marital deduction and was therefore exempt from tax.<sup>2</sup> To reach this holding, the Court invalidated section 3 of the Defense of Marriage Act (DOMA), which provided:

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.<sup>3</sup>

As a result of *Windsor*, the Internal Revenue Service (IRS) began, for the first time, to recognize same-sex marriages for federal tax purposes. It issued Revenue Ruling 2013-17,<sup>4</sup> in which it announced the adoption of a general interpretive rule that "for Federal tax purposes . . . recognizes the validity of a same-sex marriage that was valid in the state where it was entered into, regardless of the married couple's place of domicile."<sup>5</sup> Federal tax law now accords same-sex couples the same status as different-sex couples. Many academics, policymakers, and activists lauded these developments as finally achieving tax equality between same- and different-sex married couples.<sup>6</sup>

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<sup>1</sup> 133 S. Ct. 2675 (2013).

<sup>2</sup> *Id.* at 2682. The specific provision at issue allows an estate tax deduction for "any interest in property which passes or has passed from the decedent to his surviving spouse." I.R.C. § 2056(a) (2012).

<sup>3</sup> Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2012)). The Court held that section 3 of DOMA is unconstitutional as a deprivation of the liberty of a person as protected by the Fifth Amendment of the Constitution. *See Windsor*, 133 S. Ct. at 2695.

<sup>4</sup> Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

<sup>5</sup> *Id.* at 204.

<sup>6</sup> *See, e.g.*, David Crary, *Gay Rights Victories Pile Up in 2013*, HUFFINGTON POST (Nov. 5, 2013, 11:11 AM), [http://www.huffingtonpost.com/2013/11/05/gay-rights-victories-2013\\_n\\_4217854.html](http://www.huffingtonpost.com/2013/11/05/gay-rights-victories-2013_n_4217854.html) [<http://perma.cc/2J56-8GJU>] (highlighting 2013 as a year of progress for gay rights in the United States but also noting where the gay rights movement still needs to make progress); Brett LoGiurato, *Treasury and IRS: All Gay Marriages Will Be Recognized for Federal Tax Purposes*, BUS. INSIDER (Aug. 29, 2013, 2:19 PM), <http://www.businessinsider.com/gay-marriage-tax-returns-taxes-treasury-irs-2013-8> [<http://perma.cc/>

Without question, *Windsor* admirably advances the rights and freedoms of LGBT citizens. It heralded the Supreme Court's recognition, in *Obergefell v. Hodges*, of a constitutional right to same-sex marriage.<sup>7</sup> At the same time, the expansion of marital status for tax purposes presents an opportunity to explore what lies beneath the putative equality gains of *Windsor* and *Obergefell*. This Article uses *Windsor* to re-examine the notion of marriage equality under the tax law. It reconsiders whether and in what ways marital status should matter for tax purposes.

The Article focuses on a novel group of married taxpayers: women in same-sex marriages. It predicts, based on demographic statistics and other sociological and economic research relating to income levels, wealth holdings, child rearing, and employment patterns, that women in same-sex marriages will be less likely than other married people to enjoy significant marriage tax benefits, and more likely to incur substantial marriage tax burdens.

The Article's analysis of the tax treatment of women in same-sex marriages highlights some of the most objectionable and least defensible features of the current law.<sup>8</sup> In addition,

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BG8S-FUWR] (emphasizing that same-sex couples married in any state that recognizes same-sex marriages will be recognized as married for federal tax purposes); Annie Lowrey, *Gay Marriages Get Recognition from the I.R.S.*, N.Y. TIMES (Aug. 29, 2013) (recognizing that same-sex married couples will now receive the same treatment under federal tax law as different-sex married couples); David Von Drehle, *How Gay Marriage Won*, TIME (Mar. 28, 2013), <http://swampland.time.com/2013/03/28/how-gay-marriage-won/> [<https://perma.cc/W366-TN4J?type=source>] (emphasizing how quickly the gay rights movement progressed and gained popular support in the United States in recent years).

<sup>7</sup> 135 S. Ct. 2584 (2015). In the wake of *Windsor*, constitutional law scholars predicted the imminent recognition of a constitutional right to same-sex marriage. According to Michael Dorf, it is "all but a foregone conclusion that the Court will recognize a right to [same-sex marriage] by the end of the current term." Michael C. Dorf, *Does the Same-Sex Marriage Cert Grant Imperil the Affordable Care Act?*, DORF ON L. (Jan. 26, 2015, 7:00 AM), <http://www.dorfonlaw.org/2015/01/does-same-sex-marriage-cert-grant.html> [<http://perma.cc/D5XQ-DH9E>]; see also Michael C. Dorf, *The Question is How, Not Whether, the Court Will Find a Right to Same-Sex Marriage*, VERDICT (Jan. 26, 2015), <https://verdict.justia.com/2015/01/26/question-whether-supreme-court-will-find-right-sex-marriage> [<https://perma.cc/DZD6-7QZE>] (stating that "the operative question became not *whether* the Court would recognize a right to same-sex marriage, but *when* it would do so"); Michael C. Dorf, *How the Supreme Court's Inaction on Same-Sex Marriage Echoes Its Conduct in the Civil Rights Era*, VERDICT (Oct. 17, 2014), <http://verdict.justia.com/2014/10/17/supreme-courts-inaction-sex-marriage-echoes-conduct-civil-rights-era> [<https://perma.cc/9BZG-R5U6>] (stating that "most informed observers" believe "that a majority of the Justices now believe there is a constitutional right to same-sex marriage").

<sup>8</sup> Some of the findings of the Article may also be applicable to other groups such as male same-sex couples. Moreover, there are other important issues relat-

by focusing on women in same-sex marriages, the Article builds on prior feminist and critical tax scholarship showing how the tax law privileges traditional marriages in which men are the primary income earners and wealth holders, and undermines married women's incentives and abilities to be workers, income producers, and wealth holders.<sup>9</sup>

To show how and why women in same-sex marriages will be taxed unfavorably, the Article analyzes three major aspects of tax law: (1) the joint income tax return; (2) the gift and estate tax marital deduction and other spousal transfer provisions; and (3) the earned income tax credit (EITC).<sup>10</sup> The first two of

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ing to marriage among members of other groups that the Article does not address. For example, Dorothy Brown has explored the taxation of marriage and children at the intersection of race and class. See Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in *TAXING AMERICA* 45 (Karen B. Brown & Mary Louise Fellows eds., 1996) (describing how black wives contribute a greater percentage to household income, making the household more likely to pay the marriage penalty); Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111, 123–24 (2004) (describing how white wives are more likely than black wives to be eligible for the greatest spousal and survivor benefits and how black wives are more likely than white wives to receive no spousal benefits and the lowest survivor benefits).

<sup>9</sup> See EDWARD MCCAFFERY, *TAXING WOMEN* 79–81 (1997) [hereinafter MCCAFFERY, *TAXING WOMEN*]; Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2002–05 (1996); Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49, 92–95 (1971); Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757, 775–81 (2004); Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. J. 137, 146–59 (1991); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burden*, 59 TEX. L. REV. 1, 24–31 (1980); Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301, 305 (1995); Anthony Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 612–21 (2010); Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 292–94 (1988); Lily Kahng, *Fiction in Tax*, in *TAXING AMERICA*, supra note 8, at 25, 38–40 [hereinafter Kahng, *Fiction in Tax*]; Lily Kahng, *One is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 661–62 (2010) [hereinafter Kahng, *One is the Loneliest Number*]; Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 76–78, 96–97 (1993); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 991–96 (1992–93) [hereinafter, McCaffery, *Taxation and the Family*]; Amy C. McCormick, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL'Y 241, 288–90 (1997); Stephanie McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do with Joint Tax Filing*, 11 NEV. L.J. 718, 748–57 (2009); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1589–99 (1996).

<sup>10</sup> Marital status also affects taxation in many other ways, some for the benefit of married couples and some to their detriment. For example, a married couple can exclude twice as much gain from the sale of a personal residence as an unmarried individual (\$500,000 versus \$250,000). See I.R.C. § 121(b). On the

these—the joint income tax return and the marital deduction—embody and illustrate the fundamental conceptual flaw in our current tax treatment of marital status. Congress originally enacted the joint return and the marital deduction to privilege traditional marriages in which husbands were the dominant earners of income and holders of wealth. Over time, however, these origins have been obscured by a convenient legal fiction, that a married couple is an irreducible economic unit. The fiction has grown in stature to become a first principle of taxation that is now deeply embedded in tax law and policy. *Windsor* provides another ground for the removal of this fiction from the tax treatment of marriage.

The legal fiction that grew out of the joint return and the marital deduction has led to major errors in the tax law. First, we tax married couples equally when they differ in ways that ought to matter for tax purposes. Second, we tax married couples and unmarried couples differently when they are similar in ways that ought to matter for tax purposes. Third, we tax unpartnered individuals more heavily than partnered individuals when there is no plausible rationale for doing so. The EITC shows how these errors adversely affect some of our most vulnerable citizens, low-income workers with children.

The Article predicts that all three of these aspects of marriage taxation will have adverse effects on women in same-sex marriages relative to other married people.<sup>11</sup> However, the Ar-

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other hand, the taxable portion of a couple's social security benefits can be greater if they are married than if they are not. See I.R.C. § 86(c). Theodore Seto identified some 250 tax law provisions that apply to individuals related by marriage or family. Theodore S. Seto, *The Unintended Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1531 n.2 (2008). A Congressional Research Report counted nearly 200 tax law provisions in which marital status was a factor. MARGOT L. CRANDALL-HOLLIK ET AL., CONG. RESEARCH SERV., R43157, THE POTENTIAL FEDERAL TAX IMPLICATIONS OF *United States v. Windsor 2* (2015). The systemic reform proposals discussed in Part III of the Article address many of these.

<sup>11</sup> The Article assumes that all states recognize same-sex marriage, as required by *Obergefell*. The Article does not address the difficulties that arose in the period after *Windsor* and before *Obergefell*, where not all states recognized same-sex marriage. See Anthony C. Infanti, *Big (Gay) Love: Has the IRS Legalized Polygamy?*, 93 N.C. L. REV. ADDENDUM 1, 11–26 (2014); Nancy J. Knauer, *LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality*, 24 TEX. J. WOMEN, GENDER & L. 1, 26–40 (2015); Haniya H. Mir, Note, *Windsor and Its Discontents: State Income Tax Implications for Same-Sex Couples*, 64 DUKE L.J. 53, 64–79, 84–98 (2014).

The Article also does not address the disparate tax treatment of couples who choose to marry and those who do not. There are numerous pros and cons for each status, as scholars have explored at length. See M.V. Lee Badgett, *The Double-Edged Sword in Gay Economic Life? Marriage and the Market*, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 109, 124–27 (2008); and, *supra* note 10, at 1547–80. Rather, the Article focuses on the universe of married couples and the

ticle does not advocate for a more equal distribution of the benefits and burdens of marriage taxation among all married couples. Rather, it argues that marriage equality in taxation is an illusory and specious goal. The Article further argues that the current tax treatment of married people rewards and entrenches one model of marriage at the expense of other, more egalitarian models. The Article recommends that marital status as a determinant of taxation be eliminated or curtailed.

Part I of the Article analyzes the three aspects identified above—the joint return, the marital deduction, and the EITC—in terms of their impact on women in same-sex marriages. Part II provides the historical and conceptual analysis of these aspects, and demonstrates how our current treatment of marriage is based on an incoherent legal fiction. Part III offers a critical assessment of the current law of marriage taxation and recommends reforms that would eliminate or curtail taxation on the basis of marital status.

## I

### THE TAXATION OF MARRIAGE BEFORE AND AFTER *WINDSOR*

#### A. The Joint Income Tax Return

##### 1. *The Joint Return*

Under the joint return, a married couple aggregates their income and deductions and computes their tax under a rate schedule whose bracket amounts differ from the schedules for single individuals or heads of household.<sup>12</sup> Marital filing status is mandatory; spouses cannot choose to file as single individuals. They can choose to file separate returns as “married, filing separately,” but this filing choice is disadvantageous for the vast majority of married couples.<sup>13</sup> Prior to 2013, section 3

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disparate tax consequences of marriage within that universe. Relatedly, the Article does not address the tax treatment of civil unions and domestic partnerships in comparison to marriage, an area that is complicated and still in flux. See Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 837–47 (2008); Patricia A. Cain, *Taxation of Domestic Partner Benefits: The Hidden Costs*, 45 U.S.F. L. REV. 481, 484–96 (2010); David Herzig, *Marriage Pluralism: Taxing Marriage After Windsor*, 36 CARDOZO L. REV. 1, 22–28 (2014).

<sup>12</sup> The progressive rates applicable to all taxpayers are the same but the bracket amounts differ. Congress enacted this separate rate structure for married taxpayers filing jointly in 1948. See *infra* note 156 and accompanying text.

If a married couple files a joint return, each spouse is jointly and severally liable for the tax due on the return. See I.R.C. § 6013(d)(3) (2003); Lily Kahng, *Innocent Spouses: A Critique of the New Laws Governing Joint and Several Tax Liability*, 49 VILL. L. REV. 261, 263 (2004).

<sup>13</sup> This is because there is no advantage in the rate schedule for married taxpayers filing separately, while at the same time, many credits and deductions



of DOMA prevented the IRS from recognizing same-sex marriage for tax purposes; therefore, same-sex married couples could not file joint returns. After the Supreme Court struck down section 3 of DOMA in *Windsor*, the IRS announced it would recognize same-sex marriage for federal tax purposes.<sup>14</sup> As a result, same-sex married couples must now file as married taxpayers, and most will file joint returns.<sup>15</sup>

## 2. *Marriage Penalties and Bonuses Under the Joint Return*

The terms “marriage bonus” and “marriage penalty” describe the comparative tax burdens of two couples who are similarly situated except that one couple is married and files jointly, and the other couple is unmarried, with each person filing an individual return. In some cases, the married couple will pay less than the unmarried couple—a marriage bonus. In other cases, the married couple will pay more than the unmarried couple—a marriage penalty. Whether a married couple pays a penalty or bonus depends on the relative amounts of income that each earns. As a general matter, couples with relatively equal amounts of income (e.g., a two-earner couple) often incur a penalty and those with unequal amounts (e.g., a one-earner couple) often receive a bonus.<sup>16</sup>

Marriage penalties and bonuses used to occur across all income levels, but the Bush tax cuts of 2001 eliminated marriage penalties for middle-income couples by increasing certain brackets for married couples to twice the amount of the corresponding brackets applicable to single individuals and by increasing the standard deduction for married couples to twice that for single individuals.<sup>17</sup> Table 1 shows the 2014 tax rates

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are lost or limited. See Andrew Grossman & Nick Caton, *Married Borrowers and IBR: A Trap for the Unwary*, 122 TAX NOTES 1496 (2009).

<sup>14</sup> The marriage must be “valid in the state where it was entered into, regardless of the married couple’s place of domicile.” Rev. Rul. 2013–17, 2013–38 I.R.B. 201, 203.

<sup>15</sup> See *id.*

<sup>16</sup> The marriage penalties and bonuses discussed in this subsection arise from the rate schedules applicable to married couples on the one hand, and single individuals, on the other. Many other aspects of the tax law, such as the marital deduction and the EITC, discussed below, can create additional marriage bonuses and penalties. See *infra* subparts I.B and I.C; see also Seto, *supra* note 10, at 1547–80 (describing the myriad tax provisions in which marriage is either an advantage or a disadvantage).

<sup>17</sup> The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) enacted three marriage tax penalty relief provisions: (1) an increase in the standard deduction for joint returns to twice the size of the standard deduction for single returns, (2) an increase of the width of the fifteen percent tax bracket for

and brackets for taxpayers who are single, head of household, and married filing jointly.

TABLE 1. INDIVIDUAL INCOME TAX RATES BY TAXABLE INCOME, 2014<sup>18</sup>

	Single	Head of Household	Married Filing Jointly
<b>10%</b>	\$0 to \$9,075	\$0 to \$12,950	\$0 to \$18,150
<b>15%</b>	\$9,076 to \$36,900	\$12,951 to \$49,400	\$18,151 to \$73,800
<b>25%</b>	\$36,901 to \$89,350	\$49,401 to \$127,550	\$73,801 to \$148,850
<b>28%</b>	\$89,351 to \$186,350	\$127,551 to \$206,600	\$148,851 to \$226,850
<b>33%</b>	\$186,351 to \$405,100	\$206,601 to \$405,100	\$226,851 to \$405,100
<b>35%</b>	\$405,101 to \$406,750	\$405,101 to \$432,200	\$405,101 to \$457,600
<b>39.6%</b>	Over \$406,750	Over \$432,200	Over \$457,600

As Table 1 indicates, at lower- and middle-income levels (i.e., income ranges specified in the 10% and 15% brackets and a portion of the 25% bracket), the bracket amounts for married couples are double those for single individuals, thereby eliminating the marriage penalty for those income levels.<sup>19</sup> For example, a couple who each had \$36,000 of taxable income would have the same liability whether they filed as single

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joint returns to twice the width of the fifteen percent tax bracket for single returns, and (3) a \$3,000 increase in the earned income tax credit phase-out start and end points for joint returns. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 301-03, 115 Stat. 38, 53-57 (2001) (codified in scattered sections of 26 U.S.C.). The changes were phased in over several years, and were slated to sunset at the end of 2010. See *id.* Subsequent legislation in 2003 and 2004 accelerated EGTRRA’s phase-in of marriage penalty relief. See MAXIM SHVEDOV, CONG. RESEARCH SERV., RL 34498, STATUTORY INDIVIDUAL INCOME TAX RATES AND OTHER ELEMENTS OF THE TAX SYSTEM: 1988 THROUGH 2008, at 6-7 (2008). In 2011 and 2012, Congress temporarily extended the EGTRRA marriage penalty relief provisions that had been scheduled to sunset in 2010, and in 2013, Congress made them permanent. See MINDY R. LEVIT ET AL., CONG. RESEARCH SERV., R42884, THE “FISCAL CLIFF” AND THE AMERICAN TAXPAYER RELIEF ACT OF 2012, at 3-4 (2013).

The elimination of marriage penalties had the effect of increasing the marriage bonus for some couples and increasing the relative amount of tax borne by unmarried couples and single people. See Kahng, *One is the Loneliest Number*, *supra* note 9 (analyzing how the joint return for married taxpayers penalizes single taxpayers); see also Jane G. Gravelle, Cong. Research Serv., RL33755, Federal Income Tax Treatment of the Family 19-25 (2006) (analyzing the impact of the 2001 Bush tax cuts on marriage penalties and bonuses).

<sup>18</sup> See I.R.C. § 1 (2012).

<sup>19</sup> Although the marriage penalty created by the joint return rate structure has been eliminated for low-income individuals, other features of the tax law, such as the earned income tax credit, introduce other substantial marriage penalties. See *infra* notes 117-126 and accompanying text.

individuals or jointly as a married couple.<sup>20</sup> At middle-income levels, marriage bonuses persist and in fact, increased as a result of the elimination of marriage penalties.<sup>21</sup>

At higher income levels, both marriage penalties and bonuses occur. For example, an unmarried couple each with \$150,000 of taxable income would have a top marginal tax rate of 28%.<sup>22</sup> If they married, their combined income of \$300,000 would push them into a top marginal rate of 33% and they would incur a marriage penalty.<sup>23</sup> Conversely, a couple in which one individual has \$300,000 of taxable income and the other has no income would receive a marriage bonus because they could take advantage of the wider brackets available to married couples.<sup>24</sup>

The following chart shows the distribution of marriage penalties and bonuses in 2013 as a function of income level and earnings equality. As the shaded area labeled “Marriage Bonus” indicates, marriage bonuses occur across all income levels and are greatest for single-earner couples. As the shaded areas labeled “Marriage Penalty” indicate, marriage penalties occur at low and high income levels and are greatest for two-earner couples with equal incomes.

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<sup>20</sup> In either case, their tax liability would be \$9,892. Prior to the Bush tax cuts, they would have incurred a marriage penalty.

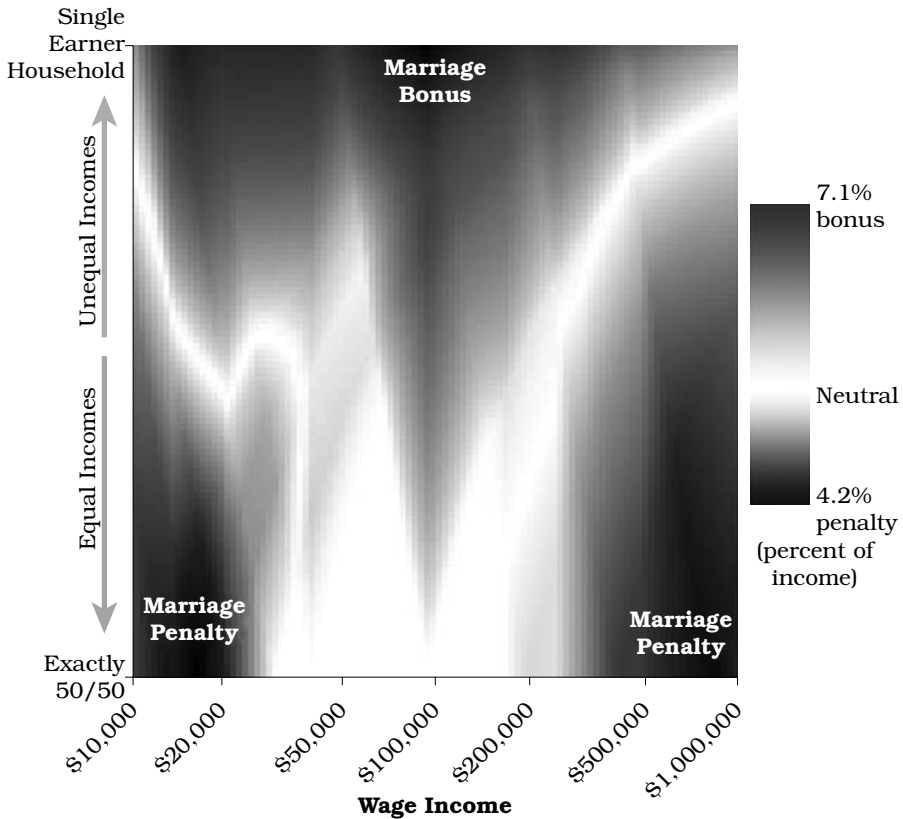
<sup>21</sup> See GRAVELLE, *supra* note 17, at 19. For example, in 2014, a couple in which one person has \$72,000 of taxable income and the other has no taxable income would pay \$13,856 if they filed as single individuals, and \$9,892 if they filed jointly as a married couple—a marriage bonus of \$3,964.

<sup>22</sup> See *supra* Table 1.

<sup>23</sup> See *supra* Table 1. As unmarried individuals, their tax liability would total \$70,352. As a married couple, their tax liability would be \$74,905. They would incur a marriage penalty of \$4,553.

<sup>24</sup> See *supra* Table 1. As unmarried individuals, their tax liability would be \$82,858. As a married couple, their tax liability would be \$74,905. They would receive a marriage bonus of \$7,953. This calculation assumes that other aspects of the tax law that offset the marriage bonus do not apply. More realistically, these other aspects—such as the exemption amounts for the alternative minimum tax and the phase-out thresholds for child credits, personal exemptions, and itemized deductions—might apply, and would reduce the amount of the marriage bonus arising under the joint return. See Jane Gravelle & Jennifer Gravelle, *Horizontal Equity and Family Tax Treatment: The Orphan Child of Tax Policy*, 59 NAT'L TAX J. 631, 634–38 (2006).

EFFECTS OF MARRIAGE ON INCOME AND PAYROLL TAX LIABILITY FOR VARIOUS HOUSEHOLDS<sup>25</sup>



The following examples illustrate who is likely to enjoy a marriage bonus and who is likely to incur a marriage penalty under the joint return rate structure.

**Example 1: Middle-Income Marriage Bonuses and Penalties**

In 2014, Ward, who has \$120,000 of gross income, and June, who has no income, got married. Ward’s 2014 tax liability as a single taxpayer would have been \$22,828, and June’s would have been \$0. As married taxpayers, Ward and June’s joint tax liability is \$16,638. They receive a marriage bonus of \$7,296.<sup>26</sup>

<sup>25</sup> Nick Kasprak, *Effects of Marriage on Tax Burden Vary Greatly with Income Level, Equality*, TAX FOUND. (Jan. 10, 2013), <http://taxfoundation.org/article/effects-marriage-tax-burden-vary-greatly-income-level-equality> [<http://perma.cc/8TE6-3DWD>]. The chart shows the effects of marriage as a function of income and payroll tax liability.

<sup>26</sup> This example assumes that Ward claims the standard deduction whether single or married. It also assumes that they claim two personal exemptions, one for Ward and one for June, whether single or married. The calculations were

Ward's gross income:	\$120,000
June's gross income:	\$0
Ward's tax (filing singly):	\$23,934
Ward & June's tax (married filing jointly):	\$16,638
<b>Marriage bonus:</b>	<b>\$7,296</b>

Also in 2014, Thelma and Louise, who each have \$60,000 of gross income, got married. Thelma and Louise's 2014 tax liabilities as single taxpayers would have been \$8,319 each, or \$16,638 total. As married tax taxpayers, their joint tax liability is still \$16,638. They receive no marriage bonus, nor do they incur a marriage penalty.<sup>27</sup>

Thelma's gross income:	\$60,000
Louise's gross income:	\$60,000
Thelma & Louise's combined tax (filing singly):	\$16,638
Thelma & Louise's tax (married filing jointly):	\$16,638
<b>Marriage bonus:</b>	<b>\$0</b>

### **Example 2: Upper-Income Marriage Bonuses and Penalties**

In 2014, Bill, who has \$600,000 of gross income, and Melinda, who has no income, got married. Bill's 2014 tax liability as a single taxpayer would have been \$192,191. As married taxpayers, Bill and Melinda's joint tax liability is \$179,443. They receive a marriage bonus of \$12,748.<sup>28</sup>

Bill & Melinda's combined gross income:	\$600,000
Bill's tax (filing singly):	\$192,191
Bill & Melinda's 2014 tax (married filing jointly):	\$179,443
<b>Marriage bonus:</b>	<b>\$12,748</b>

Also in 2014, Ellen and Portia, each with \$300,000 of gross income, got married. Ellen and Portia's 2014 tax liabilities as

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made using the calculator at *Marriage Bonus and Penalty Tax Calculator*, TAX POLICY CTR. <http://taxpolicycenter.org/taxfacts/marriagepenaltycalculator.cfm> [<http://perma.cc/W35H-NKGV>] (last visited Nov. 18, 2015).

<sup>27</sup> This example assumes that Thelma and Louise claim the standard deduction whether single or married. It also assumes that each claims a personal exemption on their individual tax return, and that they claim two personal exemptions on their joint return.

<sup>28</sup> This example assumes that Bill and Melinda claim two personal exemptions whether single or married. In addition, to best illustrate the marriage bonus and penalty arising solely as a result of the joint return rate structure, the example also assumes that Bill claims the standard deduction, whether single or married. In reality, most high-income taxpayers itemize their deductions, and provisions such as the I.R.C. § 68 (2011) phase-out for itemized deductions and the alternative minimum tax would affect the magnitude of marriage bonuses and penalties. See GRAVELLE, *supra* note 17, at 19–20; Gravelle & Gravelle, *supra* note 24, at 634–38. In general, many of these other features impose additional marriage penalties, sometimes to such an extent that the penalties exceed the rate structure marriage bonus for single-earner couples. In this situation, a single-earner couple such as Bill and Melinda might lose their marriage bonus. See Gravelle & Gravelle, *supra* note 24, at 641 tbl.4.

single taxpayers would have been \$80,004 each, or \$160,008 total. As married taxpayers, their joint tax liability is \$179,443. They incur a marriage penalty of \$19,435.<sup>29</sup>

Ellen & Portia’s combined gross income:	\$600,000
Ellen & Portia combined tax (filing singly):	\$160,008
Ellen & Portia’s tax (married filing jointly):	\$179,443
<b>Marriage penalty:</b>	<b>(19,435)</b>

The examples illustrate the typical patterns of marriage bonuses and penalties, based solely on the joint tax return rate structure, at middle- and upper-income levels (marriage bonuses and penalties for lower-income couples are addressed below in the discussion of the EITC).<sup>30</sup> Marriage bonuses generally arise for one-earner couples at both middle- and upper-income levels, as exemplified by Ward and June, and Bill and Melinda, respectively. Marriage bonuses also arise for two-earner couples with relatively unequal income.<sup>31</sup> Marriage penalties for middle-income couples were generally eliminated by the Bush tax cuts, as exemplified by Thelma and Louise. However, marriage penalties continue to occur for upper-income two-earner couples with relatively equal incomes, as exemplified by Ellen and Portia.

3. *Women in Same-Sex Marriages: More Likely to Incur Marriage Penalties and Less Likely to Receive Marriage Bonuses*

Two recent studies analyzing data from the U.S. Census Bureau’s 2005–2011 American Census Survey (ACS) suggest that women in same-sex couples were less likely than different-sex couples to have income patterns that resemble Ward and June’s or Bill and Melinda’s and more likely to have income patterns that resemble Thelma and Louise’s or Ellen and Portia’s.<sup>32</sup> That is, had they been married and eligible to file a joint

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<sup>29</sup> The example assumes that each claims a personal exemption on their individual tax return and that they claim two personal exemptions on their joint return. As with the example involving Bill and Melinda, this example also assumes, unrealistically, that Ellen and Portia claim the standard deduction whether single or married. See *supra* note 28.

<sup>30</sup> See *infra* subpart I.C.

<sup>31</sup> See Kasprak, *supra* note 25.

<sup>32</sup> See James Alm, J. Sebastian Leguizamon & Susane Leguizamon, *Revisiting the Income Tax Effects of Legalizing Same-Sex Marriages*, 33 J. POLY ANALYSIS & MGMT. 263 (2014); GARY J. GATES, THE WILLIAMS INSTITUTE, SAME-SEX AND DIFFERENT-SEX COUPLES IN THE AMERICAN COMMUNITY SURVEY: 2005–2011, at 1 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf> [<http://perma.cc/GS28-EPPH>]; see also Christopher S. Carpenter, *Sexual Orientation, Work, and Income in Canada*, 41 CAN. J. ECON. 1239, 1251 (2008) (discussing findings in Canada and surveying U.K. and U.S. studies); M.V. LEE BADGETT,

return—as they now are after *Windsor*—female same-sex couples would have been less likely than different-sex couples to receive marriage bonuses and more likely to incur marriage penalties.

In one study, Gary Gates found that individuals in same-sex couples had higher levels of labor force participation than individuals in different-sex couples (81.7% versus 69.4%).<sup>33</sup> This means that a greater proportion of different-sex couples were one-earner couples relative to same-sex couples, although Gates does not provide exact percentages.<sup>34</sup> Conversely, a higher percentage of same-sex couples were two-earner couples relative to different-sex couples.

A second study, by James Alm, Sebastian Leguizamon, and Susanne Leguizamon, found that 76% of same-sex couples were two-earner couples and 24% were one-earner couples.<sup>35</sup> Unfortunately, Alm and his coauthors do not provide comparable information for different-sex couples. The U.S. Department of Labor Bureau of Labor Statistics (BLS) found that in 2010, 54% of all different-sex married couples were two-earner couples,<sup>36</sup> a lower percentage than the 76% Alm and his coauthors found for same-sex couples. However, the two percentages are not directly comparable. First, the BLS percentage relates to *married* couples, not all couples. Second, the BLS percentage includes couples where neither husband nor wife works, or where another member of the household works. Alm and his coauthors do not appear to include these types of couples.<sup>37</sup>

The findings of both Gates and Alm and his coauthors indicate that same-sex couples were more likely to be two-earner couples than different-sex couples, but neither Gates

MONEY, MYTHS AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN 148–51 (2003) (comparing female same-sex couples and different-sex couples and finding that partners in female same-sex couples are more likely than partners in different-sex relationships to both work and work similar numbers of hours).

<sup>33</sup> GATES, *supra* note 32, at 3, 8–10.

<sup>34</sup> Gates does not provide specific percentages of one-earner versus two-earner couples. In addition, Gates does not provide a further breakdown of labor force participation for same-sex female couples or same-sex male couples. *See id.*

<sup>35</sup> Alm, Leguizamon & Leguizamon, *supra* note 32, at 267–68.

<sup>36</sup> U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, WOMEN IN THE LABOR FORCE: A DATABOOK 3, 80 (2013), <http://www.bls.gov/cps/wlf-databook-2012.pdf>.

<sup>37</sup> The BLS percentages could be recalibrated to include only couples where one or both spouses works. This would yield 68% as two-earner couples and 32% as one-earner couples, but these calculations are conjectural at best. *See id.*; see also Alm, Leguizamon & Leguizamon, *supra* note 32, at 267–71 (explaining the methodology used in the Alm study).

nor Alm and his coauthors differentiate between the earnings patterns of female and male same-sex couples.<sup>38</sup> Therefore, it is not possible to ascertain, based on their analyses, exactly how female same-sex couples fare relative to other couples. Nevertheless, these two studies support the premise that female same-sex couples are more likely than different-sex couples to be two-earner couples.<sup>39</sup>

Another group that receives marriage bonuses is comprised of two-earner couples with relatively unequal incomes. Whether same-sex couples in general, or female same-sex couples specifically, are more or less likely than different-sex couples to be in this group is not analyzed by either Gates or Alm and his coauthors.<sup>40</sup> Therefore, it is not possible to ascertain, based on their analyses, whether the relative earnings of women in same-sex couples tend to be more equal than those of other couples.

However, prior research on labor force participation among women in same-sex couples suggests that women in same-sex couples are more likely than different-sex couples both to be two-earner couples and to have relatively equal incomes. Analyzing data from the 2000 decennial U.S. Census, Dan Black, Seth Sanders, and Lowell Taylor found that 80.5% of female same-sex couples were two-earner couples, as compared to 68.1% of different-sex couples.<sup>41</sup> They also found that, in terms of relative earnings of each person within a two-earner couple, the earnings of female same-sex couples were more equal than those of either male same-sex couples or different-

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<sup>38</sup> See Alm, Leguizamon & Leguizamon, *supra* note 32, at 267–71; GATES, *supra* note 32, at 3.

<sup>39</sup> It is theoretically possible, though unlikely, that female same-sex couples were *more* likely than other couples to be one-earner couples. This would be the case if male same-sex couples were overwhelmingly two-earner couples and female same-sex couples were overwhelmingly one-earner couples.

<sup>40</sup> Neither Gates nor Alm and his coauthors provide a breakdown of individual incomes within two-earner couples. Therefore, it is not possible to ascertain whether, for example, the relative earnings of women in same-sex couples tend to be more equal than those of other couples.

<sup>41</sup> Dan A. Black, Seth G. Sanders & Lowell J. Taylor, *The Economics of Gay and Lesbian Families*, 21 J. ECON. PERSP. 53, 63–64 (2007). When couples have children, the difference between female same-sex and different-sex couples narrows, in terms of two-earner versus one-earner couples. Controlling for children, however, does not completely eliminate the difference, and female same-sex couples are still more likely to be two-earner couples. See Heather Antecol & Michael D. Steinberger, *Labor Supply Differences Between Married Heterosexual Women and Partnered Lesbians: A Semi-Parametric Decomposition Approach*, 51 ECON. INQUIRY 783, 798–801 (2013); Black, Sanders & Taylor, *supra*, at 62.



sex couples in which males were the primary earner.<sup>42</sup> Similarly, in their study analyzing 2000 decennial U.S. Census data, Christopher Jepsen and Lisa Jepsen found that female same-sex couples had smaller differences in earnings and hours worked than married different-sex couples and male same-sex couples.<sup>43</sup> Numerous other smaller-scale studies have also found that female same-sex couples specialize much less than different-sex couples in their division of household work and labor force participation.<sup>44</sup>

In sum, the research described above provides substantial evidence that female same-sex couples have been more likely than different-sex couples to be two-earner couples. Had they been married and eligible to file joint returns, female same-sex couples would have been less likely than different-sex couples to receive marriage bonuses and more likely to incur marriage penalties.<sup>45</sup> Whether those differences will persist in the future cannot be predicted with certainty. With respect to work force participation, some economists theorize that lesbian women inherently make different choices:

Lesbian women who realize early in life that they will not marry into a traditional household will generally invest more heavily in market-oriented human capital, and will be more likely to undertake a series of career-oriented decisions—staying in school longer, taking a major that is likely to lead to a higher-paying job, having continuous labor force attachment, or working long hours—that differ from those they would have made if they were adopting traditional gender-based household specialization.<sup>46</sup>

This suggests that the observed differences in labor force participation and earnings patterns may persist in the future. On the other hand, economists also recognize that marriage penalties on two-earner couples might change the behavior of women in same-sex couples, so that they could begin to look

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<sup>42</sup> See Black, Sanders & Taylor, *supra* note 41, at 63–64. The only group with a smaller “wage gap” than female same-sex couples were different-sex couples with female primary earners. See *id.*

<sup>43</sup> See Christopher Jepsen & Lisa K. Jepsen, *Labor-Market Specialization Within Same-Sex and Difference-Sex Couples*, 54 INDUS. REL. 109, 126–29 (2015).

<sup>44</sup> See BADGETT, *supra* note 32, at 146–66; Carpenter, *supra* note 32, at 1251–52; Marieka M. Klawitter, *Gays and Lesbians as Workers and Consumers in the Economy*, in HANDBOOK OF LESBIAN AND GAY STUDIES 329, 334–35 (Diane Richardson & Steven Seidman eds., 2002). But see Black, Sanders & Taylor, *supra* note 41, at 61–63 (finding that same-sex couples with children specialize similarly to different-sex couples with children); see also *infra* notes 48–53 and accompanying text.

<sup>45</sup> See *supra* section I.A.2.

<sup>46</sup> Black, Sanders & Taylor, *supra* note 41, at 65–66 (footnote omitted).

more like different-sex couples in terms of their earnings patterns.<sup>47</sup>

Other scholars theorize that same-sex female relationships are more egalitarian due to the absence of gendered power dynamics, which have traditionally resulted in female specialization in unpaid household labor and childcare and male specialization in market labor.<sup>48</sup> An extensive sociological literature has found that female same-sex couples are more egalitarian than different-sex couples along many axes,<sup>49</sup> in-

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<sup>47</sup> See Alm, Leguizamon & Leguizamon, *supra* note 32, at 287; Adam Stevenson, *The Labor Supply and Tax Revenue Consequences of Federal Same-Sex Marriage Legalization*, 65 NAT'L TAX J. 783, 791-93 (2012).

<sup>48</sup> See, e.g., M.V. Lee Badgett, *Gender, Sexuality, and Sexual Orientation: All in the Feminist Family?*, in QUEER ECONOMICS 19, 28-29 (Joyce Jacobsen & Adam Zeller eds., 2008) (theorizing that same-sex couples do not engage in gendered patterns of specialization because they tend to reject gendered roles); MAUREEN SULLIVAN, *THE FAMILY OF WOMAN: LESBIAN MOTHERS, THEIR CHILDREN, AND THE UNDOING OF GENDER* 96-106 (2004) (explaining the structural dynamic of women's economic disadvantage and dependence on men in different-sex marriages and finding that lesbian coparent families are less likely to have either partner disproportionately assume responsibility for a particular kind of labor); Megan Fulcher, Erin L. Sutfin & Charlotte J. Patterson, *Individual Differences in Gender Development: Associations with Parental Sexual Orientation, Attitudes, and Division of Labor*, 58 SEX ROLES 330, 331 (discussing how lesbian couples with children tend to divide household labor, childcare, and market labor more equally than heterosexual couples); Abbie E. Goldberg & Maureen Perry-Jenkins, *The Division of Labor and Perceptions of Parental Roles: Lesbian Couples Across the Transition to Parenthood*, 24 J. SOC. & PERS. RELATIONSHIPS 297, 300-01 (2007) (discussing how lesbians' gender socialization and awareness of gender inequality will lead them to prefer an egalitarian division of labor); Maureen Sullivan, *Rozzie & Harriet?: Gender and Family Patterns of Lesbian Coparents*, 10 GENDER & SOC'Y 747, 763-65 (1996) (discussing how the gendered division of labor in different-sex couples has led to inequality between male and female partners' economic and social status and finding that female same-sex couples are less likely to have one partner assume a disproportionate form of work-home labor or be economically dependent on the other).

<sup>49</sup> See generally PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *American Couples: Money, Work, Sex* 448-501 (1983) (presenting case studies of egalitarian female same-sex relationships); Letitia Anne Peplau & Susan D. Cochran, *A Relationship Perspective on Homosexuality*, in HOMOSEXUALITY/HETEROSEXUALITY: CONCEPTS OF SEXUAL ORIENTATION 321, 339-46 (David P. McWhirter, Stephanie A. Sanders & June Machover Reinisch eds., 1990) (finding that most lesbians have power equality as a relationship goal); SULLIVAN, *supra* note 48, at 63-64 (discussing female same-sex parents' equal involvement in parenting); Lawrence A. Kurdek, *Change in Relationship Quality for Partners from Lesbian, Gay Male, and Heterosexual Couples*, 22 J. FAM. PSYCH. 701, 707-08 (2008) (finding higher levels of relationship equality for female same-sex couples); Letitia Anne Peplau & Adam Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 ANN. REV. PSYCH. 405, 408-09 (2007) (finding more balanced division of household labor and power in same-sex couples).

cluding the division of household work,<sup>50</sup> market labor,<sup>51</sup> childcare,<sup>52</sup> and family decision making.<sup>53</sup>

Assuming that the differences in labor force participation and earnings patterns persist, whatever the theoretical explanation, it is a reasonable prediction that female same-sex married couples will be taxed less favorably than different-sex married couples. They will receive less in marriage bonuses and pay more in marriage penalties.<sup>54</sup> This prediction comes with certain caveats. Estimating and projecting the exact magnitude and distribution of marriage penalties and bonuses among women in same-sex marriages and other married people is difficult for many reasons. The Census Bureau survey provides a wealth of data that provides the starting point for estimates, but it may not accurately identify same-sex couples.<sup>55</sup> Even assuming the data and analyses are accurate, estimators must also make behavioral assumptions about how many same-sex couples will marry in the future and whether their behavior will change as a result of the change in tax law.<sup>56</sup> For

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<sup>50</sup> See, e.g., Goldberg & Perry-Jenkins, *supra* note 48, at 312 (finding that female same-sex couples maintained an equal division of household work before and after the transition to parenthood, and discussing other research showing that different-sex couples do not maintain an equal division of work across the transition to parenthood).

<sup>51</sup> See, e.g., Charlotte J. Patterson, Erin L. Sutfin & Megan Fulcher, *Division of Labor Among Lesbian and Heterosexual Parenting Couples: Correlates of Specialized Versus Shared Patterns*, 11 J. ADULT DEV. 179, 188 (2004) (finding that same-sex female couples are more likely to share paid employment and household duties equally than different-sex couples).

<sup>52</sup> See, e.g., Sondra E. Solomon, Esther D. Rothblum & Kimberly F. Balsam, *Money, Housework, Sex, and Conflict: Same-Sex Couples in Civil Unions, Those Not in Civil Unions, and Heterosexual Married Siblings*, 52 SEX ROLES 561, 567–68 (2005) (finding that female same-sex couples shared tasks like taking children to activities and appointments more equally than different-sex married couples).

<sup>53</sup> See, e.g., Claudia Ciano-Boyce & Lynn Shelley-Sireci, *Who is Mommy Tonight? Lesbian Parenting Issues*, 43 J. HOMOSEXUALITY 1, 5–7 (2002) (finding that female same-sex couples shared childcare responsibilities more equally than different-sex couples).

<sup>54</sup> See CRANDALL-HOLLICK ET AL., *supra* note 10, at 9–10; Stevenson, *supra* note 47, at 803.

<sup>55</sup> See CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES 3 (2004) [hereinafter 2004 CBO REPORT] (noting that Census Bureau data may be inaccurate due to misreporting by respondents or misinterpretation of reported relationships by the U.S. Census Bureau). Some of the problems may have been corrected on the latest 2010 U.S. Census Bureau survey. See Alm, Leguizamon & Leguizamon, *supra* note 32, at 267. Some argue, however, that there are persistent flaws and biases in the collection and analysis of data. See Dean Spade & Rori Rolfs, *Legal Equality, Gay Numbers and the (After?)Math of Eugenics*, SCHOLAR & FEMINIST ONLINE (forthcoming 2016).

<sup>56</sup> See CRANDALL-HOLLICK ET AL., *supra* note 10, at 9 (explaining that certain research suggests demographic characteristics of opposite-sex couples differ from those of same-sex couples, and therefore marriage tax consequences for same-sex

example, some same-sex couples may choose not to marry to avoid marriage penalties and others may choose to marry to receive marriage bonuses.<sup>57</sup> Some same-sex couples may alter their labor force participation as a result of marriage penalties or bonuses.<sup>58</sup>

Reflecting these uncertainties, past estimates of marriage penalties and bonuses for same-sex couples vary widely.<sup>59</sup> This Article does not attempt to provide specific future estimates of marriage penalties and bonuses among same-sex and different-sex couples. Rather, the Article makes a general prediction, based on available evidence, that women in same-sex marriages are more likely to face marriage penalties and less likely to receive marriage bonuses than different-sex couples. Once data becomes available about the earnings patterns of married same-sex couples, it will be possible to confirm whether this is true.<sup>60</sup>

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couples may differ from patterns for opposite-sex couples); M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081, 1088–91, 1106–08 (2010) (arguing that labor market patterns suggest same-sex couples and different-sex couples will have the same incentives to marry); M.V. Lee Badgett, Gary J. Gates & Natalya C. Maisel, *Registered Domestic Partnerships Among Gay Men and Lesbians: The Role of Economic Factors*, 6 REV. ECON. HOUSEHOLD 327, 329–34 (2008) (describing the economic factors that might influence a couple's decision whether to marry or enter into a domestic partnership); Stevenson, *supra* note 47, at 801–03 (examining the effects of marriage taxation on marriage and work decisions of same-sex couples).

<sup>57</sup> See 2004 CBO REPORT, *supra* note 55, at 3; Alm, Leguizamon & Leguizamon, *supra* note 32, at 287; James Alm, M.V. Lee Badgett & Leslie A. Whittington, *Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage*, 53 NAT'L TAX J. 201, 205–07 (2000).

<sup>58</sup> See Alm, Leguizamon & Leguizamon, *supra* note 32, at 287; Stevenson, *supra* note 47, at 791–93, 801–03.

<sup>59</sup> Compare Alm, Badgett & Whittington, *supra* note 57, at 203 (estimating that legalizing same-sex marriage in the most likely statistical scenario will lead to an annual federal income tax increase between \$0.3 billion and \$1.3 billion), with 2004 CBO REPORT, *supra* note 55, at 3 (estimating that from the years 2005–2010, legalizing same-sex marriage would result in an annual federal revenue increase between \$200 and \$400 million), and Stevenson, *supra* note 47, at 784 (estimating \$20 to \$40 million in annual federal revenue increases if same-sex marriage were legalized). Because of changes in the law that decreased or eliminated marriage penalties for many middle-income taxpayers, more recent estimates are considerably lower. See Alm, Leguizamon & Leguizamon, *supra* note 32, at 287 (estimating that the annual federal revenue impact would range from gains of \$5.7 million to losses of \$315.8 million).

<sup>60</sup> The U.S. Census Bureau could collect this data. Alternatively, the IRS could collect data about same-sex versus different-sex married couples who file joint returns. It does not currently collect gender information on joint returns.

## B. Gift and Estate Tax Spousal Transfer Provisions

### 1. *In General*

The gift and estate tax laws contain several provisions that accord preferential treatment to spousal transfers.<sup>61</sup> The most basic of these is the marital deduction, which allows spouses to transfer property to one another, whether by gift or upon death, free of any gift or estate tax.<sup>62</sup> The marital deduction, along with the related spousal transfer provisions discussed below, constitute “the single most important estate planning tool available to married individuals.”<sup>63</sup>

In addition to outright transfers, the marital deduction is also available for property transferred by a decedent to a “qualified terminable interest property” (QTIP) trust, that is, one in which the surviving spouse has only a life income interest.<sup>64</sup> The effect of the QTIP rules is to enable the first spouse to die to designate the ultimate beneficiaries of the property, with no current tax.<sup>65</sup> Upon the death of the surviving spouse, the QTIP trust property will be included in the surviving spouse’s estate and taxed at that time.<sup>66</sup> Like all transfers qualifying for the marital deduction, the QTIP rules defer tax until such time

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<sup>61</sup> See generally Crawford, *supra* note 9, at 775–81 (describing and critiquing the preferential treatment of marital transfers under the gift and estate tax). In addition to their preferential treatment under the gift and estate tax, interspousal transfers are also tax free for income tax purposes. See I.R.C. § 1041 (2012).

<sup>62</sup> I.R.C. §§ 2056(a), 2523(a).

<sup>63</sup> Jeffrey N. Pennell, “Importance of the Marital Deduction in Estate Planning,” TAX MGMT. PORTFOLIO NO. 843, I.B. (3RD) (2014).

<sup>64</sup> I.R.C. § 2056(b)(7). A parallel provision in the gift tax allows the marital deduction for an inter vivos QTIP trust. I.R.C. § 2523(f) (2012). For the sake of simplicity, and because testamentary QTIP trusts are much more prevalent than inter vivos QTIP trusts, this Article refers primarily to testamentary QTIP trusts.

In addition to QTIP trusts, the marital deduction is also allowed for trusts in which the surviving spouse controls property through a general power of appointment. I.R.C. § 2056(b)(5). However, as a practical matter, QTIP trusts are much more widely used. See BORIS I. BITTKER, ELIAS CLARK & GRAYSON M.P. MCCOUCH, FEDERAL ESTATE AND GIFT TAXATION 515 (10th ed. 2011).

<sup>65</sup> See generally RAY D. MADOFF ET AL., PRACTICAL GUIDE TO ESTATE PLANNING 6038–43 (2014) (discussing details and requirements of a QTIP trust); JOHN R. PRICE & SAMUEL A. DONALDSON, PRICE ON CONTEMPORARY ESTATE PLANNING 5047–51 (2013) (providing overview of the QTIP trust).

<sup>66</sup> I.R.C. § 2044. The surviving spouse may be given some control over the trust property, such as the ability to appoint the property to herself, or a special or general power of appointment exercisable at her death. See BITTKER, CLARK & MCCOUCH, *supra* note 64, at 516. However, the major planning advantage of the QTIP trust over other marital transfers is that the QTIP trust enables the decedent to retain control over the disposition of the property. See *id.*

To the extent that an inclusion of QTIP in the surviving spouse’s estate increases her estate tax, the surviving spouse’s other heirs can recover such tax from the QTIP trust beneficiaries. See I.R.C. § 2207A.

as the surviving spouse transfers the property, provided that the surviving spouse does not consume the property.<sup>67</sup> However, unlike other marital transfers, the surviving spouse typically has no control over the disposition of the property in a QTIP trust.<sup>68</sup>

Another spousal transfer provision is “gift splitting,” which Congress enacted in the Revenue Act of 1948 (the 1948 Act), at the same time as the marital deduction.<sup>69</sup> Under the gift splitting provision, a gift made by one spouse to a third party is deemed to be made one-half by each spouse, provided both spouses consent to this treatment.<sup>70</sup> This can have the effect of doubling the amounts the donor spouse can transfer tax free. In the absence of gift splitting, the donor spouse would be able to make tax-free transfers of up to \$14,000 per year (in 2014) to an unlimited number of donees—the “annual exclusion.”<sup>71</sup> On top of annual exclusions transfers, the donor spouse would be able to transfer an additional \$5.34 million (as of 2014) over the course of his or her life and at death—the “exemption amount.”<sup>72</sup> Gift splitting allows the donor spouse to use the spouse’s annual exclusion and exemption amount, in effect doubling the amounts he or she can transfer tax free to \$28,000 per donee and \$10.68 million, under the annual exclusion and the exemption amounts, respectively.<sup>73</sup>

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<sup>67</sup> See Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1731–32 (1998).

<sup>68</sup> See *id.* at 1729–30.

<sup>69</sup> Revenue Act of 1948, Pub. L. No. 471, § 374, 62 Stat. 110, 127–28 (codified as amended in scattered sections of 26 U.S.C.).

<sup>70</sup> I.R.C. § 2513(a)(1). Both spouses must consent to gift splitting, which applies to all gifts made by either spouse during the year. *Id.* Both spouses must be U.S. citizens or residents. *Id.* In addition, the consenting spouse cannot have a general power of appointment over the property transferred by the donor spouse; nor can she have an interest in the transferred property unless the interest in the property transferred to the third party is ascertainable and severable. See generally Diane S.C. Zeydel, *Gift-Splitting: A Boondoggle or a Bad Idea? A Comprehensive Look at the Rules*, 106 J. TAX’N 334, 338–43 (2007) (discussing spousal interests in gift splitting).

<sup>71</sup> I.R.C. § 2503(b). The exclusion applies to gifts of present interests. The maximum amount of the exclusion is indexed for inflation and was \$14,000 as of 2014. See Rev. Proc. 2013–47, I.R.B. 537, 543.

<sup>72</sup> I.R.C. §§ 2010, 2505. The statutory exemption amount is \$5 million, indexed for inflation beginning in 2012. I.R.C. § 2010(c)(3)(A)–(B). It was \$5.34 million for individuals dying in 2014. See *id.* Transfers in excess of the exemption amount are taxed at a flat rate of 40%. I.R.C. § 2001(c).

<sup>73</sup> Presumably, a spouse with no wealth of her own to transfer would have no objection to gift splitting. On the other hand, a spouse with wealth of her own would have an interest in preserving her ability to make tax-free transfers to her own objects of bounty. See *infra* notes 88–99 and accompanying text.

A final provision relating to spousal transfers allows the estate of decedent with a surviving spouse to make a “portability” election, under which any unused portion of the decedent’s exemption amount carries over to the surviving spouse.<sup>74</sup> Thus, for example, if the decedent made no taxable transfers during his or her life or at death, the unused exemption amount of \$5.34 million (in 2014) would “port” to the surviving spouse, whose exemption amount would then total \$10.68 million.

Under section 3 of DOMA, same-sex married couples were not treated as married for purposes of the marital deduction.<sup>75</sup> *Windsor* struck down section 3 of DOMA and held that transfers by the decedent to her same-sex spouse qualified for the estate tax marital deduction.<sup>76</sup> As a result, same-sex married couples can now use all spousal transfer provisions, including the marital deduction, gift splitting, QTIP trusts, and portability.

## 2. *Beneficiaries of the Spousal Transfer Provisions*

The spousal transfer provisions described above are available to all married individuals, but an individual must have wealth to transfer in order to use them at all.<sup>77</sup> In addition, the

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<sup>74</sup> I.R.C. § 2010(c)(4)–(5). Congress first enacted the portability provisions as a temporary, two-year measure in 2010. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111–312 §§ 302(a)(1), 303(a), 304, 124 Stat. 3296, 3302 (2010) (codified as amended in scattered sections of 26 U.S.C.). Congress made the provisions permanent in 2012. American Taxpayer Relief Act of 2012, Pub. L. No. 112–240 § 101(a), 126 Stat. 2313 (2012) (codified as amended in scattered sections of 26 U.S.C.).

<sup>75</sup> Defense of Marriage Act, Pub. L. No. 104–199 § 3, 110 Stat. 2419, 2419–20 (1996).

<sup>76</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>77</sup> The marital deduction historically benefitted transfers from husbands to wives because men were the principal holders of wealth and typically transferred that wealth to their wives at death. As discussed below, the marital deduction originally allowed a husband to transfer one-half of his wealth to his wife tax free, in order to mimic the treatment of marital transfers in community property states. The one-half limitation on the deduction was eliminated in 1981. See *infra* notes 164–85 and accompanying text.

This is not to say that only husbands *qua* wealth holders benefitted from the marital deduction. Because the incidence of the estate tax falls on the recipients of wealth transfers, a wife might also benefit to the extent her inheritance was not diminished by the estate tax, depending on whether she or other heirs bore the brunt of any estate tax liability. However, even if wives did sometimes reap the benefit of the marital deduction in the form of larger inheritances, husbands also enjoyed the benefit of being able to direct the transfer of a greater amount of wealth.

It should also be noted that husbands usually did not transfer property outright to their widows. Rather, they would typically transfer the property in trust with a life estate to the widow and remainder to their offspring, to “protect”

exemption amount is now so large (\$5.34 million in 2014, to be adjusted for inflation in the future) that only very wealthy individuals will incur any gift or estate tax at all, whether or not they can take advantage of spousal transfer provisions.<sup>78</sup> Nonetheless, the number of individuals potentially subject to the gift and estate tax, and the amount of wealth at stake, is substantial. For example, in 2007, there were an estimated 2.3 million U.S. adults owning \$2 million or more in gross assets, and the group as a whole owned more than \$12 trillion in net worth.<sup>79</sup> A 2014 worldwide survey of super wealthy individuals (those with a net worth of \$30 million or higher) estimated that there are 69,560 U.S. individuals with a net worth of \$30 million or higher, with total wealth holdings of \$9.63 trillion.<sup>80</sup> This group is projected to transfer \$6.35 trillion of wealth over the next thirty years.<sup>81</sup> For these individuals, the potential tax savings of spousal transfer provisions such as the marital deduction, portability, gift splitting, and QTIP trusts are significant.

Exactly who benefits from the spousal transfer provisions depends on a variety of factors.<sup>82</sup> The marital deduction may benefit an individual who transfers wealth to his or her spouse because the absence of tax enables the individual to direct the transfer of a larger amount of wealth (whether to his or her spouse or to others). It also benefits the transferee spouse by increasing the amount of the gift or bequest received, if he or she otherwise would have borne the incidence of any gift or estate tax due.<sup>83</sup> Ultimately, the marital deduction could be

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the widows from unwise investment decisions and predatory fortune hunters and to ensure that the offspring were not disinherited. This form of transfer is the prototype for the QTIP trust, which qualifies for the marital deduction. See *infra* sections II.A.2, II.B.2.

<sup>78</sup> See CRANDALL-HOLLIICK ET AL., *supra* note 10, at 4. In 2009, when Thea Spyer died, the exemption amount was \$3.5 million. Under today's exemption amount, her entire estate would be tax free.

<sup>79</sup> Brian Raub & Joseph Newcomb, Internal Rev. Serv. Stat. of Inc. Div., *Personal Wealth, 2007*, 31 STAT. INCOME BULL., Winter 2012, at 156, 164–65.

<sup>80</sup> *Wealth-X and UBS World Ultra Wealth Report 2014*, WEALTH-X, 40–41 (2014), <http://www.worldultrawealthreport.com/> [<http://perma.cc/8RLQ-JARS>].

<sup>81</sup> *Wealth-X and NFP Family Wealth Transfers Report*, WEALTH-X, 24 (2014), [http://www.wealthx.com/wp-content/uploads/2015/01/WealthX\\_NFP\\_FamilyWealthTransfersReport-2014.pdf](http://www.wealthx.com/wp-content/uploads/2015/01/WealthX_NFP_FamilyWealthTransfersReport-2014.pdf) [<http://perma.cc/B7AX-8H5C>].

<sup>82</sup> See Crawford, *supra* note 9, at 775–81.

<sup>83</sup> Whether the surviving spouse would bear the incidence of a tax in the absence of the marital deduction depends on whether there are other heirs who might bear the brunt of any added tax liability and whether the transferor spouse might change his or her donative or testamentary plan to take account of the added tax liability. However, even if the surviving spouse does sometimes reap



viewed as benefitting other transferees who will be the recipients of the married couple's wealth, for example, children or grandchildren.<sup>84</sup>

Portability is still so new that the estate planning community has yet to explore fully its implications. It has the potential to be a powerful tool for increasing a wealthy individual's ability to transfer more of his wealth tax free, should he have a non-propertied spouse who predeceases him.<sup>85</sup> It also might result in wealthy individuals transferring more of their wealth outright to their spouses because the decedent's unused exemption amount, instead of being wasted, will now carry over to the surviving spouse.<sup>86</sup> On the other hand, portability may have the effect of increasing the popularity of QTIP trusts as a way for a moneyed spouse to retain control over the ultimate disposition of his wealth.<sup>87</sup>

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the benefit of the marital deduction in the form of larger inheritances, the transferor spouse also enjoys the benefit of being able to direct the transfer of a greater amount of wealth.

The marital deduction also creates an incentive for a wealthy individual to transfer wealth to his spouse instead of third parties. As discussed below, Congress created this incentive unintentionally and it caused a great deal of alarm in the estate planning community. The incentive was eliminated with the enactment of the QTIP trust rules in 1981.

<sup>84</sup> Who ultimately benefits from tax savings of the marital deduction and the other marital transfer provision is a highly complex question. It depends more generally on the effects that gift and estate taxes have on individuals' behavior, which in turn depends on the patterns of, and motives for, intergenerational transfers. See William G. Gale & Maria G. Perozek, *Do Estate Taxes Reduce Saving?*, in *RETHINKING ESTATE AND GIFT TAXATION* 216, 235–37 (William G. Gale et al. eds., 2001).

<sup>85</sup> One practitioner joked about trafficking in exemption amounts when portability was first enacted in 2010:

Maybe I should retire from the practice of law, get ordained so I can perform marriages, and start a match-making service where I pair up and marry destitute seniors in nursing homes to wealthy unmarried individuals.

Jerry Cooper, *Advisors Predict Obama Tax Deal Will Hurt Trust Business*, TR. ADVISOR (Dec. 12, 2010), <http://thetrustadvisor.com/news/estatedeal> [<http://perma.cc/J8GM-FGV9>] (quoting David Diamond).

<sup>86</sup> Before portability, if a decedent transferred his entire estate to his surviving spouse, his exemption amount would be wasted. The traditional strategy for avoiding this is to create a "bypass" or "credit shelter" trust—specifically designed not to qualify for the marital deduction—and to fund it with an amount sufficient to use the decedent's exemption. See Bridget J. Crawford & Wendy C. Gerzog, *Portability, Marital Wealth Transfers, and the Taxable Unit*, in *CONTROVERSIES IN TAX LAW: A MATTER OF PERSPECTIVE* 247, 253–54 (Anthony C. Infanti ed., 2015); RICHARD S. FRANKLIN ET AL., *Portability—The Game Changer*, 2013 A.B.A. REAL PROP. TR. & EST. L. SEC., 2–4; John A. Miller & Jeffrey A. Maine, *Wealth Transfer Tax Planning for 2013 and Beyond*, 2013 B.Y.U. L. REV. 879, 934–40 (2013).

<sup>87</sup> See Jonathan G. Blattmachr et al., *Portability or No: The Death of the Credit-Shelter Trust?*, 118 J. TAX'N 232, 237–48 (2013); FRANKLIN ET AL., *supra* note 86, at 2–4, 14–17; Sisi C. Tran, Convergent Wealth Advisors, *Achieving Tax Bene-*

Gift splitting and QTIP trusts are most advantageous for a wealthy individual whose spouse has little wealth, and in the case of QTIP trusts, where the decedent is older than his or her spouse and/or has children from a prior marriage. In other words, these provisions are most beneficial where there are inequalities of wealth, age, and power between two spouses.<sup>88</sup>

Gift splitting enables a married individual to double the annual exclusion amount(s) and exemption amount by using the annual exclusion amount(s) and exemption amount of his or her spouse, provided the spouse consents.<sup>89</sup> However, if the consenting spouse has wealth of his or her own, he or she may want to preserve the ability to make tax-free transfers to his or her own objects of bounty. Because the annual exclusion applies to an unlimited number of donees, gift splitting will not affect the consenting spouse's ability to make annual exclusion transfers to different beneficiaries. (In this case, gift splitting could benefit both spouses because each would be able to transfer \$28,000 to each of their respective beneficiaries.<sup>90</sup>) However, if the consenting spouse wishes to make transfers to the same beneficiaries as the donor spouse—for example, their children or grandchildren—then gift splitting will constrain his or her ability to transfer his or her own wealth. Furthermore, if the consenting spouse wishes to make transfers of his or her own wealth in excess of the annual exclusion amount, the split gift election will also constrain his or her ability to use the \$5.34 million exemption amount to shelter those transfers from tax. Thus, a propertied individual with a nonpropertied spouse stands to gain the most benefit from the split gift election.

Like gift splitting, the QTIP trust is advantageous for a wealthy individual who wishes to transfer property to third parties and whose spouse does not have wealth. A QTIP trust defers the estate tax liability on transfers to the remainder beneficiaries until the death of the surviving spouse; at which point the trust remainder will be included in the estate of the

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*fits Through the Inter Vivos QTIP Trust* (Apr. 2013), at 1, 4–8, [http://www.convergentwealth.com/sites/default/files/insight/Achieving%20Tax%20Benefits%20through%20the%20Inter%20Vivos%20QTIP%20Trust\\_%28April%202013%29.pdf](http://www.convergentwealth.com/sites/default/files/insight/Achieving%20Tax%20Benefits%20through%20the%20Inter%20Vivos%20QTIP%20Trust_%28April%202013%29.pdf) [<http://perma.cc/6TQG-EWN2>].

<sup>88</sup> See Crawford, *supra* note 9, at 775–81. Historically, the QTIP trust and gift splitting benefitted wealthy husbands whose wives had little or no wealth of their own. See *infra* note 99 and accompanying text.

<sup>89</sup> See Crawford, *supra* note 9, at 780–81.

<sup>90</sup> This strategy will not work if the “crossed gift” doctrine applies. See *Sather v. Comm’r*, 78 T.C.M. (CCH) 456 (1999).

surviving spouse, sheltered from tax by his or her exclusion amount.<sup>91</sup> Perhaps even more importantly, the decedent retains control over the disposition of the QTIP property, even though it is taxed as part of the surviving spouse's estate. This ability to retain control allows a decedent to assuage anxieties that the surviving spouse will deplete the trust property or disinherit the decedent's heirs, particularly the decedent's children from a previous marriage.<sup>92</sup>

The following example illustrates who is likely to benefit from the QTIP trust marital deduction.

**Example 3: Marital Deduction for QTIP Trust**

Donald dies in 2014 with an estate valued at \$100 million. (Assume Donald's \$5.34 million exemption amount is already exhausted.) Donald's will transfers his entire estate to a QTIP trust, under which his widow Melania will receive a life income interest. Upon her death, the trust corpus will be distributed in equal shares to Donald's three children (Donald, Jr., Ivanka, and Eric) with his first wife, Ivana; his daughter (Tiffany) with his second wife, Marla; and his son (Barron) with Melania. Donald's estate may deduct the entire \$100 million transfer to the trust and his estate tax liability is \$0. Upon Melania's death, the trust corpus will be subject to tax in her estate even though she has no control over its disposition. If she has not otherwise used her exemption amount, it will shelter from tax \$5.34 million (indexed for inflation) of the corpus.

3. *Women in Same-Sex Marriages: Less Likely to Benefit from Spousal Transfer Provisions*

Little is known about the wealth holdings and wealth transfer patterns of same-sex couples.<sup>93</sup> However, it is possible to make a set of informed guesses that women in same-sex

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<sup>91</sup> See Blattmachr et al., *supra* note 87, at 237. The decedent could achieve the same advantageous tax result by transferring property outright to the surviving spouse but would forego control over the ultimate disposition of the property. See *id.* at 240. The ability to retain control is a major advantage of the QTIP trust relative to outright transfer. See *id.* at 237, 240; Tran, *supra* note 87, at 5.

<sup>92</sup> Miller & Maine, *supra* note 86, at 938–39.

<sup>93</sup> See 2004 CBO REPORT, *supra* note 55, at 3–4. For a study examining attitudes toward the extension of intestacy laws to same-sex couples, see generally Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1 (1998) (considering committed same-sex couples and inheritance law). The only other sources of information on wealth holdings and wealth transfer patterns of same-sex couples are private market research studies. See, e.g., PRUDENTIAL FINANCIAL, INC., THE LBGT FINANCIAL EXPERIENCE: 2012–2013 PRUDENTIAL RESEARCH STUDY (2012), [http://www.prudential.com/media/managed/Prudential\\_LBGT\\_Financial\\_Experience.pdf](http://www.prudential.com/media/managed/Prudential_LBGT_Financial_Experience.pdf) [<http://perma.cc/6V2E-LRF9>].

marriages are less likely than individuals in different-sex marriages to reap the benefits of the spousal transfer provisions described above.

To begin with, women in general are less wealthy than men.<sup>94</sup> They are less likely to benefit from spousal transfer provisions such as the marital deduction, gift splitting, or QTIP trusts, simply because they have less wealth to transfer. Whether women in same-sex marriages have less wealth than other married individuals is not known at this time.<sup>95</sup> There is some evidence that lesbians earn more than other women, which suggests they might, on average, be wealthier than other women.<sup>96</sup>

To what extent women in same-sex marriages will be able to take advantage of gift splitting depends, as discussed above, on whether there are wealth inequalities between spouses. There is not yet broad data about this, but research indicates women in same-sex couples in general tend to be more egalitarian in many respects.<sup>97</sup> This suggests that they might also be more equal in their wealth holdings, but this is quite speculative.

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<sup>94</sup> In 2007, about 43% of top wealth holders (those with assets of \$2 million or more) were women. See Raub & Newcomb, *supra* note 79, at 164–65. The percentage of women within the wealthiest 0.5% increased from about 25% during the 1920s to about 45% during the 1990s. Wojciech Kopczuk & Emmanuel Saez, *Top Wealth Shares in the United States, 1916-2000: Evidence from Estate Tax Returns*, 57 NAT'L TAX J. 445, 465 (2004). There has been a narrowing of the wealth disparity between men and women in recent years. The apparent increase in women's wealth, however, may be somewhat deceptive because the data is derived from federal estate tax returns, and the estates of many women include QTIP trust assets that would have been included in the estates of their deceased spouses in the absence of the QTIP rules. See *id.*; Wojciech Kopczuk & Joel Slemrod, *The Impact of Estate Tax on Wealth Accumulation and Avoidance Behavior*, in RETHINKING ESTATE AND GIFT TAXATION, *supra* note 84, at 299, 325.

A worldwide survey of the super wealthy (those with a net worth of \$30 million or more) found that of the 69,560 U.S. individuals in the group, only 13% were women. WEALTH-X & UBS, WORLD ULTRA WEALTH REPORT 2014 41 (2014), <http://www.worldultrawealthreport.com/> [<http://perma.cc/8RLQ-JARS>]. Women in this group had an average net worth of \$160 million, \$28 million more than their male counterparts. See *id.*

<sup>95</sup> It may be possible to ascertain this in the future if the IRS begins to collect gender information on estate tax returns.

<sup>96</sup> See, e.g., Dan Black et al., *The Earnings Effects of Sexual Orientation*, 56 INDUS. & LAB. REL. REV. 449, 462–63 (2003) (finding an earnings premium for lesbians in the range of 20% to 30%); Marieka Klawitter, *Meta-Analysis of the Effect of Sexual Orientation on Earnings*, 54 INDUS. REL. J. ECON. & SOC. 4, 13, 21 (2015) (surveying thirty-one studies and finding on average an earnings premium of 9% for lesbians compared to heterosexual women; but also noting a wide variance in the studies' results).

<sup>97</sup> See *infra* note 100 and accompanying text.

The QTIP trust historically benefitted transfers from husbands to wives. This is true for two reasons. First, husbands were more likely to predecease their wives because they tended to be older than their wives and also had a shorter life expectancy.<sup>98</sup> Second, men owned more wealth than women.<sup>99</sup> Today, husbands are still more likely to predecease their wives,<sup>100</sup> and men continue to be wealthier than women.<sup>101</sup>

In different-sex marriages, women in general are less likely than men to use QTIP trusts. For 1995 decedents for whom estate tax returns were filed, 20% of male decedents used QTIP trusts while 8% of female decedents used QTIP trusts.<sup>102</sup> In the same year, male decedents used QTIP trusts for assets valued at \$13.3 billion while female decedents used QTIPs for assets valued at \$3.2 billion.<sup>103</sup> This is in part because women have less wealth than men, although they appear to be gaining ground.<sup>104</sup> Another reason for the difference in the use of QTIP trusts is that female wealth holders are older than male wealth holders and are more likely to be widowed.<sup>105</sup> Whether for cultural or biological reasons or both, the practice of divorcing one's offensively termed "starter wife" to marry one or more in a series of younger "trophy wives" (also an offensive term), and produce an offspring or two out of each marriage, seems a singularly male pattern of behavior.<sup>106</sup> A wealthy woman is

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<sup>98</sup> See *infra* note 100 and accompanying text.

<sup>99</sup> See *supra* note 94 and accompanying text.

<sup>100</sup> Women still have longer life expectancies than men. Tom Eskes & Clemens Haanen, *Why Do Women Live Longer than Men?*, 133 EUR. J. OBSTETRICS & GYNECOLOGY & REPROD. BIOLOGY 126, 127 (2007) (reporting that women live four to five years longer than men). In addition, husbands continue on average to be older and to earn more than their wives. See U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, TABLE FG3, MARRIED COUPLE FAMILY GROUPS, BY PRESENCE OF OWN CHILDREN/1 UNDER 18, AND AGE, EARNINGS, EDUCATION, AND RACE AND HISPANIC ORIGIN/2 OF BOTH SPOUSES: 2013 (reporting that wives are at least two years younger than their husbands in 52.7% of different-sex marriages; within one year of the same age in 33.2% of different-sex marriages; at least two years older than their husbands in 14.1% of different-sex marriages; and earn at least \$5,000 less than their husbands in 54.3% of different-sex marriages; earn within \$5,000 of their husbands in 25.2% of different-sex marriages; and at least \$5,000 more than their husbands in 20.4% of different-sex marriages).

<sup>101</sup> See *supra* note 94 and accompanying text.

<sup>102</sup> See Barry W. Johnson et al., *Elements of Federal Estate Taxation*, in RE-THINKING ESTATE AND GIFT TAXATION, *supra* note 84, at 65, 101–03.

<sup>103</sup> See *id.* at 103. Although fewer female decedents used QTIP trusts, those who did use them placed a greater proportion of the marital bequest property in the QTIP trusts than males with comparable estate sizes. See *id.* at 102.

<sup>104</sup> See *supra* note 94 and accompanying text.

<sup>105</sup> Raub & Newcomb, *supra* note 79, at 157.

<sup>106</sup> To the extent it is culturally based, that might change, and there is some evidence that women are emulating this pattern. See Sarah Kershaw, *Rethinking*

less likely than her male counterpart to marry a series of younger spouses and therefore is less likely to use a QTIP trust—what one practitioner calls a “Donald Trump arrangement.”<sup>107</sup> QTIP trusts are used predominantly by wealthy husbands and appear to reflect a “deeply patriarchal outlook” that a male decedent must ensure that his widow will not squander the estate or disinherit the decedent’s children.<sup>108</sup>

There is no analogous gendered analysis of QTIP trusts for female same-sex marriages because the wealth transfers occur between women. However, as mentioned above, women are less wealthy than men, and thus, women in same-sex marriages are less likely to benefit from the marital deduction than people in different-sex marriages simply because they have less wealth to transfer.<sup>109</sup> Furthermore, based on what we know about female same-sex marriage patterns, women in same-sex marriages are even less likely than heterosexual women to use QTIP trusts for a “Donald Trump arrangement.”<sup>110</sup>

QTIP trusts are very popular with men even when they are not serial monogamist moguls like Donald Trump.<sup>111</sup> Scholars and practitioners theorize that men favor QTIP trusts because

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*the Older Woman-Younger Man Relationship*, N.Y. TIMES (Oct. 14, 2009). On the other hand, there are currently biological constraints on fertility that make it impossible for a woman to perpetuate her genetic material with a series of younger male partners.

<sup>107</sup> Charles Delafuente, *A Guiding Hand for Bequests, Beyond the Grave*, N.Y. TIMES (Oct. 16, 2012) (quoting estate planning lawyer Richard J. Shapiro).

<sup>108</sup> Dodge, *supra* note 67, at 1734.

<sup>109</sup> See *supra* note 94 and accompanying text.

<sup>110</sup> Little is known about the wealth transmission patterns of same-sex couples. See *supra* note 93. In its report on the budgetary impacts of same-sex marriage legalization, for purposes of determining the estate tax revenue impact, the Congressional Budget Office (CBO) assumes that same-sex married couples will behave like other married couples in their inheritance patterns. See 2004 CBO REPORT, *supra* note 55, at 4. Thus, it assumes that most same-sex spouses will bequeath their property to their surviving spouses, thereby availing themselves of the marital deduction. See *id.* The CBO does not address QTIP trusts. See *id.* There is possibly an indirect reference to QTIP trusts (“marriage can defer the payment of estate taxes until the death of the second spouse”), but there is no discussion of whether same-sex couples might differ from different-sex couples in the use of QTIP trusts. See *id.* There is also a mention of anecdotal evidence that same-sex couples tend to make more charitable bequests than different-sex couples. See *id.*

<sup>111</sup> See *supra* notes 102–03 and accompanying text. Female decedents also use QTIP trusts, but with less frequency. See *id.*

Recent changes to the gift and estate tax, such as the increased exemption amount and the portability of any unused exemption amount from the decedent to the surviving spouse, may add to the attractiveness of QTIP trust as a way for a moneyed spouse to retain control over the ultimate disposition of his wealth. See FRANKLIN ET AL., *supra* note 86, at 2–4, 14–18; Blattmachr et al., *supra* note 87, at 236–38; Tran, *supra* note 87, at 4–7.

they worry that their widows will over-consume the assets of the estate or be incompetent to manage the assets.<sup>112</sup> Because female same-sex relationships appear less likely to incorporate traditional male-female wealth disparities and power dynamics, the motivations of control, dominance, and paternalism that underlie QTIP trusts are less likely to be present.

In less extreme circumstances than the “Donald Trump arrangement,” the QTIP trust is a useful planning device for married couples who have children from former relationships, even those whose estates do not exceed the exemption and who will therefore receive no tax benefit from a QTIP trust.<sup>113</sup> Same-sex couples often have children from prior different-sex marriages<sup>114</sup> and, to this extent, will benefit from the non-tax planning advantages of QTIP-type trusts.<sup>115</sup> The tax advantages of the QTIP trusts, however, inure primarily to the benefit of the Donald Trumps of the world—wealthy, male, serial monogamists who marry younger women with little wealth of their own.

In sum, it is likely that, compared to individuals in different-sex marriages, women in same-sex marriages will benefit less from the marital deduction simply because they have less wealth than men. Furthermore, women in same-sex marriages are likely to benefit less from gift splitting and QTIP trusts because these provisions provide the most benefit to spouses with unequal wealth holdings, and women in same-sex marriages tend to have more equal amounts of wealth and income (as far as we know). Finally, women in same-sex marriages are less likely to benefit from QTIP trusts because they are unlikely to follow the traditional model of male wealth ownership and transfer embodied in the QTIP trust.

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<sup>112</sup> See *supra* notes 87–88.

<sup>113</sup> See MADOFF ET AL., *supra* note 65, at 6041.

<sup>114</sup> See Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, NAT'L COUNCIL ON FAM. REL. REP. MAG., Winter 2011, at F1, F2.

<sup>115</sup> In the aftermath of *Windsor*, estate planning advisers routinely list QTIP trusts as one of the estate planning devices available to same-sex married couples, but there is no mention made about whether same-sex couples will actually want to use them. See, e.g., Mary Hickok et al., *Why Trusts Still Matter: The Brave New World of Estate Planning*, WILMINGTON TR. ISSUES & INSIGHTS, Sept. 2015, at 1, 3, [https://www.wilmingtontrust.com/repositories/wtc\\_sitecontent/PDF/2013\\_Why\\_Trusts\\_Matter.pdf](https://www.wilmingtontrust.com/repositories/wtc_sitecontent/PDF/2013_Why_Trusts_Matter.pdf) [<https://perma.cc/2XTC-KVQ2>] (noting that same-sex married couples gained access to QTIP trusts following the Supreme Court's decision in *Windsor*); Ray Prather, *Estate Planning and Charitable Giving for Same-Sex Couples After United States v. Windsor*, PROB. & PROP. MAG., Sept.–Oct. 2014 (discussing the effects of the Supreme Court's decision in *Windsor* on same-sex married couples).

## C. EITC

### 1. *In General*

The EITC is a refundable credit targeted to low-income taxpayers that is based on earned income.<sup>116</sup> It is the most redistributive federal tax expenditure and reduces poverty significantly.<sup>117</sup> The EITC also provides an incentive for low-income taxpayers to work because the amount of the credit increases as earned income increases.<sup>118</sup> As Table 2 indicates, the credit is quite small for taxpayers with no children but substantial for those with one or more children.<sup>119</sup> At specified higher levels of income, the credit diminishes and eventually reaches zero.<sup>120</sup> This “phase-out” feature is necessary in order to limit the credit to low-income taxpayers, although it undermines the work incentive purpose of the EITC.<sup>121</sup> The phase-out thresholds also create a marriage penalty for certain individuals.<sup>122</sup> In particular, two-earner couples where each spouse earns a significant proportion of the couple’s income are likely to face substantial loss of the EITC.<sup>123</sup>

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<sup>116</sup> See generally Kerry A. Ryan, *EITC As Income (In)Stability?*, 15 FLA. TAX REV. 583, 592–99 (2014) (discussing the mechanics of the EITC and its effectiveness as a work incentive).

<sup>117</sup> See THOMAS L. HUNGERFORD & REBECCA THIESS, ECON. POL’Y INST., *THE EARNED INCOME TAX CREDIT AND THE CHILD TAX CREDIT 2* (2013), <http://www.epi.org/publication/ib370-earned-income-tax-credit-and-the-child-tax-credit-history-purpose-goals-and-effectiveness/> [<http://perma.cc/468D-Q2D7>].

<sup>118</sup> See *id.* at 3.

<sup>119</sup> See *infra* Table 2.

<sup>120</sup> See HUNGERFORD & THIESS, *supra* note 117, at 3.

<sup>121</sup> See *id.* at 6–7.

<sup>122</sup> See Janet Holtzblatt & Robert Rebelein, *Measuring the Effect of the EITC on Marriage Penalties and Bonuses*, 53 NAT’L TAX J. 1107, 1108 (2000).

<sup>123</sup> See *id.* at 1119.

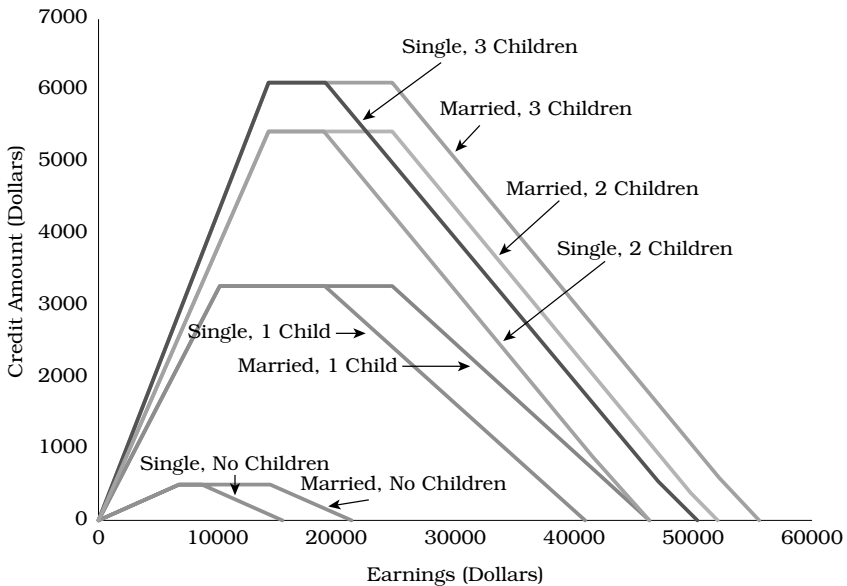


TABLE 2. 2013 INCOME LIMITS FOR THE FEDERAL EITC FOR SINGLE AND MARRIED INDIVIDUALS<sup>124</sup>

Children	Maximum Credit	Maximum Earnings (Credit = 0)	
		Single	Married
Childless	\$496	\$14,590	\$20,020
One Child	\$3,305	\$38,511	\$43,941
Two Children	\$5,460	\$43,756	\$49,186
Three or More Children	\$6,143	\$46,997	\$52,247

As the following chart indicates, couples with children and low-to-moderate income levels, where both individuals contribute substantial earnings, are likely to incur an EITC marriage penalty. If they marry, their combined earnings will move them into the EITC phase-out range, and they will lose much of the EITC that they would be able to claim as single filers.

FIGURE 1. EARNED INCOME TAX CREDIT BY NUMBER OF CHILDREN AND FILING STATUS, 2014<sup>125</sup>



<sup>124</sup> 2014 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates, INTERNAL REVENUE SERVICE, <http://www.irs.gov/Credits-&Deductions/Individuals/Earned-Income-Tax-Credit/EITC-Income-Limits-Maximum-Credit-Amounts> [http://perma.cc/FM2Z-EECK ] (last updated July 31, 2015).

<sup>125</sup> See *infra* Figure 1; *Earned Income Tax Credit Parameters, 1975-2015*, TAX POLICY CTR. (Nov. 3, 2014), <http://www.taxpolicycenter.org/taxfacts/displayfact.cfm?Docid=36> [http://perma.cc/P4DS-J6FB].

2. *Women in Same-Sex Marriages: More Likely to Incur an EITC Marriage Penalty*

The following example illustrates who is most likely to incur an EITC marriage penalty:

**Example 4: EITC Marriage Penalty**

In 2013, Kim, who has one child and \$16,000 of earned income, and Maria, who has no children and \$25,000 of earned income, got married. If they had not married, Kim would have received a tax refund of \$4,250 and Maria would have had a tax liability of \$1,804, for a combined net refund of \$2,446. However, as married taxpayers, their combined earnings put them into the EITC phase-out range and they lose most of the EITC. Their total tax liability is \$347. Kim and Maria incur a marriage penalty of \$2,793.<sup>126</sup>

Kim and Maria’s combined net refund (filing as single taxpayers):	\$(2,446)
Kim & Maria’s tax liability (filing married):	\$347
<b>Marriage Penalty</b>	<b>\$2,793</b>

Referring to Figure 1 above, Kim, a single mother with one child and earnings of \$16,000, would fall on the line labeled “Single, 1 Child,” and she would be eligible for an EITC of about \$3,250. If she were to marry Maria, they would move to the line labeled “Married, 1 Child,” and with combined earnings of \$41,000, they would be eligible for an EITC of only \$349.

Demographic data show that women in same-sex couples are disproportionately represented in the group of taxpayers who incur the EITC marriage penalty.<sup>127</sup> They are more likely to be low-income<sup>128</sup> and more likely to contribute relatively

<sup>126</sup> This example is based on one found in Elaine Maag, *Marriage Penalties—The Dilemma for Low-Income Parents*, SPOTLIGHT ON POVERTY AND OPPORTUNITY (May 28, 2013), <http://www.spotlightonpoverty.org/ExclusiveCommentary.aspx?id=594ef2af-dc11-4c05-8144-1f9060e46131> [<http://perma.cc/DBT8-2GDC>].

Further details for the computation of Kim and Maria’s taxes are as follows:

	Kim (and one child) (filing singly)	Maria (filing singly)	Kim & Maria (filing married)
Earnings	\$16,000	\$25,000	\$41,000
Tax Before Credits	0	1,804	1,700
EITC	-3,250	—	-353
Child Tax Credit	-1,000	—	-1,000
Total Tax Liability	- 4,250	1,804	347

<sup>127</sup> See *infra* notes 141–42 and accompanying text.

<sup>128</sup> See *infra* notes 134–41 and accompanying text.

equal amounts to household income.<sup>129</sup> However, they are not more likely to have children.<sup>130</sup>

Fewer same-sex female couples have children than different-sex couples. Gary Gates analyzed data from a 2012 Gallup Daily Tracking Survey and the U.S. Census Bureau's 2011 American Community Survey (ACS), and found that 19% of same-sex couple households included children under age 18.<sup>131</sup> This percentage breaks down further to 27% of female same-sex couples and nearly 11% of male same-sex couples.<sup>132</sup> By comparison, among different-sex couples, the proportion with children under age 18 was 43.5% in 2011.<sup>133</sup>

Although female same-sex couples are not as likely to have children, they are more likely than different-sex married couples to be at or near the poverty line. Analyzing data from the U.S. Census Bureau's 2010 American Community Survey, Lee Badgett, Laura Durson, and Alyssa Schneebaum found that among female same-sex couples, the proportion of those who are poor (below the federal poverty line) was significantly higher than for different-sex married couples, 7.6% versus 5.7%, respectively.<sup>134</sup> Relatedly, they also found that children

<sup>129</sup> See *supra* notes 33–44 and accompanying text.

<sup>130</sup> See *infra* note 132 and accompanying text.

<sup>131</sup> See Gary J. Gates, WILLIAMS INST., LGBT PARENTING IN THE UNITED STATES 2 (2013).

<sup>132</sup> See *id.*

<sup>133</sup> See GATES, *supra* note 32, at 5.

Relatedly, all LGBT women (whether partnered or not) were as likely as non-LGBT women to have children under the age of 18 at home (about 32% for both groups), according to a 2012 Gallup survey. See Gary J. Gates & Frank Newport, *Special Report: 3.4% of Adults Identify as LGBT*, GALLUP (Oct. 18, 2012), <http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx> [<http://perma.cc/5UPS-GRZU>]. In contrast, LGBT men were about half as likely as non-LGBT men to have children in their homes, 16% versus 31%, respectively. See *id.*

<sup>134</sup> See M.V. LEE BADGETT, LAURA E. DURSON & ALYSSA SCHNEEBAUM, WILLIAMS INST., NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY AND BISEXUAL COMMUNITY 7 (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf> [<http://perma.cc/3TVE-TRJ7>]. Due to the limitations of the ACS source data, Badgett, Durson, and Schneebaum include both married and unmarried couples in their categories of male and female same-sex couples, which precludes a direct comparison between married versus unmarried different-sex and same-sex couples. See *id.*

A predecessor study analyzing 2000 ACS data found similar differences between poverty rates of female same-sex couples and different-sex married couples, 6.9% versus 5.4% respectively. See RANDY ALBELDA, M.V. LEE BADGETT, ALYSSA SCHNEEBAUM & GARY J. GATES, WILLIAMS INST., POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY 5 (2009), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf> [<http://perma.cc/47Z4-U2B2>]; see also Anastasia H. Prokos & Jennifer Reid Keene, *Poverty Among Cohabiting Gay and Lesbian, and Married and Cohabiting Heterosexual Families*, 31 J. FAM. ISSUES 934, 944 (2010) (finding a higher

in female same-sex couples had significantly higher poverty rates than children in married different-sex couples, 19.2% versus 12.1%, respectively.<sup>135</sup>

Other findings of Badgett, Durson, and Schneebaum present a more ambiguous picture about poverty rates of women in same-sex couples relative to other groups. For example, when they used a low-income metric instead of a poverty metric, they found female same-sex couples and married different-sex couples to be at the same level, about 18%.<sup>136</sup> Furthermore, they found that unmarried different-sex couples have the highest poverty rates of all, compared to married different-sex couples, male same-sex couples, and female same-sex couples.<sup>137</sup> Similarly, they also found the highest poverty rates for children of unmarried different-sex couples, as compared to married different-sex couples, male same-sex couples, and female same-sex couples.<sup>138</sup>

TABLE 3. INDIVIDUAL INCOME TAX RATES BY TAXABLE INCOME, 2014; POVERTY RATES OF WOMEN IN SAME-SEX COUPLES RELATIVE TO OTHER GROUPS

	Married Different Sex	Unmarried Different Sex	Male Same Sex	Female Same Sex
Percent of Poor Couples	5.7	14.1	4.3	7.6
Percent of Poor Children in Coupled Families	12.1	29.8	23.4	19.2

Why poverty rates are so high for unmarried different-sex couples and their children is a complex question. It is due at least in part to the marriage penalties imposed by the EITC and

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absolute poverty rate for same-sex female couples as compared to different-sex married couples using 2000 ACS data, 12% versus 6%, respectively).

<sup>135</sup> See BADGETT, DURSON & SCHNEEBAUM, *supra* note 134, at 8. The predecessor study analyzing 2000 ACS data found similar higher poverty rates for children in female same-sex couples versus children in married different-sex couples, 19.7% versus 9.4%, respectively. See ALBELDA, BADGETT, SCHNEEBAUM & GATES, *supra* note 134, at 6.

<sup>136</sup> See BADGETT, DURSON & SCHNEEBAUM, *supra* note 134, at 7. They define low-income couples to be those with incomes below 200% of the federal poverty rate. See *id.*

<sup>137</sup> See *id.*; cf. Prokos & Keene, *supra* note 134, at 947 (finding that gay and lesbian families with children are more likely than different-sex married couples with children to be poor but less likely than cohabiting different-sex couples with children to be poor).

<sup>138</sup> See BADGETT, DURSON & SCHNEEBAUM, *supra* note 134, at 8.

other disincentives to marriage in the tax-transfer system, such as the Supplemental Nutrition Assistance Program (SNAP) (food stamps) and Medicaid.<sup>139</sup> When faced with these penalties, many poor couples will choose not to marry:

Not getting married is the major tax shelter for low- and moderate-income households with children. In many low-income communities around the nation, marriage is now the exception rather than the rule. . . . Our tax and welfare system thus favors those who consider marriage an option—to be avoided when there are penalties and engaged when there are bonuses. The losers tend to be those who consider marriage vows sacred.<sup>140</sup>

The extent to which couples like Kim and Maria in the example above will choose not to marry in order to avoid marriage penalties of the tax-transfer system has not yet been studied. However, according to Badgett, Durson, and Schneebaum, women in same-sex relationships are “significantly more likely to be in poverty, indicating that lesbian couples—who combine two low women’s incomes—are at particular risk of economic difficulty.”<sup>141</sup> What this means is that women in same-sex relationships will either incur EITC marriage penalties more frequently than different-sex couples or be deterred from marriage in greater numbers than different-sex couples.<sup>142</sup>

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<sup>139</sup> See JONATHAN BARRY FORMAN, MAKING AMERICA WORK 113–23 (2006); MELISSA S. KEARNEY & LESLEY J. TURNER, THE HAMILTON PROJECT, GIVING SECONDARY EARNERS A TAX BREAK: A PROPOSAL TO HELP LOW- AND MIDDLE-INCOME FAMILIES 1, 9–11 (2013); Adam Carasso & C. Eugene Steuerle, *The Hefty Penalty on Marriage Facing Many Households with Children*, 15 FUTURE CHILD 157, 159–61 (2005); Stacy Dickert-Conlin & Scott Houser, *Taxes and Transfers: A New Look at the Marriage Penalty*, 51 NAT’L TAX J. 175, 197–98 (1998); Nada Eissa & Hilary Williamson Hoynes, *Explaining the Fall and Rise in the Tax Cost of Marriage: The Effect of Tax Law and Demographic Trends, 1984–97*, 53 NAT’L TAX J. 683, 710 (2000); Bruce D. Meyer, *The Effects of the Earned Income Tax Credit and Recent Reforms*, in 24 TAX POLICY AND THE ECONOMY 153, 170 (Jeffrey R. Brown ed., 2010).

<sup>140</sup> *Labor Force Participation, Taxes, and the Nation’s Social Welfare System: Hearing Before the H. Comm. on Oversight and Government Reform*, 113th Cong. 4–5 (2013) (statement of C. Eugene Steuerle, Urban Institute).

<sup>141</sup> See BADGETT, DURSON & SCHNEEBAUM, *supra* note 134, at 24.

<sup>142</sup> The increased likelihood that female same-sex couples will face EITC marriage penalties is borne out by other research indicating that female same-sex couples are more likely to be two-earner couples with relatively equal incomes. See *supra* notes 42–44 and accompanying text. It is precisely this type of couple that encounters the highest EITC marriage penalty. See Carasso & Steuerle, *supra* note 139, at 158, 164; KEARNEY & TURNER, *supra* note 139, at 9–10; David John Marotta, *Earned Income Tax Credit (EITC) Punishes Marriage*, FORBES (Jan. 20, 2013, 10:51 AM), <http://www.forbes.com/sites/davidmarotta/2013/01/20/earned-income-tax-credit-eitc-punishes-marriage/> [<http://perma.cc/8NVY-DRZM>].

In sum, demographic statistics and sociological research relating to income levels, wealth holdings, child rearing, and employment patterns of women in same-sex couples as compared to people in different-sex couples suggest that women in same-sex couples will: (1) be more likely to incur penalties and less likely to receive bonuses under the income tax joint return; (2) will be less likely to receive the benefits of the estate tax marital deduction, gift splitting, and QTIP trust; and (3) will be more likely to incur marriage penalties under the EITC. The next Part situates the tax treatment of women in same-sex marriages within a broader critique of the taxation of marriage.

## II

### HISTORY AND FICTION IN THE TAX TREATMENT OF MARRIED PEOPLE

This Part first provides a historical context for the enactment of the joint return and the marital deduction and QTIP trust rules. It describes how these fundamental changes to the tax law—which provided preferential tax treatment to traditional marriages in which the husband was the dominant earner of income and owner of wealth—were politically motivated to quell a rising state law movement toward stronger marital property rights for women. This Part then analyzes how the fiction of marital unity served as the principal policy rationale for these major changes in the taxation of married people. It argues that this specious fiction, which has grown in stature to become a first principal of taxation in the eyes of many scholars, obscures inequities and irrationalities in the taxation of married people and impedes reasoned policy analysis and legal reform.

#### A. Historical Context

##### 1. *The Joint Return*

Congress enacted the modern joint return in 1948 to eliminate the disparate tax treatment of married couples in community property versus common law states.<sup>143</sup> This disparity had

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<sup>143</sup> See Dennis J. Ventry, Jr., *Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459, 1516–18 (2011). Although a married couple could file a joint return prior to 1948, there was generally no advantage to this because joint returns were subject to the same rate schedule as individuals' returns. In fact, it was often more advantageous for husband and wife to file separately. See *id.* at 1466–71.

The story of how we came to adopt the joint return is well known, though it never ceases to engage and entertain tax students and scholars. See generally Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389,

arisen as a result of two Supreme Court decisions, *Poe v. Seaborn*<sup>144</sup> and *Lucas v. Earl*.<sup>145</sup> Under *Poe v. Seaborn*, income earned by a husband in a community property state was taxed half to him and half to his wife.<sup>146</sup> The Court reasoned that community property income vested in the marital unit, not with the individual spouse who earned it, and that therefore, half of it belonged to each spouse.<sup>147</sup> The effect of this treatment, which has come to be called "income splitting," was that each spouse's putative half of the income received the benefit of progressing through the lower tax brackets of the tax rate structure.<sup>148</sup>

In contrast, married couples residing in common-law states were not permitted to income split, their attempts to do so having been disallowed in *Lucas v. Earl*.<sup>149</sup> In *Earl*, a married couple, Guy and Ella Earl, entered into a contract under which Guy assigned half of his future income to Ella. The Court held that all of the income first vested in the husband and was therefore fully taxable to him.<sup>150</sup> Thus, if a married couple had only one earner, as was typically the case at the time, his income would be allowed only one progression through the lower tax brackets.<sup>151</sup> Although *Lucas v. Earl* disallowed contractual income splitting between a husband and wife, husbands in common law states used other devices, such as family partnerships and trusts, to shift income to their

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1399–1414 (1975) (detailing the development of the joint tax return); Jones, *supra* note 9, at 292–96 (arguing that changing gender roles influenced the development of the joint tax return); Kahng, *Fiction in Tax*, *supra* note 9, at 26–32 (describing legal fictions in tax, particularly the fiction of marital unity); McMahon, *supra* note 9, at 727–38 (noting that tax avoidance by married couples under both community and common law systems during the Great Depression and World War II served as the impetus for the development of the joint tax return); Ventry, *supra* (tracing the development of the principle that ownership, rather than marriage, determines federal taxation of families).

<sup>144</sup> 282 U.S. 101 (1930).

<sup>145</sup> 281 U.S. 111 (1930).

<sup>146</sup> See *Seaborn*, 282 U.S. at 118.

I refer to men as earners and wealth holders in this historical account because men were the dominant earners of income and holders of wealth during this time period. See Jones, *supra* note 9, at 262–65.

<sup>147</sup> See *Seaborn*, 282 U.S. at 117–18.

<sup>148</sup> See Jones, *supra* note 9, at 266–67.

<sup>149</sup> See *Earl*, 281 U.S. at 114–15.

<sup>150</sup> See *id.*

<sup>151</sup> See Kahng, *Fiction in Tax*, *supra* note 9, at 26–27.

wives.<sup>152</sup> The IRS often challenged these devices as sham transactions and aggressively litigated these cases.<sup>153</sup>

Common law states, in order to obtain for their residents the favorable income splitting treatment enjoyed by married couples in community property states, began to switch to community property regimes under which husbands and wives had equal ownership in marital property.<sup>154</sup> At the same time, the estate tax treatment of community property and common law married couples was also in flux, as discussed below.<sup>155</sup>

In 1948, Congress put an end to the so-called turmoil created by states switching to community property laws and adopted the joint return rate structure, setting the amount for each tax bracket at double the amount for individual returns.<sup>156</sup> As a result, all couples, whether in community property or common law states, got the benefits of income splitting.<sup>157</sup>

The 1948 law eliminated the disparate treatment of married couples across the states by reducing taxes for married couples in common law states.<sup>158</sup> However, it also left unmarried taxpayers—including sympathetic widows, widowers, and others who supported families—with disproportionately heavy tax burdens.<sup>159</sup> To address these concerns, in 1951 Congress added a new filing status—head of household—for unmarried taxpayers with dependents, with bracket amounts roughly

<sup>152</sup> See Jones, *supra* note 9, at 274–93; McMahon, *supra* note 9, at 729–34.

<sup>153</sup> See *Revenue Revisions 1947–48: Hearings Before the Comm. on Ways and Means on Community Property and Family Partnerships*, 80th Cong. 846, 867–69 (1947) [hereinafter 1947 Hearings].

<sup>154</sup> Oklahoma, Oregon, Michigan, Nebraska, Pennsylvania, and the Territory of Hawaii all enacted community property regimes. See SPECIAL TAX STUDY, COMM. ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, REVENUE REVISION, 1947–48, at 1, 12 (1947) [hereinafter Special Report]. All repealed their community property laws after the tax legislation of 1948 described below.

<sup>155</sup> See *infra* section II.A.2.

<sup>156</sup> See Revenue Act of 1948, ch. 168, §§ 301–03, 62 Stat. 110, 114 (codified as amended in scattered sections of 26 U.S.C.).

<sup>157</sup> See Ventry, *supra* note 143, at 1517–18.

<sup>158</sup> See *id.*

<sup>159</sup> For detailed accounts of the politics and legislative activity following the 1948 adoption of the joint return, see generally Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 781–87 (1989) (arguing that the use of marital status to define taxpayers leads to disparate treatment of widows, widowers, and unmarried individuals); Ventry, *supra* note 143 (arguing that ownership of income and property, rather than marriage, determines tax liability); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 33–39 (2000) (comparing income tax treatment among single-earner married couples, two-earner married couples, and unmarried taxpayers).



halfway between those for single and joint return filers.<sup>160</sup> This left only one group to pay disproportionately high taxes: single taxpayers, whose taxes ranged from 20% to 40% higher than that of an equivalent joint filing couple.<sup>161</sup> In 1969, Congress cut their taxes, too, by capping their taxes at 20% higher than the taxes paid by equivalent joint filing couples.<sup>162</sup>

The effect of these changes was to create a mix of marriage bonuses and penalties that we see today. Prior to 1969, married couples never paid more than a comparable unmarried couple, and sometimes paid less.<sup>163</sup> However, the 1969 law, when it ameliorated the tax burden on single filers, for the first time imposed a higher tax on a married couple than on an unmarried couple with the same combined income.<sup>164</sup> Thus, after 1969, a married couple sometimes paid less, or sometimes paid more, than an unmarried couple with comparable income—the creation of marriage bonuses or penalties.

## 2. *The Marital Deduction and QTIP Trust*

Congress also amended the estate tax in 1948 to address a disparity between community property and common law residents in the taxation of spousal wealth transfers.<sup>165</sup> Here, again, husbands in community property states had enjoyed an advantage: if, for example, a decedent bequeathed his entire estate to his widow, his estate was taxed on only half of the community property transferred to her because she was deemed already to own the other half.<sup>166</sup> In contrast, the estate of a common law decedent was taxed on the entire amount of property bequeathed to his widow.<sup>167</sup>

Congress first tried to eliminate the disparity between community property and common law residents in 1942 by increasing the tax on community property residents. It enacted a provision requiring most community property to be taxed en-

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<sup>160</sup> See Revenue Act of 1951, ch. 521, 301, 65 Stat. 452, I.R.C. § 1(b).

<sup>161</sup> See Robinson & Wenig, *supra* note 159, at 783.

<sup>162</sup> See Tax Reform Act of 1969, Pub. L. No. 91-172, § 803, 83 Stat. 487, 678-85.

<sup>163</sup> See Bittker, *supra* note 143, at 1429-31.

<sup>164</sup> See *id.*

<sup>165</sup> The gift tax follows a parallel history with the estate tax, but is omitted for the sake of simplicity.

<sup>166</sup> See, e.g., Estate of Lee v. Comm'r, 111 T.C. 141, 145 (1948) (finding that decedent had a one-half interest in the community property).

<sup>167</sup> See *Reduction of Individual Income Taxes: Hearings on H.R. 4790 Before the S. Comm. on Finance, 80th Cong. 23 (1948)* [hereinafter Senate Hearings] (statement of John W. Snyder, Secretary of the Treasury).

tirely in the estate of the first spouse to die.<sup>168</sup> Community property residents complained that the increase caused hardships and inequities and the reform was short lived.<sup>169</sup> In 1948, Congress repealed the 1942 provision and in its place enacted a marital deduction.<sup>170</sup>

The new marital deduction permitted common law decedents to transfer up to one-half of their property to the surviving spouse tax free, thus reducing the estate tax burden on common law residents and equalizing it with that of community property residents.<sup>171</sup> The deduction was designed to mimic the prior law's treatment of community property residents, who were required to pay tax on only half the estate, on the theory that their wives already owned the other half.<sup>172</sup>

The 1948 marital deduction applied only to outright transfers.<sup>173</sup> Transfers in trust—those in which the wife had an income interest that would terminate after some period of time—generally did not qualify for the deduction unless the wife was given control over the ultimate disposition of the trust property.<sup>174</sup> Significantly, dower transfers—those in which the

<sup>168</sup> Revenue Act of 1942, Pub. L. No. 77-753, § 402(b), 56 Stat. 798, 942 (amending § 118(e) of the 1939 Code) (repealed 1948).

<sup>169</sup> See, e.g., Senate Hearings, *supra* note 167, at 337 (statement of J. P. Jackson, representing State Rights Association of Houston, Texas); *Revenue Revisions, 1947-48: Hearings Before the Comm. on Ways and Means on Community Property and Family Partnerships*, 80th Cong. 776-93 (1947) (statements of Charles E. Dunbar, Jr. and John G. Wisdom, attorneys for the Louisiana Community Property Taxpayers Committee).

<sup>170</sup> See Revenue Act of 1948, ch. 168, § 351, 62 Stat. 110, 116-17.

<sup>171</sup> See *id.*

<sup>172</sup> See S. REP. NO. 80-1013, at 27-28 (1948).

Under prior law, a husband in a community property state would be taxed on only half the marital estate bequeathed to his wife, on the theory that the wife already owned the other half. See, e.g., *Estate of Lee v. Comm'r*, 11 T. C. 141, 144-45 (1948). In contrast, a husband in a common law state would be taxed on the entire estate. See Senate Hearings, *supra* note 167, at 26 (statement of John W. Snyder, Secretary of the Treasury).

In 1942, the estate tax took a brief detour from the prior law described in the preceding paragraph when Congress equalized the estate tax treatment of community property and common law residents by taxing the entire estate bequeathed by a community property husband to wife. Revenue Act of 1942, Pub. L. No. 77-753, § 402(b), 56 Stat. 798, 942 (amending § 118(e) of the 1939 Code) (repealed 1948). Obviously, community property residents were not happy with this solution and complained that it was unfair. See, e.g., 1947 Hearings, *supra* note 153, at 776-93 (statements of Charles E. Dunbar, Jr. and John G. Wisdom, attorneys for the Louisiana Community Property Taxpayers Committee); Senate Hearings, *supra*, note 167, at 337 (statement of J. P. Jackson, representing State Rights Association of Houston, Texas).

<sup>173</sup> See Revenue Act of 1948, ch. 168 § 361, 62 Stat. 110, 117-18.

<sup>174</sup> See *id.* at 118. This limitation is codified today at I.R.C. § 2056(b)(5) (2015).

wife received only an income interest for life and the decedent husband designated the ultimate recipients of the trust property upon his wife's death—did not meet this requirement and were not deductible.<sup>175</sup>

The new marital deduction thus created an incentive for decedents to transfer property outright to the surviving spouse and a disincentive for them to use the customary transfer in trust in which the surviving spouse received only an income interest. Then Treasury Secretary John W. Snyder, who opposed the marital deduction, pointed out these incentive effects:

Since it is a frequent practice in common-law States for a wealthy husband to give his wife a life interest in his estate with remainders to his children or other beneficiaries, equality of treatment [between community property and common-law residents] would be achieved only by interfering to a large extent with this long-established pattern of family dispositions.<sup>176</sup>

Despite the marital deduction's "immediate and startling"<sup>177</sup> disruption to customary wealth transfer patterns, it seems that most lawmakers overlooked or simply did not understand its estate planning implications. As Stanley Surrey, then Tax Legislative Counsel for the Treasury Department, observed:

[T]he splitting of estates and gifts simply rode in unheralded and uninspected on the coattails of splitting of income. . . . The impact upon estate planning, upon the disposition of property within the family, is immediate and startling. Yet on passage of the Act, only a relative handful of attorneys close to the theater of operations even approached awareness of what these provisions involve, and it will be many months or even years before operative understanding of all of their ramifications is achieved by tax practitioners.<sup>178</sup>

Once practitioners learned of the new law, they were horrified to realize that the marital deduction in effect created an anti-dower incentive. Their commentary is a revealing admixture of condescending and mistrustful attitudes toward women, seasoned with castration imagery:

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<sup>175</sup> See *id.* For a history of dower transfers and their continued use in modern estate planning, see Fellows, *supra* note 9, at 146–59.

<sup>176</sup> Senate Hearings, *supra* note 167, at 26 (statement of John W. Snyder).

<sup>177</sup> Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1117 (1948).

<sup>178</sup> *Id.*

The wife must be given absolute control, either during her life or by her will; in either event she may (foolishly perhaps) cut off the objects of his bounty and leave his estate to a gigolo second husband.<sup>179</sup>

Even where the [power of appointment trust] (rather than outright bequest) is used, the wife's unrestricted power of appointment can be a source of great personal power. The [husband's designated beneficiaries] can be cut off by a stroke of mother's testamentary pen.<sup>180</sup>

In general, property relieved of taxation in the estate of the spouse first to die will be taxed in the estate of the survivor—and will be subject to the unfettered disposition of the survivor in the meantime. For many people this power of disposition will be too high a price to pay . . . .<sup>181</sup>

The tax law should not offer a premium to a husband who ignores his better judgment and grants his widow a general power of appointment leaving his children at the mercy of any charlatan who has his widow's ear.<sup>182</sup>

Eventually, in 1981, Congress remedied the inadvertent disincentive for dower transfers.<sup>183</sup> The Economic Recovery Tax Act of 1981 (ERTA) made two major changes to the marital deduction. First, it made deduction unlimited in amount, eliminating the 1948 restriction that limited the deduction to half the decedent's wealth.<sup>184</sup> Second, it made dower transfers deductible in the decedent's estate under a new deduction for a qualified terminable interest in property (QTIP).<sup>185</sup> The new QTIP rules also provided that property in a QTIP trust would be taxed in the widow's estate, even though she would not control the disposition of the trust property upon her death.<sup>186</sup>

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<sup>179</sup> Charles Looker, *The Impact of Estate and Gift Taxes on Property Dispositions*, 38 CALIF. L. REV. 44, 62 (1950).

<sup>180</sup> *Id.* at 67.

<sup>181</sup> John J. Waldron, *Implications of the Marital Deduction*, 87 TR. & EST. 523, 523 (1948).

<sup>182</sup> John W. Beveridge, *The Estate Tax Marital Deduction—Beneficent Intent, Baneful Result*, 44 TAXES 283, 284 (1966).

<sup>183</sup> Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172. For a detailed history and analysis of the QTIP provisions, see Gerzog, *supra* note 9, at 306–18.

<sup>184</sup> See I.R.C. § 2056(a) (2012).

<sup>185</sup> See *id.* § 2056(b)(7).

<sup>186</sup> See *id.* § 2044.

## B. The Fiction of Marital Unity<sup>187</sup>

### 1. *The Joint Return*

The 1948 adoption of income splitting under the joint return rested on a fiction that all married couples shared their income. Stated another way, a married couple was treated as an irreducible economic unit, and the individual rights of husband and wife to marital income and property were deemed irrelevant. Once this fiction was adopted, it seemed logical to conclude that married couples with equal amounts of income should pay equal amounts of tax. It simply did not matter that husbands and wives had differing rights to the income depending on whether they resided in community property or common law states.

Clearly, the immediate political goal in Congress's adoption of this fiction was to reduce tax liability for husbands residing in common law states.<sup>188</sup> Income splitting was also beneficial from a policy perspective. It eliminated the disruption of common law states switching to community property regimes. It also removed the incentive for residents of common law states to use devices, such as partnerships and trusts, to shift income to their spouses. Both the Report of the House Committee on Ways and Means and the Report of the Senate Committee on Finance cite these two benefits as the reasons for Congress's adoption of income splitting.<sup>189</sup> Neither report, however, mentions the costs of income splitting. One cost was that income splitting mismeasured income to the extent that it ignored the differing economic rights allocated to husbands and wives under differing state property law regimes.<sup>190</sup> Another cost was its effect on married women's property rights: income splitting eliminated the political pressure on common law states to provide married women with the stronger property rights of a community property regime.<sup>191</sup>

The Special Tax Study Committee, which recommended that the Ways and Means Committee adopt income splitting, brushed aside the importance of women's marital property rights as insignificant:

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<sup>187</sup> The following account is based on Kahng, *Fiction in Tax*, *supra* note 9.

<sup>188</sup> See SPECIAL TAX STUDY COMM. TO THE H.R. COMM. ON WAYS AND MEANS, 80TH CONG., REVENUE REVISION, 1947-48 35, 40 (1947) [hereinafter *Minority Report*] (describing the joint return as a "poorly disguised measure" to relieve high-income groups).

<sup>189</sup> S. REP. NO. 80-1013, at 23-24 (1948); H.R. REP. NO. 80-1274, at 22-23 (1948).

<sup>190</sup> See Jones, *supra* note 9, at 295.

<sup>191</sup> See *id.*

The fact that the legal rights of [a man's] wife under the State law may differ . . . does not seem to justify the significant differences in Federal income taxes payable. There has come to be rather, general agreement that spouses with similar incomes should pay similar Federal taxes, no matter where they live.<sup>192</sup>

The reasoning of the Special Tax Study Committee is specious. Rather than recognizing the fiction of treating all married couples as if they shared their income, the Committee relied upon the fiction to trivialize the differing allocations of rights between husband and wife under common law and community property. By defining the policy goal as equal treatment of married couples with equal income, in essence treating each married couple as an irreducible unit, the Committee preempted any consideration whatsoever of each spouse's individual rights to marital income and property.<sup>193</sup>

As Carolyn Jones has argued, income splitting was attractive to legislators and policymakers not only because it reduced taxes for common law residents, but also because it halted the community property movement and defeated the advancement of stronger property rights for married women, thereby preserving traditional gender roles and power relationships.<sup>194</sup> The

<sup>192</sup> Special Report, *supra* note 154, at 12.

<sup>193</sup> The Special Tax Study Committee further demonstrated the error in its logic through its treatment of other alternatives. The Committee viewed as inferior alternatives that would have recognized the differing rights accorded to married women in different states, not only because of the administrative costs the alternatives would have entailed but also because they would not treat married couples equally. For example, the Committee considered taxing all earned income to the earner, even in community property states, and all community property income to the spouse who exercised management and control of the property. As an alternative proposal, the Committee considered reversing *Lucas v. Earl* so that married couples in common law states could enter into sharing agreements that would be recognized for tax purposes. The Committee rejected these alternatives as inferior to income splitting, in part because they believed the income splitting scheme would be easier to administer. *See id.* However, the Committee cited equal taxation of married couples as the most important benefit of income splitting:

[Income splitting] eliminates the legal and administrative problems which now arise from the many attempts to divide income between spouses . . . . It avoids the serious questions which would arise in the interpretation and construction of contracts between spouses. *Most important, [income splitting] puts the incomes of husbands and wives, wherever resident, on a like basis for Federal tax purposes.*

*Id.* (emphasis added).

<sup>194</sup> *See* Jones, *supra* note 9, at 266, 295. Others have argued that there was not an antiwoman agenda. *See* Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 347 (1994) (describing the 1948 enactment of the joint return as "essentially a historical accident"); Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. REV. 1521, 1574 (1998) (describing Grace

fiction of marital unity was the vehicle by which Congress could both justify these goals and obscure the social costs of achieving these goals.

In the aftermath of the 1948 Act, marital unity, which during the debates had operated as a convenient fiction and served as political camouflage, became dogma. Stanley Surrey, then Assistant Treasury Secretary for Tax Policy, portrayed the joint return as the product of a reasoned policy analysis, which rightfully treated the married couple “as a [single economic] unit.”<sup>195</sup> By 1976, scholars had elevated marital unity to a first principle of taxation. According to Professor Boris Bittker, one of the most influential tax scholars of the twentieth century, “the 1948 statutory principle of equal taxes for equal-income married couples has been ‘almost universally accepted’ by tax theorists . . . .”<sup>196</sup>

The “principle of equal taxes for equal-income married couples” led Bittker to conceptualize the taxation of married people as a set of “insoluble dilemmas”—three ideals that cannot be attained simultaneously: the first, horizontal equity or couples equality—that is, taxing equal-income married couples equally; the second, a progressive rate structure; and the third, marriage neutrality—that is, not penalizing or rewarding the choice to marry.<sup>197</sup>

Bittker’s framework is now the dominant one.<sup>198</sup> It has an internal logical consistency: it is true that the three articulated

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Blumberg’s finding that “Congress did not adopt joint returns for the purpose of discouraging married women from working”).

<sup>195</sup> Surrey, *supra* note 177, at 1162.

<sup>196</sup> Bittker, *supra* note 143, at 1395 (citation omitted).

<sup>197</sup> *Id.* at 1395, 1419–20. Bittker was not the first to explain the marriage tax dilemma in this way, as a 1972 statement also addressed this dilemma. *Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working, Hearings Before the H.R. Comm. on Ways and Means*, 92d Cong. 78–79 (1972) (statement of Edwin S. Cohen, Ass’t Treas. Sec’y). Nonetheless, Bittker’s article was extremely influential, and he is the one who has become most closely identified with what I call the “Bittker framework.”

<sup>198</sup> See, e.g., CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 2–6 (1997) [hereinafter FOR BETTER OR FOR WORSE] (noting the impossibility of simultaneously achieving equal treatment of married couples, marriage neutrality, and progressivity); MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 451–52 (7th ed. 2013) (noting the same); JANE G. GRAVELLE, THE MARRIAGE TAX PENALTY 52–53 (2003) (detailing the legislative history of the marriage penalty); PAUL MCDANIEL ET AL., FEDERAL INCOME TAXATION 971 (5th ed. 2004) (stating that “it is simply impossible to design a progressive tax regime in which all married couples of equal aggregate income are taxed equally and in which an individual’s tax liability is unaffected by changes in marital status”); James Alm, Leslie A. Whittington & Jason Fletcher, *Is There a “Singles Tax”? The Relative Income Tax Treatment of Single Households*, PUB. BUDGETING & FIN. 69, 85–86 (stating that “[i]t is well known that no tax system

goals cannot be achieved at the same time. However, the first goal is circular insofar as it serves as the rationale for the joint return. If one begins, as Bittker does, with the proposition that equal-income married couples ought to pay equal amounts of tax, then one necessarily assumes that equal-income married couples are the same in ways that matter for horizontal-equity purposes.<sup>199</sup>

This assumption underlies the concept of income splitting under the joint return: husband and wife are assumed to share equally in the income produced within the marital unit, regardless of which spouse actually earns the income. Pamela Gann and Marjorie Kornhauser have interrogated the equal-sharing assumption, and Kornhauser found that equal-income married couples differ widely in the extent to which they pool their income and make joint decisions about consumption.<sup>200</sup> Conversely, people other than married couples—such as unmarried couples and roommates—sometimes do pool resources and make joint consumption decisions.<sup>201</sup> Therefore, if the joint return is premised on equal sharing, it is both over inclu-

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can achieve simultaneously the goals of progressivity, marriage neutrality, and horizontal equity across families”).

<sup>199</sup> As scholars have noted, the whole enterprise of horizontal equity is disturbingly circular. Not only must one assume that the married couple is the appropriate unit of comparison, one must also assume that income is the appropriate metric by which to determine whether two units are equally situated. It seems that all the difficult judgments must be made in advance of actually applying the horizontal equity criterion. See Thomas D. Griffith, *Should “Tax Norms” Be Abandoned? Rethinking Tax Policy Analysis and the Taxation of Personal Injury Recoveries*, 1993 WIS. L. REV. 1115, 1155–56 (arguing that horizontal equity cannot justify tax policy); Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT’L TAX J. 139, 140, 148 (1989) (critiquing horizontal equity as devoid of normative value). But see Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT’L TAX J. 113, 116–17 (1990) (defending horizontal equity).

Anthony Infanti, in his devastating critique of equity analysis, makes a persuasive case for the “subtle, yet pernicious ways in which framing our tax policy analyses in tax equity terms can shape the results of those analyses.” Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1259 (2008). According to Infanti, one of the several ways in which horizontal equity does this is through what he calls a “sanitizing effect”: “Tax equity rids [the] debate of difficult discussions about race, ethnicity, gender, sexual orientation, disability, and/or other forms of invidious discrimination by forcing those discussions to be carried out in ostensibly ‘neutral’ economic terms.” *Id.* at 1209.

<sup>200</sup> See Gann, *supra* note 9, at 24–27 (identifying conceptual and empirical problems with equal sharing between spouses); Kornhauser, *supra* note 9, at 87–91 (cataloguing research studies that show great variation in sharing arrangements between spouses). But see Zelenak, *Marriage and the Income Tax*, *supra* note 194, at 348–55 (arguing that there is strong evidence of pooled marital income consumption).

<sup>201</sup> See Kornhauser, *supra* note 9, at 67.



sive (including married couples who do not share) and under inclusive (excluding unmarried persons who do share).<sup>202</sup>

Another important challenge to the purported “sameness” of equal-income married couples focuses on the differences between one- and two-earner couples.<sup>203</sup> A one-earner couple benefits from the value of household and other unpaid services performed by the stay-at-home spouse (imputed income) and as a result, is better off than a comparable two-earner couple.<sup>204</sup> In addition, a two-earner couple incurs more in the way of nondeductible expenses of producing income, such as childcare, clothing, and commuting expenses, also leaving them worse off than the one-earner couple.<sup>205</sup> Again, the rationale for the joint return—treating equal-income couples equally—is undermined to the extent that equal-income couples are shown to differ in these significant ways.

An even more fundamental challenge to Bittker’s framework is to question why coupled people (whether married or not) should be treated under a separate category at all from single people. The obvious alternative is to treat all people individually, and many scholars have argued for just that.<sup>206</sup>

Despite these serious challenges to the claim that equal-income married couples ought to be taxed equally, the joint return, along with the notion that the couple (whether married or not) is a fundamental unit for tax purposes, remains en-

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<sup>202</sup> See Patricia A. Cain, *Imagine There’s No Marriage*, 16 QUINNIAC L. REV. 27, 54–60 (1996) (describing the underinclusiveness of treating marriage as the only type of economically beneficial household deserving of special tax treatment); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 851–53 (2008) (proposing a system in which spouses or domestic partners could opt to file jointly or individually); Shari Motro, *A New “I Do”: Towards a Marriage-Neutral Income Tax*, 92 IOWA L. REV. 1509, 1540–44 (2006) (describing how a couple’s married or unmarried status is a poor proxy for whether they share income).

<sup>203</sup> See generally Blumberg, *supra* note 9 (discussing the many ways in which the tax law benefits single-earner married couples and disadvantages two-earner married couples).

<sup>204</sup> See McCaffery, *Taxation and the Family*, *supra* note 9, at 1001–05 (discussing the nontaxation of imputed income and its effects on married couples); Staudt, *supra* note 9, at 1589–99 (same).

<sup>205</sup> See McCaffery, *Taxation and the Family*, *supra* note 9, at 1005–10.

<sup>206</sup> See Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 747 (2013); Gann, *supra* note 9, at 36–39; Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 157 (1998); Kornhauser, *supra* note 9, at 108–11; James M. Puckett, *Rethinking Tax Priorities: Marriage, Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409, 1434 (2010); Harvey S. Rosen, *Is It Time to Abandon Joint Filing?*, 30 NAT’L TAX J. 423, 427–28 (1977); Zelenak, *Marriage and the Income Tax*, *supra* note 194, at 342.

trenched in mainstream political and policy discourse.<sup>207</sup> The political and policy debate regarding the joint return has not questioned the primacy of the couple as taxpayer, focusing rather on whether, and to what extent, couples should suffer marriage penalties or enjoy marriage bonuses, and who among the universe of couples ought to be eligible for the marriage bonus.<sup>208</sup>

## 2. The Marital Deduction and QTIP Trust

On the estate tax side, the fiction of marital unity produced even more pernicious results. As discussed above, the 1948 marital deduction inadvertently created a tax disincentive for dower transfers, much to the dismay of estate planning practitioners.<sup>209</sup> In their eyes, the problem with the marital deduction was not that it was based on a fiction of shared wealth between husband and wife. Rather, it required too much reality: in order to be taxed as if he shared his wealth with his wife, a husband actually had to cede control of the wealth to her. Completely inadvertently, the marital deduction strengthened women's property rights by providing a tax incentive for husbands to transfer wealth to their wives.<sup>210</sup>

The fiction of marital unity ultimately provided the solution to this "sorry mess," as Surrey described it.<sup>211</sup> Allan H. W. Higgins, chairman of the American Bar Association, Section of Taxation, Committee on Equalization of Taxes in Community-Property and Common-Law States planted the first seeds of the fiction. During the 1948 Act congressional hearings, he argued that even dower transfers should qualify for the marital deduction in the decedent's estate, as long as they were taxed in the widow's estate.<sup>212</sup> According to Higgins, the fact that the

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<sup>207</sup> See Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*, 11 THEORETICAL INQUIRIES 631, 646-49 (2010).

<sup>208</sup> See Cain, *Imagine There's No Marriage*, *supra* note 202; Cain, *Taxing Families Fairly*, *supra* note 202; Motro, *supra* note 202; Zelenak, *supra* note 159, at 34-39. In recent years, an increasing number of academics have called for repeal of the joint return, but most of them continue to cast their analysis in accordance with Bittker's framework. See, e.g., Alstott, *supra* note 206, at 705, 728-31 (referring to the Bittker framework as an "insoluble" problem that a system of individual filing cannot solve).

<sup>209</sup> See *supra* section II.A.2.

<sup>210</sup> *Id.*

<sup>211</sup> Stanley S. Surrey, *An Introduction to Revision of the Federal Estate and Gift Taxes*, 38 CALIF. L. REV. 1, 14 (1950).

<sup>212</sup> Senate Hearings, *supra* note 167, at 317 (statement of Allan H. W. Higgins, Chairman, American Bar Association, Tax Section, Comm. on Equalization of Taxes in Community-Property and Common-Law States).

widow had no control over the disposition of the trust property was irrelevant: "It has long been the custom to protect wives by placing property in trust. As long as the trust property is taxed at the death of the surviving spouse[,] the marital deduction should apply irrespective of the varying provisions of the trust."<sup>213</sup>

Higgins's claim—that transfers by a married couple to third parties should be taxed only once, no matter which spouse controls the transfer—was based on the fiction of marital unity. Again, the fiction provided a basis for disregarding the allocation of property rights between husband and wife for tax purposes. Higgins's proposal tracked the logic of income splitting. Transfers made by husbands would be deemed to be made by their wives as well. In this fashion, the fiction served to justify favorable tax treatment for transfers in which husbands retained control of the ultimate disposition of their property even after death.

Soon after the 1948 Act was passed, Surrey adopted Higgins's ideas, and explicitly clothed them in the fiction of marital unity:

Husband and wife are regarded as a unit for income tax purposes, and I would similarly regard them as a unit for transfer tax purposes. There would be no tax as long as the enjoyment of property shifted from one to the other within this unit. The transfer tax would apply only when property left this unit and passed to the children or others. The unit would cease to exist on death of the surviving spouse.<sup>214</sup>

Surrey stated his view in neutral, if conclusory, terms: the married couple is a unit, and property should be taxed only upon transfer from the unit to a third party. However, two years later, in 1950, Surrey revealed his true concerns:

Basically the sorry mess we now face resulted from the illicit alliance in 1948 of transfer tax reduction and community property concepts. . . . The husband has to choose between obtaining tax savings through releasing his hand from the control of the property on his wife's death and the risk that when she dies some alien hand will be guiding her actions.<sup>215</sup>

The fiction of marital unity enabled Surrey to disguise his fears that a purportedly untrustworthy or incompetent widow,

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<sup>213</sup> *Id.* at 316.

<sup>214</sup> Surrey, *supra* note 177, at 1162.

<sup>215</sup> Surrey, *supra* note 211, at 14.

guided by an “alien hand” would acquire control of her husband’s wealth.<sup>216</sup>

The 1981 enactment of ERTA actualized Surrey and Higgins’ vision for the marital deduction. As discussed above, ERTA made the marital deduction unlimited in amount and enacted the QTIP trust rules.<sup>217</sup> The legislative history of these provisions explains them by reference to marital unity: all transfers within the unit should be exempt, without any limitation on the amount of transfers.<sup>218</sup> Transfers by the marital unit to others should be taxed only once, when the property leaves the marital unit.<sup>219</sup> ERTA engrafted the income tax fiction of marital unity to the estate tax: “The committee believes that a husband and wife should be treated as one economic unit for purposes of estate and gift taxes, as they generally are for income tax purposes. Accordingly, no tax should be imposed on transfers between a husband and wife.”<sup>220</sup>

After ERTA, the estate tax fiction of marital unity quickly became orthodoxy among tax academics.

All quantitative limitations on the marital deduction were removed because “a husband and wife should be treated as one economic unit for purposes of the estate and gift taxes.” . . . The QTIP provision is a natural extension of the [marital deduction] given the shift in emphasis from mimicking community property to taxing property only once each generation.<sup>221</sup>

Viewed broadly, the unlimited marital deduction has the effect of treating spouses as a single taxpayer with a lifetime equal to the survivor’s. In this light, the transfer of a life interest from one spouse to the other can be regarded as the retention of a life interest by this notional taxpayer.<sup>222</sup>

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<sup>216</sup> *Id.*

<sup>217</sup> See *supra* section II.A.2.

<sup>218</sup> S. REP. NO. 144, 97-144, at 127 (1981); H.R. REP. NO. 97-201, at 159 (1981); STAFF ON J. COMM. ON TAXATION, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981 233 (Comm. Print 1981).

<sup>219</sup> See H.R. REP. NO. 97-201, *supra* note 218, at 160; STAFF ON J. COMM. ON TAXATION, 97TH CONG., *supra* note 218, at 234.

<sup>220</sup> S. REP. NO. 97-144, *supra* note 218, at 127.

<sup>221</sup> Howard E. Abrams, *A Reevaluation of the Terminable Interest Rule*, 39 TAX L. REV. 1, 12–13 (1983).

<sup>222</sup> Joseph Isenbergh, *Simplifying Retained Life Interests, Revocable Transfers, and the Marital Deduction*, 51 U. CHI. L. REV. 1, 32 (1984) (emphasis omitted).

The substantive effect of . . . [the 1981] changes is to treat the marital unit as a separate transfer tax unit with respect to interspousal transfers.<sup>223</sup>

In contrast to the academic explanations for the new law, practitioners were quick to point out the true purpose of the QTIP rules; they eliminated the tax disincentive for dower transfers inadvertently created by the 1948 marital deduction and enabled husbands to reap the benefit of the marital deduction while retaining dead hand control of their wealth:

[E]liminated is the nagging anxiety that the surviving spouse will remarry and . . . divert the marital deduction property from the natural objects of the decedent's bounty.<sup>224</sup>

It is no longer necessary for a testator to make the difficult decision of whether to take advantage of the marital deduction for his estate and give up control over the final disposition of his property or forego the marital deduction and maintain control. Formerly, . . . and a more painful prospect, it was not possible for a testator to ensure that the marital deduction property would not end up in the hands of his successor, if the surviving spouse decided to remarry.<sup>225</sup>

[T]he QTIP trust is attractive to many clients who want to "handcuff" the surviving spouse while at the same time qualifying for the marital deduction.<sup>226</sup>

In her critique of how the law of wills and trusts relegates women to the role of a vessel for patrilineal wealth transmission, Mary Louise Fellows observes that the QTIP rules are "especially revealing of the patriarchy's subversion of married

<sup>223</sup> Harry L. Gutman, *Reforming Federal Wealth Transfers After ERTA*, 69 VA. L. REV. 1183, 1220-21 (1983).

<sup>224</sup> Jeffrey Pennell, *Estate Tax Marital Deduction*, 239-4th TAX MGMT. EST. GIFTS & TR. J. (BNA), at A-58(3) (1990).

<sup>225</sup> *The Uses of a QTIP Trust*, 1 TAX IDEAS § 422 (1990).

Today, estate planners continue to promote the QTIP trust as a way to handcuff the surviving spouse, as Jeffrey Pennell observes in this candid assessment of the reasons for the QTIP trust:

If you think back, QTIP was enacted in 1981, along with adoption of the unlimited marital deduction, I believe because men like members of the House Ways and Means Committee that crafted this legislation did not want their widows to have control over that much of their estates. And didn't . . . [the estate planning community] embrace QTIP predominantly because of its "handcuff" nature?

Jeffrey N. Pennell, *It's Not Your Father's Buick, Anymore: Estate Planning for the Next Generation(s) of Client*, 43 INST. ON EST. PLAN., 13-1, 13-17 (2009). Pennell goes on to speculate that the desire to handcuff wives is much less prevalent among younger men. He speculates that the estate planners, many of whom are from the "GI generation," are out of step with the times. *Id.* at 13-17 to 13-21.

<sup>226</sup> Pennell, *supra* note 224, at A-42.

women's property rights."<sup>227</sup> Similarly, Wendy Gerzog finds the rules "can only be explained as a gender-biased, paternalistic, and degrading treatment of women."<sup>228</sup> The fiction of marital unity disguises the pernicious effects of the QTIP rules described by these scholars. Taxing a wealth transfer only when it left the marital unit seems a justifiable result only because the fiction obscures the "handcuff" worn by the wife.

The fiction of marital unity—that a married couple is a single economic unit—has evolved into a first principle of taxation that is foundational to both the income tax joint return and the estate tax marital deduction and related provisions. In both cases, it provides the justification for a tax regime that privileges a certain type of marriage, in which spousal roles are both gendered and hierarchical. The next Part considers how the introduction of a new group of married taxpayers—same-sex wives—can help disrupt the hidebound orthodoxies of marriage taxation and lead to meaningful reform.

### III ASSESSMENT AND REFORMS

This final Part assesses the tax treatment of women in same-sex marriages in the context of the account of the historical and conceptual underpinnings of marriage taxation, developed in the previous Part. That account both explains and gives credence to my prediction in Part I that the women in same-sex marriage will be taxed disadvantageously relative to people in different-sex marriages. The tax treatment of marriage developed during a time when husbands were the dominant breadwinners and wealth holders and wives were homemakers.<sup>229</sup> Political and social forces of the time, fortified by flawed policy rationales based on the legal fiction of marital unity, led to laws that favor this model of marriage.<sup>230</sup> Today, the tax law continues to reward this anachronistic model of marriage and to penalize other, more egalitarian models of marriage. The effects of this on women in same-sex marriages are both predictable and profound.

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<sup>227</sup> Fellows, *supra* note 9, at 158.

<sup>228</sup> Gerzog, *supra* note 9, at 305; *see also* Dodge, *supra* note 67, at 1734–35 (stating that "[t]here is no doubt that the QTIP device diminishes the autonomy of wives and widows" and remarking upon "the enormous constraints imposed by the QTIP trust on women's control of wealth").

<sup>229</sup> *See supra* note 115 and accompanying text.

<sup>230</sup> *See supra* subpart II.B.

With respect to income tax, the fictional notion of marital unity supports the specious claim that married couples with equal incomes should be taxed equally, and that therefore we should aggregate two spouses' income and tax it under a joint return. The analysis of women in same-sex marriages shows how this "equal" treatment in fact rewards one type of marriage—the traditional, single-earner model of marriage—and penalizes another type of marriage—an egalitarian model of marriage in which both spouses participate in the labor force. The joint return rewards marriages like Ward and June's and Bill and Melinda's, and penalizes marriages like Thelma and Louise's and Ellen and Portia's.<sup>231</sup>

With respect to the gift and estate tax side, the fiction of marital unity supports the seemingly reasonable proposition that we ought not to tax wealth transfers within the marital unit and should tax wealth only when it leaves the marital unit. The analysis of women in same-sex marriages shows how this seemingly reasonable proposition serves to rationalize a set of rules that benefits a certain type of marriage—one in which historically the husband dominated the wife through the inequalities of wealth, age, and power—and provides no benefit to couples who either own less wealth or are more equal in their wealth holdings or share more equally in deciding how to transfer their wealth.<sup>232</sup> The most extreme illustration of this is the QTIP trust, which benefits the "Donald Trump arrangement" of marriage.<sup>233</sup>

The EITC illustrates a separate and serious flaw in the tax law: it equates marriage with economic interdependence and conversely, it assumes no economic interdependence for other types of households.<sup>234</sup> The tax law relies on marriage as a proxy for economic interdependence in many provisions that one might roughly characterize as means based, but the EITC has the most severe impact on vulnerable populations.<sup>235</sup> Using marriage as a proxy for economic interdependence is in-

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<sup>231</sup> See *supra* notes 26–29 and accompanying text.

<sup>232</sup> See *supra* subpart I.B.

<sup>233</sup> See *supra* text accompanying notes 106–13.

<sup>234</sup> See Infanti, *supra* note 9, at 609–10; see also Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2181 (1995) (“[C]ontinued adherence to an unrealistic and unrepresentative set of assumptions about the family affects the way we perceive and attempt to solve persistent problems of poverty and social welfare.”).

<sup>235</sup> Other means-based provisions include the child and dependent care credit, the child tax credit, education tax credits, the adoption credit, and a variety of other deductions and credits that phase out at higher income levels. See CRANDALL-HOLLICK ET AL., *supra* note 10, at 8–9.

creasingly problematic in view of today's fluid and diverse family formations.<sup>236</sup>

My purpose in analyzing the adverse effects of marriage taxation on women in same-sex marriages is not to advocate for a more equal distribution of the benefits and burdens of marriage taxation among all married couples. Rather, my purpose is to show that equality among married couples is an illusory goal based on the fiction of marital unity that has produced irremediable inequities and irrationalities.<sup>237</sup>

Congress should reform the tax law to eliminate or curtail marital status as a determinant of taxation. By relinquishing the fiction of marital unity, so dearly held by lawmakers, policymakers, and scholars, we can cut through the Gordian knot of Bittker's "insoluble dilemma."<sup>238</sup> Contrary to Bittker's argument, married couples do not warrant equal treatment simply because their combined tax attributes are equal. Rather, a married couple consists of two individuals who may resemble or differ from two other individuals who are also married. Same-sex wives, newly recognized as married under the tax law, highlight the ways in which married couples may be different—in terms of how they divide household and market labor, make decisions, and share income and wealth. There is no reason to assume that all married couples would be the same with respect to these relational parameters. Nor is there reason to prefer one set of parameters over another, as the current law does.

In addition to being logically flawed, the current tax treatment of married people perpetuates one model of marriage at the expense of another. It rewards and entrenches an anachronistic, nonegalitarian model of marriage and at the same time, penalizes and discourages a more egalitarian model. Viewed as a means by which the state regulates intimate relationships,<sup>239</sup>

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<sup>236</sup> See Infanti, *supra* note 9, at 609–10, 619.

<sup>237</sup> The problems are irremediable because of the choice of marital unit. For example, Congress could change the tax rate structure to further reduce or eliminate marriage penalties for two-earner couples, but this would unavoidably increase marriage bonuses for single-earner couples and would also unduly penalize single people. A two-earner deduction could ameliorate the first problem but not the second problem. Congress could remedy some of the more egregious problems under the gift and estate tax marital deduction, by, for example, repealing the QTIP trust rules, but this would not alter the inherent bias the marital deduction in favor of couples with unequal wealth holdings.

<sup>238</sup> Bittker, *supra* note 143, at 1419.

<sup>239</sup> See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 472–76 (1996). Elizabeth Emens provides this succinct albeit nonexhaustive catalog of the ways in which the state regulates through marriage:



the tax law is a particularly powerful tool because it imposes immediate and quantifiable economic consequences to marriage. Marrying can produce income tax bonuses of tens or hundreds of thousands of dollars over the lives of a married couple (even more in the case of gift and estate tax benefits), but only if the marriage fits a certain mold. Conversely, a marriage that does not fit that mold can incur income tax penalties of comparable magnitude. Of course, people can choose not to marry, but this is just another form of regulation. Similarly, once two people marry, the promise of marriage rewards or the threat of marriage penalties can shape their behavior and preferences, pushing them away from more egalitarian marriage and toward more traditional marriage.

My analysis of the impact of marriage taxation on same-sex wives cogently demonstrates the consequences of taxation-as-regulation. This novel group of married taxpayers, who are less likely to conform to the privileged model of marriage, will suffer the economic consequences of their nonconformity in the form of fewer tax bonuses and more tax penalties. The tax system epitomizes why scholars such as Nancy Polikoff find the LGBT marriage movement to be problematic; they believe marriage is an irredeemably gendered and hierarchical institution that can subvert LGBT relationships and stunt the development of alternative models of intimate relationships.<sup>240</sup>

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Though state laws vary, state and federal laws affecting marriage broadly include tax benefits and burdens for spouses; immigration benefits; evidentiary privileges; inheritance benefits and obligations; surrogate decision-making responsibilities; parenting presumptions; special forms of property ownership; various veterans' benefits; statutory privileges (such as caretaking leave time under the Family Medical Leave Act); and a legal mechanism and default rules for divorce, *inter alia*.

Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter-marriage*, 99 CALIF. L. REV. 235, 258–59 (2011).

<sup>240</sup> See Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1538–39 (1993); see also William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L. J. 1881, 1961–64 (2012) (explaining that many progressives object to same-sex marriage because they view it as a patriarchal institution).

In arguing for the elimination of the joint return, Anthony Infanti and Nancy Knauer have made forceful arguments along these same lines. See Infanti, *supra* note 9; Knauer, *supra* note 206. Similarly, I have argued elsewhere that by imposing undue tax penalties on single people, the joint return undermines their ability to forge a positive social identity. See Kahng, *One Is the Loneliest Number*, *supra* note 9, at 684; see also Nancy Leong, *Negative Identity*, 88 S. CALIF. L. REV. 1357, 1400–10 (2015) (analyzing ways in which the legal system, including tax laws, adversely impacts atheist, asexual, single, and child-free people).

To eliminate or curtail marital status as a basis for taxation would entail a variety of measures, many of which other scholars have developed, and a full exploration of which is beyond the scope of this Article. Instead, the following paragraphs sketch the broad contours of what such a reform would look like.

With respect to the income tax, Congress should abolish and replace the joint return with a system of individual filing for all taxpayers. Such a reform would revive many of the issues that existed before the adoption of the 1948 joint return, such as how to take account of differences in state marital property laws, allocate deductible expenditures between married people, deal with property transfers between spouses, and police avoidance behavior.<sup>241</sup>

These obstacles are not insurmountable. Many developed countries, which blindly followed the United States in adopting the joint return, have since replaced it with a system of individual filing.<sup>242</sup> The United States is one of the few developed countries to retain the joint return.<sup>243</sup> Anthony Infanti has

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<sup>241</sup> See Infanti, *supra* note 9, at 647–63; McMahon, *supra* note 9, at 738–46; Puckett, *supra* note 206, at 1422–24; Ventry, *supra* note 143, at 1466–71, 1510–18; Zelenak, *Marriage and the Income Tax*, *supra* note 194, at 381–401.

<sup>242</sup> See Edward McCaffery, *Where's the Sex in Fiscal Sociology?: Taxation and Gender in Comparative Perspectives*, in *THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE* 216, 218 (Isaac William Martin et al. eds., 2009)

<sup>243</sup> As of 2004, only seven countries (including the United States) of the thirty-two countries in the Organisation for Economic Co-operation and Development (OECD) required the joint return. See James Alm & Mikhail I. Melnick, *Taxing the "Family" in the Individual Income Tax*, 5 *PUB. FIN. & MGMT.* 67, 85 (2005); see also FOR BETTER OR FOR WORSE, *supra* note 198, at 59 (in 1993, nineteen out of twenty-seven OECD countries taxed husbands and wives separately); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *FUNDAMENTAL REFORM OF PERSONAL INCOME TAX* 54–56 (2006) [hereinafter OECD REPORT] (noting that many OECD countries have moved away from family-based taxation toward individually based systems); Joseph A. Pechman & Gary V. Engelhardt, *The Income Tax Treatment of the Family: An International Perspective*, 43 *NAT'L TAX J.* 1, 7–10 (1990) (identifying a "world-wide trend" toward individual filing and away from joint filing).

Many countries appear to have moved to individual filing to capture the labor efficiency gains of taxing married women at lower marginal rates. See OECD REPORT, *supra* note 243, at 56; McCaffery, *supra* note 242, at 218–19. Efficiency is often a popular and forceful rationale for changing tax laws in the United States (witness the Bush tax cuts on high incomes, capital gains, and dividends). Given the well-documented inefficiencies engendered by the joint return, its persistence in the United States is somewhat surprising. On the other hand, some scholars have questioned the claim that joint taxation depresses work effort by married women. See Robert A. Pollak, *Family Bargaining and Taxes: A Prolegomenon to the Analysis of Joint Taxation*, 57 *CESIFO ECON. STUD.* 216, 216 (2011). Furthermore, as Marjorie Kornhauser notes, strong cultural, religious, and political forces in the United States may explain the persistence of the joint return. See Kornhauser, *supra* note 207, at 650.

developed a thoughtful and thorough proposal for mandatory individual filing modeled in part on Canada's individual tax filing system.<sup>244</sup>

With respect to the marital deduction and related provisions, Bridget Crawford has proposed to eliminate entirely the marital deduction along with related provisions such as gift splitting and QTIP trusts.<sup>245</sup> Under her proposal the exemption amount for each individual would be increased to \$10 million.<sup>246</sup> Similarly, Pat Cain proposed that the exemption amount be increased to \$5 million as a way of minimizing the importance of the marital deduction.<sup>247</sup> Crawford and Cain's recommendation to increase the exemption amount has come to pass, as the exemption amount is now \$5.34 million.<sup>248</sup> However, instead of repealing the marital deduction, as Crawford recommended, Congress expanded the preference for spousal transfers through portability.<sup>249</sup> Other possibilities for reform of spousal transfers under the gift and estate tax could be modeled after other countries.<sup>250</sup>

Related to eliminating the joint return are reforms that would eliminate marriage as a proxy for economic interdependence, so that means-based provisions such as the EITC would take account of a diverse range of households. As an alternative to individual filing, Anne Alstott considers a household filing system similar to that used for welfare transfer programs, although she has concerns about the administrability and intrusiveness of such a system.<sup>251</sup> Infanti would adopt a hybrid

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<sup>244</sup> See generally Infanti, *supra* note 9, at 623–64 (proposing an inclusive United States individual tax filing system based on the Canadian Income Tax Act).

<sup>245</sup> See Crawford, *supra* note 9, at 797, 801; see also Dodge, *supra* note 67, at 1748 (recommending a return to the pre-ERTA marital deduction for up to half the decedent's estate and the repeal of the QTIP trust rules); Gerzog, *supra* note 9, at 327 (recommending repeal of the QTIP trust rules).

<sup>246</sup> See Crawford, *supra* note 9, at 797–98. At the time Crawford's proposal was made, in 2003, the exclusion amount was only \$1 million, scheduled to increase in increments up to \$3.5 million in 2009, and then, in 2010, the estate tax was scheduled to be repealed. See *id.* at 779 n.116.

<sup>247</sup> See Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677, 702–03, 707 (2000).

<sup>248</sup> See *supra* note 72 and accompanying text.

<sup>249</sup> See *supra* note 74 and accompanying text.

<sup>250</sup> See Lisa Philipps, *Tax Policy and the Gendered Distribution of Wealth*, in *RETHINKING RESTRUCTURING: GENDER AND CHANGE IN CANADA* 141, 152–55 (Isabella Bakker ed., 1996) (recommending that Canada's exemption for spousal transfers be reconsidered and possibly repealed).

<sup>251</sup> See Anne L. Alstott, *supra* note 206, at 744–48; see also Cain, *Imagine There's No Marriage*, *supra* note 202, at 57–60 (recommending the adoption of the household as a taxpaying unit but expressing privacy concerns).

system of individual filing that could be modified to take account of economic interdependencies where necessary.<sup>252</sup>

#### CONCLUSION

*Windsor* heralds the recognition of a constitutional right to same-sex marriage and promises equality in the tax treatment of same- and different-sex marriage. However, *Windsor*, and now *Obergefell*, will fail to deliver on the promise of tax equality unless we relinquish the fiction of marital unity. As long as we persist in the mistaken assumption that the married couple is an irreducible economic unit, we will continue to favor one model of marriage at the expense of other more egalitarian models. The joint return will continue to reward single-earner couples and penalize two-earner couples. The gift and estate tax marital deduction will continue to benefit couples who are unequals in wealth and power. The EITC and other aspects of the tax law will continue to equate marriage with economic interdependence, a proxy that is increasingly problematic in view of today's fluid and varied family formations.

This Article predicts that women in same-sex marriages will suffer the failures of *Windsor* in disproportion to other married people. We should not wait to see whether that prediction is borne out. Instead, we should refuse to tolerate a law of marriage taxation that attaches immediate and concrete financial rewards and penalties to different types of intimate relationships. Only by removing marriage from the tax law can we begin to create a tax system that will allow a diversity of relationships to flourish and fulfill the promise of *Windsor*.

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<sup>252</sup> See Infanti, *supra* note 9, at 662–63.

