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

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ABSTRACT

In United States v. Windsor, the Supreme Court invalidated the Defense of Marriage Act definition of marriage as "between one man and one woman" and is now poised to recognize 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 gay and straight 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 married couples—privileged traditional marriages in which men were the primary income earners and wealth holders, and adversely affected 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 other reforms. More broadly, the Article demonstrates how taxation is a powerful tool by which the state regulates intimate relationships, and 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*,[1] the Supreme Court took a momentous step forward in the recognition of same-sex marriage under federal laws. 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.[2] 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.[3]

As a result of *Windsor*, the Internal Revenue Service (IRS) began, for the first time, to recognize same-sex marriages for federal income tax purposes. It issued Revenue Ruling 2013-17,[4] 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."[5] 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 gay and straight married couples.[6]

Without question, *Windsor* admirably advances the rights and freedoms of LGBT citizens, and scholars believe the Supreme Court is poised to recognize a constitutional right to same-sex marriage.[7] At the same time, the expansion of

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[1] United States v. Windsor, 133 S. Ct. 2675 (2013).
[2] *Id*. at 2682. The specific provision at issues 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).
[3] 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. *Windsor*, 133 S. Ct. at 2695.
[4] Rev. Rul. 2013-17, 2013-38 I.R.B. 201.
[5] *Id*. at 204.
[6] *See, e.g.*, David Crary, *Gay Rights Victories in 2013 Pile Up*, HUFFINGTON POST (Nov. 5, 2013), http://www.huffingtonpost.com/2013/11/05/gay-rights-victories-2013_n_4217854.html; David Von Drehle, *How Gay Marriage Won*, TIME, Mar. 28, 2013, available at http://swampland.time.com/2013/03/28/how-gay-marriage-won/
[7] 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*

marital status for tax purposes presents an important opportunity to explore what lies beneath the putative equality gains of *Windsor*. This Article re-examines critically 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. In addition, 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.[8]

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).[9] The first two of

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Marriage Cert Grant Imperil the Affordable Care Act?, DORF ON LAW (Jan. 26, 2015), http://www.dorfonlaw.org/2015/01/does-same-sex-marriage-cert-grant.html. *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; 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 (stating that "most informed observers" believe "that a majority of the Justices now believe there is a constitutional right to same-sex marriage").

[8] Some of the findings of the Article may also be applicable to gay or transgendered married people. Moreover, there may be other important issues relating marriage among members of these other groups which the Article does not address.

[9] Marital status also affects taxation in many other ways, some for the benefit of married couples, 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). I.R.C. § 121(b). On other hand, the taxable portion of a couple's social security benefits can be greater if they are married than if they are not. 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, n. 2 (2008). A Congressional Research Report counted 198 tax law provisions in which marital status was a factor. CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX

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.

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.[10] However, the Article does not advocate for a more equal distribution of the benefits and burdens of marriage taxation among all married couples. Rather,

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MARRIAGES 1 (2004) [hereinafter 2004 CBO Report]. The systemic reform proposals discussed in Part III of the Article addresss many of these.

[10] The Article assumes that all states must eventually recognize same-sex marriage under a constitutional right to marry that the Supreme Court will recognize in the near future. *See supra* note 7. In addition, the Article does not address the difficulties that arise where, as is currently the case, not all states recognize same-sex marriage. *See* Anthony C. Infanti, *Big (Gay) Love: Has the IRS Legalized Polygamy?* 93 N.C. L. REV. ADDENDUM 1 (2014), Nancy J. Knauer, *LGBT Elders in a Post-Windsor World: The Promise and Limits of Marriage Equality*, 24 TEX. J. WOMEN, GENDER & L. 103 (2015); Haniya H. Mir, *Windsor and Its Discontents: State Income Tax Implications for Same-Sex Couples*, 64 DUKE L.J. 53 (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 (2008); Seto, *supra* note 9.

Rather, it focuses on the universe of married couples and the 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 which is complicated and still in flux. *See* Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2008); Patricia A. Cain, *Taxation of Domestic Partner Benefits: The Hidden Costs*, 45 U.S.F. L. REV. 481 (2010); David Herzig, *Marriage Pluralism, Taxing Marriage after Windsor*, 36 CARDOZO L. REV. 1 (2014).

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 aggregate their income and deductions and compute their tax under a rate schedule whose bracket amounts differ from the schedules for single individuals or heads of household.[11] Marital filing status is mandatory: Spouses cannot choose to file as single individuals. They can, however, choose to file separate returns as "married, filing separately," but this filing choice is disadvantageous for the vast majority of married couples.[12] Prior to 2013, the Section 3 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

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[11] 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* notes __ 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. I.R.C. § 6013(e). *See* Lily Kahng, *Innocent Spouses: A Critique of the New Laws Governing Joint and Several Tax Liability*, 49 VILLANOVA L. REV. 261 (2004).

[12] This is because there is no advantage in terms of the rate schedule applicable to married taxpayers filing separate, while at the same time, many credits and deductions are lost or limited. *See* Andrew Grossman, *Married Borrowers and IBR: A Trap for the Unwary*, 122 TAX NOTES 1496 (2009).

marriage for federal tax purposes.[13] As a result, same-sex married couples must now file as married taxpayers, and most will file joint returns.

2. Marriage Penalties and Bonuses under the Joint Return

The terms "marriage bonus" or "marriage penalty" describes 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 and that each person files 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. Married couples sometimes pay either more or less in federal income taxes compared to two unmarried individuals with the same amounts of taxable income—a marriage penalty or bonus. 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.[14]

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 increasing the standard deduction for married couples to twice that for single individuals.[15]

[13] 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, 204.

[14] 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.

[15] 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 joint returns to twice the width of the fifteen percent tax bracket for single returns, and (3) an increase in the earned income tax credit phase-out start and end points for joint returns by $3000. *See* Pub. L. No. 107-16, 115 Stat. 38 (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 6-7 (2008). In 2011 and 2012, Congress temporarily extended the EGTTRA 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., R42284, THE "FISCAL CLIFF AND THE AMERICAN TAXPAYER RELIEF ACT OF 2012 3-4 (2012).

Table 1 shows the 2014 tax rates and brackets for taxpayers who are single, head of household and married filing jointly.

Table 1

Individual Income Tax Rates by Taxable Income, 2014[16]

	Single	**Head of Household**	**Married Filing Jointly**
10%	$0 to $9,075	$0 to $12,950	$0 to $18,150
15%	$9,076 to $36,900	$12,951 to $49,400	$18,151 to $73,800
25%	$36,901 to $89,350	$49,401 to $127,550	$73,801 to $148,850
28%	$89,351 to $186,350	$127,551 to $206,600	$148,851 to $226,850
33%	$186,351 to $405,100	$206,601 to $405,100	$226,851 to $405,100
35%	$405,101 to $406,750	$405,101 to $432,200	$405,101 to $457,600
39.6%	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, which eliminates the marriage penalty.[17] For example, a couple who each had $36,000 of taxable income would have the same liability whether they filed as single individuals or jointly as a married couple[18] At middle income levels,

[16] *See* I.R.C. § 1.

[17] 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 substantial other marriage penalties. *See infra* notes 97-99 and accompanying text.

[18] Their tax liability would be $9,892. Prior to the Bush tax cuts, they would have incurred a marriage penalty. In 2000, for example, the couple would have incurred a marriage penalty of $3,443 (based on taxable income of $36,000 each; if they took the standard deduction, the penalty would actually be a bit more because the standard deduction for married couples was slightly less than double the amount for single individuals.)

marriage bonuses persist and in fact, increased as a result of the elimination of marriage penalties.[19]

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%. 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.[20] 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.[21]

The following chart shows the distribution of marriage penalties and bonuses in 2013 as a function of income level and earnings equality. As the green shading indicates, marriage bonuses occur across all income levels and are greatest for single-earner couples. As the red shading indicates, marriage penalties occur at low and high income levels and are greatest for two-earner couples with equal incomes.

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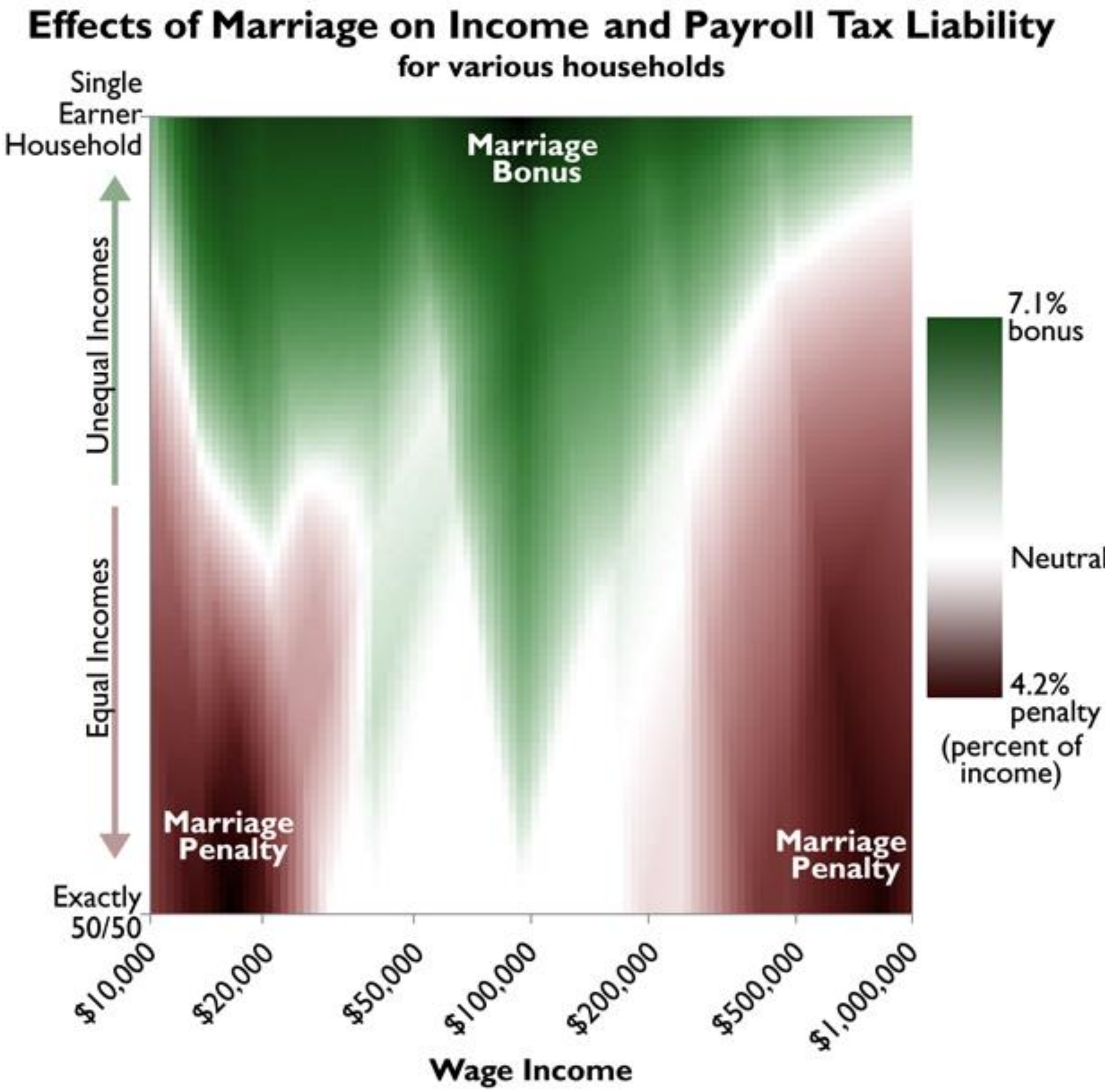
[19] For example, in 2014, a couple in which one person has $72,000 of taxable income and the other has no taxable income would pay $13,856 if they filed as single individuals, and $9,892 if they filed jointly as a married couple—a marriage bonus of $3,964. In 2000, the couple would have received a marriage bonus of $2,541 (if they took the standard deduction, the bonus would be a bit smaller because the standard deduction for married couples was slightly less than double the amount for single individuals.)

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* Lily Kahng, *One Is the Loneliest Number*, 61 HASTINGS L.J. 651 (2010) (analyzing how the joint return for married taxpayers penalizes single taxpayers). *See also* JANE GRAVELLE, CONG. RESEARCH SERV., RL33755, FEDERAL INCOME TAX TREATMENT OF THE FAMILY 19-21 (2008).

[20] 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.

[21] 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 (2006).



Source: Tax Foundation[22]

[22] Nick Kasprak, *Effects of Marriage on Tax Burden Vary Greatly with Income Level, Equality*, TAX FOUNDATION, http://taxfoundation.org/article/effects-marriage-tax-burden-vary-greatly-income-level-equality The chart shows the effects of marriage as a function of income and payroll tax liability.

The following examples illustrate who is likely to enjoy a marriage bonus and who is like 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.[23]

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
Marriage bonus	**7,296**

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 $16,638. They receive no marriage bonus; nor do they incur a marriage penalty.[24]

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
Marriage bonus	**0**

[23] This example assumes that Ward claims the standard deduction whether single or married. It also assumes that he claims two personal exemptions, one for himself and one claims a personal exemption for June, whether single or married. The calculations were made using the Tax Policy Center Marriage Bonus and Penalty Tax Calculator, http://taxpolicycenter.org/taxfacts/marriagepenaltycalculator.cfm

[24] 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.

<u>Example 2: Upper Income Marriage Bonuses and Penalties</u>

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.[25]

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
Marriage bonus	**12,748**

Also in 2014, Ellen and Portia, each with $300,000 of gross income, got married. Ellen and Portia's 2014 tax liabilities as single taxpayers would have been $80,004 each, or $160,008 total. As married tax taxpayers, their joint tax liability is $179,443. They incur a marriage penalty of $19,435.[26]

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
Marriage penalty	**(19,435)**

[25] This example assumes that Bill claims 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 phase-out for itemized deductions under and the alternative minimum tax, would affect the magnitude of marriage bonuses and penalties. See GRAVELLE, *supra* note 19, at 19-20; Gravelle & Gravelle, *supra* note 21, at 638. In general, many of these other features impose additional marriage penalties, sometimes to such an extent that the penalties exceed 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 __, at 641, Table 4.

[26] 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 25.

The examples illustrate the typical patterns of marriage bonuses and penalties at middle and upper income levels (marriage bonuses and penalties for lower income couples are addressed below in the discussion of the EITC). Marriage bonuses generally arise for one-earner couples at both middle and upper income levels, as exemplified by Ward & June and Bill & Melinda, respectively. Marriage bonuses also arise for two-earner couples with relatively unequal income. Marriage penalties for middle income couples were generally eliminated by the Bush tax cuts, as exemplified by Thelma & Louise. However, marriage penalties continue to occur for upper-income two-earner couples with relatively equal incomes, as exemplified by Ellen & 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 & June's or Bill & Melinda's and more likely to have income patterns that resemble Thelma & Louise's or Ellen & Portia's.[27] That is, had they been married and eligible to file a joint 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 percent versus 69.4 percent).[28] This means that a greater proportion of different-sex couples were one-earner couples relative to same-sex couples, although Gates does not provides exact percentages.[29] Conversely, a higher percentage of same-sex couples were two-earner couples relative to different-sex couples.

[27] See GARY J. GATES, THE WILLIAMS INSTITUTE, SAME-SEX AND DIFFERENT-SEX COUPLES IN THE AMERICAN COMMUNITY SURVEY: 2005-2011 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/ACS-2013.pdf; James Alm, J. Sebastian Leguizamon, & Susane Leguizamon, *Revisiting the Income Tax Effects of Legalizing Same-Sex Marriages*, 33 J. POL'Y ANALYSIS & MGMT 263 (2014). *See also* Christopher S. Carpenter, *Sexual Orientation, Work, and Income in Canada*, 41 CAN. J. ECON. 1239 (2008) (findings in Canada; surveying UK and US studies); M.V. LEE BADGETT, MONEY, MYTHS AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN, 148-51(2003).
[28] Gates, *supra* note 27, at 3.
[29] Gates does not provide specific percentages of one-earner versus two-earner couples. In addition, Gates does not provide a further break down of labor force participation for same-sex female couples or same-sex male couples. *See id.*

A second study, by James Alm, Sebastian Leguizamon, and Susanne Leguizamon, found that 76 percent of same-sex couples were two-earner couples and 24 percent were one-earner couples.[30] Unfortunately, Alm and his co-authors 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 percent of all different-sex married couples were two-earner couples,[31] a lower percentage than the 76 percent Alm and his co-authors found for same-sex couples. However, the two percentages are not directly comparable. For one thing, the BLS percentage relates to *married* couples, not all couples. For another, the BLS percentage includes couples where neither husband nor wife works, or where another member of the household works. Alm and his co-authors do not appear to include these types of couples.[32]

The findings of both Gates and Alm and his-co-authors indicate that same-sex couples were more likely to be two-earner couples than different sex couples, but neither Gates nor Alm and his co-authors differentiate between the earnings patterns of female and male same-sex couples. Therefore, it is not possible to ascertain, based on their analyses, exactly how female same-sex couples fare relative to other couples. Most likely, however, female same-sex couples are more likely than different-sex couples to be two-earner couples.[33]

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 co-authors.[34] 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.

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[30] Alm et al., *supra* note 27, at 267-68.

[31] DEP'T 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

[32] The BLS percentages could be re-calibrated to include only couples where one or both spouses works. This would yield 68 percent as two-earner couples and 32 percent as one-earner couples, but these calculations are conjectural at best.

[33] 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.

[34] Neither Gates nor Alm and his co-authors 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.

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 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.[35] 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-sex couples in which males were the primary earner.[36] 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.[37] Numerous other smaller-scale studies have also found that female same-sex couples specialize much less than different-sex couples in their division of housework work and labor force participation.[38]

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. Whether those differences will persist in the future cannot be predicted with certainty. With

[35] Dan A. Black, Seth G. Sanders, & Lowell J. Taylor, *The Economics of Gay and Lesbian Families*, 21 J. ECON. PERSPECTIVES 53, 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. However, controlling for children does not completely eliminate the difference, and female same-sex couples are still more likely to be two-earner couples. *See* Heather Antecol & Michael Steinberger, *Labor Supply Differences Between Married Heterosexual Women and Partnered Lesbians: A Semi-Parametric Decomposition Approach*, 51 ECON. INQUIRY 783, 798-801 (2013); Black et al., *supra*, at 62.

[36] *See id*. The only group with a smaller "wage gap" than female same-sex couples were different-sex couples with female primary earners.

[37] *See* Christopher Jepsen & Lisa K. Jepsen, *Labor-Market Specialization Within Same-Sex and Difference-Sex Couples*, 54 INDUS. REL. 109, 126-29 (2015).

[38] *See* Christopher S. Carpenter, *Sexual Orientation, Work, and Income in Canada*, 41 CAN. J. ECON. 1239, __ (2008) (findings in Canada; surveying UK and US studies); M.V. LEE BADGETT, MONEY, MYTHS AND CHANGE: THE ECONOMIC LIVES OF LESBIANS AND GAY MEN, 146-66 (2003); Marieka M. Klawitter, *Gays and Lesbians As Workers and Consumers in the Economy*, *in* HANDBOOK OF GAY AND LESBIAN STUDIES 329 (Diane Richardson & Steven Seidman, eds. 2002), *but see* Dan A. Black, Seth G. Sanders, & Lowell J. Taylor, *The Economics of Gay and Lesbian Families*, 21 J. ECON. PERSP. 53 (2007) (finding that same-sex couples with children specialize similarly to different-sex couples with children). *See also infra* notes 40-45 and accompanying text.

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.[39]

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

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.[40] An extensive sociological literature has found that female same-sex couples are more egalitarian than different-sex couples along many axes,[41] including the division of household work,[42] market labor,[43] childcare,[44] and family decision making.[45]

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[39] Black, Sanders & Taylor, *supra* note 35, at 65-66 (footnote omitted).

[40] *See, e.g.*, MAUREEN SULLIVAN, THE FAMILY OF WOMAN: LESBIAN MOTHERS, THEIR CHILDREN, AND THE UNDOING OF GENDER (2004); Maureen Sullivan, *Rozzie & Harriet?: Gender and Family Patterns of Lesbian Coparents*, 10 GENDER & SOC. 747 (1996).

[41] *See generally* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY WORK, SEX (1983); Lawrence A. Kurdek, *Change in Relationship Quality for Partners from Lesbian, Gay Male, and Heterosexual Couples*, 22 J. FAM. PSYCH. 701 (2008); Letitia Anne Peplau & Adam Fingerhut, *The Close Relationships of Lesbians and Gay Men*, 58 ANN. REV. PSYCH. 405 (2007);); Letitia Anne Peplau & Susan D. Cochran, *A Relationship Perspective on Homosexuality*, *in* HOMOSEXUALITY/HETEROSEXUALITY: CONCEPTS OF SEXUAL ORIENTATION (D. P. McWhirter, S. A. Sanders, & J. M. Reinisch eds. 1990) 321-49; SULLIVAN, *supra* note 40.

[42] *See, e.g.*, 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. REL. 297 (2007).

[43] *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. 11 (2004).

[44] *See, e.g.*, Sondra Solomon, Esther D. Rothblum, & Kimberly F. Balsam, *Money, Housework, Sex, and Conflict*, 52 SEX ROLES 561 (2005).

Assuming that the differences in labor force participation and earnings patterns persist, whatever the theoretical explanation for it, 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.

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.[46] Even assuming the data and analysis are accurate, estimators must also make behavioral assumption 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.[47] For example, some same-sex couples may choose not to marry to avoid marriage penalties and others may choose to marry to receive marriage bonuses.[48] Some same-sex couples may alter their labor force participation as a result of marriage penalties or bonuses.[49]

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[45] *See*, *e.g.*, Claudia Ciano-Boyee & Lynn M. Shelley-Sireci, *Who Is Mommy Tonight?: Lesbian Parenting Issues*, 43 J. HOMOSEXUALITY 1 (2002).

[46] *See* CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES 3 (2004), available at http://www.cbo.gov/sites/default/files/06-21-samesexmarriage.pdf (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 may have been corrected on the latest 2010 U.S. Census Bureau survey. *See* Alm et al, *supra* note __, at 267. However, some have argued 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 (unpublished manuscript on file with author) [forthcoming Scholar & Feminist Online].

[47] *See* MARGOT L. CRANDALL-HOLLICK ET AL, CONG. RESEARCH SERV., R43157, THE POTENTIAL FEDERAL TAX IMPLICATIONS OF UNITED STATES V. WINDSOR 9 (2013); M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081, 1088-91, 1106-08 (2010); Adam Stevenson, *The Labor Supply and Tax Revenue Consequences of Same-Sex Marriage Legalization*, 65 NAT'L TAX J. 783 (2012) (examining the effects of marriage taxation on marriage and work decisions of same-sex couples); 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 (2008) (describing the economic factors that might influence a couple's decision whether to marry or enter into a domestic partnership).

[48] *See* 2004 CBO Report, *supra* note 9, at 3; Alm Leguizamon & Leguizamon, *supra* note 27, at 269.

[49] *See* Alm, Leguizamon & Leguizamon, *supra* note 27, at 265; 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, 205-06 (2000); Stevenson, *supra* note 47; CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES 3 (2004), available at http://www.cbo.gov/sites/default/files/06-21-samesexmarriage.pdf

Reflecting these uncertainties, past estimates of marriage penalties and bonuses for same-sex couples vary widely.[50] This Article does not attempt to provide specific 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 like 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.[51]

B. Gift and Estate Tax Spousal Transfer Provisions

1. In General

The gift and estate tax laws contain several provisions which accord preferential treatment to spousal transfers.[52] The most basic of these is the marital deduction, which allows married couples to transfer property to one another, whether by gift or upon death, free of any gift or estate tax.[53] The marital deduction, along with the related spousal transfer provisions discussed below, constitute "the single most important planning tool available to married individuals."[54]

In addition to outright transfers, the marital deduction is also available for property transferred by a decedent to a "qualified terminable interest in property" (QTIP) trust, that is, one in which the surviving spouse has only a life income interest.[55] The effect of the QTIP rules is to allow the first spouse to die to retain

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[50] *Compare* Alm, Badgett & Whittington, *supra* note 49 (2000) (estimating that legalizing same-sex marriage in the most likely statistical scenario will lead to an annual federal income tax increase of $ 1 billion) *with* 2004 CBO Report, *supra* note 9 , (estimating that from the years 2005-10, legalizing same-sex marriage would result in an annual federal revenue increase of $200 to $ 400 million) *with* Stevenson, *supra* note 47 (estimating $20 to $40 million in federal revenue increases post-2003). 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 27, at 287 (estimating a range of federal revenue gains of $5.7 million to losses of $316 million annually).

[51] 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.

[52] *See generally* Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757, 775-81 (2004) (describing and critiquing the preferential treatment of marital transfers under the gift and estate tax).

[53] I.R.C. §§ 2056(a), 2523(a).

[54] JEFFREY PENNELL, TAX MGMT. PORTFOLIO NO. 843 (3RD), ESTATE TAX MARITAL DEDUCTION I.B. (2014).

[55] 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). For the sake of simplicity, and because testamentary QTIP

control of the ultimate beneficiaries of his property upon the death of his surviving spouse, with no imposition of the estate tax at the time of his death.[56] Upon the death of the surviving spouse, the QTIP trust property will be included in her estate and taxed at that time, even though she has no control over its disposition.[57]

Another spousal transfer provision is "gift splitting," which Congress enacted in 1948, at the same time as the marital deduction.[58] 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.[59] 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."[60] On top of annual exclusions transfers, he would be able to transfer an additional $5.43 million (as of 2014) over the course of his life and at death—the "exemption amount."[61] Gift splitting allows the donor spouse to use his spouse's annual exclusion and exemption amount, in effect doubling the amounts he can transfer tax free under the to $28,000 per donee and

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trusts are much more prevalent than inter vivos QTIP trusts, this Article refers primarily to testamentary QTIP trusts.

In addition to QTIP trusts, the martial 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, 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 (10 ed. 2011).

[56] *See generally* RAY D. MADOFF ET AL., PRACTICAL GUIDE TO ESTATE PLANNING (2013); JOHN R. PRICE & SAMUEL A. DONALDSON, PRICE ON CONTEMPORARY ESTATE PLANNING (2013).

[57] 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 55, at 520-25. 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 an inclusion in QTIP property 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.

[58] Revenue Act of 1948, ch. 168, §§ 374, 62 Stat. 110, 127-28.

[59] 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. Both spouses must be U.S. citizens or residents. 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 (2007).

[60] 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 in 2014.

[61] 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 $5.43 million for individuals dying in 2014.

$10.86 million, under the annual exclusion and the exemption amounts, respectively.[62]

A final provision relating to spousal transfers allows the estate of decedent with a surviving spouse to a make "portability" election, under which any unused portion of the decedent's exemption amount carries over to the surviving spouse.[63] Thus, for example, if the decedent made no transfers during his life or at death, his unused exemption amount of $5.43 million (in 2014) would "port" to his surviving spouse, whose exemption amount would then total $10.86 million.

Under Section 3 of DOMA, same-sex married couples were not treated as married for purposes of the marital deduction. *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. 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 use them at all. [64] In addition, the exemption amount is now so large ($5.43 million in

[62] 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.

[63] 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). Congress made the provisions permanent in 2012. American Taxpayer Relief Act of 2012, P.L. 112-240 § 101(a) 126 Stat. 2313 (2012).

[64] The marital deduction historically benefitted transfers from husbands to wives because men were the principal holders of wealth, who 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 spouse 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 127-147 and accompanying text.

This is not to say that only husbands 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

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.[65] 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 individuals owning $2 million or more in gross assets, and the group as a whole owned more than $12 trillion in net worth.[66] A 2014 worldwide survey of super wealthy individuals (those with a net worth of $30 million or higher) estimated that there are 69,650 U.S. individuals with a net worth of $30 million or higher, with total wealth holdings of $10.265 trillion.[67] This group is projected to transfer $6.35 trillion of wealth over the next thirty years.[68] 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.[69] The marital deduction may benefit an individual who transfers his wealth to his spouse because the absence of tax enables him to direct the transfer of a larger amount of his wealth (whether to his spouse or to others). It also benefits the transferee spouse by increasing the amount of the gift or bequest she actually receives, if she otherwise would have borne the incidence of any gift or estate tax due.[70] Ultimately, the marital deduction could be viewed as

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and remainder to their offspring, to "protect" 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* Parts II.A.2., II.B.2.

[65] *See* CRANDALL-HOLLICK ET AL., *supra* note 47, at 3-4.

[66] Brian Raub & Joseph Newcomb, Internal Rev. Serv. Stat. of Inc. Div., *Personal Wealth, 2007*, 31 STAT. INC. BULL., Winter, 2012, at 156, 164-65.

[67] *Wealth-X and UBS World Ultra Wealth Report 2014*, WEALTH-X, 40-41 (2014), http://www.worldultrawealthreport.com/

[68] *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

[69] *See* Crawford, *supra* note 52, at 775-81.

[70] Whether she 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 donative or testamentary plan to take account of the added 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.

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.

benefitting other transferees who will be the recipients of the married couple's wealth, for example, children or grandchildren.[71]

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 nonpropertied spouse who predeceases him.[72] 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.[73] 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. [74]

Gift splitting and QTIP trusts are most advantageous for a wealthy individual whose spouse has little wealth of her own, and in the case of QTIP trusts, where the decedent is older than his spouse and/or has children from a prior marriage. In other words, these provisions are most beneficial where there inequalities of wealth, age and power between two spouses.[75]

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[71] 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).

[72] 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*, TRUST ADVISOR, (Dec. 10, 2010), http://thetrustadvisor.com/news/estatedeal (quoting David Diamond).

[73] 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 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* John A. Miller & Jeffrey A. Maine, *Wealth Transfer Tax Planning for 2013 and Beyond*, 2013 B.Y.U. L. REV. 879, 934-40 (2013); RICHARD S. FRANKLIN ET AL., A.B.A. REAL PROP. TR. & EST. L. SEC., PORTABILITY—THE GAME CHANGER, 2-4 (20__).

[74] See Jonathan G. Blattmachr et al., *Portability or No: The Death of the Credit-Shelter Trust?*, 118 J. TAX'N 231, 237-48 (2013); RICHARD S. FRANKLIN ET AL, A.B.A. REAL PROP. TR. & EST. L. SEC., PORTABILITY—THE GAME CHANGER, 2-4, 14-18; Sisi C. Tran, Convergent Wealth Advisors, *Achieving Tax Benefits 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

[75] *See* Crawford, *supra* note 52, at 775-81.

Gift splitting enables a donor spouse to double his annual exclusion amount(s) and exemption amount by using the annual exclusion amount(s) and exemption amount of his spouse, provided she consents. However, if she has wealth of her own, she may want to preserve her ability to make tax free transfers to her own objects of bounty. Because the annual exclusion applies to an unlimited number of donees, gift splitting will not affect her 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.[76]) However, if she wishes to make transfers to the same beneficiaries as the donor spouse—for example, their children or grandchildren—then gift splitting will constrain her ability to transfer her own wealth. Furthermore, if she wishes to make transfers of her own wealth in excess of the annual exclusion amount, the split gift election will also constrain her ability to use her $5.43 million exemption amount to shelter those transfers from tax. Thus, a propertied individual with a non-propertied 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 surviving spouse, sheltered from tax by her exclusion amount.[77] 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 allow a decedent to assuage his anxieties that the surviving spouse will squander the trust property or disinherit the decedent's heirs, particularly children of the decedent from a previous marriage.[78] [A QTIP trust merely defers the decedent's estate tax until the death of the surviving spouse. Because the estate appreciates in value during the deferral period, the present value of the deferred estate tax liability will be equivalent to an immediate estate tax (assuming a flat estate tax rate). The advantages of the QTIP trust are the ability to use the surviving spouse's

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Historically, the QTIP trust and gift splitting benefitted wealthy husbands whose wives had little or no wealth of their own. *See infra* notes 83 and accompanying text.

[76] This strategy will not work if the "crossed gift" doctrine applies. *See* Sather v. Comm'r, T.C. Memo. 1999-309.

[77] The decedent could achieve the same tax advantageous tax result by transferring property outright to the surviving spouse, but would forego control over the ultimate disposition of the property. The ability to retain control is a major advantage of the QTIP trust relative to outright transfer. *See* Blattmachr et al., *supra* note 74, at 237, 240; Tran, *supra* note 74, at 5.

[78] Miller & Maine, *supra* note 73, at 938-39.

exemption amount to shelter the QTIP assets from estate tax, and GST and planning benefits.]

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 $5.43 million exemption amount has already been exhausted.). Donald's will transfers his entire 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 transfers 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 her exemption amount is not otherwise used, it will shelter from tax $5.43 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.[79] However, it is possible make a set of informed guesses that women in same-sex 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.[80] They are less likely to benefit from spousal transfer provisions such as the marital

[79] *See* 2004 CBO Report, *supra* note 9, at 3-4. There is study examining the attitudes toward the extension of intestacy laws to same-sex couples. *See* Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1 (1998). The only other sources of information are private market research studies. *See* THE LBGT FINANCIAL EXPERIENCE, 2012-2013 PRUDENTIAL RESEARCH STUDY, PRUDENTIAL.COM, http://www.prudential.com/media/managed/Prudential_LGBT_Financial_Experience.pdf

[80] In 2007, women were 43 percent of top wealth holders (those with assets of $2 million or more). *See* Brian & Newcomb, *supra* note 66, at 165. This percentage increased from about 25 percent during the 1920s to about 45 percent during the 1990s. *See* Wojciech Kopczuk & Emmanuel Saez, *Top Wealth Shares in the United States, 1916-2000: Evidence from Estate Tax Returns*, 57 NAT'L

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.[81] There is some evidence lesbians earn more than other women, which suggests they might on average be wealthier than other women.[82]

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

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. Second, men owned more wealth than women.[83] Today, husbands are still more likely to predecease their wives,[84] and men continue to be wealthier than women.[85]

TAX J. 445, 465 (2004); ROBERT J. LAMPMAN, NAT'L BUREAU ECON. RESEARCH, THE SHARE OF TOP WEALTH-HOLDERS 1922-1956 (1962). There has been has been a narrowing of the wealth disparity between men and women in recent years. Whether this narrowing trend will continue in the future is unknown. Furthermore, the apparent increase in women's wealth may be somewhat deceptive because the data is derived from federal estate tax returns, and the estates of many women include QTIP trust assets would have been included in the estates of their deceased spouses in the absence of the QTIP rules. *See* Kopczuk & Saez, *supra*, at 465; Wojciech Kopczuk & Joel Slemrod, *The Impact of Estate Tax on Wealth Accumulation and Avoidance Behavior*, *in* RETHINKING ESTATE AND GIFT TAXATION 299, 325 (William G. Gale et al., eds., 2001).

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. *See Wealth-X and UBS World Ultra Wealth Report 2014*, WEALTH-X, 41 (2014), http://www.worldultrawealthreport.com/

Women in this group had an average net worth of $160 million, $28 more than their male counterparts. *See id.*

[81] It may be possible to ascertain this in the future, if the IRS begins to collect gender information on estate tax returns.

[82] Dan Black, Hoda Makar, Seth Sanders, & Lowell Taylor, *The Effects of Sexual Orientation on Earnings*, 56 INDUS. & LAB. REL. REV. 449 (2003), Marieka Klawitter, *Meta-Analysis of the Effect of Sexual Orientation on Earnings*, 54 INDUS. REL. J. ECON. & SOC. 4 (2015).

[83] *See supra* note 80.

[84] Women still have longer life expectancies than men. *See* Tom Eskes & Clemens Haanen, *Why Do Women Live Longer than Men?* 133 EUR. J. OF OBSTETRICS & GYN. & REPROD. BIO. 26 (2007) (reporting that women live 4 to 5 years longer than men). In addition, husbands continue on average to be older 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,

In different-sex marriages, women in general are less likely than men to use QTIP trusts. For 1995 decedents, about 42 percent of men used QTIP for assets valued at $16.4 billion, which comprised about 49 percent of the value of their spousal bequests. In the same year, about 33 percent of women used QTIPs for assets valued at $3.2 billion, which comprised about 43 percent of the total spousal bequests.[86] This is in part because women have less wealth than men, although they appear to be gaining ground.[87] 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.[88] 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.[89] A wealthy woman is 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"[90]—to ensure that her surviving spouse will not squander the estate or disinherit the decedent's children from prior marriages.

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. Furthermore, based on what we know about female same-sex marriage patterns,

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www.census.gov/hhes/families/files/cps2013/tabFG3-all.xls (last visited March 6, 2015); 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: 2003, www.census.gov/hhes/families/files/cps2003/tabFG3.pdf (last visited March 6, 2015).

[85] *See supra* note 80.

[86] *See* Martha Britton Eller, Barry W. Johnson, & Jakob M. Mikow, *Elements of Federal Estate Taxation*, *in* RETHINKING ESTATE AND GIFT TAXATION (Joel Slemrod et al., eds., 2001).

[87] *See supra* note 80.

[88] Raub & Newcomb, *supra* note 66, at 157.

[89] 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 the Older Woman-Younger Man Relationship*, N.Y. TIMES, Oct. 14, 2009. On 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.

[90] Charles Delafuente, *A Guiding Hand for Bequests, From Beyond the Grave*, N.Y. TIMES, Oct. 16, 2012 (quoting estate planning lawyer Richard J. Shapiro).

women in same-sex marriages are even less likely than heterosexual women to use QTIP trusts for a Donald Trump arrangement.[91]

QTIP trusts are extremely popular with men even when they are not serial monogamist moguls like Donald Trump.[92] Scholars and practitioners theorize that men favor QTIP trusts because they worry that their widows will over-consume the assets of the estate or be incompetent to manage the assets.[93] Because female same-sex relationships do not 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.[94] Same-sex couples often have children from prior different-sex marriages,[95] and to this extent, will benefit from the non-tax planning advantages of QTIP trusts.[96] The

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[91] Little is known about the wealth transmission patterns of same-sex couples. *See supra* note 79. 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* CBO Report, *supra* note 9, 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. 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 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.*

[92] *See* Eller et al., *supra* note 86, at 102-03. QTIP trusts are also used by female decedents 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 a the decedent to the surviving spouse may add the attractiveness of QTIP trust as a way for a moneyed spouse to retain control over the ultimate disposition of his wealth. See Jonathan G. Blattmachr et al., *supra* note 73, 237-48; FRANKLIN ET AL, *supra* note 73, at 2-4, 14-18; Tran, *supra* note 73, at 4-8.

[93] *See supra* notes 77-78.

[94] See MADOFF ET AL., *supra* note 56.

[95] *See* Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, NATIONAL COUNCIL ON FAMILY RELATIONS FAMILY FOCUS, Winter 2011, F-1, F-2, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf

[96] 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 TRUST ISSUES &

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 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 are unlikely to follow the traditional model of male wealth ownership and transfer embodied in the QTIP trust.

C. EITC

1. In General

The EITC is a refundable credit targeted to low-income taxpayers that is based earned income. It is the most progressive tax expenditure in the federal income tax law and reduces poverty significantly.[97] The EITC also provides an incentive for low-income taxpayers to work because the amount of the credit increases as earned income increases. As Table 2 indicates, the credit is quite small for taxpayers with no children but substantial for those with one or more children. At specified higher levels of income, the credit diminishes and eventually reaches zero. This "phase-out" feature is necessary in order to limit the credit to low-income taxpayers. However, the phase-out thresholds result in a marriage penalty for certain individuals. In particular, two-earner couples where

INSIGHTS, Sept. 2013, at 1, 3. file:///C:/Users/kahngl/Dropbox/Documents/Documents/2015%20wives%20of%20windsor/estate%20planning%20for%20same%20sex%20couples%202013.pdf; Ray Prather, *Estate Planning and Charitable Giving for Same-Sex Couples After United States v.Windsor*, 28 PROB. & PROP. MAG., Sept.-Oct. 2014, http://www.americanbar.org/publications/probate_property_magazine_2012/2014/september_october_2014/2014_aba_rpte_pp_v28_5_article_prather_same_sex_couples_after_united_states_v_windsor.html

[97] *See* THOMAS L. HUNGERFORD & REBECCA THIESS, ECON. POL'Y INST., THE EARNED INCOME TAX CREDIT AND THE CHILD TAX CREDIT (2013), http://www.epi.org/publication/ib370-earned-income-tax-credit-and-the-child-tax-credit-history-purpose-goals-and-effectiveness/

each spouse earns a significant proportion of the couple's income are likely to face substantial loss of the EITC.[98]

Table 2. **2013 Income Limits for the Federal EITC for Single and Married Individuals**			
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

Source: Internal Revenue Service, *EITC Income Limits, Maximum Credit Amounts and Tax Law Updates* (2014).

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:

[98] *See* Janet Holtzblatt & Robert Rebelein, *Measuring the Effect of the EITC on Marriage Penalties and Bonuses*, 53 NAT'L TAX J. 1107 (2000); Kerry A. Ryan, *EITC As Income (In)Stability?* 15 FLA. TAX REV. 583 (2014).

Example 4: EITC Marriage Penalty

In 2013, Kim, who has one child and $16,000 of earned income and Maria, who has $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.[99]

Kim and Maria's combined net refund (filing singly):	($2,446)
Kim & Maria's tax liability (filing married):	347
Marriage Penalty	**2,793**

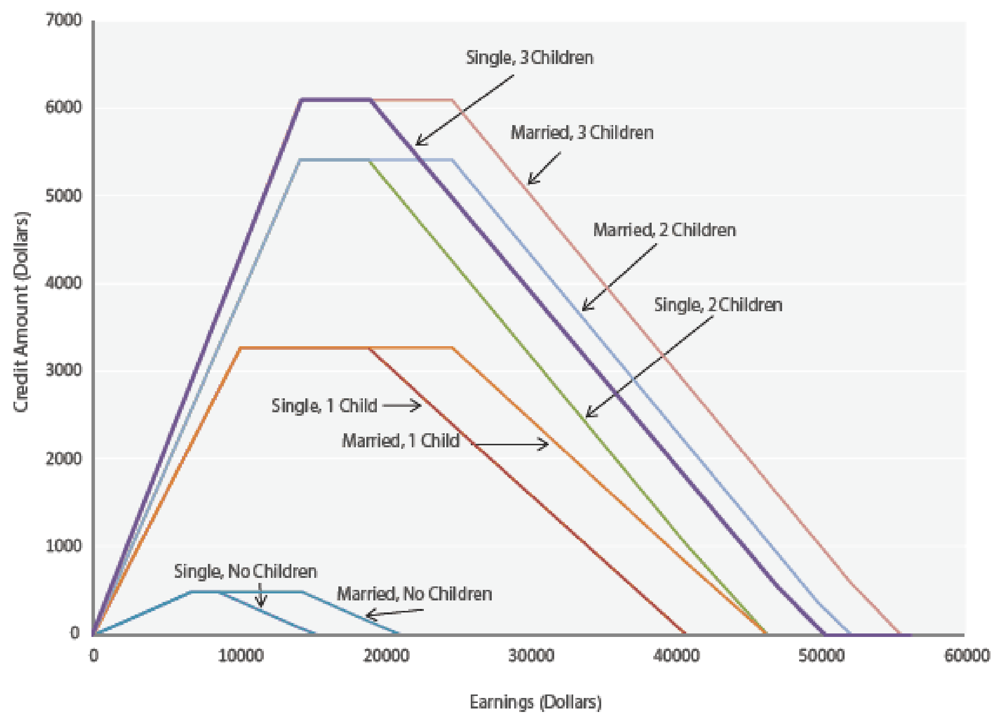
As the Example 4 illustrates, couples with children and low-to-moderate income levels, where both individuals contribute substantial earnings, are likely to incur an EITC marriage penalty. If they marry, their combined earnings will move them into the EITC phase-out range, and they will lose much of the EITC that they would be able to claim as single filers. The following chart illustrates how marriage affects the amount of EITC:

[99] 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

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

Figure 1: Earned Income Tax Credit by Number of Children and Filing Status, 2014



Source: 2014 EITC parameters taken from http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=36

In the example above, Kim, as a single mother with one child with earnings of $16,000, would fall on the line labeled “Single, 1 Child”, and 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, would be eligible for an EITC of only $349.

Demographic data show that women in sex-sex couples are disproportionately represented in the group of taxpayers who incur the EITC marriage penalty. They are more likely to be low-income and more likely to contribute relatively equal amounts to household income. (However, they are not more likely to have children.)

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 percent of same-sex couple households included children under age 18.[100] This percentage breaks down further to 27 percent of female same-sex couples and nearly 11 percent of male same-sex couples.[101] By comparison, among different-sex couples, the proportion with children under age 18 was 43.5 percent in 2011.[102]

Although female same-sex couples are not as likely to have children, they are more likely to than different-sex married couples to be poor. Analyzing data from the U.S. Census Bureau 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 percent versus 5.7 percent, respectively: [103] Relatedly, they also found that children in female same-sex couples had significantly higher poverty rates than children in married different-sex couples, 29.2 percent versus 12.1 percent, respectively.[104]

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 low-income metric rather than a poverty metric, they found female same-sex couples and married different-sex

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[100] *See* GARY J. GATES, WILLIAMS INSTITUTE, LGBT PARENTING IN THE UNITED STATES, 2 (2013).

[101] *See Id*.

[102] *See* GATES *supra* 27, at 5.

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

[103] *See* M.V. LEE BADGETT, LAURA E. DURSON, & ALYSSA SCHNEEBAUM, WILLIAMS INSTITUTE, NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY AND BISEXUAL COMMUNITY, 7 (2013). 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 percent versus 5.4 percent respectively. *See* RANDY ALBELDA, M.V. LEE BADGETT, ALYSSA SCHNEEBAUM & GARY J. GATES, WILLIAMS INSTITUTE, POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY, 5 (2009); *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 (2010) (finding similar differences in poverty rates between same-sex female couples and different-sex married couples using 2000 ACS data).

[104] *See* BADGETT, DURSON & SCHNEEBAUM, *supra* note 103, 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 percent versus 9.4 percent respectively. *See* ALBELDA, BADGETT, SCHNEEBAUM & GATES, *supra* note 103, at 6.

couples to be at the same level, about18 percent.[105] 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.[106] 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.[107]

	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 other disincentives to marriage in the tax-transfer system, such as SNAP (food stamps) and Medicaid.[108] When faced with these penalties, many poor couples will choose not to marry:

> Not getter 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

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[105] *See* BADGETT, DURSON & SCHNEEBAUM, *supra* note 103, at 7. They define low-income couples to be those with incomes below 200 percent of the federal poverty rate. *See id.*
[106] *See id.* at 7. *See also* Prokos & Keene, *supra* note 103, at 945.
[107] *See* Badgett, Durson & Schneebaum, *supra* note __, at 8.
[108] See Adam Carasso & C. Eugene Steuerle, *The Hefty Penalty on Marriage Facing Many Households with Children*, 15 FUTURE CHILD 157 (2005); Stacy Dickert-Conlin & Scott Houser, *Taxes and Transfers: A New Look at the Marriage Penalty*, 51 NAT'L TAX J. 195 (1998); Nada Eissa & Hilary Williamson Hoynes, *Taxes and the Labor Market Participation of Married Couples: The Earned Income Tax Credit*, 88 J. PUB. ECON. 1931 (2004); JONATHAN BARRY FORMAN, MAKING AMERICA WORK 113-82 (2006); MELISSA S. KEARNEY AND LESLEY J. TURNER, THE HAMILTON PROJECT, GIVING SECONDARY EARNERS A TAX BREAK: A PROPOSAL TO HELP LOW- AND MIDDLE-INCOME FAMILIES 9-11 (2013); Bruce D. Meyer, *The Effects of the Earned Income Tax Credit and Recent Reforms*, in 24 TAX POLICY AND THE ECONOMY 153 (Jeffrey R. Brown ed., 2010).

> are penalties and engaged when there are bonuses. The losers tend to be those who consider marriage vows sacred.[109]

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 couples 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."[110] What this means is that women in same-sex couples will either incur EITC marriage penalties more frequently than different-sex couples or be deterred from marriage in greater numbers than different-sex couples.[111]

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 different-sex couples suggests 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 sole earner of income and the husband owned and controlled the transfer of wealth—were politically motivated to quell a rising state law movement toward stronger marital property rights for

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[109] *Labor Force Participation, Taxes, and the Nation's Social Welfare System: Hearing Before the H. Comm. on Oversight and Government Reform* (2013) (Statement of C. Eugene Steuerle, Urban Institute)

[110] *Id*. at 24.

[111] The increased likelihood of 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 two-earner couples with relatively equal incomes. *See supra* notes 36-38 and accompanying text. It is precisely this type of couple that encounters the highest EITC marriage penalty. *See* Carasso & Steuerle, *supra* note 108, at 158, 164; Kearney & Turner, *supra* note 108, at 9-10; David John Marotta, *Earned Income Tax Credit (EITC) Punishes Marriage*, FORBES.COM (Jan. 20, 2013, 10:51 AM), http://www.forbes.com/sites/davidmarotta/2013/01/20/earned-income-tax-credit-eitc-punishes-marriage/

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.[112] This disparity had arisen as a result of two Supreme Court decisions, *Poe v. Seaborn*[113] and *Lucas v. Earl*.[114] Under *Poe v. Seaborn*, income earned by a husband in a community property state was taxed half to him and half to his wife.[115] 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.[116] 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 though the lower tax brackets of the tax rate structure.

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*

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[112] 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* Dennis J. Ventry, Jr., *Saving* Seaborn*: Ownership As the Basis of Family Taxation*, 86 IND. L. J. 1459, 1466-71 (2011).

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, 1399-1414 (1975); Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1988); Lily Kahng, *Fiction in Tax*, in TAXING AMERICA 25, 26-32 (Karen B. Brown & Mary Louise Fellows, eds., 1996); Stephanie McMahon, *To Have and To Hold: What Does Love (of Money) Have to Do with Joint Tax Filing*, 11 NEV. L.J. 718 (2009); Ventry, *supra*.

[113] Poe v. Seaborn, 282 U.S. 101 (1930).

[114] Lucas v. Earl, 282 U.S. 111 (1930).

[115] *Seaborn*, at 118.

I use 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.

[116] *Id.* at 117-18.

v. Earl.[117] In Earl, husband and wife entered into a contract under which husband assigned half of his future income to his wife. The Court held that all the income first vested in the husband, and was therefore fully taxable to him.[118] 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. 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 wives. The IRS often challenged these devices as sham transactions and aggressively litigated the cases.[119]

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, creating upheaval and uncertainty.[120] At the same time, the estate tax treatment of community property and common law married couples was also in flux, as discussed below.

In 1948, Congress put an end to the turmoil by adopting the joint return rate structure, setting the amount for each tax bracket at double the amount for individual returns.[121] The effect was that all couples, whether in community property or common law states, got the benefits of income splitting.

The 1948 law eliminated the disparate treatment of married couples across the states by reducing taxes for married couples in common law states. However, it also left unmarried taxpayers—including sympathetic widows, widowers, and others who supported families—with disproportionately heavy tax burdens.[122] To address these concerns, in 1951, Congress added a new filing status—head of

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117 *Earl*, at 114-115.
118 *Id.*
119 *See Division of Tax Research, Dept. of Treasury, The Tax Treatment of Family Income, in Revenue Revisions 1947-48: Hearings Before the Comm. on Ways and Means on Community Property and Family Partnerships*, 80th Cong., 1st Sess. 846, 867-69 (1947).
120 Oklahoma, Oregon, Michigan, Nebraska, Pennsylvania, and the Territory of Hawaii all enacted community property regimes. *See* Revenue Revisions, 1947-78: Majority Report of the Special Tax Study Comm. Report to the Comm. on Ways and Means, 1, 12 (1947) [hereinafter Special Report]. All repealed their community property laws after the tax legislation of 1948 described below.
121 *See* Revenue Act of 1948, ch. 168 §§ 301-5, 62 Stat. 110, 114 (codified as amended in scattered sections of 26 U.S.C.).
122 For detailed accounts of the politics and legislative activity following the 1948 adoption of the joint return, *see generally* Lawrence Zelenak, *Doing Something About Marriage Penalties A Guide for the Perplexed*, 54 TAX L. REV. 1, 33-39 (2000); Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 776-87 (1989); Ventry, *supra* note 112.

household—for unmarried taxpayers with dependents, with bracket amounts roughly halfway between those for single and joint return filers.[123] This left only group to pay disproportionately high taxes: single taxpayers, whose taxes ranged from twenty to forty percent higher than that of an equivalent joint filing couple.[124] In 1969, Congress cut their taxes, too, by capping their taxes at twenty percent higher than the taxes paid by equivalent joint filing couples.[125]

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. 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.[126] Thus, after 1969, a married couple sometimes paid less, 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.[127] 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.[128] In contrast, the estate of a common law decedent was taxed on the entire amount of property bequeathed to his widow.[129]

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 entirely in the estate of the first spouse to die.[130] Community property residents

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[123] Revenue Act of 1951, ch. 521. 301, 65 Stat. 452, I.R.C. § 1(b).
[124] *See* Robinson & Wenig, *supra* note 122, at 783.
[125] The Tax Reform Act of 1969, Pub. L. No. 91-172, 88 Stat. 487.
[126] *See* Bittker, *supra* note 112, at 1429-1431.
[127] The gift tax follows a parallel history with the estate tax, but is omitted for the sake of simplicity.
[128] *See, e.g.*, *Estate of Lee v. Commissioner*, 111 T.C. 141, 145 (1948).
[129] *See Reduction of Individual Income Taxes: Hearings on H.R. 4790 Before the Senate Comm. on Finance*, 80th Cong., 2d Sess. 26 (1948) [hereinafter Senate Hearings] (statement of John W. Snyder, Secretary of the Treasury).
[130] Revenue Act of 1942, Pub. L. No. 77-753, § 402(b), 56 State 798, 942 (amending § 118(e) of the 1939 Code; repealed 1948.)

complained that the increase caused hardships and inequities, and the reform was short-lived.[131] In 1948, Congress repealed the 1942 provision and in its place enacted a marital deduction. [132]

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. [133] The deduction was designed to mimic the prior law treatment of community-property residents, who were required to pay tax only half the estate, on the theory that their wives already owned the other half.[134]

The 1948 marital deduction applied only to outright transfers. 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.[135] Significantly, dower transfers—those in which the 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.[136]

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[131] *See, e.g., Revenue Revisions, 1947-48: Hearings Before the Comm. on Ways and Means on Community Property and Family Partnerships,* 80th Cong., 1st Sess. 776-93 (1947) [hereinafter 1947 Hearings] (statements of Charles E. Dunbar, Jr., and John G. Wisdom, attorneys for the Louisiana Community Property Taxpayers Committee); Senate Hearings, *supra* note 129, at 337 (statement of J. P. Jackson, representing State Rights Association of Houston, Texas).

[132] *See* Revenue Act of 1948, ch. 168, §§ 361, 62 Stat. 110, 117.

[133] *See id*.

[134] S. Rep. No. 1013, 80th Cong., 2d Sess. 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 129, at 26 (statement of John W. Snyder, Secretary of the Treasury).

The estate tax took a brief detour from the prior law described in the preceding paragraph in 1942, when Congress equalized the estate tax treatment of community property and common law residents by taxing 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 131, 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 129, at 337 (statement of J. P. Jackson, representing State Rights Association of Houston, Texas).

[135] Revenue Act of 1948, ch. 168, §§ 361, 62 Stat. 110, 118. This limitation is codified today at I.R.C. § 2056(b)(5).

[136] For a history of dower transfers and their continued use in modern estate planning, see Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers*," 10 LAW & INEQ. J. 137, 146-59 (1991).

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.[137]

Despite the marital deduction's "startling and immediate"[138] 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 the operative understanding of all their ramifications is achieved by tax practitioners.[139]

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:

> 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

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[137] Senate Hearings, *supra* note 129, at 26 (statement of John W. Snyder).

[138] Stanley S. Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV, 1097, 1117 (1948).

[139] *Id.*

> objects of his bounty and leave his estate to a gigolo second husband.[140]
>
> 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.[141]
>
> In general, property relieved of taxation in the estate of the 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.[142]
>
> 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.[143]

Eventually, in 1981, Congress remedied the inadvertent disincentive for dower transfers.[144] 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.[145] Second, it made dower transfers deductible in the decedent's estate under a new deduction for a qualified terminable interest in property (QTIP).[146] 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.[147]

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[140] Charles Looker, *The Impact of Estate and Gift Taxes on Property Dispositions*, 38 CAL L. REV. 44, 62 (1950).
[141] *Id.* at 67.
[142] John J. Waldron, *Implications of the Marital Deduction*, 87 TR. & EST. 523, 523 (1948).
[143] John W. Beveridge, *The Estate Tax Marital Deduction—Beneficent Intent, Baneful Result*, 44 TAXES 284 (1966).
[144] Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172. For a detailed history and analysis of the QTIIP provisions, see Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301, 305 (1995).
[145] I.R.C. § 2056(a).
[146] I.R.C. § 2056(b)(7).
[147] I.R.C. § 2044.

B. The Fiction of Marital Unity[148]

1. The Joint Return

The 1948 adoption of income splitting under the joint return rested on a fiction that all married couples as if they shared their income whether or not they actually did. 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 adopting this fiction was to reduce tax liability for husbands residing in common law states.[149] 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 adopting income splitting.[150] 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. 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.[151]

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: “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

[148] The following account is based on Kahng, *supra* note 112.
[149] *See Revenue Revisions, 1947-48: Minority Report of the Special Tax Study Comm. to the Comm. on Ways and Means* 35, 40 (1947) [hereinafter Minority Report] (describing the joint return as a “poorly disguised measure” to relieve high-income groups).
[150] H.R. Rep. No. 1274, 80th Cong., 2d Sess, 22-23 (1948); S. Rep. No. 1013, 80th Cong., 2d Sess. 23-24 (1948).
[151] *See* Jones, *supra* note 112.

rather, general agreement that spouses with similar incomes should pay similar Federal taxes, no matter where they live."[152]

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.[153]

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 of traditional gender roles and power relationships.[154] The 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, that marital unity was a convenient fiction, serving as political camouflage, was overlooked. Instead, Stanley Surrey, then Assistant Treasury Secretary for Tax Policy, portrayed the joint return as the

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[152] Special Report, *supra* note 120, at 12.

[153] 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,[153] 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).

[154] *See* Jones, *supra* note 112. Others have argued that there was no anti-woman agenda. *See* Lawrence Zelenak, *Taking Critical Tax Seriously*, 76 N.C. L. REV. 1521, 1574-76 (1998).

product of a reasoned policy analysis, which rightfully treated the married couple as a "single economic unit."[155] By 1976, scholars had elevated marital unity had to a first principle of taxation. According to Professor Boris Bittker, one of the most influential tax scholars of the twentieth century: "[T]he 1948 statutory principle of equal taxes for equal-income married couples has been 'almost universally accepted' by tax theorists."[156]

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.[157]

Bittker's framework has come to be the dominant one.[158] It has an internal logical consistency: it is true that the three articulated 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.[159]

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[155] Surrey, *supra* note 138, at 1162.

[156] Bittker, *supra* note 112, at 1395 (citation omitted).

[157] *See id.*, at 1419-20. As Lawrence Zelenak points out, Bittker was not the first to explain the marriage tax dilemma in this way. Professor Zelenak cites a 1972 statement, as the earliest of which he is aware. *Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working, Hearings Before the House Ways and Means Committee*, 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."

[158] *See, e.g.*, Paul McDaniel et al., FEDERAL INCOME TAXATION CASES AND MATERIALS 971 (5th Ed. 2004); Michael J. Graetz et al., FEDERAL INCOME TAXATION PRINCIPLES AND POLICIES 468 (6th ed. 2008); JANE G. GRAVELLE, THE MARRIAGE TAX PENALTY 53 (2003); 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; CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX, at 2-6 (1997).

[159] 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 Awards*, 1993 WIS. L. REV. 1115, 1155-56; Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139 (1989) (critiquing horizontal equity as devoid of normative value); *but see* Richard A.

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.[160] Conversely, people other than married couples—such as unmarried couples and roommates—sometimes do pool resources and make joint consumption decisions.[161] Therefore, if the joint return is premised on equal sharing, it is both over inclusive (including married couples who do not share) and under inclusive (excluding unmarried persons who do share).[162]

Another important challenge to the purported "sameness" of equal-income married couples focuses on the differences between single- and two-earner couples. 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-income couple.[163] 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.[164] Again, the rationale for the joint return—

Musgrave, *Horizontal Equity Once More*, 43 NAT'L TAX J. 113 (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.

160 See Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating the Income Tax Burden*, 59 TEX. L. REV. 1, 24-27; Marjorie E. Kornhauser, *Love, Money and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 80-92(1993); *but see* Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. Cal. L. Rev. 339, 348-55 (1994).

161 *See* Kornhauser, *supra* note 160, at 103.

162 *See* Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 851-53 (2008); Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27, 54-60 (1996); Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 92 IOWA L. REV. 1509, 1540-44 (2006).

163 *See generally* Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); EDWARD J. MCCAFFERY, TAXING WOMEN (1999); Nancy D. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996).

164 See Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 1005-1010 (1992-93).

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.[165]

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 entrenched in mainstream political and policy discourse.[166] 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.[167]

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. 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.

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[165] *See* Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 65 TAX L. REV. 695 (2013); Gann, *supra* note 160, at 32-52; Anthony Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605 (2010); Kahng, *supra* note 19, at 684; Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 154-157 (1998); Kornhauser, *supra* note 160, at 108-111; James M. Puckett, *Rethinking Tax Priorities: Marriage, Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409 (2010); Harvey S. Rosen, *Is it Time to Abandon Joint Filing?*, 30 NAT'L TAX J. 423 (1977).

[166] *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 (2010).

[167] *See* Cain, *supra* note 162; Motro, *supra* note 162; Zelenak, *supra* note 122, 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 165.

The fiction of marital unity ultimately provided the solution to this "sorry mess," as Surrey described it.[168] 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. According to Higgins, the fact that the 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."[169]

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 even after death of the ultimate disposition of their property.

Soon after the 1948 Act was passed, Surrey adopted Higgins' 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.[170]

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:

[168] Stanley S. Surrey, *An Introduction to Revision of the Federal Estate and Gift Taxes*, 38 CAL. L. REV. 1, 14 (1950).
[169] Senate Hearings, *supra* note 129, at 316 (statement of Allan H. W. Higgins, chairman, American Bar Association, Tax Section, Committee on Equalization of Taxes in Community- Property and Common-Law States).
[170] Surrey, *supra* note 138, at 1162.

> 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 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.[171]

The fiction of marital unity enabled Surrey to disguise his fears that an untrustworthy or incompetent widow, guided by an "alien hand" would acquire control of her husband's wealth.

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. 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.[172] Transfers by the marital unit to others should be taxed only once, when the property leaves the marital unit.[173] 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."[174]

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

> All quantitative limitations on the marital deduction were limited 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.[175]

Viewed broadly, the unlimited marital deduction has the effect of

[171] Surrey, *supra* note 168, at 14.
[172] S. Rep. No. 144, 97th Cong., 1st Sess, 127 (1981), 1981-2 C.B. 412; H.R. Rep, No. 201, 97th Cong., 1st Sess. 159 (1981), 1981-2 C.B. 352; STAFF OF JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981 233 (Comm. Print 1981).
[173] *See* H.R. Rep. No. 201, *supra* note 172, at 160; Staff of Joint Comm. on Taxation, *supra* note 172, at 234.
[174] S. Rep. No. 144, *supra* note 172, at 127.
[175] Howard E. Abrams, *A Reevaluation of the Terminable Interest Rule,* 39 TAX L. REV. 1, 12-13 (1983).

> 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.[176]

> The substantive effect of [the 1981] changes is to treat the marital unit as a separate transfer tax unit with respect to interspousal transfers.[177]

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.[178]

> 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.[179]

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[176] Joseph Isenbergh, *Simplifying Retained Life Interests, Revocable Transfers, and the Marital Deduction*, 51 U. CHI. L. REV. 1, 32 (1984).
[177] Harry L. Gutman, *Reforming Federal Wealth Transfers after ERTA*, 69 VA. L. REV. 1183, 1220-21 (1983).
[178] Jeffrey Pennell, *Estate Tax Marital Deduction*, 239-4th TAX MGMT. PORTFOLIO (BNA), at A-58(3) (1990).
[179] *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 we [the estate planning community] embrace QTIP predominantly because of its "handcuff" nature?

> [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.[180]

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 women's property rights."[181] Similarly, Wendy Gerzog finds the rules "can only be explained as a gender-biased, paternalistic, and degrading treatment of women."[182] 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 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. 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. Today, the

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Jeffrey Pennell, *It's Not Your Father's Buick, Anymore: Planning for the Next Generation(s) of Client*, 2009 Inst. on Estate Planning, 13-17. 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 – 13-21.

[180] Pennell, *supra* n0te 178, at A-42 (1990).

[181] Fellows, supra note 136, at 148.

[182] Gerzog, *supra* note 144, at 301, 305 (1995).

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.

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 Ward & June's and Bill & Melinda's, and penalizes marriages like Thelma & Louise's and Ellen & Portia's.

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 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. The most extreme illustration of this is the QTIP trust, which benefits the Donald Trump model of marriage.

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.[183] The tax law relies on marriage as a proxy for economic interdependence in many provisions that might roughly be characterized as "means-based"[184] but the EITC has most severe impact on vulnerable populations. Using marriage as a proxy economic interdependence is increasingly problematic in view of today's fluid and diverse family formations.[185]

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[183] See Martha A.L. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2181 (1995) (arguing that "continued 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).

[184] These provisions include the child and dependent care credit, the child tax credit, education tax credits, the adoption, and a variety of other deductions and credits that phase out at higher income levels. *See* CRANDALL-HOLLICK ET AL., *supra* note 47, at 7-8.

[185] *See* Infanti, *supra* note 165.

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.[186]

The tax law should be reformed to eliminate or curtail marital status as a determinant of taxation. Relinquishing the fiction of marital unity, so dearly held by lawmakers, policymakers, and scholars, enables us to cut through Bittker's "insoluble" dilemma as through a Gordian knot. 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, how they make decisions, how they share income and wealth. There is no reason to assume that all married couples would be the same in respect of 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, non-egalitarian 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,[187] the tax law is a

[186] The problems are irremediable because of the choice of martial 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. Some of the more egregious problem under the gift and estate tax marital deduction could be remedied, for example, the QTIP trust rules could be repealed, but this would not alter the inherent bias the marital deduction in favor of couples with unequal wealth holdings.

[187] *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 non-exhaustive catalog of the ways in which the state regulates through marriage:

> 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

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 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.[188]

To eliminate or curtail marital status as a basis for taxation would entail a variety of measures, many of which have been developed by other scholars, 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.

> 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 Countermarriage*, 99 S. CAL. L. REV. 235, 258-59.

[188] *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 (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. 1880, 1961-65.

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 165; Knauer, *supra* note 165. 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, *supra* note 19. *See also* Nancy Leong, *Negative Identity*, __ S. CAL. L. REV. __ (forthcoming 2015) (analyzing ways in which the legal system, including tax laws, adversely impacts atheist, asexual, single, and childfree people).

With respect to the income tax, the joint return should be abolished and replaced with a system of individual filing for all taxpayers. Such a reform would revive many of the issues existed before the adoption of the 1948 joint return, such as how to allocate deductible expenditures between married people, how to deal with property transfers between spouses, and how to police avoidance behavior.[189]

These obstacles are not insurmountable. Many developed countries, who blindly followed the United States in adopting the joint return, have since replaced it with a system of individual filing.[190] The United States is one of the few developed countries to retain the joint return.[191] Anthony Infanti has developed a thoughtful and thorough proposal for mandatory individual filing modeled in part Canada's individual tax filing system.[192]

With respect to the marital deduction and related provisions, Bridget Crawford has proposed to eliminate entirely the marital deduction along with

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[189] *See* Infanti, supra note 165, at 623-64; McMahon, *supra* note 112, at 738-46; Puckett, supra note 165, at 1422-24; Ventry, supra note , at 1466-71; 1507-1518; Zelenak, *supra* note 160, at 381-401.

[190] *See* Edward J. McCaffery, *Where's the Sex in Fiscal Sociology? Taxation and Gender,* THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE 216-36 (Isaac William Martin, Ajay K, Mehrotra, & Monica Prasad eds., 2009)

[191] As of 2004, only seven countries (including the U.S.) of the thirty-two countries in the Organisation for Economic Cooperation and Development used the joint return. *See* James Alm & Mikhail I. Melnick, *Taxing the 'Family' in the Individual Income Tax,* 5 PUB. FIN. & MGMT 67 (2005); CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX, at 59 (1997) (in 1993, 19 out of 27 OECD countries taxed husbands and wives separately); ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, FUNDAMENTAL REFORM OF THE PERSONAL INCOME TAX (2006), at 54-56 (noting that many OECD countries have moved away from family based taxation toward individually based systems); Joseph A. Pechman & Gary V. Englehardt, *The Income Tax Treatment of the Family: An International Perspective*, 43 Nat'l Tax J. 1, 7-10 (1991) (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*, at 56; Edward J. McCaffery, *supra* note 190, at xx. 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 U.S. 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*, in TAXATION OF THE FAMILY (2011). Furthermore, as Marjorie Kornhauser notes, strong cultural, religious, and political forces in the U.S. may explain the persistence of the joint return. *See* Kornhauser, *supra* note 166.

[192] *See* Infanti, *supra* note 165, at 623-664.

related provisions such as gift splitting and QTIP trusts.[193] Under her proposal the exemption amount for each individual would be increased to $10 million.[194] Similarly, Pat Cain proposed that the exemption amount be increased to $5 million as a way of minimizing the importance of the marital deduction.[195] Crawford and Cain's recommendation to increase the exemption amount has come to pass, as the exemption amount is now $5.43 million. However, instead of repealing the marital deduction, as Crawford recommended, Congress expanded the preference for spousal transfers through portability. Other possibilities for reform of spousal transfers under the gift and estate tax could be modeled after other countries.[196]

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 her proposal for individual filing, Anne Alstott considers a system household filing similar to that used for transfer programs, although she has concerns about the administrability and intrusiveness of such a system.[197] Infanti would adopt a hybrid system of individual filing that could be modified to take account of economic interdependencies where necessary.[198]

CONCLUSION

Windsor heralds the right to same-sex marriage as the law of the land and promises equality in the tax treatment of gay and straight marriage. However, *Windsor* will fail to deliver on its 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

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[193] *See* Crawford, *supra* note 52, at 797. See also Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction,* 76 N.C. L. REV. 1729 (1998) (recommending a return to the pre-ERTA marital deduction for up to half the decedent's estate, with no QTIP trust); Gerzog, *supra* note 144, at 327 (recommending repeal of the QTIP trust rules).

[194] *See id.* At the time Crawford's proposal was made, in 2003, the exclusion amount was only $1 million, scheduled to increase in increments to $.35 million in 2009, and then, in 2010, the estate tax was scheduled to be repealed. *See id.* at n. 116.

[195] *See* Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677,702-03, 707 (2000).

[196] *See* Infanti, *supra note __;* Lisa Philipps, *Tax Policy and the Gendered Distribution of Wealth*, *in* RETHINKING RESTRUCTURING: GENDER AND CHANGE IN CANADA (Isabella Bakker ed., 1996) 141, 152-55 (recommending that Canada's exemption for spousal transfers be reconsidered and possibly repealed).

[197] See Anne L. Alstott, *supra* note 165, at 744-48; *see also* Cain, *supra* note 162, at 57-60 (recommending the adoption of the household as a taxpaying unit but expressing privacy concerns).

[198] *See* Infanti, *supra* note 165, at 662-663.

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, but we should not wait to see whether that prediction is borne out. 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*.