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Heteronormativity and Federal Tax Policy

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HETERONORMATIVITY AND FEDERAL TAX POLICY

*Nancy J. Knauer**

I. INTRODUCTION 130
II. QUEER THEORY: A PRIMER 138
III. THE APPROPRIATE TAXABLE UNIT 143
A. *The Choice* 144
B. *"A Page of History"* 147
C. *A Singles Penalty?* 151
D. *The Tax Policy Postscript* 152
E. *The Critique* 154
F. *Alternative Tax Visions of Marriages* 158
1. *Marriage as Personal Consumption* 158
2. *Marriage and Optimal Income Tax Theory* 159
IV. MARITAL PROVISIONS 160
A. *Who's Married and Who's Not?* 162
B. *Economic Partnership: The Joint Filing Provisions* 163
C. *Fundamental Unit of Society: The Marriage Benefit Provisions* 168
1. *Employer-Provided Fringe Benefits* 169
2. *Estate and Gift Taxation: The Unlimited Marital Deduction* 171
D. *An Inti nate Association Warranting Suspicion: The Attribution Rules* 177
E. *Defining (and Dissolving) the Family* 179
1. *The Personal Exemption Amount and Dependents* 179
2. *Dissolution* 181
a. *Alimony* 181
b. *Child support* 183
c. *Property settlements* 184
V. THE FEDERAL TAX CODE, CONGRESS, AND CULTURE WARS 185
A. *"Pro-family" Tax Reform and DOMA* 185
B. *The Defense of Marriage Act* 188
C. *"Pro-Family" Tax Reform and Tax Relief for Married Couples* 197
VI. THE EXCLUSION OF SAME-SEX COUPLES AND PROPOSALS FOR

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REFORM 209
A. *Goal Assessment: Identifying Points for Reform* 210
1. *Tax liability* 212
2. *Behavior* 212
a. *Relationship choices* 213
b. *Work force participation* 214
3. *Compliance* 216
4. *Ritual* 216
5. *Uniformity* 217
6. *Fairness* 218
B. *Voter Demand and the Public Choice/Public Interest Theory of Legislation* 219
C. *Institutional Alternatives* 223
VII. TAX SCHOLARSHIP: TOWARD A SCHOLARSHIP OF ARTICULATION 226
A. *Caution What We Too Easily "Mistake for Nature"* 226
B. *Toward a Scholarship of Articulation* 229
VIII. CONCLUSION 233

I. INTRODUCTION

The legal recognition of same-sex relationships remains one of the most hotly contested issues on the current political scene.[1] As lesbian and gay political activists continue their push for equal marriage rights,[2] conservative political forces have taken steps to "defend" marriage[3] and denounce homosexuality as a "sin,"[4]

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[1] The legal battle for the recognition of same-sex relationships has centered on securing equal marriage rights, domestic partnership benefits, and various parenting rights. Currently, same-sex marriage cases are pending in three states. *See infra* note 451. Domestic partnership benefits are offered by an increasing number of private employers, municipalities, and a few states. *See generally* Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337 (1998) (outlining the advances made in the private sector regarding the recognition of same-sex relationships). Same-sex co-parents have also made strides in the area of joint adoption and custody or visitation rights for non-biological (or non-adoptive) co-parents. *See id.* at 356.

[2] The proponents of same-sex relationships frame the issues in terms of formal equality, at times asserting that sexual orientation is an immutable characteristic. For a critique of the immutability argument see Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994). For a discussion of the litigation strategy employed in connection with such equality claims see William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L. J. 1623 (1997).

[3] After the 1993 Hawaiian Supreme Court decision in Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), states began to enact laws that restricted their definition of marriage to a union between one man and one woman and refused to recognize same-sex marriage performed in sister states. Commentators were quick to point out that this legislation raised serious questions under the Full Faith and Credit Clause of the U.S.

and have launched an advertising campaign showcasing "reformed" homosexuals.[5] The proponents of same-sex marriage demand equal marriage rights as a matter of fundamental human dignity and as a means to gain certain legal benefits that attach to marital status. When they enumerate the benefits of marriage, the proponents invariably place the ability to file joint federal income tax returns near the top of the list, followed by inheritance rights, pension and survivor benefits, and decision-making authority in the case of disability.[6] However, for anyone familiar with the recent Congressional debate over the "marriage tax penalty,"[7] characterizing joint filing status as a 'benefit' seems to be at best ill-informed and at worst just plain wrong.[8] After all, everyone knows that the federal tax code is anti-marriage.

Constitution. *See generally* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L. J.1965 (1997); *see also* MARK STRASSER, LEGALLY WED (1997) (asserting that DOMA is unconstitutional on several grounds). On the federal level, the Defense of Marriage Act (DOMA) defines marriage for all federal purposes as a union between one man and one woman. Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996). It also purports to grant states the power to refuse to recognize out-of-state same-sex marriages. *See id.* at § 3. For a discussion of the enactment of DOMA see *infra* text accompanying notes 295-342.

4 In 1998 Senate majority leader, Trent Lott stated in an interview that he considered homosexuality to be a sin and likened it to alcoholism and kleptomania. *See* Alison Mitchell, *Lott Says Homosexuality Is a Sin and Compares It to Alcoholism*, N.Y. TIMES, June 16, 1998, at A24.

5 A coalition of "pro-family" organizations, many of which are key players in the push for "pro-family" tax reform, purchased full-page advertisements in national newspapers to offer a Christian message of "hope and healing" for homosexuals. *See* Frank Rich, *Lott's Lesbian Ally*, N.Y. TIMES, July 22, 1998, at A19 (describing the advertising campaign). The ads claim that homosexuals can change with proper counseling, thereby contradicting the immutable characteristic argument advanced by certain lesbian and gay political activists. *See* Laurie Goodstein, *The Architect of the "Gay Conversion" Campaign*, N.Y. TIMES, Aug. 13, 1998, at A10 (interviewing a leading proponent of the "homosexuals can change" campaign).

6 For example, a popular "legal guide for lesbian and gay couples" starts its list of the benefits that are not available to same-sex couples with the right to "file joint income tax returns." HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES xi (8th ed., 1994); *see also* WILLIAM ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE (1996). Proponents of same-sex marriage are not the only ones focused on the tax treatment of married couples. The Supreme Court of Hawaii has included tax benefits in its list of the "most salient marital rights and benefits." *Baehr*, 852 P.2d at 59, *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

7 A Congressional Budget Office Report defines a marriage penalty or bonus as "the difference between the tax liability of a couple filing jointly and their liability if they could file as individuals." CONGRESSIONAL BUDGET OFFICE, *For Better or For Worse: Marriage and the Federal Income Tax*, June 1997, 97 TAX NOTES TODAY 135-20, July 15, 1997, *available in* LEXIS, Fedtax Library, TNT file [hereinafter CBO REPORT].

8 The notion that same-sex couples are better off because they can avoid a potential marriage penalty has been voiced by certain commentators. *See* Jeff Millar, *Be Single, Be Rewarded; Get Married, Get Penalized*, THE HOUSTON CHRONICLE, Apr. 14, 1994, at 2. For example, Millar writes: "[o]ne wonders if the gay-rights activists advocating the sanction of same-sex marriages have considered . . . [the marriage penalty]." *Id.*

In addition, Lawrence Zelenak has criticized scholars who have made blanket statements regarding the beneficial treatment of married couples under the federal tax laws; noting that they had committed a "selection bias error." Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L.

To the contrary, I believe that this assertion by same-sex couples reveals three points that may not be obvious to tax scholars. First, from their vantage point, same-sex couples can see that the joint filing provisions are just one example of a scheme of taxation where considerations of marital status are pervasive. Accordingly, the risk of a marriage penalty may be overstated because the narrow focus on the marriage penalty ignores the numerous other provisions of the federal tax code which reference a taxpayer's marital status.[9] Second, the provisions governing family taxation are prescriptive in nature. They are designed to recognize and privilege a specific type of relationship. Thus, for some same-sex couples, the risk of a marriage penalty may be offset by the value of official recognition.[10] Finally, the stance of the *opponents* of same-sex marriage highlights another very important point. Any discussion of sexual orientation and/or marriage implicates difficult and divisive questions of morality.

This Article uses these three observations — marital status considerations are pervasive, the tax code is prescriptive, and discussions of sexual orientation are framed by morality — to analyze the marital provisions of the federal tax code,[11] the treatment of these provisions in tax scholarship, and the current legislative proposals for "pro-family" tax reform. Central to my analysis is the contention, informed by queer theory, that the scholarly treatment of the choice of a taxable unit, including much of the new critical tax research,[12] is limited by

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REV. 1521, 1576 (1998).

9 The economic costs could by overstated unless the analysis also includes the various tax benefits afforded to married couples which are independent of the joint filing provisions. These include the exclusion from gross income of certain employer-provided fringe benefits made available to spouses and the unlimited transfer tax marital deductions. *See infra* text accompanying notes 179-222.

10 Doubtless those not in same-sex relationships may find it difficult to believe that some individuals (who are able) would willingly pay more tax if their relationships were recognized by the federal government. *See* Zelenak, *supra* note 8, at 1532 (noting that "[w]idespread distrust of the [social security] system means younger earners want out of the system, not in"). In another context, Zelenak has declared the symbolic value of taxation "dubious." *Id.* at 1528; *see also* Nancy C. Staudt, *Tax Theory and "Mere Critique": A Reply to Professor Zelenak*, 76 N. C. L. REV. 1581, 1587-8 (1998) (responding to Zelenak's criticism). For a discussion of the symbolic and prescriptive function of family taxation, *see infra* text accompanying notes 447-50.

11 In addition to the tax code sections discussed in this Article, the social security system comes complete with its own marriage penalty for two-earner married couples. Spouses and surviving spouses of retired workers are entitled to receive social security benefits even if they never engage in wage labor. A spouse of a retired worker receives fifty percent of the retiree's benefits and a surviving spouse receives one hundred percent of the deceased retiree's benefit. If the spouse is also entitled to her own benefits as the result of workforce participation, she receives only the larger of the two benefits. The extent to which the current system provides a benefit for spouses who do not work outside the home has been the subject of considerable recent comment in critical tax scholarship. *See e.g.*, Jonathan Barry Forman, *Social Security: What Can Be Done About Marriage Penalties*, 6 S. CAL. REV. L. & WOMEN'S STUD. 553 (1998) (urging the adoption of reform less radical than privatization to end the redistributive effect of the marriage penalties). This Article does not address the treatment of same-sex couples under the social security system.

12 In recent years there has been an increasing body of tax scholarship written from what has been

heteronormativity — the largely unstated assumption that heterosexuality is the essential and elemental ordering principal of society.[13] Queer theory offers a particularly useful perspective for this analysis because it demands that we question the normal.[14] It reminds us that heterosexuality also is a sexual orientation warranting study. Because queer theory rejects stable gay and lesbian subjects, it does not articulate an ethnic or minority program of inclusion. By moving beyond a rights-centered dialogue it invites us to challenge the construction of the taxpayer as married, widowed or divorced and to grapple with fundamental normative questions, such as how to define family and which, if any, relationships to privilege.[15]

From this perspective, it is clear that the marital provisions are far from punitive. Not all couples see their federal income tax liability increase upon marriage. In fact, many more see it decrease, experiencing a marriage tax bonus.[16] When viewed in their entirety, the seemingly discordant rules offer a composite picture of marriage. The rules reflect, for better or worse, a view of marriage as an economic unit, a fundamental unit of society, and an intimate association whose

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referred to as a "critical" perspective. For a discussion of the benefits of critical scholarship see Staudt, *supra* note 10, at 1582-5. Generally, it shares a disbelief in neutral principles and an impatience with the claim that tax policy is apolitical. *See id.* Critical tax scholarship has been the subject of two law review symposia issues. The first was a collection of responses to a book written by Edward J. McCaffery from a liberal feminist perspective entitled TAXING WOMEN. *See* Symposium, *Taxing Women: Thoughts on a Gendered Economy,* 6 S. CAL. REV. L. & WOMEN'S STUD. 287 (1997). The second was a collection of responses to an article written by Lawrence Zelenak which was critical of much of the new scholarship. *See* Symposium, *Critical Tax Theory: Criticism and Response,* 79 N. C. L. REV. 1519 (1998).

[13] Michael Warner used the term heteronormativity to apply to the view of heterosexuality (and, therefore, heterosexual culture) "as the elemental form of association, as the very model of intergender relations, as the indivisible basis of all community, and as the means of reproduction without which society wouldn't exist." Michael Warner, *Introduction* to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY xxi (Michael Warner ed., 1993); *see also* Paisley Currah, *Politics, Practices, Publics: Identity and Queer Rights, in* PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES 258 (ed. Shane Phelan, 1997)(attributing the term heteronormativity to Michael Warner).

[14] For an accessible introduction to queer theory and the development of gay and lesbian political theory in general see ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION (1996). *See also* PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES 258 (Shane Phelan ed., 1997); FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY (Michael Warner ed., 1993).

[15] Marjorie Kornhauser has written about the benefit that a feminist perspective can bring to tax scholarship. *See* Marjorie E. Kornhauser, *The Relationship of Feminist Scholarship to Tax,* 6 S. CAL. REV. LAW & WOMEN'S STUD. 301, 302 (1997). After considering several alternative formulations, she defines "feminist scholarship" as articles that "analyze topics of concern to women from a viewpoint sympathetic to and informed by feminist thought." *Id.* at 305. Borrowing from Marjorie Kornhauser's definition of feminist scholarship then, queer scholarship would analyze topics that implicate sexual orientation from a viewpoint that is sympathetic to and informed by queer theory. Kornhauser notes that while feminist insights can broaden our understanding of tax, tax can enhance the understanding of other disciplines as well. *See id.* at 302.

[16] The CBO reports a $4 billion net marriage tax bonus for 1996. *See* CBO REPORT, *supra* note 7.

members may not deal with each other at arm's length. In stark contrast, same-sex partners always act as strangers under the tax code regardless of the economic or contractual realities of their relationship and, since the Defense of Marriage Act (DOMA), regardless of a valid marriage under state law.[17] Whether a same-sex couple will owe more or less federal income tax than a similarly situated married couple depends on the couple's individual circumstances.[18] Generally, a single-earner same-sex couple will pay more income tax than its "traditional" counterpart. A high income dual-earner same-sex couple will pay less income tax, but in the end may be the hardest hit because of the federal estate and gift tax.

In addition to any economic disadvantage, the exclusion of same-sex couples carries a symbolic cost. No matter how much taxpayers resent paying taxes, the tax code continues to send a strong prescriptive message each year when millions of taxpayers check the appropriate box for their filing status. Your filing status, the way you present yourself, and the annual tally of your accomplishments to the state depends, not simply on your marital status, but on the sex of your partner. As a result, I will always be "single" regardless of the length of my relationship or the depth of my commitment. The marital provisions exist very clearly as an expression of the way things should be, not simply of the way things are.

Critical tax scholarship has made great strides in bringing new perspectives to bear on issues of tax policy. Surprisingly absent from this progressive critique has been any extended discussion of the heterosexual bias imbedded in the numerous tax provisions that reference a taxpayer's marital status.[19] This relative

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17 For the relevant text of DOMA see *infra* note 144.

18 This Article is primarily concerned with the unstated assumptions in the marital provisions of the federal tax code regarding sexual orientation, and my analysis proceeds from that vantage point. Because same-sex couples are not considered "married," many of the observations I make also are applicable to opposite-sex unmarried couples (or other couples who may consider themselves as a family unit without intimate or romantic attachment). Although the question of recognizing opposite-sex couples is framed by a morality discourse, it is a different discourse from that constructed around (and by) the heterosexual-homosexual opposition.

I use the term same-sex couple rather than gay or lesbian couple to stress the fluidity of identity and note that not everyone in a same-sex relationship identifies as gay or lesbian, despite how others may perceive them. For the same reason, I use opposite-sex couple rather than heterosexual couple. Admittedly, both constructions assume that sex has a degree of certainty, and they do not account for the consideration of transgendered identifications.

Unless otherwise stated, I use "married couple" to refer exclusively to opposite-sex couples, thereby distinguishing state-sanctioned marriage from ceremonial or religious marriages that may be available to same-sex couples.

19 A noted exception to this is the scholarship of Patricia Cain. Cain notes that lesbians "have remained invisible in most of the feminist scholarship dealing with tax law." Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471, 471 (1997) [hereinafter Cain, *Taxing*]. Cain's contribution to tax scholarship on matters involving sexual orientation has been immeasurable. She wrote the first article in this "field" in 1991. *See, e.g.*, Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 LAW & SEX. 97 (1991) [hereinafter Cain, *Same-Sex*]. Cain's goal is "to bring the reality of lesbian lives into the broader tax policy conversation regarding taxation of the family." Cain, *Taxing*, *supra* at 473.

silence on matters of sexual orientation reinforces the heteronormative nature of the federal tax code and necessarily limits the depth of any analysis of the marital provisions.

Critical tax scholarship has successfully used critical race and/or feminist theory to reveal racial and gender bias in the tax code.[20] It examines the "neutral" principles which purport to undermine tax policy and illustrates how such principles maintain and reinforce existing social and economic structures.[21] This new scholarship also identifies the disparate impact of facially neutral statutory language[22] and examines the behavioral incentives produced by specific provisions with regard to both market and family-based decision making.[23] Too often, sexual orientation is mentioned only in passing within the larger and primarily gender-based discussion of the joint filing provisions.[24] When sexual orientation is present, the arguments for changing the tax treatment of same-sex couples are grounded safely and securely on neutral principles of tax policy.[25]

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20 Marjorie Kornhauser states that "[a] primary virtue of critical tax theory is that it, like any outsider theory, reveals the assumptions hidden behind established thought and institutions." Majorie E. Kornhauser, *Through the Looking Glass With Alice and Larry: The Nature of Scholarship,* 76 N. C. L. REV. 1609, 1623 (1998) . Lawrence Zelenak has called feminist tax scholarship "the most interesting and important developments in tax scholarship in recent years." Zelenak, *supra* note 8, at 1521. Edward McCaffery's book TAXING WOMEN merges feminist concerns with optimal tax theory to construct a critique of the joint filing provisions. EDWARD J. MCCAFFERY, TAXING WOMEN (1997). TAXING AMERICA, a collection of critical tax writings, spells out its purpose in very broad and inclusive terms: "the purpose of this anthology is to change the tax discourse to include issues of disability discrimination, economic exploitation, heterosexism, sexism, and racism." Karen B. Brown & Mary Louise Fellows, *Introduction* to TAXING AMERICA 1, 2 (Karen B. Brown & Mary Louise Fellows eds., 1996).

21 *See* Brown and Fellows, *supra* note 20, at 3 (discussing how tax law can reinforce existing subordinations).

22 *See, e.g.,* john a. powell, *How Government Tax and Housing Policies Have Racially Segregated America, in* TAXING AMERICA, *supra* note 20, 80, at 83 (asserting that the home mortgage deduction, *inter alia.,* has "racialized space by encouraging and enabling widespread disinvestment from the central cities and communities of color").

23 *See generally* Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code,* 40 UCLA L. REV. 983 (1993).

24 TAXING AMERICA and TAXING WOMEN are prime examples. Both assert that tax is political, both consider the impact of taxes on family structure and intimate relationships, and both only mention sexual orientation in passing. The editors of TAXING AMERICA acknowledge that "disability discrimination, heterosexism, and racism against [groups other than African-Americans] . . . have been largely unaddressed in the anthology . . . ." Brown & Fellows, *supra* note 20, at 3. Likewise, McCaffery suggests that the tax treatment of same-sex couples could warrant a separate book. *See* MCCAFFERY, *supra* note 20, at 3.

25 For example, Patricia Cain argues that if joint filing is appropriate for married couples, then it is appropriate for same-sex couples. *See* Patricia A. Cain, *Imagine There's No Marriage,* 16 QUINNIPIAC L. REV. 27, 54-60 (1996). The few commentators who have looked specifically at same-sex couples in the federal tax code have advocated extending the marital provisions (or other tax benefits) to same-sex partners. This approach expands access to the institution of marriage, at least for tax purposes, and in that respect it is very useful to help bring the topic of heterosexual bias to the fore. It does not, however, disrupt the basic

The pervasive nature of the marital provisions makes the assumption that every taxpayer, if not married, will marry at least once. One challenge for the new scholarship should be to disrupt the normative image of the taxpayer which underlies our present system of taxation (i.e., the quintessential liberal choosing subject who by default is white, male, and who will marry at least once) and ask what impact race, gender, and sexual orientation have on the tax burden of a particular taxpayer.[26] Looking forward, it is equally important to ask these questions early on when considering any fundamental tax reform in order to begin constructing an (in)essential taxpayer.

As tax scholars labor to make the identities of taxpayers visible, special care is necessary to structure the inquiry in a manner that both acknowledges and avoids the essentializing tendencies that have plagued other areas of legal scholarship.[27] Queer theory cautions that identity is fluid and multivalent.[28] It is not a seriatim experience. We do not have an alternative series of identities but have multiple identities or identifications. At any one moment we are not female *or* gay *or* latina *or* Jewish, but potentially all of those and more.

The assertion that morality is an integral part of any public policy decision-making regarding sexual orientation and/or marriage[29] presents an additional challenge to the new tax scholarship and to gay and lesbian scholarship in general. Sexual orientation is not experienced in the same way as ethnicity and/or race because it is framed by questions of morality. Thus, existing minority identity models are not transferable to individuals in same-sex relationships, whether they identify themselves as gay, lesbian, queer, bisexual, heterosexual, or eschew labels entirely. Further, when discussing the tax treatment of same-sex couples (or any married couple) tax scholarship can not rely on the comfortable commonplace that taxation is morally neutral or, as stated in a favorite gem of legislative history, that "the object . . . is to tax a man's net income . . . not reform men's moral characters .

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ordering principal that marital status is an appropriate and relevant factor in determining tax liability.

[26] It does not necessarily follow from this question that any revealed disparities should (or even could) be remedied through tax reform. This entails a much larger question of institutional choice to determine whether tax reform should be used proactively to address pre-existing social or economic bias, such as McCaffery proposes when he suggests taxing married men at a higher rate than married women. *See* MCCAFFERY, *supra* note 20, at 5.

[27] *See* Kimberly Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

[28] For a discussion of the multivalent nature of identity see *infra* text accompanying notes 523-31.

[29] Sexual orientation is inextricably bound with issues of morality. Existing identity models borrowed from feminism and critical race theory are ill-equipped to take into account the element of morality. A defense of same-sex object choice phrased in terms of formal equality will fail to engage objections offered in terms of moral (and religious) considerations. *See infra* text accompanying notes 517-19.

. . ."[30]

The Congressional debates over DOMA and "pro-family" tax reform illustrate the extent to which morality informs the legislative process. As the new scholarship questions the continued efficacy of the unity of husband and wife for income tax purposes,[31] Congress bows under considerable pressure from conservative organizations to deliver "pro-family" tax reform.[32] The Congressional celebration of the opposite-sex married couple (i.e., the family unit) as a transhistorical building block of society leaves little room for the individualistic, autonomy-maximizing proposals for separate filing originating in the tax academy[33] or the more modest proposals for inclusion voiced by lesbian and gay scholars.[34]

Much of this disconnect between the progressive critique and the realities of the political process is attributable to the failure of scholars to consider the extent of the influence of anti-gay "pro family" organizations (or voter demand) on the legislative process. A public choice analysis can bring the role of voter demand into sharper relief and provide useful insights to the political economy of "pro family" legislative initiatives.[35] It can also help reform-minded scholars craft their proposals in such a way as to maximize their chance for adoption or implementation. For example, if your goal is to have same-sex couples treated as "married" under the tax code, it is important to note whether Congress has been captured by "pro-family" organizations. If so, strategic institutional choice can help focus attention on the various institutional alternatives, such as regulatory guidance, IRS private rulings, judicial decisions, and private contract.[36]

Part II of this Article provides a basic introduction to queer theory. Part III outlines the heteronormativity of the debate concerning the choice of the

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30 Comm'r v. Tellier, 383 U.S. 687, 691-92 (1966) (quoting Sen. Williams during the debate of the 1913 income tax bill).

31 Tax scholars who have addressed the issue of joint filing generally have endorsed separate filing. *See, e.g.*, Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 343 (1994) (arguing society would be better served by separate returns); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993); McCaffery, *supra* note 23. In addition, separate filing is the trend internationally. *See* CBO REPORT, *supra* note 7.

32 For a discussion of the goals of "pro-family" tax reform see text accompanying notes 343-44.

33 *See generally* MCCAFFERY, *supra* note 20.

34 *See, e.g.*, Cain, *Same-Sex*, *supra* note 19.

35 For a description of the public choice or interest group theory of legislation see *infra* text accompanying notes 465-88.

36 When a goal is contested, the "best" institutional choice for the implementation of the goal may not be the most politically feasible choice. This necessarily introduces a strategic element to any discussion of institutional choice involving a contested social goal. *See* Knauer, *supra* note 1, at 339 (using "efficiency and equity concerns to evaluate the competing institutional choices" after engaging in "a strategic assessment of the relief available").

"appropriate" taxable unit. Part IV illustrates how pervasive marital status is throughout the tax code. It describes the marital provisions, including those involving the definition of family and its dissolution, and contrasts them with the federal tax treatment of same-sex couples. Part V presents DOMA and the recent "pro-family" tax reform as prescriptive measures to define family that are grounded in moral judgements informed by religion. After discussing the cost of the exclusion of same-sex couples from the marital provisions, Part VI offers two methodological suggestions for future proposals for reform: consider the demand side of legislation and employ a strategic institutional analysis. Using a public choice/public interest analysis, it categorizes DOMA and "pro-family" tax reform as either a "rent-seeking" demand by "pro-family" organizations or governmental intervention designed to correct a perceived failure in normative family structure. Part VII urges tax scholars to resist essentializing tendencies and offers some insights of queer theory to suggest a future "scholarship of articulation" where identity is at all times visible and multivalent. A brief conclusion notes that since taxation is indeed political, it makes sense that the battle over the changing face of the American family is being mediated, at least in part, through the tax code.

II. QUEER THEORY: A PRIMER

This Article adopts an eclectic approach to the seemingly narrow issues of "pro-family" tax reform and the treatment of same-sex couples under the federal tax law — ultimately mixing elements of queer theory, public choice theory, and strategic institutional choice.[37] Assuming that many readers are not familiar with the basic outlines of queer theory, this section provides a general description of the perspectives and understandings offered by queer theory and their utility for analyzing legal questions involving issues of sexual orientation.[38] The perspective of queer theory shows that the marital provisions are much more than simply a question of joint returns and alerts us to the extreme heteronormativity of the debate, both political and scholarly, regarding the marriage penalty and other "pro-family" tax reform. It also suggests that before gay and lesbian scholars endorse a "me too" strategy of inclusion grounded on equality principles, it is important to

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[37] Edward L. Rubin has called for a synthesis of legal discourse drawing on elements of law and economics and outsider scholarship. *See* Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394 (1996); *see also* Michael A. Livingston, *Reinventing Tax Scholarship: Lawyers, Economists, and the Role of the Legal Academy*, 83 CORNELL L. REV. 365 (1998) (discussing ways to reinvigorate tax scholarship).

[38] Marjorie Kornhauser has written about the impact that the label "feminist" can have on the reception of a scholar or an article. *See* Kornhauser, *Feminist Scholarship*, *supra* note 15, at 301. If "feminist" can produce such reactions, I can only imagine what impact the label "queer" can have on an audience. *See id.* at 312 (suggesting that "[t]he more controversial the theory or the less established it is, the more negative cues it will provide . . .").

ask why the marital provisions exist in the first place.

Queer theory studies the construction and regulation of sexuality, specifically sexual orientation or sexual object choice.[39] It denies the fixity of sexual identity which it sees instead as historically contingent and provisional.[40] The goal of queer theory is to "refocus our attention on how culturally sanctioned versions of the normal and the natural have been constructed and sustained . . . [and] reveal[] the normal and the natural themselves to be cultural fictions . . . ."[41] In this way, queer theory echoes Blackstone's admonition from his COMMENTARIES: "we often mistake for nature what we find established by long and inveterate custom."[42] A central part of this Article's analysis of the marital provisions tries to reveal just exactly how much we "mistake for nature."

Building on the work of Michel Foucault, queer theory accepts that both homosexuality and heterosexuality are products of the medicalization of sexuality which occurred in the late 19th century.[43] This social constructionist view of sexual orientation holds that although same-sex behavior clearly existed prior to this period of naming, the concept of the homosexual as an independent, self-defined subject did not.[44] This represents a major departure from the strategy of contemporary lesbian and gay activists, many of whom work very hard to articulate an immutable gay or lesbian identity.[45]

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39 Although informed by feminist work on gender, queer theory recognizes sexuality or sexual orientation as distinct from, although related to, gender. Feminism's primary interest in gender makes it an inadequate framework to produce an understanding of sexual orientation. Queer theory rejects feminism (i.e., gender) as "the privileged site of a theory of sexuality." Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, in* THE LESBIAN AND GAY STUDIES READER 1, 32 (Henry Abelove et al. eds., 1993) (theorizing the study of sexuality long before the advent of queer theory). The editors of THE LESBIAN AND GAY STUDIES READER elected against using the term queer in its title. *See Introduction, supra* at xvii.

40 For a discussion of the influence of post-structuralism on queer theory see generally SHANE PHELAN, GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS 152 (1994); Ki Namaste, *The Politics of Inside/out: Queer Theory, Poststructuralism, and a Sociological Approach to Sexuality, in* QUEER THEORY/SOCIOLOGY 194 (1996). For a helpful discussion of the distinction between poststructrualism and postmodernism see CHRIS WEEDON, FEMINIST PRACTICE AND POSTSTRUCTURALIST THEORY 170-80 (2d ed., 1997).

41 Scott Bravman, *Queer Historical Subjects*, 25 SOCIALIST REV. 47, 49 (1995). The quote continues that cultural fictions are "enabled only through their dependent relationship with the abnormal and the unnatural." *Id.*

42 2 WILLIAM BLACKSTONE, COMMENTARIES *11.

43 *See* MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, PART I (1977).

44 Foucault speaks of the "reverse" discourse enabled by the identification of homosexuality as a discrete area of study. *Id.* at 101. He notes that it was at this point that "homosexuality began to speak in its own behalf, to demand that its legitimacy or 'naturality' be acknowledged, often in the same vocabulary, using the same categories by which it was medically disqualified." *Id.*

45 The identity politics of the lesbian and gay political movements are "committed to establishing

Rejecting the notion of a stable gay or lesbian identity, queer theory asserts that who is gay and who is not is "far from self-evident."[46] It sees such categorization as not simply irrelevant, but counter-productive. The identity politics of gay and lesbian activism (and scholarship) reinforces what queer theory considers the artificial divide between the socially constructed polar extremes of sexual object choice.[47] Queer theory seeks to destabilize the hetero-homo opposition without offering an alternative fixed identity. Instead, queer theory advocates an alternative positionality or perspective.[48] This unique perspective is one of the most promising aspects of queer theory, at least with regard to its applicability to legal analysis, because "it allows us to view the world from perspectives other than those which are generally validated by the dominant society."[49] Thus, instead of seeing from a position of presumed heterosexuality (i.e., that of universal subject) we can begin to approach "heteronormativity" and regard it as the object of critique and a powerful prescriptive force.[50] This, in turn,

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gay identity as a legitimate minority group, whose official recognition would secure citizenship rights for lesbian and gay subjects." JAGOSE, *supra* note 14, at 61 (referring to this mode of political activity as the "ethnic model" as opposed to the earlier "liberationist model" that predominated in the early years of the contemporary gay and lesbian movement); *see also* Halley, *supra* note 2, at 547-53 (discussing the esssentialist/constructionist split in both the lesbian and gay political movement and its anti-gay opponents).

46 JAGOSE, *supra* note 14, at 7. For example, Jagose asks "is the man who lives with his wife and children, but from time to time has casual or anonymous sex with other men, homosexual?" *Id.* Commentators often conflate homosexual behavior with lesbian or gay identification. *See, e.g.*, RICHARD A. POSNER, OVERCOMING LAW 554 (1995) (defining a homosexual as one who "will buy more same-sex than other-sex activity if the full price . . . is the same").

47 Carl F. Stychin explains that "[t]o the extent that the coherent gay subject depends upon the construction of sexuality as a binary opposition dependent upon the gender of object choice, the articulation of a gay subjectivity can reinforce and reify the hetero-homo dichotomy which forms the basis of categorical thinking around sexuality." CARL F. STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 141-2 (1995).

48 Daniel Halperin explains: "Queer is by definition *whatever* is at odds with the normal, the legitimate, the dominant. *There is nothing in particular to which it necessarily refers.* It is an identity without an essence. 'Queer,' then demarcates not a positivity but a positionality vis-a-vis the normative . . . ." DAVID M. HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 62 (1995) (Emphasis in original).

49 Brett Beemyn & Mickey Eliason, *Queer Theory in Practice, in* QUEER STUDIES: A LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ANTHOLOGY 165 (Brett Beemyn & Mickey Eliason eds., 1996).

50 *See* Chrys Ingraham, *The Heterosexual Immaginary: Feminist Sociology and Theories of Gender, in* QUEER THEORY/SOCIOLOGY 169 (Steven Seidman ed., 1996) (defining heteronormativity as "the view that institutionalized heterosexuality constitutes the standard for legitimate and prescriptive sociosexual arrangements").

For a discussion of the prescriptive nature of normativity see CHRISTINE KORSGAARD, THE SOURCES OF NORMATIVITY 8-9 (1996). Korsgaard writes:

> [E]thical standards are *normative*. They do not merely *describe* a way in which we in fact regulate our conduct. They make *claims* on us; they command, oblige, recommend, or guide. Or at least, when we invoke them, we make claims on one another. When I say that an action is right I am saying that you ought to *do* it; when I say that something

allows us to question why the issue of couples neutrality was raised by voters and accepted as a inveterate goal of tax policy.

The contingent nature of identities helps address the essentializing tendencies of legal scholarship, including the new tax scholarship.[51] Queer theory directs us to resist the urge to create an essential woman or to try to find a "core lesbian experience."[52] Recognizing that identity is multivalent, queer theory challenges us to engage one identification without necessarily silencing or excluding other simultaneous identifications.[53]

The historical explanation of contemporary homosexuality and heterosexuality establishes a relationship of dependence between the two concepts.[54] Heterosexuality does not exist (and indeed would be meaningless) without its evil twin of homosexuality.[55] Thus, the privileged position of

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> is good I am recommending it as worthy of your choice. The same is true of the other concepts for which we seek philosophical foundations. Concepts like knowledge, beauty, and meaning, as well as virtue and justice, all have a normative dimension, for they tell us what to think, what to like, what to say, what to do, and what to be. And it is the force of these normative claims -- the right of these concepts to give laws to us -- that we want to understand.

Id. (Emphasis in original).

51 Queer offers the potential within its perspective to acknowledge the differences and distinctions related to issues or identities, such as race, gender, class, ethnicity. *See* Beemyn & Eliason, *supra* note 49, at 165. Beemyn and Eliason describe this as queer theory's "*potential* to be inclusive of race, gender, sexuality, and other areas of identity by calling attention to the distinctions between identities, communities, and cultures, rather than ignoring these differences or pretending that they don't exist, as it often does now." *Id.* (Emphasis in original).

52 Patricia Cain has written persuasively regarding the tendency of certain incarnations of feminism to ignore the experiences of lesbians. *See* Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism,* 2 VA. J. SOC. POL'Y & L. 43 (1994). However, Cain is reluctant to destabilize the essential nature of the term "lesbian" because she asserts that it is still in the process of defining. *Id.* I would suggest that the perfect time to begin to destabilize the definition is before it becomes based on exclusionary tendencies and hidden biases. *See* Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse,* 29 CONN. L. REV. 561, 613 (1997) (discussing Cain's reluctance to deconstruct the category of "lesbian").

53 Work on intersectionality has stressed the interaction of overlapping and at times contradictory identity positions. Darren Hutchinson has worked to refine the concept of intersectionality to avoid privileging particular subject positions to the detriment of others. This requires building a new way to conceptualize identity that resists the impulse to switch attention from that of one identity to the next. *See* Hutchinson, *supra* note 52, at 641; *see also* Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory, and Anti-Racist Politics,* ___ BUF. L. REV. (forthcoming 1999).

54 The importance of binary pairing is derived from Jacques Derrida's concept of the supplementarity. Diana Fuss used the notion of supplement to explain a relationship of dependence between heterosexual and homosexual in an early queer theory text INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES (Diana Fuss ed., 1991). She notes that "[T]he philosophical opposition between 'heterosexual' and 'homosexual,' like so many other conventional binaries, has always been constructed on the foundations of another related opposition: the couple 'inside' and the couple 'outside.'" *Id.* at 1.

55 For example, Ki Namaste explains that "a macho homophobic male can define himself as

heterosexuality depends on the existence of a category which defines that which it is not (i.e., homosexuality).[56] A major project of queer theory is to destabilize the boundary between the natural and the unnatural — between heterosexuality and homosexuality. As the Congressional debate on DOMA shows quite clearly, when this boundary is blurred or attempted to be redrawn, "[t]he language and law that regulates the establishment of heterosexuality as both an identity and an institution, both a practice and a system, is the language and law of defense and protection . . ."[57]

As a final note, the term queer has been increasingly used as the truly up-to-date way to refer to lesbians and gay men — the latest politically correct term to come from a movement that has advanced from "homosexual" to "homophile" to "gay" to "lesbian and gay" to "queer."[58] From a practical standpoint, to deploy "queer" in such a way runs the risk of displeasing many groups or individuals who would otherwise seem to fit under the banner of "queer."[59] It also would exclude

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'straight' only in opposition to that which he is not -- an effeminate gay man." Namaste, *supra* note 40, at 196.

[56] Diana Fuss explained this concept as follows: "The homo[sexual] in relation to the hetero[sexual], much like the feminine in relation to the masculine, operates as an indispensable interior exclusion — an outside which is inside interiority making the articulation of the latter possible, a transgression of the border which is necessary to constitute the border as such." Fuss, *supra* note 54, at 3.

[57] *Id.* at 1-2. The quote continues: "heterosexuality secures its self-identity and shores up its ontological boundaries by protecting itself from what it sees as the continual predatory encroachments of its contaminated other, homosexuality." *Id.* at 2; *see also* HALPERIN, *supra* note 48, at 47 (discussing how heterosexuality "needs to be militantly protected, defended, and safeguarded by a constant mobilization of social forces").

[58] The term "queer" entered the political realm in the early 1990's with the advent of the direct political action group Queer Nation. *See* JAGOSE, *supra* note 14, at 107. Continuing in the politics of confrontation and disruption practiced by Act-Up, Queer Nation turned its attention beyond AIDS policies and addressed issues such as anti-gay violence. *See id.* at 107-9. Interestingly, when Teresa de Lauretis first used the term "queer theory" in 1991, she reported in a footnote that she had been unaware of the fledgling activities of Queer Nation. Teresa de Lauretis, *Introduction, Queer Theory: Lesbian and Gay Sexualities*, 3 DIFFERENCES *iv*, n.2. (1991).

[59] Typically, queer is used to refer to the group comprised of gay men, lesbians, bisexuals, and transgendered individuals. However, this is a limited reading of the term. As deployed within queer theory, queer stands for those forms or modes of sexuality that are opposed to the "normal." *See* HALPERIN, *supra* note 48, at 62 (remarking that "queer" could include *inter alia.*, "married couples without children"). A broader reading would mark "queer" as simply that which is opposed to the "normal." *Id.* This offers the possibility of a "straight queerness." Calvin Thomas, *Straight with a Twist: Queer Theory and the Subject of Heterosexuality, in* THE GAY '90S: DISCIPLINARY AND INTERDISCIPLINARY FORMATIONS IN QUEER STUDIES 83, 85 (Thomas Foster et al. eds., 1997). An "otherwise straight" subject with non-transgressive libidinal object choice can identify as "queer." *Id.* at 84 (explaining that such identifications are "formulations of discursive, performative, or "dis-positional" queerness" rather than formulations based on non-normative sexuality).

The potentially inclusive nature of queer, and its insistence on the contingent nature of identity, signal an opportunity for queer to express racial, gender, and class differences in a way that does not rest on unmarked assumptions of whiteness and masculinity. *See* Elizabeth Weed, *Introduction* to FEMINISM MEETS QUEER THEORY vii, x (1997). Despite this potential, many agree that, as presently enacted, queer theory has

those who may identify as "queer," but not as "lesbian" or "gay." All queers are not lesbians or gay men and all lesbians and gay men are not queer. Many older lesbians and gay men, particularly gay men, object to the attempt to "reclaim" a word that was used for decades as a highly derogative term.[60] Lesbians object to the use of a seemingly gender neutral term on the grounds that it threatens to erase the hard-earned, albeit limited, visibility of lesbians in the current lesbian and gay movement.[61] In the end, some suggest that queer has become an empty term and has not lived up to its promise of inclusion and transformative value.[62] Ideally, "queer," or at least the positionality advocated by "queer," has the potential to be inclusive of considerations such as of race, class, ethnicity, and disability because it does not attempt to foreground one form of social identification to the necessary exclusion of others. This potential offers legal scholarship the opportunity to develop a "scholarship of articulation" where both differences and commonalities are recognized and spoken.

III. THE APPROPRIATE TAXABLE UNIT

The current joint filing provisions are considered a compromise between competing neutrality principles: marriage should not impact on a taxpayer's tax liability (i.e., marriage neutrality) and married couples with equal income should bear the same tax, regardless of who earns the income (i.e., couples neutrality).[63]

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yet to live up to its potential. *See* Evelynn Hammonds, *Black (W)holes and the Geometry of Black Female Sexuality, in* FEMINISM MEETS QUEER THEORY 136, 152 (Elisabeth Weed & Naomi Schor eds., 1997) (urging queer theory to develop a "politics of articulation" with respect to difference rather than replicating the "politics of silence" practiced by feminist and gay and lesbian activists).

60 *See* JAGOSE, *supra* note 14, at 103 (describing the "generation gap" regarding the use of the term "queer").

61 *See id.* at 3-4 (explaining the objection that "a generic masculinity may be reinstalled at the heart of the ostensibly gender-neutral queer"). Further, queer theory's interest in destabilizing identities, especially gay and lesbian identity positions, is perceived by certain lesbian feminists as counterproductive, or even homophobic. *See id.* at 101 (quoting from a lesbian cultural anthology that attempts to destabilize identity are "an explicitly homophobic strategy"); *see also supra* note 52 (describing Cain's reluctance to de-construct the term lesbian). Concern that queer theory does not adequately deal with issues related to gender and concerns over the characterization of feminist theory within queer theory in general has been the subject of considerable comment. For an expanded discussion of this topic see FEMINISM MEETS QUEER THEORY (Elisabeth Weed & Naomi Schor eds., 1997).

62 For example, Teresa de Lauretis who is credited with having proposed the use of the term in 1991 has since noted that queer theory "has quickly become a conceptually vacuous creature of the publishing industry." Teresa de Lauretis, *Habit Changes. Response, in* FEMINISM MEETS QUEER THEORY 315, 316 (Elisabeth Weed & Naomi Schor eds., 1997).

63 Boris Bittker characterized the question of the appropriate taxable unit as a conundrum because, within a progressive tax system, it is impossible to construct a regime that is both marriage neutral and couples neutral. *See* Boris I. Bittker, *Federal Income Taxation and the Family,* 27 STAN. L. REV. 1389,

The very question of couples neutrality presupposes that as an elemental unit of society a married couple should also be an elemental unit of taxation. Much of tax policy has grounded its explanation for joint filing on the basis that spouses act as a single economic unit. However, this explanation has not withstood the scrutiny of critical tax scholars. A "page of history" illustrates that the enactment of the joint filing provisions, as well as every significant modification to them, was the product of intense and orchestrated voter demand. This means that although the critique has refuted the tax policy justification for joint filing, it has not engaged the underlying cause — from time to time taxpayers demand the government reconsider the way it defines and taxes families. Moreover, the intense scholarly interest in the joint filing provisions represents a heteronormative "selection bias" because commentators tend to critique only those marital provisions which are potentially detrimental to married taxpayers.[64]

A. The Choice

Fundamental to any system of taxation is the identification of the appropriate (or desirable) unit of taxation. Examples of potential taxable units include an individual, corporation, complex trust, estate, a married couple, and a family.[65] The recognition of a particular taxable unit signals that the relationships it creates are to be respected for tax purposes.[66] Since 1948, the federal income tax has recognized husbands and wives as a single taxable unit, subject to certain exceptions discussed in Part III below.[67]

1395-96 (1975). The Report of the Congressional Budget Office regarding the federal income tax marital provisions accepts Bittker's characterization. *See* CBO REPORT, *supra* note 7.

64 Zelenak, *supra* note 8, at 1523-24.

65 For example, estates and certain trusts are considered separate taxable entities for income tax purposes and are subject to a separate rate schedule. *See* I.R.C. § 1 (e) (1994).

66 For example, a trust where the grantor retains the ability to reclaim the trust property is disregarded for income tax purposes. *See id.* at §§ 671, 676. The grantor remains taxable on the income earned by the trust property as if he still had legal title to the trust assets. *See id.* at § 671.

67 The United States is among the minority of industrialized states which recognize a married couple as a taxable unit and tax husbands and wives on their combined earned income. The CBO Report notes that as of 1993 only three of the 27 member countries of the Organization for Economic Cooperation and Development (OECD) impose tax on the combined incomes of married couples. *See* CBO REPORT, *supra* note 7. The countries are Germany, Ireland, and Norway. *See id.* Only four countries provide a marriage bonus (i.e., France, Luxembourg, Portugal, and Switzerland), whereas the remaining 19 countries tax spousal earned income separately. *See id.* In many instances, investment income is taxed at a combined rate. *See id.* Internationally, the trend clearly is away from joint filing to individual filing. The CBO Report notes that from 1970 to 1993 the number of OECD countries which tax spousal earned income separately increased from six to 19. *See id.*

A growing consensus among tax scholars suggests that a return to individual filing would be advantageous for a number of reasons. *See supra* note 31 (listing scholars who advocate the adoption of separate filing). Although a married couple can choose between filing jointly and filing separately, the vast

Before moving on to the broader discussion, it is important to explain the dynamic of the "marriage penalty" and shed some light on why it receives so much attention (both scholarly and otherwise) to the exclusion of the other marital provisions. The choice of a husband and wife as a taxable unit, combined with progressive rate schedules, the standard deduction, and in some cases the earned income credit, produces either a marriage tax bonus or a marriage tax penalty, depending upon a couple's particular circumstances.[68] A slightly larger number of married taxpayers actually pay less income tax due to their marital status and, therefore, receive a marriage bonus. A Congressional Budget Office Report estimates that 21 million couples experience a marriage penalty, whereas 25 million couples experience a marriage bonus.[69] This breaks down to 42% of married taxpayers who pay more, 51% who pay less, and 6% whose tax liability remains unchanged.[70] The Report concludes that "[m]arriage [income tax] penalties totaled about $29 billion in 1996, and bonuses added up to roughly $33 billion," for a net bonus of $4 billion.[71] Notwithstanding these figures, this dual nature of the marriage bonus/penalty is consistently eclipsed by the potential for a marriage penalty.

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majority of all married couples file joint returns because the rates applicable to "married filing separately" are effectively unfavorable. I.R.C. § 1(d); *see CRS Questions Practicality of Reducing Marriage Penalty*, 98 TAX NOTES TODAY 162-11, Aug. 21, 1998, *available in* LEXIS, Fedtax Library, TNT file (reporting 40% of all individual returns are joint returns, whereas only 2% are married filing separately). Filing separately remains a viable option during marital separation or in order to allow one spouse to take advantage of itemized deductions that are subject to a floor based on a percentage of adjusted gross income. It can also address concerns regarding joint and several liability that can arise by reason of a joint return.

68 Joint filing requires husbands and wives to aggregate their income and deductions. In some instances relevant ceilings, floors, and limitations are doubled to reflect the joint filing and in other instances they are not. For a more complete discussion of the interaction of these factors see *infra* text accompanying notes 147-57.

69 *See* CBO REPORT, *supra* note 7.

70 *See id.*

71 *See id.*

Comparison of Income Tax Liability - Married and Unmarried Couples[72]

Gross income	$ 20,000	$ 40,000	$ 80,000	$ 160,000	$ 320,000
Unmarried single-earner couple	$ 2,363	$ 6,715	$ 18,345	$ 44,528	$ 103,470
Married single or equal-earner couple	$ 1,935	$ 4,935	$ 14,907	$ 38,825	$ 97,512
Unmarried equal-earner couple	$ 1,725	$ 4,725	$ 13,429	$ 36,690	$ 89,055

The joint filing system can greatly advantage taxpayers who choose a traditional single wage-earner model of marriage.[73] It is the marriage where both spouses are wage earners that risks a marriage penalty.[74] In any event, a marriage bonus is somewhat a misnomer for the non wage-earner spouse whose tax liability will increase dramatically upon marriage to the extent that she is now jointly liable for the couple's tax liability.[75]

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72 This chart is based on the 1998 rate schedules applicable to married couples filing jointly and single individuals. *See* I.R.C. § 1 (1994). It assumes no itemized deductions that would otherwise reduce gross income. It does take into account the relevant standard deduction amounts for 1998 (i.e., $7,100 - married filing jointly and $4250 - unmarried). *See* Rev. Proc. 97-57, 1997-52 I.R.B. 20. The calculations do not take into account the personal exemption amounts (i.e., $2,700 for 1998). For a calculation including personal exemption amounts see *infra* note 156. The calculations for the unmarried equal-earner couple reflect the aggregate amount of tax imposed on two individuals with each earning one-half of the stated gross income amount.

In addition to the rate schedule differential, an equal-earner unmarried couple gets the benefit of two standard deductions of $4250 each. A married couple filing jointly, whether single-earner or equal-earner, only has a standard deduction of $7,100. Finally, a single-earner unmarried couple only receives a benefit of the wage-earner's standard deduction of $4,250.

73 This requires a comparison of the unmarried single-earner couple with that of the married couple. As a result of joint filing, it is irrelevant whether one or both spouses work. However, there may be social security and other tax consequences if one spouse does not work outside the home.

74 This requires a comparison between the unmarried equal-earner couple and the married couple. The marriage penalty and the progressive rate structure further exacerbate this dynamic by producing a marginal disincentive for the secondary wage-earner, thereby increasing the likelihood of single-earner families at the upper income levels. *See* MCCAFFERY, *supra* note 20, at 20.

75 *See* Toni Robinson & Mary Ferrari, *The New Innocent Spouse Provision: "Reason and Law Walking Hand in Hand,"* 98 TAX NOTES TODAY 158-60, Aug. 17, 1998, *available in* LEXIS, Fedtax Library, TNT file.

B. *"A Page of History"*[76]

The adoption of the joint filing provisions was the result of voter demand for couples neutrality (i.e., similarly situated married couples should bear the same income tax liability, regardless of which spouse earns the income). Until 1948, husbands and wives filed separate income tax returns. Prior to that time, two important Supreme Court cases governed the allocation of spousal income for tax purposes. In 1930, the Supreme Court case of *Poe v. Seaborn* ruled that married residents of community property states could in effect split their income for tax purposes because under state law each spouse has a one-half interest in the earned income of the other.[77] The potential benefits of income-splitting are obvious when one considers the high number of single-earner families existing at that time and the aggressively progressive rate structure.[78] That same year, the Supreme Court in *Lucas v. Earl* held that married residents of separate property states were not permitted to split income for tax purposes, even in the case of a legally enforceable agreement to split income.[79]

The result was that a married resident of a community property state included in gross income one-half of the marital income, whereas a married resident of a separate property state included in gross income only the income he or she actually earned.[80] Under this system, a traditional single-wage earner couple

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[76] In determining the Constitutionality of the federal estate tax, Justice Holmes wrote: "Upon this point a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

[77] *See* Poe v. Seaborn, 282 U.S. 101, 117 (1930). Critical tax scholars dispute the position that income-splitting for tax purposes was not really a benefit extended to married taxpayers residing in community property states because it simply reflected property rights as determined under state law. *See* Kornhauser, *supra* note 31, at 74 (stating "[u]nder the traditional community property laws, the husband had the basic right to manage and control . . .").

[78] During World War II, the top marginal rate was as high as 94%. *See* MICHAEL GRAETZ & DEBORAH SCHENK, FEDERAL INCOME TAXATION 9 (2d ed., 1995).

[79] *See* Lucas v. Earl, 281 U.S. 111, 114-15 (1930). In that way, *Lucas v. Earl* can be seen to disadvantage earned income. Residents of common law states who received income from property could effectively split that income by making a gift of the underlying property. *See* Helvering v. Horst, 311 U.S. 112, 118-19 (1940). In addition, there were numerous tax planning devices that they could employ to shift the income without parting with the ownership of the property which produced the income. *See infra* note 85. As Bittker notes, this advantaged married couples with investment income over married couples with earned income. *See* Bittker, *supra* note 63, at 1403 (noting that *Lucas v. Earl* "imposed a disability on wage earners and salaried taxpayers . . .").

[80] Community property law is based on the concept of marriage as an economic partnership where each spouse has an equal interest in property the other brings into the marriage. Each spouse owns an undivided one-half interest in community property. Different rules govern the scope of power each spouse has to manage the community property, sell it, or give it away. This ownership interest survives the death of a spouse and the dissolution of the marriage upon divorce. Not all property is community property. Spousal earnings and property acquired with earnings are community property. In some states, income from separate property is community property (Idaho, Texas, and Louisiana). Typically, property acquired by one of the spouses prior to the marriage and property received during marriage by gift or inheritance is separate

would pay considerably more income tax in a separate property state than in a community property state because of the ability to "split income" and take advantage of a second run through the lower brackets. A married couple with total gross income of $50,000 living in a community property state, such as California, would pay income tax as if they each had $25,000 of gross income. To the contrary, the same married couple residing in a separate property state, such as Pennsylvania, would be taxed only on what each of them had earned. Thus, one spouse would be taxed on $50,000 and the other on $0.

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property. Complicated allocation rules govern the characterization of separate property that is commingled with community property.

In separate property or common law states, ownership is determined by title. If one spouse works outside the home for paid labor and the other spouse does not, it is possible that the spouse who works outside the home could own all of the couple's assets. Although the spouse may choose to title the property in some form of joint ownership with the other spouse, it is entirely voluntary.

In community property states upon death, the surviving spouse is entitled to her one-half of the community property. The deceased spouse has the authority to leave his remaining one half to whomever he desires under his will. In separate property states each spouse has the right dispose of his or her property by will. With the exception of one state (Georgia), the surviving spouse has the right to "elect against the will" and claim a portion of the deceased spouse's estate where the deceased spouse failed to provide the survivor with an amount at least equal to the amount of the elective share (typically one-third). In recent years, separate property states have enacted changes that increasingly reflect a view of marriage as an economic partnership. *See generally* Kornhauser, *supra* note 31, at 73-79 (discussing the partnership model of marriage and the critique of the model in terms of tax policy and broader issues of autonomy and equality). This is evident in the adoption of equitable distribution statutes, as well as new proposals regarding the spousal elective share that increase the size of the share over the length of the marital relationship. The 1990 Uniform Probate Code provides for an elective-share percentage which increases with the length of the relationship. *See* UNIF. PROBATE CODE § 2-201(a) (1990). The rationale is that marriage is an economic partnership and the longer the marriage, the more likely it is that the surviving spouse contributed to the acquisition and maintenance of the deceased spouse's assets. For marriages of less than one year, the survivor is entitled to a liquidated amount of $50,000, known as the "supplemental amount." *Id.* at § 201(b). For marriages lasting longer than one year, the amount of the elective share is expressed as the greater of the supplemental amount or a stated percentage of the assets subject to the election. *See id.* The highest percentage is the 50% amount for marriages of 15 years or more. *See id.*

Comparison of Income Tax Liability - Geographic Disparity Between Married Couples [81]

Gross Income	$ 20,000	$ 40,000	$ 80,000	$ 160,000	$ 320,000
Single-earner couple in community property state	$ 3,000	$ 6,000	$ 15, 809	$ 39,325	$ 92,115
Single-earner couple in separate property state	$ 3,000	$ 7,905	$ 19,663	$ 46,057.5	$ 105,153

This geographical disparity induced voters to lobby Congress and take up the issue of the allocation of spousal income at the local level. For single wage-earner couples in separate property states, the potential benefit of income splitting was sufficiently appealing to prompt several state legislatures to adopt community property laws in order to realize tax economies for their residents.[82] The challenge for legislators was to craft a quasi-community property regime that required the wage-earner spouse to part with the minimum amount of control over his property while still satisfying *Poe v. Seaborn.*

The initial Congressional response was a mandatory joint filing proposal which would have required husbands and wives to aggregate their income and then calculate their tax liability under the same rate schedule applicable to individual taxpayers.[83] In a progressive system, the stacking effect of this 1941 proposal is obvious, and it was roundly attacked as being anti-marriage.[84]

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[81] To illustrate the point of geographic disparity, this chart uses the 1998 rate schedule applicable to unmarried taxpayers. It assumes no itemized deductions, and it does not take into account the personal exemption amounts. For a chart that does take the personal exemption amounts into account see *infra* note 156.

[82] Bittker notes that Oklahoma, Oregon, Hawaii, Nebraska, Michigan, and Pennsylvania had adopted some form of community property by 1948. *See* Bittker, *supra* note 63, at 1411-12. The Pennsylvania Supreme Court held the Pennsylvania statute unconstitutional in *Willcox v. Penn Mutual Life Ins. Co.*, 357 Pa. 581 (1947). The remaining states switched back to separate property law after the 1948 legislation. *See id.* at 1414. Currently, there are nine community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Since 1948, only one state, Wisconsin, has adopted a community property regime.

[83] The 1941 proposal for mandatory joint filing would have assessed tax liability under the same rate schedule applicable to individuals, thereby resulting in increased tax liability for couples where more than one spouse had income. *See* Bittker, *supra* note 63, at 1409.

[84] The unsuccessful 1941 proposal was denounced as immoral in terms that are strikingly similar to the current Congressional debate regarding the marriage penalty. *See id.*

Comparison of Income Tax Liability - Mandatory Joint Filing with No Splitting[85]

Gross Income	$ 20,000	$ 40,000	$ 80,000	$ 160,000	$ 320,000
Equal-earner/ single-earner couple w/ income splitting	$3,000	$ 6,000	$ 15,809	$ 39,325	$ 92,115
Equal-earner couple w/ joint filing, no splitting	$ 3,000	$ 7,905	$ 19,663	$ 46,056	$ 105,153

In response to a growing lack of geographic uniformity,[86] Congress enacted the joint filing provisions which allowed married couples to aggregate their income for tax purposes, regardless of the actual ownership of that income either under state law or contractual agreement.[87] The income was then split and tax liability was

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85 To illustrate the potential increase in tax liability for dual-income married couples, this chart uses the 1998 rate schedule applicable to unmarried taxpayers. It assumes no itemized deductions and no personal exemption amounts.

86 Legislative history is clear that Congress' action was designed to provide uniformity in the treatment of married couples and stop the states from enacting hastily drawn community property legislation. The Senate Finance Committee identified the rush to adopt community property laws as one of the reasons for the adoption of joint filling. The Report stated: "The impetuous enactment of community-property legislation by States that have long used the common law will be forestalled." Bittker, *supra* note 63, at 1413 (quoting the Senate Finance Committee Report). The other reason was to reduce the use of trusts and other income shifting devices. *See id.*

Bittker quotes at length from the Senate Finance Committee report which cited the following reasons for the adoption of the joint filing provisions:

> Adoption of these income-splitting provisions will produce substantial geographical equalization in the impact of the tax on individual incomes. ... The incentive for married couples in common-law states to attempt reduction of their taxes by the division of their income through such devices as trusts, joint tenancies, and family partnerships will be reduced materially. Administrative difficulties stemming from the use of such devices will be diminished [.]

Id. (quoting the Senate Finance Committee Report).

87 Bittker is the source for much of the recounted history of the joint filing provisions. *See id.* at 1399-1414 (describing the events leading to the enactment of the 1948 legislation). Bittker explains that not to be outdone or out maneuvered, Congress adopted the joint return to insure "that the political credit for reducing taxes was concentrated on Congress rather than dispersed among the state legislatures." *Id.* at 1413. Zelenak refers to this as one of the "unacknowledged motivations" for the passage of the 1948 legislation. Zelenak, *supra* note 31, at 346. The other motivation was to stop the tide of increasing property rights for women. *See id.* Much of the feminist tax scholarship suggests that Congress also wanted to limit the extent to which husbands would have had to part with ownership or control over property under the newly emerging community property regimes. Indeed this might be the subtext of the relief expressed with the passage of the 1948 income-splitting rules that taxpayers would no longer have to resort to income-splitting devices such as family partnerships and other trust arrangements. *See supra* note 86. In fact, Bittker stated that the

determined under the same rate schedule as applicable to individuals.[88] This achieved the goal of couples neutrality, but eventually led to complaints from unmarried taxpayers who pointed to the singles penalty and demanded a tax code that was marriage neutral.[89]

C. *A Singles Penalty?*

In 1969 Congress took steps to reduce the singles penalty and adopted the current separate rate schedules.[90] Although this legislation is generally considered a victory for the single taxpayer, the lobbying and media events that brought this issue to the nation's attention all took place within a safely heteronormative shadow of a marriage that never was. Headed by Vivien Kellems, a Connecticut businesswoman and long-time tax protestor, a group called War Widows of America lobbied Congress to revise the rate structure in favor of unmarried taxpayers.[91] Far from championing the conscious choice of an emancipated single

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irrelevance of "bedchamber" transfers of property was an "almost universally praised result" of the legislation. Bittker, *supra* note 63, at 1441. Many of these "bedchamber transactions" sought to split income for tax purposes while parting with the minimum amount of control over the property. Further, it is arguable that the community property regimes hastily adopted by common law states did not grant the wife outright ownership of one-half of the marital property. As such, the suggestion that the 1948 legislation was designed to impoverish women might be overstated. Perhaps it was designed to allow husbands to impoverish their wives without the attendant administrative costs of complicated tax motivated devices or adopting some modified form of community property law.

88 *See* Bittker, *supra* note 63, at 1412.

89 In 1975 Bittker stated that "[i]t is increasingly argued that the income tax on two persons who get married should be neither more nor less than they paid on the same income before marriage." *Id.* at 1395. According to Bittker's own account of the history of the joint filing provisions, this was not a new complaint. *See id.* at 1399-1416.

90 The current rate structure was the result. For a description of the relationship between the rate schedule applicable to single taxpayers and that applicable to married taxpayers filing jointly see *supra* text accompanying notes 94-95. For a discussion of the growing political power of singles see McCaffery, *supra* note 23, at 991.

91 Michael Graetz provides an engaging description of the antics of Vivien Kellems and her War Widows of America. *See* MICHAEL J. GRAETZ , THE DECLINE (AND FALL?) OF THE IINCOME TAX 32-3 (1997). With the assistance of Gloria Swanson, she orchestrated a lobbying campaign that urged single taxpayers to send tea bags to members of Congress in protest over the "single's penalty." *Id.* at 32.

This was not the first time that Kellems gained national attention as a tax protester. And, a further look into her background suggests that she may be more "queer" than she would appear at first glance. In the 1940s, Kellems was a "withholding tax protestor" who refused to comply with the newly enacted system of withholding tax on wages at the source. Carolyn C. Jones, *Mass-based Income Taxation: Creating a Taxpaying Culture, 1940-1952, in* FUNDING THE MODERN AMERICAN STATE, 1941-1995 107 (W. Elliot Brownlee ed., 1996). Kellems was investigated by federal authorities because of her relationship with a German Count living in Argentina who was a suspected German agent. *See id.* at 131. This gives a distinctly different twist to her notion of the man she would have married, but for the war. She later wrote a book: TOIL, TAXES, AND TROUBLE. *See id.*

life, the War Widows explained that they represented a demographic cohort of women who would be married but for World War II.[92] Since they remained single through no fault of their own, they should not be saddled with additional tax liability as a result of their unfortunate (and patriotic) loss.[93] Their argument never challenged the construction of the marital unit as a taxable unit. (In this regard, Kellems' strategy is similar to that of contemporary lesbian and gay commentators who advocate an expanded version of couples neutrality that includes same-sex couples.)

After hearings on Capitol Hill and a large-scale symbolic tea bag protest,[94] Congress finally enacted the current compromise. Under the new rate schedules, a single person with the same income as a married couple continues to pay more tax than the married couple, but that extra amount of tax never exceeds twenty percent of the married couple's tax liability. However, the new rate schedules also introduced the possibility that a two wage-earner couple could face a marriage penalty.[95]

D. The Tax Policy Postscript

Clearly, issues of family taxation are very sensitive to voter demand. This is consistent with Boris Bittker's view that the question of the appropriate taxable unit is essentially a political issue beyond the ken of economists and tax scholars.[96] Bittker wrote that the question of the taxable unit was "so entangled with social and psychological issues of a non-tax character" that it was "absurd to think that an economist's definition can provide a uniquely 'correct' solution."[97] The only

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92 *See* GRAETZ, *supra* note 91, at 32.

93 *See id.*

94 The act of mailing tea bags to Congressional representatives, with its nod to the Boston tea party, remains an expressive form of tax protest. It was utilized most recently by Queer Nation. *See Queer Nation Asks Gay Americans to Withhold $1 from Income Taxes*, 93 TAX NOTES TODAY 83-64, Apr. 13, 1993, *available in* LEXIS, Fedtax Library, TNT file (describing the symbolic delivery of tea bags to Congress to demand full civil rights for gay men and lesbians).

95 Congress later provided some relief for the dual earner couple in 1981 in the form of the secondary earner income deduction which was later repealed in 1986. For a discussion of the secondary earner deduction and its repeal see MCCAFFERY, *supra* note 20, at 74-81.

96 Zelenak refers to this when, following Bittker's lead, he notes that balance of the two goals of neutrality "rest on nothing more precise or permanent than collective social preferences." Zelenak, *supra* note 31, at 342 (quoting Bittker, *supra* note 63, at 1395-96). Of course, there remains the question as to how these "collective social preferences" are communicated to the legislative body.

97 Bittker, *supra* note 63, at 1421. Referring to the Haig-Simons definition of income (i.e., income equals consumption plus savings). Bittker did not see this as a stumbling block for tax scholarship because he deemed the choice of taxable unit as independent from the measurement of income. *See id.* Invoking the architect of the comprehensive tax base, Bittker wrote: "[Henry] Simons himself wobbled when he discussed the issue -- perhaps an implicit acknowledgment that the definition seeks to determine whether a given item

thing left for the tax scholar to do was to provide a tax policy "postscript" once the "the citizenry casts the die."[98] In the case of the joint filing provisions, this postscript attempted to balance competing neutrality concerns and appealed to the economic realities of married life. Neither approach engaged or questioned the choice of couples neutrality. Indeed, Bittker declared, "[a]s an objective of federal tax policy, this result of equal taxes on equal-income married couples has been widely approved by tax theorists . . . ."[99]

The first move by tax scholars was to measure the choice of taxable unit against two objective pillars of horizontal equity: couples neutrality and marriage neutrality.[100] Bittker's conclusion that "we cannot simultaneously have (a) progression, (b) equal taxes on equal-income married couples, and (c) a marriage-neutral tax burden"[101] became the starting point for all academic as well as reasoned political debate.[102] Next, scholars justified joint filing on the basis that the

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constitutes income, but does not purport to decide who should be taxed on the item in question . . . ." *Id.*

This meant that a generation of tax scholars who embraced the search for the comprehensive tax base could continue with their work. For a description of the influence of the Haig-Simons definition of income on tax scholarship see Livingston, *supra* note 37, at 376-77 (noting the pervasive influence of the Haig-Simons definition).

Michael J. McIntyre and Oliver Oldman expressly used the Haig-Simons formula as a reference point in their development of a normative model for family taxation. *See* Michael J. McIntyre & Oliver Oldman, *Taxation of the Family in a Comprehensive and Simplified Income Tax*, 90 HARV. L. REV.1573, 1576 (1977). They countered that although source was irrelevant for purposes of the comprehensive tax base, in a progressive rate structure it was essential to develop a uniform attribution rule to link individuals with items of income. *See id.* (asserting that "[i]n an ideal income tax, a uniform rule should be developed for linking individual taxpayers with particular items of income"). They ultimately conclude that 50-50 income splitting for spouses (consistent with the pre-1969 rules) would be the best practice. *See id.* at 1596.

98 Bittker, *supra* note 63, at 1463.

99 *Id.* at 1402. Bittker earlier noted that "the 1948 statutory principle of equal taxes for equal-income married couples has been 'almost universally accepted' by tax theorists . . . ." *Id.* at 1395 (quoting J. PECHMAN, FEDERAL TAX POLICY 87-88 (rev. ed. 1971). The only exception was the suggestion that a two-earner married couple should not pay as much tax as a single earner couple with the same income because of the value of the imputed income of the services of the non-earner spouse. *See id.*

100 *See* Bittker, *supra* note 63, at 1396.

101 *Id.* Bittker further stated that:

> A corollary of this conclusion is that a tax system with a progressive rate schedule can be marriage-neutral if individual legal rights over income and property are controlling even after marriage and each spouse reports his or her own income, but not if the tax is based on the couple's consolidated income.

Id.

102 Commentators still try to strike the appropriate balance between competing neutral principles and speak of the need to "sacrifice" the goal of couples neutrality. Zelenak concludes that "given current attitudes the income tax has made the wrong choice in the battle of the neutralities." Zelenak, *supra* note 31, at 343. Zelenak believes that taxpayers must be more tolerant of a violation of couples neutrality because there has been "no popular outcry" against the treatment of two-earner married couples under the social security system. *Id.* at 361. Zelenak suggests that taxpayers do not accept the argument for couples neutrality as an explanation for the marriage penalty. *See id.* at 362. From this he reasons that couples neutrality is no

marital unit is a single economic unit where extensive voluntary resource pooling occurs.[103] Although the economic unit theory quickly became the accepted rationale for the joint filing provisions,[104] it was never based on actual evidence of widespread pooling behavior.[105] It also did not address the question of why the tax code only recognizes income pooling between married couples.

E. The Critique

The recent critique of the joint filing provisions has destabilized the tax policy postscript but not the underlying view of marriage.[106] In particular, the critique has refuted the economic unit theory by showing that the use of marriage as a proxy for pooling behavior is both over broad and under inclusive.[107] It has also

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longer a concern for married taxpayers. *See id.* Although this may be the case, it is also true that couples neutrality has been more or less achieved since 1948, subject to arguments regarding imputed income. Accordingly, it has not yet had an opportunity to irk a new generation of taxpayers. I suspect that given the opportunity, taxpayers will demand the impossible: marriage neutrality and couples neutrality, just as they often demand lower taxes and increased spending.

103 For example, McIntyre and Oldman justify joint filing on the grounds that "each member of the couple will benefit more or less equally from the total available income without regard to the source distribution." McIntyre & Oldman, *supra* note 97, at 1590. Concerned primarily with attribution rules, they further note that a return to separate filing would simply reintroduce the various income shifting devices that Congress had successfully mooted with the 1948 legislation. *See id.* McIntyre and Oldman only question couples neutrality "in light of the arguments made for adjusting the burdens on one and two-job couples on account of perceived differences in the imputed income typically available to each." *Id.* at 1608. Citing only one study involving child-care patterns and working mothers and the theoretical objections to including imputed income in an ideal tax base, McIntyre and Oldman conclude that "no assumptions can be made about the distribution and comparative economic effects of self-performed services that are of sufficient generality to justify the sweeping proposals which have been made." *Id.* at 1609.

104 For example, Marjorie Kornhauser writes unequivocally that the justification for the joint return is "the belief that married couples share resources." Kornhauser, *supra* note 31, at 80. David Chambers discusses how laws that treat a married couple as a single economic unit "build on beliefs or guesses about the economic relationships that married couples actually have and on prescriptive views about what those relationships ought to be." 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, 470-71 (1996).

105 Zelenak agrees, referring to the legislation as "essentially a historical accident." Zelenak, *supra* note 31, at 347.

106 *But see* McCaffery, *supra* note 23 (questioning the notion of couples neutrality from the perspective of optimal tax theory and Pigouvian welfare considerations). Lily Kahng provides a description of the 1948 report of the Special Tax Study Committee recommending income-splitting and citing couples uniformity as a policy goal. *See* Lily Kahng, *Fiction in Tax, in* TAXING AMERICA, *supra* note 20, at 28-30. Kahng objects to the uniformity principle on the grounds that husbands and wives who live in community property states did/do not have the same property rights as those living in common law states. *See id.* at 30.

107 *See* Kornhauser, *supra* note 31, at 73 (reporting less evidence of income pooling than assumed by the economic unit theory). For example, empirical work has shown that income pooling does not occur on as great a level as previously assumed. To the contrary, some unmarried or same-sex partners do pool their income and indeed act more "married" than many legally married couples. As a further complicating factor,

identified undesirable behavioral incentives produced by joint filing[108] and revealed the disparate impact of the marriage penalty.[109] On the subject of income pooling, Marjorie Kornhauser reports less pooling between married couples than anticipated and introduces the concept of nominal pooling where the spouse who earns the income still retains greater dispositive control over the income.[110] The potential that same-sex (or other unmarried) couples could pool their income is often cited as evidence that the economic unit justification for joint filing is under inclusive.[111] In fact, there is little evidence on the pooling patterns of same-sex couples.[112]

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domestic partnership ordinances and employment policies generally require the partners to sign a statement that attests to some degree of resource sharing. *See infra* text accompanying notes 113-14.

108 *See* McCaffery, *supra* note 23, at 1023-24 (discussing behavioral distortions regarding women's participation in the labor force caused by the marital provisions). The feminist critique also points to the adverse behavioral effects of the joint filing system. For example, aggregation of spousal income creates a "stacking" effect which produces a disincentive for secondary wage earners to enter the paid labor force. *See* MCCAFFERY, *supra* note 20, at 20. In addition, the joint filing provisions do not encourage the equalization of property ownership between spouses because they permit husbands in separate property states to split income for tax purposes without actually transferring the income (or any power over the income) to their wives. The ability of the husband to retain ownership of his earnings and any property producing income does not further the goal of enhancing women's economic autonomy through increased wealth. This objection is similar to that leveled against the QTIP provisions. *See generally* Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L. J. 301 (1995); Mary Louise Fellows, *Wills and Trusts: "The Kingdom of the Fathers,"* 10 LAW & INEQ. J. 137 (1991).

109 *See* Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1479-80 (1997) (noting that the marriage penalty disproportionately falls on African-American families and low income white families because the wives in such families are more likely not to be marginal wage earners); *see also* Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997). Both the feminist and critical race critique(s) note that the marriage penalty is not equally distributed throughout all segments of society. The phase-out of the earned income credit increases the marriage penalty for low income individuals, thereby reinforcing the incentives of existing entitlement programs to remain unmarried. *See* MCCAFFERY, *supra* note 20, at 145-50 (discussing the severe effects of joint filing on lower income taxpayers). The fact that the marriage penalty occurs when husbands and wives have comparable income levels has implications for African-American and low income couples. A critical race perspective notes that African-American men and women are more likely to have comparable income levels, thus increasing the likelihood that African-American married couples will experience a marriage penalty, rather than a marriage bonus. This is because racism depresses wages and opportunity and makes it more likely that two-earner African-American couples will have comparable earnings. *See* Brown, *supra* at 1489-90; Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 785 (1996).

110 *See* Kornhauser, *supra* note 31, at 86, 88. Based on her own empirical research, Kornhauser concludes "even among couples who nominally pool assets . . . , true sharing frequently does not occur because power arising from both cultural sources and earning power is distributed unequally." *Id.* at 88. This conclusion holds true for same-sex relationships between men where earning power effects control. *See id.* at 89. Earning power, however, has been shown not to effect control of resources in same-sex relationships between women. *See id.* at n.78.

111 McCaffery cites the failure of the income tax to consider unmarried couples who do pool or to require married couples to pool as proof that income pooling was not "the driving force behind joint filing." MCCAFFERY, *supra* note 20, at 63.

112 *But cf.* Kornhauser, *supra* note 31, at 87 n.69 (citing statistics that gay men and lesbians favored

However, many employer-based domestic partnership policies, as well as municipal registration ordinances, require "proof" that the domestic partners "share the common necessities of life" and are economically interdependent.[113] From this, it is possible to infer that at least registered same-sex domestic partners may exhibit a strong degree of income pooling.[114]

Tax scholarship written from a gay/lesbian perspective tends to try to expand the definition of couples neutrality and not to question it. Lesbian and gay scholars and activists who have addressed this issue generally have argued that the marital provisions should apply to same-sex couples. For example, Patricia Cain accepts the notion that two individuals in an intimate committed relationship should constitute a single taxable unit and argues for the expansion of the marital unit to include same-sex couples.[115] Cain notes that "[f]ull parity between married couples and same-sex couples could be obtained if Congress would recognize some form of 'tax marriage.'"[116]

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pooling more than opposite-sex cohabitors, but less than married individuals). On this point, David Chambers concludes:

> No adequate research exists about the current behavior or expectations of lesbian and gay couples regarding the economic dimensions of their relationships, and we cannot know, of course, what sorts of couples would choose to marry in the future. What evidence there is suggests that most lesbian and gay couples in long-term relationships believe in pooling resources and practice it today, and that pooling is particularly common among those who engage in ceremonies of commitment.

Chambers, *supra* note 104, at 471.

113 Typically, the couple must sign a statement of domestic partnership, represent that they are economically interdependent, and further prove it by attesting that they satisfy a certain number of supposedly objective indicators of economic interdependence. *See* Knauer, *supra* note 1, at 345-48.

114 It is also possible that the ideal of income pooling is simply so pervasive that it influenced the way in which domestic partnership policies were constructed -- they were designed to identify relationships that were equivalent to marriage.

In the absence of empirical studies, there is a wide body of prescriptive literature that may provide a useful glimpse into the "ideal" same-sex relationship. These relationship books routinely have sections on finances (many even provide headings called "income pooling"). They exist as a prescriptive guide for behavior within same-sex relationships and suggest that pooling is practiced to some degree. *See, e.g.*, PERMANENT PARTNERS, LESBIAN COUPLES, THE LESBIAN COUPLE SOURCE-BOOK.

115 *See* Cain, *Same-Sex, supra* note 19, at 101 (arguing that separate returns reinforce the "fallacy of individualism"). The continued viability of "rugged individualism" as a guiding consideration of tax policy was the initial question posed by Boris Bittker in his influential work *Federal Income Taxation and the Family. See* Bittker, *supra* note 63, at 1391 (noting that the "tension between rugged individualism and family solidarity permeates the entire Code"). His article begins: "A persistent problem in the theory of income taxation is whether natural persons should be taxed as isolated individuals, or as social beings whose family ties to other taxpayers affect their taxpaying capacity." *Id.* At the time, it was likely that Bittker was considering the report by the Canadian Royal Commission on Taxation endorsing the family as the appropriate taxable unit. *See id.* at 1393. However, it is not unreasonable to suggest that a more contemporary reading of "family ties" would include same-sex partners. Julie Nelson advances a similar proposal with her concept, influenced by Martha Fineman's work on the family, of "individuals-in-relation." *See generally* JULIE A. NELSON, FEMINISM, OBJECTIVITY AND ECONOMICS (1996).

116 Cain, *Same-Sex, supra* note 19, at 129. Surprisingly, the notion of a "fiscal definition of

To the extent same-sex couples want the tax code to recognize their relationships, they are at odds with the emerging consensus that the individual and not the married couple should be the appropriate unit of taxation.[117] Thus, lesbian and gay scholars seem to be asking for inclusion in the very regime that other progressive scholars are trying to dismantle in the name of greater female autonomy.

Looking beyond the economic unit theory, some commentators have suggested that marriage should remain relevant for tax purposes because of considerations of administrative convenience.[118] Marriage may not be a perfect proxy for income pooling, but it provides a bright-line test that is necessary to avoid a case by case determination of whether two taxpayers actually pool their income. Patricia Cain expands on this argument and advocates the continued use of marriage as a legally privileged category on ethical and efficiency grounds.[119] Establishing that adult couples produce efficiency and other non-tangible gains such as emotional support, Cain asserts that the state should encourage and recognize such relationships, including same-sex relationships.[120] She concludes that using marriage as a bright-line test carries with it the least threat to privacy concerns because it does not require the state to delve into the specifics of the relationship between the parties.[121] The four factors Cain proposes for "differentiating deserving couples from undeserving ones" are designed to be objective and contain no reference to any questions of morality.[122]

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marriage" was first proposed in 1977 by Michael J. McIntyre and Oliver Oldman. McIntyre & Oldman, *supra* note 97, at 1597. Despite her interest in full parity, Cain has focused her tax policy recommendations on the more discreet concern of the appropriate tax treatment of support payments between same-sex partners. Cain characterizes this as "part of a larger reform that must occur before full tax parity between same-sex couples and married couples will be attained." Cain, *Same-Sex*, *supra* note 19, at 130.

117 For example, Zelenak concludes forcefully that: "American society at the end of the twentieth century would be better served by separate returns." Zelenak, *supra* note 31, at 342.

118 McIntyre and Oldman placed considered stock in continuing to use marriage as a bright-line rule for purposes of administrative convenience. *See* McIntyre & Oldman, *supra* note 97, at 1589. They also objected to separate filing on the grounds that "it would abandon a well-established feature of our tax structure since 1948." *Id.* Nonetheless, they left open the question of whether other forms of couples should qualify in the future pending societal change. *See id.* at 1597.

119 *See* Cain, *supra* note 25.

120 *See id.*

121 *See id.*

122 The factors Cain cites are mutual support, legally enforceable commitments, shared living quarters, and an affirmative statement of commitment from the couple. *See id.*

F. *Alternative Tax Visions of Marriages*

To illustrate that the heteronormative acceptance of the opposite-sex married couple as a relevant subject of taxation is not inexorable, this section concludes with two examples of how tax policy could have addressed marriage but did not. Working from the notion of the ideal tax base, it is possible to see marriage as the ultimate act of personal consumption and, therefore, properly without tax consequences. From the perspective of optimal tax theory, the relatively inelastic nature of the decision to marry suggests that marital status itself could be a focal point for taxation. In fact, in many instances it already is.

1. Marriage as Personal Consumption

Marriage could have been easily considered an irrelevant item of personal consumption. Under an ideal tax base, items of personal consumption are not deductible and tax liability is indifferent to the varying levels of frugality or waste exhibited by taxpayers.[123] Tax liability is unaffected by a taxpayer's decision regarding clothing, leisure, food, etc.[124] To provide otherwise would result in an increased tax burden on the frugal taxpayer, whereas the spendthrift could easily consume all otherwise taxable income.

Surely, few things are as personal as the decision to marry. Bittker rejected the characterization of marriage as consumption, stating that although marriage was voluntary, it "has social consequences that are far more fundamental than ordinary consumption expenditures."[125] In other words, marriage is not simply a personal matter, it is an elemental ordering feature of society.[126]

Even if one accepts that marriage is fundamentally different from buying a new sweater or going to the movies, there remains the curious distinction between *Poe v. Seaborn* and *Lucas v. Earl.* In these cases, marriage is considered fundamentally different from not just personal consumption but from legally enforceable contractual obligations. In the case of a legally binding assignment of income, the taxpayer who earns the income is still considered to retain control over the income for tax purposes because he has the ability to determine when to work, how long to work, and even whether to work. Again, the answer seems to be

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123 *See generally* Michael J. McIntyre, *An Inquiry into the Special Status of Interest Payments*, 1981 DUKE L.J. 765, 780 (1981).

124 Section 262 denies a deduction for personal living expenses. *See* I.R.C. §262(a) (1994).

125 Bittker, *supra* note 63, at 1421. In a footnote, Bittker suggests that the marriage-as-consumption argument is not offered as a serious critique of the marital provisions. *See id.* at n.98 (stating that "I do not know of many marriage-as-consumption theorists, however, who are prepared to apply the theory rigorously and to oppose all tax allowances for marriage.").

126 For the definition of heteronormativity see *supra* note 13.

simply that there is something different, something special about marriage that can not be replicated by private contract.[127] This is exactly the argument made by lesbian and gay activists as to why domestic partnership is an inadequate substitute for marriage.

2. Marriage and Optimal Income Tax Theory

Edward McCaffery has applied optimal income tax theory to family taxation and concluded that society should tax married men more than married women because the commitment of married women to the workforce is more sensitive to tax pressures.[128] Optimal tax theory strives to tax relatively inelastic choices to produce the minimum amount of tax distortion. McCaffery identifies the labor force participation of married men as highly inelastic and, therefore, a prime candidate for taxation.[129] Although McCaffery offers a highly innovative and unabashedly gendered proposal, he does not question the underlying heterosexual bias of the family he seeks to explain.

The resilience of marriage to the existing marriage penalty suggests that perhaps marriage itself would be an appropriate object of taxation. Empirical studies show that the marriage penalty has very little impact on the decision to marry.[130] Recognizing the social pressures to marry and stay married, the tax on marriage would relieve the tax burden of those struggling against the norm to remain single, navigate non-monogamy, or pursue other alternative forms of

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127 Notwithstanding the possible concession that marriage and not contract is significant for tax purposes, there remains the tax code's general interest in substance over form. If income pooling were an important policy goal (or even if the code just passively reflected the economic realities of the relationship), the rules governing the qualification for joint filing status would be very different.

The feminist critique illustrates that community property rights may be less than the full ownership rights granted to Mrs. Earl under her agreement with her husband. Moreover, the joint filing provisions further extended the benefit of *Poe v. Seaborn* to residents of separate property states even where the non wage-earner spouse never touches one dollar of the "couple's" income. To the contrary, an unmarried couple who through private contract creates the most economically egalitarian of relationships is not permitted to agree to an allocation of their earned income for tax purposes.

If the focus were income pooling, then "sham" marriages where there is no (or nominal) income pooling would be disregarded. The taxing authorities have successfully invoked the "sham-transaction" doctrine in connection with "sham" divorces where the couple divorces each year to avoid the marriage penalty. *See infra* note 141. There the object of the inquiry is to determine whether the couple is "really" married (as evidenced by a December 31 divorce and a January 1 marriage) in which case the divorce is a sham designed to avoid income tax. In the case of a sham marriage, the object of the inquiry would be to determine whether the couple actually pools income. Marital status would be disregarded if the marriage produced no significant economic impact on both spouses.

128 *See* MCCAFFERY, *supra* note 20, at 192.

129 For a description of the general contours of optimal tax theory and its application to income tax see MCCAFFERY, *supra* note 20, at 170-84.

130 *See infra* text accompanying notes 430-37.

relationships. This would increase the level of relationship choice, thereby increasing individual utility. Further, it would increase social welfare by encouraging (or at least not penalizing) new forms of intimate expression and ultimately enriching the human condition.

Obviously, this proposal is clear folly. Society has no interest in encouraging new forms of intimate expression. Society wants people to get married and is not indifferent to a choice between marriage and cohabitation.[131] The application of optimal tax theory starts with the determination that two or more choices are moral equivalents; that they are just like apples and oranges.[132] It then measures the relative elasticity of the demand for each choice.[133] It recommends taxing the commodity (or behavior) with the inelastic demand more in order to maximize consumer choice and maintain optimal levels of production.[134] The moral (and heteronormative) starting point of this analysis belies the objective neutrality of optimal tax theory. Maximizing relationship choice is not a question of permitting consumers to choose freely between apples and oranges.

IV. MARITAL PROVISIONS

Michael Graetz identifies taxpayer dissatisfaction with the marriage penalty as a prime cause for the "decline" of the income tax.[135] Members of Congress have responded to this taxpayer dissatisfaction with a series of "pro-family" tax reform measures and tax scholars have weighed in with their own proposals to address the problem. The focus on the marriage penalty, which actually produces a $4 billion net bonus,[136] creates the impression that the tax code is anti-marriage. It overlooks the numerous tax provisions that reference a taxpayer's marital status; an estimated 60 provisions on the income tax side alone.[137]

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131 For a description how this is expressed in the Congressional debate regarding "pro-family" tax reform see *infra* text accompanying notes 407-11.

132 *See* MCCAFFERY, *supra* note 20, at 170.

133 *See id.* at 170-71.

134 *See id.* at 174-75.

135 *See* GRAETZ, *supra* note 91, at 7.

136 *See* CBO REPORT, *supra* note 7.

137 *See id.* Testimony and reports offered in connection with the recent "pro-family" tax reform estimate upwards of 60 different income tax sections under which marital status will effect an individual's tax liability. *See id.* These estimates typically do not include the generous federal estate and gift tax provisions geared to provide relief for married taxpayers, such as the unlimited estate and gift tax marital deductions for property payable to a citizen spouse. *See* I.R.C. §§ 2055; 2522 (1994). Of course, the estate and gift tax

Far from being anti-marriage, the tax code embraces and recognizes marital status in a wide variety of contexts. Beneficial provisions such as the unlimited transfer tax marital deductions and the exclusion of employer-provided fringe benefits from gross income have gone largely unnoticed and unquestioned.[138] This section offers a broader view of the marital provisions from the perspective of someone who is excluded from them and, therefore, cannot take them for granted or "mistake them for nature."

The marital provisions are based on a series of assumptions concerning the terms, merit, and nature of the taxpayer's relationship with his or her spouse. These provisions use marital status to identify (i) a relationship where income or resource pooling occurs (or should occur), (ii) a relationship that is worthy of societal support in the form of tax deferral or other relief, and (iii) a relationship where the individuals never deal with one another at arm's length.[139] To the contrary, for tax purposes, same-sex partners always deal with each other at arm's length or, at best, with "detached and disinterested generosity."[140]

This section discusses the determination of marital status, describes the three general categories of marital provisions, and contrasts the treatment of same-sex couples under the same provisions. It also examines the instances where the tax

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provisions apply to a very small numbers of taxpayers. They nonetheless represent another instance where the tax code privileges married couples over other couples. This sensitivity to marital status is not unique to the tax code. A 1996 report of the General Accounting Office catalogued 1049 federal statutes where martial status was relevant to the law. *See* General Accounting Office, *Defense of Marriage Act*, Letter Report GAO/OGC-97-16 (Jan. 31, 1997).

138 *See* sources cited *supra* note 19 (discussing Patricia Cain's scholarship); *see also* Adam Chase, *Tax Planning for Same-sex Couples*, 72 DENV. U. L. REV. 359, 377-78 (1995) (outlining the potential efficacy of tax planning and contractual arrangement as a means to secure certain benefits for same-sex couples).

139 Other commentators and studies have drawn the lines at different points. For example, David Chambers categorizes the general panoply of laws that are sensitive to marriage around the following themes: (i) recognizing affective or emotional bonds, (ii) encouraging an environment conducive to child rearing, and (iii) assuming an economic partnership. *See* Chambers, *supra* note 104, at 453 (describing the three categories of regulation). He explains that

> some laws recognize affective or emotional bonds that most people entering marriage express for each other; some build upon assumptions about marriage as creating an environment that is especially promising or appropriate for the raising of children; and some build on assumptions (or prescriptive views) about the economic arrangements that are likely to exist (or that ought to exist) between partners.

Id.

The report of the General Accounting Office on the income tax treatment of single and married taxpayers analyzes 59 marriage-sensitive provisions. *See* General Accounting Office, *Income Tax Treatment of Married and Single Individuals, Report to the Honorable Orrin G. Hatch*, GAO/GGD-96-175 (Sept. 3, 1996).

140 Comm'r v. Duberstein, 363 U.S. 278, 285 (1960) (establishing the test to determine whether an item of receipt is excluded from gross income as a gift under section 102) (citing Comm'r v. LoBue, 351 U.S. 243, 246 (1956)).

code is sensitive to the way taxpayers define their families, including the special rate schedule for heads of households, the dependency exemptions, and the tax consequences of divorce.

A. Who's Married and Who's Not?

Despite its interest in marriage, the tax code does not attempt to define marriage (or divorce). Although it provides certain timing rules to determine *when* a taxpayer is considered married, it has traditionally deferred to the laws of the state of a taxpayer's domicile to determine *whether* a taxpayer is married.[141] After *Baehr v. Lewin*,[142] this deferral to state law raised the possibility that same-sex couples who were legally married under state law would be considered married for federal tax purposes.[143] This possibility was foreclosed, at least for the time being, with the passage of DOMA in 1996 which defines marriage for all federal purposes as the union of one man and one woman.[144] DOMA makes it clear that same-sex couples

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[141] The tax code establishes timing rules for determining when an individual is considered married during a given tax year. *See* I.R.C. § 7703(a)(1) (1994) (DOMA supercedes section 7703 and provides that for all federal purposes marriage must be between a woman and a man and further provides that the federal government will not recognize same-sex marriages that are valid under state law). Section 7703 also states that an individual is no longer married upon the issuance of a decree of divorce. *See id.* at (a)(2). With a limited exception for certain tax-motivated divorces, the validity of a "decree of divorce" is determined by state law. *See* Rev. Rul. 76-255, 1976-2 C.B. 40.

The marriage penalty and the timing rule of section 7703 suggested to taxpayers an unconventional year-end tax planning strategy -- divorce in December and remarry in January. The IRS disregarded these year-end divorces under the "sham transaction" doctrine, noting that their only purpose was tax avoidance. *See id.* For a discussion of one couple who made a career out of tax-motivated divorces see *infra* note 358.

[142] The Supreme Court of Hawaii held that the state's marriage statute discriminates on the basis of gender and, therefore, may violate the equal protection clause of the Hawaiian Constitution. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993). On remand, the trial court determined that the state law permitting marriage only between a man and a woman did not further a compelling state interest. *See* Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996). Prior to the hearing on remand, the state of Hawaii empaneled a Commission on Sexual Orientation and the Law to conduct fact finding regarding the state's interest in prohibiting same-sex marriage. The seven person commission voted seven to five in favor of allowing same-sex marriage. For a discussion of the debate in Congress regarding same-sex marriage see *infra* text accompanying notes 298-342.

[143] For example, prior to DOMA a same-sex couple legally married in Hawaii would have qualified as married for federal tax purposes under section 7703. The open question was what would be the federal tax result if that same couple moved to a state which had passed a law refusing to recognize foreign same-sex marriages.

[144] DOMA adds a definition of "marriage" and "spouse" to the United States Code. Specifically, it adds the following section 7 to Chapter 1 of title 1:

> 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.

1 U.S.C. A. § 7 (West 1997).

are not considered married for federal tax purposes, even if they are legally married in their state of domicile.[145] This represents a marked change for the tax code which has always deferred to state law to determine marital status.[146] Accordingly, there is nothing unintended about the exclusion of same-sex couples from the marital provisions.

B. Economic Partnership: The Joint Filing Provisions

As explained in Part III, the economic unit theory of marriage is the chief tax policy justification for the joint filing provisions. Based on a partnership model of marriage, husband and wife are assumed to pool resources and share equally both income and expenses. Empirical evidence has shown that the use of marriage as a proxy for relationships which involve pooling of income and resources is both over broad and under inclusive.[147] Not all married couples pool their income, whereas some unmarried couples or other family units do.[148] Further, the tax code's endorsement of joint filing is not as complete as the economic unit rationale would suggest. For example, the marriage rates are not double the unmarried rates, but rather reflect the 1969 compromise between marriage and couples neutrality. In addition, only some of the numerous limits, floors, credits, and ceilings that punctuate the tax code are doubled to correct for the effect of joint filing.[149]

An individual's tax rate depends on two variables: (i) taxable income and (ii) marital or household status.[150] Under the present progressive rate structure,

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For a discussion of the perceived constitutional shortcomings of DOMA see STRASSER, *supra* note 3.

145 Currently, no state allows same-sex couples to marry. *See* Knauer, *supra* note 1, at 351. As I have noted elsewhere, my students are often under the impression that same-sex couples can marry in some states, they are just never sure which ones. *See id.* at n.67 (noting this mistaken belief on the part of "some of my students in my first year Property class"). This underscores the fact that people do not differentiate between the images of same-sex ceremonial weddings in popular culture and state-sanctioned marriage. The strong command of DOMA makes it unlikely that Congress (or the Treasury) will endorse a form of "tax marriage" any time soon. *See* Cain, *Same-Sex*, *supra* note 19, at 129 (discussing a form of "tax marriage").

146 *See* Rev. Rul. 76-255, 1976-2 C.B. 40.

147 *See, e.g.*, Kornhauser, *supra* note 31, at 73.

148 *See, e.g.*, Zelenak, *supra* note 31, at 342 (arguing society would be "better served" by separate returns).

149 The CBO Report divided the tax code provisions into four different categories: nine provisions made some adjustment for joint versus individual filing, 15 provisions made no adjustment, nine provisions made complete adjustment, and 26 provisions treated married taxpayers as "a unique unit." CBO Report, *supra* note 7.

150 Section 1 imposes tax on taxable income in accordance with the various rate schedules. *See* I.R.C. § 1 (1994).

income tax rates increase with taxable income. There are four different individual rate schedules: married filing jointly, head of household, single, and married filing separately.[151] The rates applicable to married taxpayers filing jointly are the most favorable.[152] The second most favorable rates are those applicable to a head of household,[153] followed by single individuals and finally by married taxpayers filing separately.[154] The marriage penalty is actually the complicated interaction of the rate schedule, joint filing, the personal exemption and standard deduction amounts, and, where appropriate, the earned income credit.[155]

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151 *See* I.R.C. §1(a)-(d). There is also a separate rate schedule for estates and trusts. *See* I.R.C. § 1(e). The corporate income tax is imposed pursuant to a separate rate schedule. *See* I.R.C. § 11 (1994).

152 *See* I.R.C. §1(a).

153 The head of household filing status was added to the tax code in 1951. *See* Bittker, *supra* note 63, at 1417. For a history of the enactment of the head of household filing status, its subsequent modifications and a description of the rationale for the addition of the head of household designation, see *id.* at 1417-18.

154 *See* I.R.C. §1(b)-(d).

155 As we know, "it is simply impossible to design a progressive tax regime in which all married couples of equal aggregate income are taxed equally and in which an individual's tax liability is unaffected by changes in marital status." Drucker v. Comm'r, 697 F.2d 46, 50 (2d Cir. 1982).

Detailed Comparison of Income Tax Liability - Married and Unmarried Couples[158]

Gross Income	$ 20,000	$ 40,000	$ 80,000	$ 160,000	$ 320,000
Unmarried single-earner couple w/ two personal exemptions	$ 1,553	$ 5,203	$ 16,671	$ 44,022	$ 103,470
Unmarried single-earner couple w/ one personal exemption	$ 1,958	$ 5,986	$ 17,508	$ 44,275	$ 103,470
Married filing Jointly	$ 1,125	$ 4,125	$ 13,395	$ 37,151	$ 97,512
Unmarried equal-earner couple	$ 915	$ 3,915	$ 11,917	$ 35,015	$ 87,663

At lower income levels, the potential for a marriage penalty is enhanced due to a perverse interaction between the rate structure and the phase-out of the earned income credit.[157]

For a same-sex couple where one partner has considerably more income than the other, the inability to file jointly will result in greater tax liability than a similarly situated married couple. Although same-sex couples may agree to split income for relationship reasons unrelated to tax planning, any attempt to shift income to the lower income partner will fail under the *Lucas v. Earl* proscription

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158 This chart illustrates the interaction among the standard deduction, the personal exemption, its phase-out for high income taxpayers, and the earned income credit. It is based on the 1998 rates applicable to married couples filing jointly and unmarried individuals. It assumes no itemized deductions. The calculation of the equal-earner unmarried couple represents aggregate tax liability based on aggregate gross income. The calculations for the single-earner unmarried couples show the impact of claiming one or two personal exemption amounts. For a discussion of the rules determining when a taxpayer can claim a second personal exemption amount for a supported partner see *infra* text accompanying notes 241-49. In addition to the technical rules determining when an unmarried partner can claim a second exemption, there remains the possibility that some taxpayers in same-sex relationships would not claim a second exemption for their partner because of a reluctance to signal their sexual orientation. For example, potential lenders routinely request past income tax returns.

157 *See* I.R.C. §32 (1994). For a discussion of the impact of joint filing on lower income taxpayers see MCCAFFERY, *supra* note 20, at 146-50; *see also* Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995).

against the anticipatory assignment of income.[158] As discussed below, it may also have gift tax consequences.[159]

For income tax purposes, a transfer between same-sex partners is most likely a gift under section 102.[160] This means that the transfer can be excluded from the gross income of the donee partner and is not deductible by the donor partner.[161] Professor Cain advocates a proposal that would reverse this result by including any support payments in the gross income of the payee.[162] She argues that support payments should be taxed at the marginal bracket of the transferee.[163] This would allow a limited form of income shifting between same-sex partners at least to the extent of support payments made by the supporting partner. Cain argues that one way for Congress to implement this would be to reverse *Lucas v. Earl* and to respect income-splitting agreements between same-sex couples to the extent of

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158 Generally, income from services is taxed to the individual who earns the income and income from property is taxed to the individual who owns the property. *See generally* Lucas v. Earl, 281 U.S. 111 (1930) (discussing income from services); Helvering v. Horst, 311 U.S. 112 (1940) (discussing income from property).

159 For a discussion of the gift tax consequences see *infra* text accompanying notes 219-22.

160 Professor Cain vigorously advocates this position. *See* Cain, *Taxing, supra* note 19, at 475-76.

> Although I think such transfers are clearly gifts, it is disturbing that others continue to suggest in print and at tax workshops that such payments might constitute taxable income to the recipient. And yet, these suggestions are not so far-fetched given the Internal Revenue Service's traditional treatment of couples, married or not. The IRS has tended to view couples, including husbands and wives, as individuals who are capable of bargaining with each other in much the same way unrelated individuals negotiate commercial transactions. In other words, the IRS often determines the tax consequences of a two-party transaction by ignoring personal relationships and focusing solely on individuals as independent actors.

Id. at 476.

161 *See* I.R.C. § 102 (1994).

162 *See* Cain, *Same-Sex, supra* note 19, at 119. Of course, central to this proposal would be the ability to define support payments. For a discussion of the support question in the gift tax context *see infra* note 218.

163 *See id.* at 129. Cain concludes: "In this article . . . I have argued that support payments from one lesbian or gay partner to another ought to be taxed at the marginal bracket of the transferee." *Id.*

Interestingly, the argument in favor of taxing support payments to the supported partner but not the supporting partner follows the general argument made by Michael J. McIntyre and Oliver Oldman in their 1977 study of the taxable unit and the "ideal income tax." *See* McIntyre & Oldman, *supra* note 97, at 1576. They conclude that "the attribution rule most in harmony with the Haig-Simons definition is that each family member should be taxed on the items he actually consumes or accumulates, regardless of source." *Id.* Moreover, they acknowledge that "unmarried persons who pool their income should therefore theoretically be entitled to use some form of income splitting for tax purposes." *Id.* at 1597. Nonetheless, McIntyre and Oldman conclude that due to matters of administrative convenience marriage should continue to determine whether taxpayers are entitled to split their income. *See id.* However, they note that "if income pooling among single persons becomes a common feature of our society," then "[w]e may have to develop a fiscal definition of marriage." *Id.*

support payments.[164]

In addition to advocating for specific legal interpretations, commentators have suggested a number of unique ways to try to shift income to the partner with the lower marginal rate of tax. Just like Mr. and Mrs. Earl, same-sex partners can legally shift income pursuant to a contract enforceable under state law,[165] but the income remains taxable to the partner who earns it.[166] Accordingly, a cohabitation agreement which mandates income sharing does not have income tax consequences. However, it may very well have federal gift tax consequences.[167]

Other suggestions harken back to the types of family devices that couples used to shift income prior to the enactment of the joint filing provisions, including the use of a family partnership.[168] Some commentators suggest paying a same-sex partner who does not work outside the home for household work.[169] However, this is not an effective way to shift income and could have undesirable tax consequences.[170]

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164 *See* Cain, *Same-Sex, supra* note 19, at 120. Such payments also raise gift tax concerns. *See infra* text accompanying notes 219-22. Cain's proposal also extends to the gift tax treatment of support payments. *See infra* note 218. Again, she concludes: "Such support payments ought not be viewed as taxable gifts." Cain, *Same-Sex, supra* note 19, at 129.

165 Courts have demonstrated a willingness to enforce such relationship or cohabitation agreements. *See* Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, But Not Hell Either*, 73 DENV. U. L. REV. 1107, 1139 (1996); *see also* Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235 (1996).

166 *See* Lucas v. Earl, 281 U.S. 111, 114-15 (1930).

167 For a discussion of the possible gift tax consequences see *infra* text accompanying notes 219-22. Also, the agreement could have income tax consequences to the extent that any payments were considered compensation for services.

168 Some commentators suggest that same-sex partners form tax partnerships in order to obtain the benefits of income splitting and nonrecognition of gain. *See, e.g.*, 1 SEXUAL ORIENTATION AND THE LAW (Roberta Achtenberg ed., 1993). The family partnership, however, has a checkered history with the taxing authorities and generally should be undertaken only where there is a genuine business motive.

169 *See* FREDERICK HERTZ, LEGAL AFFAIRS: ESSENTIAL ADVICE FOR SAME-SEX COUPLES 154 (1998) (noting without further elaboration that same-sex couples "may even be able to contract with each other to perform domestic services and thus shift some income to the one paying a lower rate of taxes, something married couples can't do").

170 The payee stay-at-home partner would include the amounts in gross income, but the payor partner would not be entitled to deduct such payments unless they could somehow qualify as a business expense because general living expenses are not deductible. *See* I.R.C. § 262(a) (1994). Moreover, the payee partner would be subject to self-employment FICA and FUTA tax on the amounts paid. The resulting combined rate would sharply mitigate any possible tax benefit due to income shifting. For gift tax purposes, the payor partner makes a taxable gift to the extent the payments exceed the fair market value of the services rendered. (The gift tax does not take into account consideration such as love and affection.) *See infra* text accompanying notes 219-22.

C. *Fundamental Unit of Society: The Marriage Benefit Provisions*

As discussed, the question of couples neutrality is based on a view of marriage as the fundamental institution or ordering unit of society.[171] The review of the Congressional testimony and debate surrounding DOMA and the "pro-family" tax reform in Part V confirms the strongly held belief that marriage is "society's basic institution,"[172] and it represents the "heart of our values as Americans."[173] This view is not only advanced by heterosexual conservatives; a similar refrain is often voiced by the advocates of same-sex marriage.[174] As Andrew Sullivan explains, "it's perfectly possible to combine a celebration of the traditional family with the celebration of a stable homosexual relationship."[175] Less conservative pro-marriage members of the gay and lesbian communities have stressed the "right" to marry as a matter of equality. Evan Wolfson, in many ways the architect of the contemporary push for same-sex marriage, concludes that "[e]ven though equal marriage rights, until recently, seemed a dream, all available evidence suggests that the vast majority of gay and non-gay people alike share such sentiments."[176] Other

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171 Marjorie Kornhauser observes that the popular belief that "the joint return in [sic] necessary because it promotes family values" is mistaken, at least in the current formulation of the marital provisions. Kornhauser, *supra* note 31, at 64. The goal of the "pro-family" tax reform described in Part V is to bring the joint filing provisions into line with a particular brand of "family values."

172 *Weller Release Against Senate Marriage Tax Penalty,* 98 TAX NOTES TODAY 118-27, Jun. 19, 1998, *available in* LEXIS, Fedtax Library, TNT file (urging that a Senate bill designed to reduce the marriage penalty did not go far enough to eliminate the penalty which "punishes marriage, our society's most basic institution").

173 *Legislators Call for Elimination of Marriage Penalty,* 98 TAX NOTES TODAY 29-45, Feb. 12, 1998, *available in* LEXIS, Fedtax Library, TNT File (reproducing the text of similar letters sent to President Clinton by four members of Congress). In January 1998, four members of Congress urged the President to include the repeal of the "marriage tax penalty" as a "legislative priorit[y] for 1998." *Id.* The letter noted that "[t]he institution of marriage is at the heart of our values as Americans." *Id.*

174 Patricia Cain supports marriage on ethical and efficiency grounds. *See* Cain, *supra* note 25. David Chambers concludes:

> [M]y claim is that after thousands of years of human history, the union of two persons in a relationship called "marriage" is almost certainly here to stay, that the special rules for married people serve legitimate purposes, and that gay men and lesbians should not shrink from embracing them, nor should politicians shrink from extending them.

Chambers, *supra* note 104, at 448.

He later refers to marriage as "the single most significant communal ceremony of belonging." *Id.* at 450.

175 ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 112 (1995). Sullivan continues: "The one, after all, is modeled on the other. If constructed carefully as a conservation social ideology, the notion of stable gay relationships might even serve to buttress the ethic of heterosexual marriage, by showing however those excluded from it can wish to model themselves on its shape and structure." *Id.*

176 Evan Wolfson, *Crossing the Threshold, in* SAME-SEX MARRIAGE: PRO AND CON A READER 141, 141-42, (Andrew Sullivan ed., 1997).

gay and lesbian activists and scholars have justified the pursuit of marriage rights by citing their potential to offer truly transformative social change.[177]

As discussed in greater detail in Part V, there is wide Congressional consensus that the government should encourage marriage (and should forbid same-sex marriage). The exclusions or deductions discussed below share that view. They encourage marriage through unambiguously preferential tax treatment and measures designed to protect the surviving spouse.[178]

1. Employer-Provided Fringe Benefits

Over the last several decades, there has been an explosion of employer-provided fringe benefits. Studies typically estimate that fringe benefits constitute between thirty and forty percent of total compensation.[179] In many instances, these items are doubly tax-advantaged because they are excluded from an employee's gross income[180] and employers are entitled to deduct them as reasonable compensation.[181] The largest single item in this category is employer-provided health insurance,[182] but fringe benefits can also include employee discounts, no additional cost services, lodging, and group-term life insurance.[183] For many of these items, the exclusion from gross income extends to amounts paid by the

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177 Despite the high profile of the push for marriage rights, marriage is not a universal goal within the gay and lesbian community. *See* Knauer, *supra* note 1, at n.54.

178 The fact that the successful lobbying effort to mitigate the "singles' penalty" was led by the War Widows Association is consistent with the desire to protect a surviving spouse. *See supra* note 91 and accompanying text.

This section focuses on tax provisions designed to benefit all married couples. Accordingly, this section does not include the marriage bonus because the same provisions also produce the marriage penalty.

179 *See* Knauer, *supra* note 1, at 342.

180 *See* I.R.C. §132 (1994) (excluding from gross income certain employer-provided fringe benefits).

181 *See* I.R.C. §162(a)(1) (1994) (allowing a deduction for "reasonable allowance for salaries or other compensation").

182 The 1995 tax expenditure budget lists this item as $ 2.2 billion. *See* GRAETZ & SCHENK, *supra* note 78, at 47.

183 *See* I.R.C. §106 (1994) (employer-provided health insurance); I.R.C. §132(c) (employee discount); I.R.C. §132(b) (no additional cost services, such as estate planning services offered to an employee of a law firm or a free (and otherwise vacant) hotel room to an employee of the hotel); I.R.C. §119(a) (1994) (certain employer-provided lodging); I.R.C. §79(a) (1994) (employer-provided group-term life insurance up to $50,000). This does not include the considerable amounts in deferred compensation available under employer pension plans. For a discussion of employer pension plans analyzed in conjunction with the fringe benefits listed above see McCaffery, *supra* note 23, at 1010, 1013 (describing the taxation of pension plans from a family tax perspective).

employer to provide benefits to the employee's spouse and dependents.[184]

An increasing number of employers, including a number of municipalities and several states, offer fringe benefits that are usually reserved for spouses to the same-sex partners of their employees.[185] Unlike when these benefits are extended to spouses, however, the fair market value of the benefit is included in the gross income of the employee partner, unless the employee partner provides more than one-half of the support for the non-employee partner.[186] This is because the relevant statutory exclusion from gross income for employer-provided fringe benefits only applies to benefits extended to spouses, and in certain cases, other dependents.

DOMA precludes the possibility that the non-employee partner could qualify as a "spouse."[187] In a series of private letter rulings, the IRS developed its policy regarding the tax treatment of domestic partnership benefits. A 1996 IRS private letter ruling reiterated that domestic partners do not qualify as spouses for purposes of the exclusion from gross income of employer-provided health insurance under § 105.[188] The ruling stated that the fair market value of the health insurance coverage provided for the non-employee partner by the employer is

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184 *See* I.R.C. §§ 132(h)(2)(A); 106(b)(6); Treas. Reg. § 1.106-1 (1960).

185 *See* Knauer, *supra* note 1, at 339-40 (discussing the number of employers offering benefits for same-sex domestic partners).

186 For a discussion of the determination of dependent status for income tax purposes see *infra* text accompanying notes 236-49.

187 Priv. Ltr. Rul. 97-17-018 (Apr. 25, 1997). In a private letter ruling, the IRS concluded that a same-sex partner could not qualify as a spouse in light of DOMA. *See id.* Even prior to the enactment of DOMA, the IRS was not receptive to arguments that a municipal domestic partnership registration ordinance was sufficient to bestow marital status on a domestic partner. *See* Priv. Ltr. Rul. 92-31-062 (July 31, 1992). It did leave open the possibility that the benefit could be excluded from the gross income of the employee if "the state of the employee's residence recognizes the relationship as a valid marital relationship." Priv. Ltr. Rul. 94-31-017 (Aug. 5, 1994) (ruling that the fair market value of a qualified tuition reduction benefit made available to the same-sex partner of an employee was included in the gross income of the employee partner).

188 Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996). The IRS also held that the fair market value of the employer-provided insurance constitutes "wages" under § 3121(a) for purposes of FICA and under § 3306(b) for purposes of FUTA. *Id.* This 1996 private letter ruling was requested by an international law firm that was expanding its benefits policy to include health benefits for its employees' domestic partners. *See id.* Issued prior to the enactment of DOMA, Private Letter Ruling 96-03-011explains that state law determines marital status for purposes of the tax code, noting that marriage "has long been regarded as a virtually exclusive province of the States." *Id.* (citing Ensminger v. Comm'r, 610 F.2d 189, 191 (4th Cir. 1979)). The IRS ruled on the includability of the fair market value of the cost of health insurance provided to domestic partners in at least three prior instances. *See* Priv. Ltr. Rul. 92-31-062 (July 31, 1992) (extending City health fund to the domestic partners of municipal employees); Priv. Ltr. Rul. 91-09-060 (Mar. 1, 1991) (extending county health plan to include "Principal Domestic Partner"); Priv. Ltr. Rul. 90-34-048 (Aug. 24, 1990) (expanding coverage under City health plan to include domestic partners of City employees). The IRS seems to have abandoned its position announced in Private Letter Ruling 90-34-048 that the fair market value of the insurance coverage had to be calculated by reference to individual, not group, policy rates. *See* Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996); Priv. Ltr. Rul. 92-31-062 (July 31, 1992); Priv. Ltr. Rul. 91-09-060 (Mar. 1, 1991).

included in the gross income of the employee partner (and is subject to income tax withholding under § 3402), unless the non-employee partner qualifies as the employee partner's dependent within the meaning of § 152(a), and the relationship is "not in violation of local law."[189] As explained in Part IV. E. below, a same-sex partner may not easily qualify as a dependent for tax purposes.[190]

2. Estate and Gift Taxation: The Unlimited Marital Deduction

The federal transfer tax system is wholly separate from the income tax system. It has as its base a different measure of ability to pay — the transfer of wealth without consideration either during lifetime or at death. It is a unified system in that it requires an individual to keep a tally of all taxable inter vivos transfers which are then added at death to the individual's testamentary transfers. The scope of the estate and gift tax is relatively limited due to large exemption amounts, and it represents only slightly more than 1% of all federal revenue.[191]

In connection with critical scholarship regarding the QTIP provisions, Lawrence Zelenak has stated that "in the overall feminist scheme of things" estate and gift tax provisions are "simply trivial."[192] Here, the estate and gift tax is relevant because it helps us continue to piece together a picture of how the federal tax code views marriage.[193] Further, the failure to take into account the impact of transfer taxes on wealthy same-sex couples will overstate the marriage bonus inuring to equal-earning same-sex couples and drastically understate the marriage penalty for single-earner same-sex couples.

As of 1998, each individual has a $202,050 unified transfer tax credit which means that he or she can transfer up to $625,000 without incurring any transfer tax liability.[194] In addition, there is a $10,000 per donee annual exclusion

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189 *See* Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996); *see infra* text accompanying notes 244-46. In Private Letter Ruling 92-31-062 (July 31, 1992), the IRS stated that a municipal registration ordinance was not equivalent to marital status, but that it would eliminate concerns about local law that arise under § 152(b)(5).

190 *See infra* text accompanying notes 236-46.

191 *See* BORIS I. BITTKER ET AL., FEDERAL ESTATE AND GIFT TAXATION 1 (7th ed. 1996) (citing figures for 1993).

192 Zelenak, *supra* note 8, at 1549. In response to Zelenak, Wendy Gerzog countered that "biased and degrading public laws should not escape criticism because they bias and degrade mostly wealthy white women." Wendy C. Gerzog, *The Illogical and Sexist QTIP Provisions: I Just Can't Say It Ain't So*, 76 N.C. L. REV. 1597, 1607 (1998).

193 *See* Mary Moers Wenig, *"Taxing Marriage,"* 6 S. CAL. REV. L. & WOMEN'S STUD. 561, 562 (1997) (stating that the transfer tax provisions offer a "reflection of marriage in one corner of the law").

194 *See* I.R.C. § 2010 (c) (1994). The "applicable exclusion amount" is scheduled to increase incrementally to $1 million by the year 2006. *Id.*

for gifts of a present interest.[195] Once an individual has used his or her unified credit, transfers are subject to tax at rates that are much steeper than the current income tax rates, starting at 37% and increasing to 55%.[196]

There is an unlimited deduction for inter vivos and testamentary transfers to a spouse.[197] As a result, the vast majority of transfers between spouses do not give rise to transfer tax liability.[198] The unlimited deduction defers transfer taxation of marital assets until the death of the surviving spouse. The deduction is granted in the estate of the first spouse to die with the view that the property qualifying for the deduction will be included in the estate of the survivor, absent consumption.[199] For this reason, the deduction is not allowed for the transfer of certain "terminable interests" that otherwise would escape taxation on the death of the survivor.[200]

Congress enacted the first estate and gift tax marital deductions in 1948 along with the joint filing provisions. Like the income tax rules, the marital deduction was designed to compensate for the disparity between community property states and separate property states and the deduction was limited to 50% of the gross estate.[201] In order to qualify for the 50% marital deduction, the transfer had to approximate the automatic property distribution in a community property jurisdiction.[202] It had to be a non-terminable interest and vest substantial ownership rights in the surviving spouse.[203]

Congress enacted the unlimited marital deduction in 1981 with the express policy goal of providing relief for surviving spouses.[204] It also abandoned the

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195 *See* I.R.C. § 2503 (b) (1994). For years after 1998, the $10,000 amount is adjusted for inflation. *See* I.R.C. § 2503(b)(2).

196 *See* I.R.C. § 2001(c)(1) (1994). Amounts over $3 million are taxed at a marginal rate of 55%. *See id.*

197 *See* I.R.C. §§ 2056; 2523 (1994).

198 *But see* I.R.C. §§ 2056(b); 2523(b) (disallowing a deduction for a transfer of certain "terminable interests").

199 *See* I.R.C. § 2056(a).

200 *See* I.R.C. § 2056(b). Similarly, a deduction is not allowed for transfers to a non-citizen spouse because such property could escape estate taxation by expatriation. *See* I.R.C. § 2056(d). Special rules permit the deduction in the case of transfers of terminable interests and transfers to a non-citizen spouse, provided the property is held in such a way as to insure taxability upon the death of the survivor. *See* I.R.C. §§ 2056(b)(7); 2056A; *see also* Alice Abreu, *Taxing Exits,* 29 U.C. DAVIS L. REV. 1087 (1996).

201 *See* S. REP. NO. 80-1013 (1948), *reprinted in* 1948 U.S.C.C.A.N. 1163, 1167.

202 *See id.*

203 *See id.* at 1228.

204 *See* BITTKER, *supra* note 191, at 222.

substantial ownership model with the introduction of "qualified terminable interest property"[205] which allows the estate of the first spouse to die to qualify certain property for the marital deduction without vesting substantial ownership in the surviving spouse.[206]

The unlimited marital deduction means that, with minimum planning, a married couple can transfer $1.25 million (the amount equal to two exemption equivalent amounts) without incurring any transfer tax liability.[207] Even in the case of a combined taxable estate in excess of this amount, a marital deduction may provide a considerable benefit in the form of a tax deferral until the death of the survivor.[208] This is because although the married couple is referred to as a single taxable unit, they do not file jointly. Each individual gets a separate "run through the brackets" and a separate unified credit amount.

One of the reasons that married couples can so easily plan for the optimal use of the marital deduction is that they can transfer property to each other to equalize estates (or at least to take full advantage of the unified credit). Married couples can also engage in nontax estate planning without transfer tax consequences.[209] This option is not available to same-sex couples. Transfers between same-sex partners do not qualify for the unlimited marital deduction.[210]

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205 *See* I.R.C. § 2056(b)(7)(B).

206 The qualified terminable interest property or "QTIP" provisions have prompted feminist critical scholars to question the underlying gender disparities. *See* Fellows, *supra* note 108, at 157-59; Gerzog, *supra* note 108, at 305. The appeal of the QTIP provisions, in addition to their flexibility, is that they offer a marital deduction without ceding ultimate dispositive control to the surviving spouse. One's view of the provisions might depend on whether one identifies with the surviving spouse or the propertied deceased spouse. Feminist critical scholars make the point that the woman is more often than not the former.

207 A married couple with combined assets of $1.25 million must first equalize their estates to take full advantage of the dual unified credit amounts. (This can be accomplished without any tax liability due to the gift tax unlimited marital deduction. *See* I.R.C. § 2523 (1994)). On the death of the first to die, $625,000 is included in his gross estate. Assuming that he made no lifetime taxable gifts, there is no tax due as a result of the unified credit. In order to "use" the full unified credit amount, the estate of the first to die does not qualify the $625,000 for the marital deduction. A typical estate plan would create a "credit shelter trust" that pays income to the surviving spouse for life with the ability of a trustee to reach the principal in case of emergency. The remaining $625,000 is paid to the surviving spouse. Upon the death of the second to die, there is $625,000 in her taxable estate, assuming no consumption or growth, but her estate would pay no federal transfer tax on the $625,000 as a result of the unified credit.

208 Assuming equal estates of $1 million each, there is no tax on the death of the first to die. The amount of $625,000 is placed in the credit shelter trust described above and the remaining $375,000 is paid to the surviving spouse and qualifies for the unlimited marital deduction. The survivor then has a taxable estate of $1.375 million, assuming no growth or consumption. This produces an estate tax liability of approximately $243,600. The benefit is that the tax on the $375,000 is deferred until the death of the surviving spouse, thereby maximizing the assets at her disposal. Without the deduction, the tax in the estate of the first to die would have been approximately $110,550. *See infra* note 214.

209 *See* I.R.C. §2523.

210 *See* Joan B. Ellsworth, *Prescribing TUMS: An Alternative to the Marital Deduction for Unmarried*

Thus, any property transferred between partners without consideration is subject to gift tax liability to the extent the aggregate annual transfer exceeds (or does not qualify for) the $10,000 annual exclusion.[211] Any amounts in excess of the $10,000 exclusion are taxable gifts.[212] Moreover, transfers between same-sex couples for everyday living expenses have potential transfer tax ramifications because the general exclusion of "support payments" from taxable gifts does not clearly apply to same-sex partners.[213]

For example, where a same-sex couple has no prior taxable gifts and a combined taxable estate of $1.25 million, a zero tax result is only available for same-sex couples who have approximately equal estates. In a relationship where one partner either has greater income or assets, it is possible that the aggregate yearly transfers would already exceed the annual exclusion. As a result, any equalizing transfers would be taxable gifts.[214]

In this way, if one same-sex partner has considerably more wealth than the

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Cohabitants, 11 VA. TAX REV. 137, 138 (1991).

211 *See* I.R.C. § 2503(b) (1994). After 1998, the $10,000 amount is adjusted for inflation. *See id.* at (b)(2).

212 Again, Professor Cain argues that support payments should not be considered taxable gifts. *See* Cain, *Same-Sex*, *supra* note 19, at 123-29.

213 *See* Rev. Rul. 68-379, 1968-2 C.B. 414; *see also* HERTZ, *supra* note 169, at 155-56.

> If you are pooling your assets, in theory the richer partner could be considered to be making a gift to the poorer one or the poorer one could be viewed as receiving income for services rendered. If either of you ever gets audited, it is *conceivable* that the IRS could hold the richer one liable for a gift tax or could make the poorer one pay income tax. While it's highly unlikely that you'll ever face this kind of an audit it's not impossible, so you should speak with a tax specialist if you are doing a fair amount of income sharing or asset pooling.

Id. (emphasis in original).

The American Law Institute's Estate and Gift Taxation Project recommended an exclusion from gift tax for consumption transfers, provided the donee did not "acquir[e] property that will retain any significant value after the passage of one-year" from the transfer. BITTKER, *supra* note 191, at 136-37 (quoting the ALI proposal). The proposed exclusion applied to dependent members of the taxpayer's household regardless of relationship. *See id.* Section 2503(e) was a compromise. *See* I.R.C. § 2503(e). It allows an unlimited amount to be used for the medical or educational expenses of any individual. *See id.* Thus, it narrows the scope of the type of support payments excluded but expands the scope of permissible donees because it does not limit them to household members.

214 Even with fairly equal estates, however, same-sex partners are not entitled to the tax deferral granted to married couples. If each partner has a $1 million taxable estate, on the death of the first partner to die, $625,000 is placed in a credit shelter trust for the benefit of the survivor. The remaining $375,000 is payable to the survivor, but it is subject to approximately $110,550 in federal estate tax. This leaves $ 264,450 for the survivor, rather than $375,000. Assuming no consumption or growth, the $ 264,450 is then added the survivor's $1 million taxable estate. Upon the death of the survivor, her $1,264,450 taxable estate gives rise to approximately $203,139 in estate tax, subject to any available credit for previously taxed property. The surviving partner loses the use of the $ 110,550 tax payment made in the estate of the first decedent. Further, the total tax paid is $ 313,689, as opposed to $243,600 as described in *supra* note 208.

other, the relationship in effect could become taxable when the wealthier partner exhausts her unified credit.[215] Transfers that would use large amounts of unified credit could include adding a partner's name to a deed in order to hold the property in joint tenancy with a right of survivorship.[216] Again, Patricia Cain argues that "support" transfers should not carry tax consequences and should not constitute taxable gifts.[217] Cain argues that support payments should not be considered taxable gifts because they represent consumption of the transferor or, alternatively, a legally binding obligation of support.[218] This is not inconsistent with her position that a support transfer should be included in the gross income of the transferee because it represents consumption on the part of the transferee.[219]

The following chart illustrates the potential transfer tax consequences where one same-sex partner has considerably more assets than the other partner. It does not take into account any payments that arguably qualify as "support" and only includes transfers of property or an interest in property.[220] In the end, it gives new meaning to the phrase "a taxing relationship."

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215 One reason to do this is to decrease the amount of property that would pass under the will of the wealthier partner and thereby minimize the amount of property subject to a potential will contest.

216 On the death of the first to die, the survivor is said to get the property by operation of law. Jointly held property with the right of survivorship is not part of a decedent's probate estate. Although this property will avoid probate, it will not avoid federal estate tax. If the wealthier partner dies first, the entire date of death value of the property is included in her gross estate, unless the surviving partner can show that she exchanged consideration in money or money's worth for the property or some portion of it. *See* I.R.C. § 2040 (1994).

217 *See* Cain, *Same-Sex, supra* note 19, at 129.

218 *See id.* This requires a method by which to differentiate an obligation to support a partner versus an obligation of support that has been assumed by a family member as a way to defeat the gift tax. For example, a parent could enter into a legally enforceable contract to support an adult child for which the child exchanges no consideration reducible to money or money's worth, but for which there is sufficient consideration to make it binding under state law. (This is possible because the transfer tax does not recognize consideration that is not "reducible to a value in money or money's worth." Treas. Reg. § 25.2512-8 (as amended in 1992)). The parent could then argue that payments made under the agreement were not taxable gifts because of the support obligation that the parent had voluntarily assumed. If this were permitted, every family could defeat the transfer tax by contractual agreement.

219 In order to qualify as a "gift" for income tax purposes, the donor must make the transfer with the requisite level of "detached and disinterested generosity." *See Duberstein*, 363 U.S. at 285 (citing Comm'r v. LoBue, 351 U.S. 243, 246 (1956)). For gift tax purposes, donative intent is irrelevant. *See* Treas. Reg. § 25.2512-8 (as amended in 1992). The only question is whether the donor made a completed transfer for less than adequate consideration in money or money's worth. If so, and the transfer is not in the ordinary course of business, then the extent to which the amount transferred exceeds the amount received constitutes a gift. *See* I.R.C. § 2512(b) (1994).

220 *See supra* note 219.

Gift Tax Consequences of Property Transfers[221]

Taxable transfers	Year 1	Year 2	Year 3	Year 4	Year 5
1. ½ mortgage payments, jointly owned	$18,000	18,000	18,000	18,000	18,000
2. ½ down payment jointly owned	50,000				
3. Car		25,000			
4. ½ vacation home			250,000		
5. ½ stock portfolio			250,000		
Taxable gifts	68,000	43,0000	518,000	18,000	18,000
Prior taxable gifts	-0-	68,000	111,000	629,000	647,000
Total taxable transfers	68,000	111,000	629,000	647,000	665,000
Tentative tax	15,080	27,100	203,530	210,190	217,405
Unified credit	192,800 (1993)	192,800 (1994)	192,800 (1995)	192,800 (1996)	192,800 (1997)
Credit remaining	177,720	165,700	-0-	-0-	-0-
Gift tax paid	-0-	-0-	-0-	10,730	17,390
Gift tax due	-0-	-0-	10,730	6,660	7,215

[221] This table uses the unified credit amount of $192,800 which was in effect for years prior to 1998 in order to have a constant unified credit throughout the years of the transfers. For 1998, the amount of the unified credit is $202,500. It is scheduled to increase gradually until it reaches $1 million in 2006. *See* I.R.C. §2010(c).

This chart assumes that the donor partner has already used in each year the $10,000 annual exclusion amount on gifts and other transfers. (Under Cain's theory of the gift tax treatment of support payments, it would be necessary to show that these transfers were not "support" payments, but actual taxable gifts.) Some of the transfers recorded each year are transfers of property to be held in joint names. In Year 1, the partners buy a house which is titled in joint names with the right of survivorship. The wealthier partner provides the down payment and makes the monthly mortgage payments of $3,000. The chart includes one-half of the total annual mortgage payments as a taxable gift. The mortgage payment may be classified as a "support" payment, but given that the house is in both names there is arguably a transfer of property. *See supra* note 219. In Year 2, the wealthier partner buys her partner a car. After two large equalizing transfers in Year 3, all future taxable transfers will give rise to an immediate gift tax liability. This creates a taxable relationship going forward. An additional concern is that the use of unified credit during lifetime will mean that none is available at death.

Perhaps the most disturbing aspect of the above example is that same-sex couples often have very valid non-tax reasons to equalize estates or place property in joint names. Like many opposite sex-couples, non-testamentary transfers may be motivated by a desire to avoid probate.[222] However, the threat probate poses for same-sex couples is not simply increased time and cost. Rather, it is the threat of a will contest. For some non-traditional testators, avoiding probate is the only way to insure that the surviving partner gets the property. For same-sex couples, this may require taxable transfers.

D. An Intimate Association Warranting Suspicion: The Attribution Rules

Numerous sections in the tax code attribute the ownership of property held by one family member to another.[223] In some instances, the scope of an attribution rule includes an extended family complete with in-laws.[224] In other instances the attribution is limited to between husband and wife.[225] Attribution rules are typically viewed as essential to the administration of a tax system because they identify the relevant taxpayer.[226] Consistent with the view that same-sex partners are strangers under the tax code, same-sex couples are not included within the ambit of any of the attribution rules.[227]

The attribution rules reach what Bittker referred to as "bedchamber transactions."[228] They are designed principally to ferret out sham transactions rather

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222 In probate, a partner's will is open to contest by disappointed family members who will have standing to sue as intestate heirs.

223 This is based on what Bittker referred to as "skepticism about intrafamily transactions." Bittker, *supra* note 63, at 1459.

224 For example the Chapter 14 rules governing the valuation for estate and gift tax purposes of certain types of transfers to family members apply to in-laws and step-children. *See* I.R.C. § 2704(c)(2) (1994). A "member of the family" means the taxpayer's spouse, any ancestor or lineal descendant of the taxpayer or his spouse, the taxpayer's brother or sister, and the spouses of any of the foregoing (with the exception, of course, of the taxpayer's spouse). *See id.*

225 *See* I.R.C. § 672(e) (1994).

226 McIntyre and Oldman use attribution rules as their basis for analyzing family taxation and asserting its relevance to the comprehensive tax base. *See* McIntyre & Oldman, *supra* note 97, at 1574-75. They specifically repudiate what they perceive as the prevailing notion that attribution rules are a "trivial concern" and assert that "[a]ttribution rules are one of the essential building blocks of every income tax." *Id.* at 1574.

227 Of course, this assumes the absence of a relationship by blood, adoption, or biology. Query: Would a same-sex couple, legally married under state law, still be excluded from the reach of the attribution rules?

228 Bittker, *supra* note 63, at 1394, 1404, 1441. In 1974, Bittker asserted that "[f]or at least 50 years, a major theme in the taxation of income from property transferred within the family has been that

than benefit the marital unit. On one hand, these provisions could be interpreted as assuming that a husband and wife will act in concert to defeat the federal fisc. On the other hand, they may speak to a belief that a wife cannot be an independent actor in the marketplace.[229]

For purposes of the grantor trust rules and certain stock ownership attribution rules, a taxpayer is considered to have any interest held by his or her spouse.[230] The stated policy is to prevent taxpayers from being able to do indirectly, as a result of spousal involvement, that which they could not do directly.[231] For example, the grantor trust rules provide that the income of a trust is taxed to the grantor where the taxpayer retains certain interests in the trust property.[232] The result is to deny the grantor the benefit of shifting the income of the trust to a beneficiary in a lower marginal rate of tax.[233]

There are no "bedchamber transactions" between same-sex couples; all transactions take place in the light of day and between strangers.[234] There must be numerous couples, business partners, employer/employee teams, and grandmother and grandson duos who eagerly conspire to defeat the federal fisc. Likewise there must be numerous husbands and wives who would never seek to understate their

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bedchamber transactions are suspect because the allocation of legal rights within the family is a trivial matter." *Id.* at 1394 (citing Helvering v. Clifford, 309 U.S. 331 (1940)). The GAO Report noted that this category of tax code provisions treats married taxpayers as unique units. To illustrate the attribution rules, the GAO Report uses the example of the section 1092 straddle rules. *See id.*

229 McCaffery takes this view of the attribution rules. He writes: "Of course the husband would really own and manage and control the wealth, and no wife would think of making the tax avoidance transfer meaningful by asserting real ownership." MCCAFFERY, *supra* note 20, at 36. An analogous contemporary situation would be the "Crummey powers" granted to the future beneficiaries of long-term trusts in order to permit the grantor to qualify gifts to the trust for the annual exclusion available to gifts of "present interests." The Crummey withdrawal powers are respected, in most instances by the taxing authorities, even though no one ever expects a Crummey beneficiary to attempt to exercise them.

230 *See* I.R.C. §§ 672(e); 318(a)(1)(i) (1994).

231 In many instances the tax code recognizes that spouses do not always deal at arm's length. For example, the transfer of property between spouses does not trigger the recognition of loss or gain. *See* I.R.C. § 1041 (1994). In addition, the general rule of § 102 disallowing the exclusion of gifts in the business context does not hold where there is a family relationship between the donor and the donee. *See* Prop. Reg. § 1.102-1(f)(2). Finally, the provisions of Chapter 14 drastically change the gift tax treatment of transfers of interests in family-owned enterprises and trusts. *See* I.R.C. §§ 2701-2704 (1994).

232 *See* I.R.C. § 671 (1994).

233 *See* I.R.C. § 672(e) (1994).

234 The risk might be minimized due to the fact that same-sex couples cannot transfer property as easily as married couples. For example, a transfer of property between same-sex partners will trigger the recognition of loss or gain, unless the transfer is considered a gift under section 102. *See generally* United States v. Davis, 370 U.S. 65 (1962); Farid-Es-Sultaneh v. Comm'r, 160 F.2d 812 (2d Cir. 1947). Married couples do not recognize gain or loss. *See* I.R.C. § 1041.

tax liability. In any event, there is little reason for excluding from the reach of these provisions the unmarried cohabitants and the same-sex couples who, after all, have reason to engage in the creative characterization of intra-couple transfers.[235]

E. Defining (and Dissolving) the Family

The marital provisions extend far beyond just those that govern transfers between spouses. They also determine how taxpayers can define their family for tax purposes and what tax consequences they face upon the dissolution of their family.

1. The Personal Exemption Amount and Dependents

As discussed in connection with the excludability of fringe benefits from gross income, there are many instances where favorable tax treatment extends to a taxpayer and her "dependents." In order to qualify as a dependent for tax purposes, an individual must satisfy a relationship test and a support test.[236] Section 152 provides nine different categories of relationship that an individual can satisfy in order to be considered a dependent.[237] In the absence of a relationship by blood, marriage, or adoption, the only option is to qualify as a member of the taxpayer's household.[238] Under section 152(a)(9), individuals other than the taxpayer's spouse whose principal place of residence is the taxpayer's home can qualify as a dependent provided the support test is also met.[239] This means that a same-sex partner can qualify as a dependent within the meaning of section 152 provided the other partner provides over one-half of her support.[240] A non-biological and non-adoptive child that the taxpayer is co-parenting could also qualify as a dependent under section 152(a)(9).

If the supporting partner wishes to claim an extra personal exemption for the supported partner under section 151,[241] the supported partner must satisfy an

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235 *See* Cain, *supra* note 25 (noting that the failure to apply these rules to same-sex couples can "result in losses to the treasury").

236 *See* I.R.C. § 152(a) (1994).

237 *See* I.R.C. § 152(a)(1)-(9).

238 *See* I.R.C. § 152(a)(9) (applying to an individual who has as her "principal place of abode the home of the taxpayer and is a member of the taxpayer's household").

239 The requirement is that "over half" of the individual's support must come from the taxpayer. *See* I.R.C. § 152 (a).

240 *See* I.R.C. § 152(a)(9).

241 Section 151 authorizes an individual to deduct the personal exemption amount, as defined by § 151(d) in determining taxable income. *See* I.R.C. § 151(a) (1994). In addition, an individual can deduct

additional income test. Under this test, the supported partner's gross income must not exceed the amount of the personal exemption.[242] Thus, a same-sex partner may qualify as a dependent under section 152 because the other partner provides over one-half of her support, but the supporting partner may not be able to claim an additional personal exemption because the supported partner has gross income in excess of the personal exemption amount. The income test does not apply in the case of a biological, adoptive, or step child, provided that the parent provides over one-half of the child's support and the child is either under age 19 or a student under the age of 24.[243]

Section 152(b)(5) provides an interesting caveat that could have ramifications for same-sex couples in certain jurisdictions. It provides that "[a]n individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law."[244] Based on section 152(b)(5), same-sex partners who reside in any of the states with criminal sodomy statutes could potentially be "in violation of local law." Although there are no reported instances where the IRS challenged dependency on this basis, every IRS private letter ruling regarding domestic partnership benefits refers to this provision.[245] A review of existing case law suggests that the IRS could argue that a same-sex couple who lived in a state with a sodomy law was in violation of section 152(b)(5). Surprisingly recent cases have disallowed the personal exemption on the basis of fornication and cohabitation statutes.[246]

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exemption amounts for each dependent as defined in § 152, provided the dependent's income is less than the exemption amount *or* the dependent is a child of the taxpayer and meets certain other age restrictions. *See* I.R.C. § 151(c)(1). An individual is entitled to deduct an additional exemption amount for a spouse, if they file jointly. *See* I.R.C. § 151(b).

242 *See* I.R.C. § 151(c)(1)(A). For 1998, the amount of the personal exemption for unmarried taxpayers is $2700. *See* Rev. Proc. 97-57, *supra* note 72. The benefit of the personal exemption is subject to a phase-out at certain income levels. *See* I.R.C. § 151(d)(3).

243 *See* I.R.C. § 151(c)(1). A taxpayer may have difficulty qualifying to deduct an additional personal exemption for a domestic partner's older child. This would be the case where the partner or child had gross income in excess of the personal exemption amount, but the taxpayer contributed over one-half of his or her support. *See* I.R.C. § 152(a)(9). This would not be an obstacle if the taxpayer was recognized as the child's parent or step-parent.

244 *See* I.R.C. § 152(b)(5). The technical effect of this section is that a same-sex partner does not satisfy the relationship test of section 152(a)(9).

245 Patricia Cain argues that sodomy statutes should not affect dependent status because they outlaw sexual conduct and not cohabitation. *See* Cain, *supra* note 19, at 121 n.117. However, the existing case law dealing with fornication undercuts this argument.

246 *See generally* Turgeon v. U.S., 82-2 U.S.T.C. ¶9433 (D. Minn. 1982) (fornication); Nicholas v. Comm'r, 62 T.C.M. (CCH) 467 (1991) (unmarried sexual intercourse or fornication); Ochs v. Comm'r, 52 T.C.M. (CCH) 1218 (1986) (adulterous relationship); Peacock v. Comm'r, 37 T.C.M. (CCH) 177 (1978) ("open and notorious cohabitation"); Martin v. Comm'r, 32 T.C.M. (CCH) 656 (1973) ("illegal

Another way the tax code defines family is through the head of household designation. In a nod to single-parent families, the head of household filing status entitles a taxpayer to use a tax rate schedule that is more favorable than the rate schedule for single taxpayers but not as favorable as that for married taxpayers.[247] A taxpayer, however, cannot qualify as a head of household by virtue of providing support for individuals who are not related to the taxpayer by blood, adoption, or marriage.[248] This means that the separate head of household rate schedule has limited utility for same-sex couples. For example, a taxpayer could not file as head of household by virtue of supporting her same-sex partner. Nor could a taxpayer claim head of household status on account of supporting her same-sex partner's child, unless the taxpayer was also an adoptive co-parent.[249]

2. Dissolution

Upon the dissolution of a marriage (or a long-term relationship) there is the necessary "unscrambling" of assets, particularly when there was income and/or resource pooling.[250] Both the income tax and the estate and gift tax have special provisions to help mitigate the tax bite that might otherwise arise by reason of asset shifting and other payments. None of these provisions applies to the dissolution of a same-sex relationship which also lacks the certainty of equitable distribution laws and child support and visitation provisions. Recall that same-sex partners are urged to commingle assets by the terms of domestic partner policies and ordinances, but, in the absence of a formal cohabitation agreement, they often have no guidance regarding the disposition of the assets of the domestic partnership upon its dissolution. The potential characterizations of dissolution transfers for tax purposes are alimony, child support, and property settlements.

a. Alimony

For income tax purposes, section 71 defines alimony as amounts "received

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cohabitation"); Eichbauer v. Comm'r, 30 T.C.M. (CCH) 581 (1971) (lewd and vicious cohabitation); Wondsel v. Comm'r, 23 T.C.M. (CCH) 1278 (1964) (adultery); Turnipseed v. Comm'r, 27 T.C. 758 (1957) (prior to the enactment of § 152(b)(5) finding general public policy exception for "unlawful intimacy").

247 *See* 26 U.S.C.A. § 1(b) (West Supp. 1998); Bittker, *supra* note 63, at 1428. Returns filed by taxpayers claiming head of household status constitute 14% of all individual returns. *See CRS Questions, supra* note 67.

248 *See* I.R.C. § 2(b)(3)(B) (1994).

249 A same-sex co-parent is only able to adopt in certain jurisdictions. *See* Knauer, *supra* note 1, at 356. Even within jurisdictions, the ability to adopt might vary on a county by county basis. *See id.*

250 *See* Harris v. Comm'r, 340 U.S. 106, 108 (1950) (referring to the necessary "unscrambling" of the marital assets upon divorce).

by (or on behalf of) a spouse under a divorce or separation instrument."[251] Generally, the payor is entitled to deduct alimony payments[252] and the payee must include the payment in his or her gross income.[253] The result is to shift income from the payor's presumably higher marginal rate of tax to the payee's lower marginal rate.

This treatment is not available for palimony or support payments made to former same-sex partners.[254] Not only are support payments made to a former same-sex partner not deductible by the payor, but they may be included in the gross income of the recipient unless the payor can exclude such payments as gifts under section 102.[255] Given the context, it might be difficult to prove the requisite "detached and disinterested generosity."[256]

Absurd as it might sound, support payments to a former same-sex partner may be considered taxable gifts.[257] For gift tax purposes, the subjective intent of the transferor is irrelevant.[258] The only question is whether the amount the donor transfers exceeds the amount the donor receives in return.[259] In the case of support payments to a former same-sex partner there would be nothing received in return

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251 I.R.C. § 71(b)(1)(A) (1994).

252 *See* I.R.C. § 215(a) (1994). The deduction reduces gross income and, as such, is a favored above-the-line-deduction. *See* I.R.C. § 62(a)(10) (1994). This means that the payor is entitled to the deduction regardless of whether the aggregate of the payor's itemized deductions exceeds the standard deduction. *See* I.R.C. § 63(c) (1994). In addition, the deduction is not subject to the phase-out of itemized deductions applicable to high income for taxpayers. *See* I.R.C. § 68(a) (1994).

253 *See* I.R.C. §§ 71(b); 61(a)(8) (1994).

254 *See* HERTZ, *supra* note 169, at 258-59. "According to the IRS, payments between unmarried couples based on claims of oral or implied contracts, including ongoing financial support for an ex-lover, are considered taxable income to the recipient and are *not* tax-deductible to the one making the payments." *Id.* (emphasis in original).

255 *See* I.R.C. § 102(a) (1994).

256 Comm'r v. Duberstein, 363 U.S. 278, 285 (1960). If the payments are not excluded, then they are taxed twice, whereas the same payments qualifying as "alimony" payments within the meaning of section 71 are excluded from the income of the payor and included in the gross income of the payee. *See* Richard B. Malamud, *Taxing Small and Common Gifts: Tax Laws vs. Taxpayer Perception,* 97 TAX NOTES TODAY 231-17, Dec. 2, 1997, *available in* LEXIS, Fedtax Library, TNT file.

257 This would be equally true for divorced couples who do not satisfy one of the available safe-harbors. *See* Rev. Rul. 68-379, *supra* note 213 (ruling the release of support obligations constitutes consideration for gift tax purposes); *see also* Harris v. Comm'r, 340 U.S. 106, 110-11 (1950) (holding no transfer tax consequences upon divorce where transfer made pursuant to a court ordered settlement, provided the court had the authority to alter the terms of the agreement); I.R.C. § 2516 (1994) (providing that transfers "incident to divorce" constitute full and adequate consideration).

258 *See* Comm'r v. Wemyss, 324 U.S. 303, 306 (1945).

259 *See* I.R.C. § 2512(b) (1994).

and, in the absence of a court decree, the taxpayer would be under no legal obligation to make the transfers.

This is not typically the result in the case of divorced individuals.[260] There are numerous ways in which such transfers are removed from the reach of the gift tax. For example, transfers "incident to divorce" are not subject to gift tax because they are deemed to be made for full and adequate consideration.[261] If a transfer does not occur within the necessary time frame to be considered a "transfer incident to divorce," then it is possible to claim that the payments are exempt because they are required under a specific type of court order.[262] Finally, a transfer that discharges a support obligation is only considered a taxable gift to the extent the amount of the transfer exceeds the value of the support rights.[263]

b. Child support

Unlike alimony payments, child support payments are not deductible and not included in the gross income of the recipient parent or child.[264] In this case, the income tax treatment of a same-sex partner's child support payments to a non-biological and non-adoptive child she had agreed to co-parent is not that different. Such child support payments are not deductible, but they might be included in the gross income of the recipient unless they qualify as a gift which requires a showing of "detached and disinterested generosity."[265]

For gift tax purposes, support payments could be considered taxable gifts except to the extent they discharge the payor's legally binding support obligation. This could be a problem if the taxpayer agreed to co-parent the child but was not the child's adoptive or biological parent. A court order obligating support payments may be necessary to avoid gift tax liability. In the absence of a support obligation, child support payments may be taxable gifts.[266] This might result in the worst of both worlds where the recipient has gross income and the payor has made a taxable gift.

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260 *See Harris*, 340 U.S. at 110-11; Rev. Rul. 68-379, *supra* note 213.

261 *See* I.R.C. § 2516.

262 *See Harris*, 340 U.S. at 110. This occurs only in cases where the divorce court had the power to alter the terms of the agreement. *See id.*

263 *See* Rev. Rul. 68-379, *supra* note 213.

264 *See* I.R.C. § 71(c)(1) (1994).

265 Comm'r v. Duberstein, 363 U.S. 278, 285 (1960).

266 However, direct payments of medical and educational expenses are excluded from taxable gifts. *See* I.R.C. § 2503(e) (1994). The exclusion applies regardless of the relationship between the donor and donee. *See id.*

c. Property settlements

No gain or loss is recognized on transfers between spouses or transfers "incident to divorce."[267] Instead, the transfer is treated as a gift and the transferee receives the transferor's basis in the property.[268] There is an unlimited marital gift tax deduction for transfers between spouses.[269] Transfers "incident to divorce" are considered to be made for full and adequate consideration and, therefore, are not subject to gift tax.[270]

This is not the case for same-sex partners.[271] The income tax consequences of a property settlement between same-sex partners will depend upon whether the transferor can qualify the transfer as a gift within the meaning of section 102. If so, there is no recognition of gain or loss and the transferee receives a carry-over basis in accordance with section 1015.[272] If not, the transfer constitutes a "sale or other disposition" within the meaning of section 1001(a).[273] The transferor then must compute gain or loss by reference to the difference between his or her basis in the property and the "amount realized."[274]

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267 I.R.C. § 1041(a) (1994).

268 *See* I.R.C. § 1041(b).

269 *See* I.R.C. § 2523(a) (1994).

270 *See* I.R.C. § 2516 (1994).

271 *See* HERTZ, *supra* note 169, at 259 (referring to the unavailability of § 1041 treatment to same-sex partners as "yet another form of discrimination").

272 *See* I.R.C. § 1015(a) (1994).

273 I.R.C. § 1001(a) (1994).

274 *See* I.R.C. § 1001(a), (b). Again, the subjective intent of the donor has no bearing on gift tax liability. *See* Comm'r v. Wemyss, 324 U.S. 303, 306 (1945). Thus, the donor is deemed to have made a taxable gift to the extent the value of the property transferred exceeds the value of any property received in return or to the extent the transfer discharges a legally binding support obligation.

V. THE FEDERAL TAX CODE, CONGRESS, AND CULTURE WARS[275]

This section looks at two cases where Congress debated, articulated, and defined marriage and family: (1) the passage of DOMA and (2) the recent debate regarding "pro-family" tax reform. It examines the floor debate, testimony, and the numerous press releases issued by various interest groups and members of Congress. The Congressional construction of marriage and family is very far removed from the dispassionate theories of income pooling and the apolitical machinations of competing neutrality principles. It stands instead as a harshly normative view expressed in terms of morality and directly informed by conservative Christian thought. Thus, before tax scholars suggest individual filing or tax marriages, I suggest that they take note of Senator Coats' statement regarding jurisdiction over the term "marriage":

> The definition of marriage is not created by politicians and judges, and it cannot be changed by them. It is rooted in our history, in our laws and our deepest moral and religious convictions, and in our nature as human beings. It is the union of one man and one woman. This fact can be respected, or it can be resented, but it cannot be altered.[276]

A. "Pro-Family" Tax Reform and DOMA

During the 1996 Presidential campaign, the specter of same-sex marriage and the need for pro-family tax reform became linchpins of the conservative focus on the family.[277] Two days before the Iowa caucuses, Republican Presidential

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275 Didi Herman notes that the term "culture war" was appearing as a "catch-phrase" with some frequency in conservative Christian literature by 1992. DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 55 (1997). She notes that it was defined as "struggles over ideas and values, rights and responsibilities." *Id.* Justice Scalia's dissenting opinion in *Romer v. Evans* used the German term "Kulturkampf" to express the notion of a culture war. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (stating that the majority opinion "has mistaken a Kulturkampf for a fit of spite"). For a description of the origin of Kulturkampf, *see generally* William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L. J. 2411 (1997).

276 142 CONG. REC. S10,100-02, S10,113 (daily ed. Sept. 10, 1996) (statement of Sen. Coats).

277 Didi Herman conducted a comprehensive study of the anti-gay policy of conservative Christian organizations in the United States. *See* HERMAN, *supra* note 275, at 6-7. Although it does not extend to the period surrounding DOMA, it provides a useful explanation of anti-gay Christian ideology. She defines the "Christian Right" as "a broad coalition of pro-family organizations and individuals who have come together to struggle for a conservative Christian vision in the political realm." *Id.* at 9. She rejects the notion that this activity represents simply "backlash" and makes the case that it is a "paradigmatic movement for social change." *Id.* at 195. She states unequivocally that the Christian Right considers "the fight against gay rights

hopefuls attended a Rally to Protect Marriage[278] in a Des Moines church where they signed a "Resolution to Protect Marriage."[279] The front-runner, Bob Dole, did not attend the rally, but he pledged to sign the resolution and sent a letter to be read at the gathering.[280] Dole responded that although he "fully support[ed] the position taken in the resolution", it did "not go far enough."[281] Dole continued, "[n]ot only does government have a duty to 'protect' the foundation of marriage, it has a duty to promote it through sound public policies" such as eliminating the marriage penalty in the Federal tax code.[282] From that point on, pro-family political reform

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among its foremost political priorities." *Id.* at 60. The major national organizations she studied include the Christian Coalition, Focus on the Family, the Family Research Council, the American Family Association, and Concerned Women for America. *See id.* at 14-16. All of these organizations were active in their support of both DOMA and "pro-family" tax reform.

278 The estimates of the number of people in attendance vary from 2,000, with a "large media contingent" to close to 4,500. *See, e.g.,* Deb Price, *Anti-gay Marriage Rally Turns Into GOP Campaign Event in Iowa,* THE DETROIT NEWS, Feb. 11, 1996, at A7 (reporting a "near-capacity crowd in the 4,500-seat nondenominational First Federated Church")[hereinafter *3 GOP*]; Bob Sipchen, *Same-sex Marriage Moves to Forefront of Cultural Debate; Hawaii Case may Require States to Recognize Such Unions. Conservatives are Rallying Against the Possibility,* L.A. TIMES, Apr. 10, 1996, at A5 (noting "about 2,000 people including a large media contingent attended the group's rally in Des Moines"); Marc Fisher, *Bob Dole's Winter Crop; The Senator Touts His Experience, but Iowans Aren't Sure That's What They Want,* THE WASH. POST, Feb, 12, 1996, at B01 (estimating "[t]hree thousand Iowa Republicans" were in attendance).
The rally was broadcast live on C-SPAN. *See* John Carlson, *Iowan Leads Charge Against Same-sex Marriage,* THE DES MOINES REGISTER, Feb. 25, 1996, at 1. The rally was moderated by the former actor and now president of the National Rifle Association, Charlton Heston. *See* Deb Price, *Presidential Hopefuls Promise to Support Iowa Rally Against Same-sex Marriages,* THE DETROIT NEWS, Feb. 10, 1996, Accent (noting that "the 7 p.m. (CST) rally, moderated by actor Charlton Heston," kicked off a movement called "the National Campaign to Protect Marriage").
The rally was the inaugural event of the National Campaign to Protect Marriage which itself was the result of a coalition of conservative organizations, such as the Traditional Values Coalition and the American Family Association. *See* Carlson, *supra* at 1 (referring to the founding organizations as a "who's who of . . . the 'radical right'"); *see also* Sipchen, *supra* at A5 (recounting the formation of the National Campaign to Protect Marriage).

279 The Resolution reads: "The State should not legitimize homosexual relationships by legalizing same-sex 'marriage' but should continue to reserve the special sanction of civil marriage for one man and one woman as husband and wife." Price, *3 GOP, supra* note 278, at A7 (quoting the resolution). The remaining GOP Presidential candidates signed the pledge. President Clinton in effect ratified the pledge when he signed DOMA into law. *See* Kevin Merida, *Republican Contenders Show Little Division on Fundamental Issues,* THE WASH. POST, Feb. 12, 1996, at A08 (stating that those candidates who did not attend the rally endorsed the resolution). For a discussion of the circumstances surrounding President Clinton's signing of DOMA *see infra* note 300.

280 *See* Richard L. Berke, *Politics: the Overview; Fight for Religious Right's Votes Turns Bitter,* N.Y. TIMES, Feb. 10, 1996, §1, at 1. "Mr. Dole sent a letter to one of the organizers, Bill Horn, head of the National Campaign to Protect Marriage, who is [sic] has been outspoken in condemning homosexuality. The Senator expressed his disappointment that he could not attend the rally . . ." *Id.*

281 Price, *3 GOP, supra* note 278, at A7.

282 *Id.; see also* Fisher, *supra* note 278, at B01 (noting that Dole's letter was greeted with "polite applause" at the rally).

became identified with the fight against the legitimization of same-sex marriage and the eradication of the so-called "marriage penalty."[283]

At the rally, Phil Gramm, Alan Keyes, and Pat Buchanan delivered speeches that touched on themes virtually identical to those made in support of "pro-family" tax reform.[284] For example, Phil Gramm, the architect of the Senate marriage penalty amendment to the Tobacco bill, urged that unless Americans "put family first, we're going to lose our country."[285] Alan Keyes noted that the acceptance of "the homosexual agenda" will destroy "the integrity of the marriage-based family."[286] It would, Keyes continued, "destroy family life, the innocence of childhood and the very fabric of American life."[287] These assertions could have just as easily been made against the marriage penalty — and they have.[288]

"Pro-family" tax reform seems a curious addition to the other more emotional issues that comprise the conservative platform, such as abortion and religious freedom. A platform dedicated to smaller government and a stronger family includes concerns for the collateral attack on the family in the form of growing acceptance of homosexuality and reproductive freedom, but it also raises the central question as to what, if any, direct aid government should provide for families. At least since the 1992 *Contract With America*, the answer has been that this aid should be in the form of a tax break for married couples.[289]

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283 In his book TAXING WOMEN, McCaffery devotes a chapter to the prevalence of tax reform in the 1994 GOP *Contract with America* and includes an analysis of the more strikingly conservative *Contract with the American Family* published by the Christian Coalition. *See* MCCAFFERY, *supra* note 20, at 202-25. In particular, McCaffery notes how both documents "use the rhetoric of family to argue for massive tax reduction centered on traditional families." *Id.* at 205.

284 *See* Price, *3 GOP*, *supra* note 278, at A7. The organizers used the event to unveil their latest anti-gay video, entitled "The Ultimate Target of the Gay Agenda: Same-Sex Marriages." *See* E. J. Graff, *Retying the Knot*, *in* SAME-SEX MARRIAGE: PRO AND CON A READER 134-5 (Andrew Sullivan ed., 1997).

285 Fisher, *supra* note 278, at B01.

286 *Id.* Referring to same-sex marriage, Pat Buchanan said, "There is no equality between what has been sanctified by God and what is morally wrong." *Id*

287 Price, *3 GOP*, *supra* note 278, at A7.

288 In fact, there is some thought that certain candidates, such as Bob Dole, were more comfortable with the less-emotionally charged topic of the marriage penalty than with same-sex marriage. *See infra* note 344.

289 The *Contract with America* offered the family three tax breaks: a $500 tax credit for each child, limited marriage penalty relief, and the American Dream Savings Account. *See* MCCAFFERY, *supra* note 20, at 205-06 (quoting the *Contract with America* and noting that the proposed marriage penalty relief was "limited to no more than $145 per family per year"). Representative Weller later characterized this relatively modest gesture as "the repeal of the Marriage tax" that had been vetoed by the President. *Weller Release Against Senate Marriage Tax Penalty*, 98 TAX NOTES TODAY 118-27, Jun. 19, 1998, *available in* LEXIS, Fedtax Library, TNT file (stating that "[t]he repeal of the Marriage tax was part of the Republican's 1994 'Contract with America,' but the legislation was vetoed by President Clinton").

Tax relief for married couples is viewed as an essential reform goal because of the perceived detrimental impact of federal taxes on family life.[290] The Christian Coalition's *Contract with the American Family* explains:

> It is hard to overestimate our tax code's damage to American families. Many people look back to the 1950s and 1960s with nostalgia. At least with regard to the tax code, that nostalgia is understandable. Those were the days when one income was often all that was needed to support a family. Today, many families need two incomes just to pay taxes and meet basic needs.[291]

The notion that a wife works solely to pay the family's tax liability surfaces continually in the debate regarding the marriage penalty.[292] Simply put, taxes are tearing apart the nuclear family because taxes force wives to work.[293] In the words of Speaker Gingrich: "The American people want a tax code that is pro-family."[294]

B. The Defense of Marriage Act

Tax relief alone, however, was not considered sufficient to protect marriage and, with it, the American family. Before granting tax relief to married couples, it was necessary to stabilize the term "marriage" to forestall possible encroachment by homosexuals.[295] Although the Hawaiian Supreme Court decided

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290 McCaffery has written extensively on the "animus to tax" contained in the *Contract With America*, as well as in the Christian Coalition's *Contract With the American Family*. *See* MCCAFFERY, *supra* note 20, at 202-225. He devotes an entire and engaging chapter in his book to the influence of conservative "pro-family" forces on family tax reform. *See id.*

291 *Id.* at 207-08 (quoting the *Contract with the American Family*). In fact, the argument continues, it is taxes which force both spouses to work, thereby resulting in a "dramatic loss of family time." *Id.* at 209.

292 An early statement of this view is found in the *Contract with the American Family*. "[A]pproximately two-thirds of a working mother's income is consumed solely by the family's federal tax liability. Unless the tax burden on families is reduced, working-parent families will continue to see one of their two incomes supporting government, not the family." *Id.* (quoting the *Contract with the American Family*).

293 This is repeated throughout the marriage penalty debate. McCaffery has discussed the flaws in the reasoning. *See id.* at 208-09.

294 Ryan J. Donmoyer, *Republicans Want to Use Budget Surplus to Kill Marriage Penalty*, 97 TAX NOTES TODAY 197-4, Oct. 10, 1997, *available in* LEXIS, Fedtax Library, TNT file (quoting Rep. Gingrich).

295 Senator Kempthorne, a strong supporter of marriage penalty reform, explained that DOMA was a vital part of a larger process designed to strengthen marriage and family. *See* 142 CONG. REC. S10,100-02, S10,116 (daily ed. Sept. 10, 1996) (statement of Sen. Kempthorne) (noting that the welfare reform bill "also stressed the importance of marriage").

Baehr v. Lewin in 1993,[296] it was not until the Presidential election year of 1996 that states began in any large number to consider legislation that defined marriage to the exclusion of same-sex couples and refused to recognize same-sex marriages performed in sister states.[297]

On the federal level, DOMA was introduced in the Senate by then-presidential candidate Bob Dole during the May Republican primaries.[298] The debate in Congress showed overwhelming support for DOMA.[299] In the midst of a re-election campaign, President Clinton signed DOMA on September 23, 1996.[300] The DOMA debate offers a snapshot of the extent to which morality informs and indeed controls any debate regarding same-sex marriage (or non- normative sexual

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296 *See supra* note 3.

297 The number of legislative anti-marriage measures on the state level continues to increase with time. However, 1996 was a banner year, with anti-marriage legislation considered in 36 states. *See* American Civil Liberties Union Freedom Network, *Statewide Anti-Gay Marriage Laws* (last visited Sept. 5, 1998) <http://www.aclu.org.issues/gay/gaymar.html>. The web page of the American Civil Liberties Union reports that 25 states have adopted anti-marriage laws and anti-marriage laws were defeated in 24 states. *See* American Civil Liberties Union Freedom Network, *Marriage Project* (last visited Sept. 5, 1998) <http://www.aclu.org.issues/gay/hmg.html>.

298 Senate Bill 1740 was introduced in the Senate on May 8, 1996 by Senator Nickles of Oklahoma and Senator Dole of Kansas. *See* S. 1740, 104th CONGRESS (1996). An identical bill, H.R. 3396, had been introduced in the House the day before. *See* H.R. 3396, 104th CONGRESS (1996). The House proceeded with greater dispatch and the House bill was overwhelmingly approved on July 12, 1996. The vote in the House was 342 yeas, 67 nays, and two not voting. *See* 142 CONG. REC. D735-01 (daily ed. July 12, 1996). The Senate bill also met with overwhelming approval on September 10, 1996 and the bill was singed into law by President Clinton several days later. The vote in the Senate was 85 yeas, 14 nays, and one not voting. *See* 142 CONG. REC. S10,129-01 (daily ed. Sept. 10, 1996).

299 There were a number of exceptions. For example, Representatives of Parents and Friends of Lesbians and Gays testified before both House and Senate Committees, as did constitutional law scholars. *See Defense of Marriage Act, 1996: Hearings on S.1740 Before the Senate Committee on the Judiciary on the Defense of Marriage Act,* 1996 WL 387312 (July 11, 1996) (testimony of Cass R. Sunstein, Professor of Law, University of Chicago); 142 CONG. REC. S5931-01, S5931-33 (daily ed. June 6, 1996) (written statement of Laurence H. Tribe). *See contra Written Statement of Professor Lynn D. Wardle Before the U.S. Senate Judiciary Committee Concerning S. 1740: A More Perfect Union - Federalism in American Marriage Law,* 1996 WL 390295 (July 11, 1996). Although ultimately voting in favor of DOMA, Senator Nancy Kassebaum spoke movingly of a conversation with one of her gay male constituents. *See* 142 CONG. REC. S10119 (daily ed. Sept. 10, 1996) (statement of Sen. Kassebaum). Finally, Senator Kennedy also testified before the Senate Judiciary Committee and suggested that the bill should be called "the Defense of Endangered Republican Candidates Act." *Defense of Marriage Act, 1996: Hearings on S.1740 Before the Senate Committee on the Judiciary on the Defense of Marriage Act,* 1996 WL 387306 (July 11, 1996) (statement of Sen. Kennedy). The charge that Republicans focus on homosexuality during campaign years has surfaced again in connection with the most recent spate of anti-gay statements by the members of the Republican leadership. *See id.*

300 President Clinton signed House Bill 3396 slightly after midnight on September 23, 1996, without ceremony. *See* Todd S. Purdum, *Gay Rights Groups Attack Clinton on Midnight Signing*, N.Y. TIMES, Sept. 22, 1996, §1, at 22; Bob Kabel, *Clinton Signs Anti-gay Defense of Marriage Act*, 1996 PRESIDENTIAL CAMPAIGN PRESS MATERIALS, Sept. 23, 1996, *available in* LEXIS, Legislation and Politics Library, U.S. Campaign file (reporting the signing occurred at 12:50 am on the morning of September 21).

orientation).[301] It is the ever-present pressure of moral appeals that sets apart this debate from others regarding minority rights.[302]

The Congressional testimony and floor debate described marriage in terms that would later be used in connection with the marriage penalty legislation. The notion that marriage was in need of "defense" was not considered mere hyperbole nor was DOMA simply symbolic legislation. Numerous members of Congress returned again and again to the cost of providing federal benefits to same-sex partners. The effect of DOMA on the marital provisions of the tax code was not an unintended consequence.[303]

The starting point for all debate was the notion of marriage as a fundamental unit of society. There was no discussion of income or resource pooling and no discussion of a married couple constituting an economic unit. The testimony and debate is replete with the image of marriage as the elemental building block of society,[304] whether that be a rock,[305] a foundation,[306] a pillar,[307] or a keystone.[308]

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301 Herman explains the conservative Christian perspective on homosexuality as follows: "First, homosexual practice is an incontrovertible sin. Biblical inerrancy demands this conclusion; any other is not truly Christian. Second, homosexuality is a chosen behavior, and not an immutable genetic or psychological trait." HERMAN, *supra* note 275, at 69. The second point means that children and others can be swayed toward homosexual behavior. This gives homosexuality its contagious quality.

302 As Professor Warner explains, the centrality of morality goes to the question of identity itself: "There have always been moral prescriptions about how to be a woman or a worker or an Anglo-Saxon; but not about whether to be one." FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY xviii (Michael Warner ed., 1993). Professor Warner notes that "[u]nlike other identity movements, for example, queerness has always been defined centrally by discourses of morality." *Id.*

303 In his criticism of critical tax scholarship, Zelenak listed as his first concern "an overeagerness to accuse the tax laws of hostility to women or blacks." Zelenak, *supra* note 8, at 1523. He later refers to this as an "air of grievance" that is pervasive in much of the new scholarship. *Id.* at 1525 n.26. He notes approvingly that tax scholarship that considers sexual orientation is not a "search for hidden discrimination" because "[a] same-sex couple could not help but notice they do not file joint returns like their married friends." *Id.* at 1579. Existing tax scholarship has only focused on this most obvious exclusion arguing in the main for equal treatment, thereby advancing stable gay and lesbian taxpayer identities. It has not addressed the underlying heteronormativity of the tax code nor the broader issue of the efficacy of identity politics raised by queer theory.

304 *See* 142 CONG. REC. H7441-03, H7444 (daily ed. July 11, 1996) (statement of Rep. Barr) (stating that "[t]his is the land that has as its most basic building block the family unit, a marriage between a man and a woman"); *see also* 142 CONG. REC. S10,100-02, S10,104 (daily ed. Sept. 10, 1996) (statement of Sen. Nickles) (referring to marriage as "the backbone of the American family").

305 Representative Seastrand stated: "Traditional marriage, however, is a house built on a rock. As shifting sands of public opinion and prevailing winds of compromise damage other institutions, marriage endures, and so must its historically legal definition. This bill will fortify marriage against the storm of revisionism." 142 CONG. REC. H7480-05, H7485 (daily ed. July 12, 1996) (statement of Rep. Seastrand); *see also* 142 CONG. REC. H7480-05, H7493 (daily ed. July 12, 1996) (statement of Rep. Weldon) (referring to family as "the bedrock of our society" and marriage as the "foundation of the family").

306 *See* 142 CONG. REC. H7441-03, H7444 (daily ed. July 11, 1996) (statement of Rep. Barr) (stating that "[t]his is the land that has as its most basic building block the family unit, a marriage between a man and a woman"); 142 CONG. REC. S10,100-02, S10,105 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm)

Accordingly, America needs strong families and as Senator Faircloth explained, "[s]ame-sex unions do not make strong families."[309] In fact, they are not even families[310] because the purpose of families is the rearing of children.[311] Obviously this line of argument overlooks the fact that large numbers of children are successfully reared by parents who are in same-sex relationships.[312] Even the House

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(noting that DOMA defended the traditional family and "the traditional family has stood as the seminal institution which has formed the foundation for civilized society for some 5,000 years").

307 *See* 142 CONG. REC. H7480-05, H7493 (daily ed. July 12, 1996) (statement of Rep. Ensign) (stating that "[t]he time-honored and unique institution of marriage between one man and one woman is a fundamental pillar of our society and its values").

308 *See* 142 CONG. REC. S10,100-02, S10,109 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd) (stating "the permanent relationship between men and women is a keystone to the stability, strength, and health of human society").

309 142 CONG. REC. S10,100-02, S10,117 (daily ed. Sept. 10, 1996) (statement of Sen. Faircloth).

310 For example, when discussing the oft-banned children's book HEATHER HAS TWO MOMMIES, Representative Largent took issue with the title. He said that "[h]omosexual couples by definition create motherless and fatherless families[.]" *Defense of Marriage Act, 1996: Hearings on S.1740 Before the Senate Committee on the Judiciary on the Defense of Marriage Act,* 1996 WL 387295 (July 11, 1996) (testimony of Rep. Steve Largent).

311 Testifying in support of DOMA, the Chief Counsel of the American Center for Law and Justice explained that his organization was "dedicated to defending families against all efforts to undermine their nature, their sovereignty, and their importance, and to supporting and encouraging all elements in society to work together toward the creation and sustenance of a social order that supports the most important work of families: rearing children." *Defending Marriages, A Congressional Imperative to Protect the Family: Hearing on the Defense of Marriage Act, by the Subcommittee on the Constitution of the Committee on the Judiciary of the U.S. House of Representatives,* 1996 WL 262304 (May 15, 1996) (testimony of Jay Alan Sekulow, Chief Counsel, American Center for Law and Justice).

312 In *Baehr v. Miike*, Judge Chang made a series of findings of fact regarding the impact of homosexual parenting on children. *See* Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, *1 (Haw. Cir. Ct. Dec. 3, 1996). He found that same-sex parenting produced no detrimental effects. *See id.* at *18. Despite evidence to the contrary, the belief persists that homosexual parenting is in some way harmful to children. This is most evident in custody cases. The two cases of Mary Ward and Sharon Bottoms illustrate judicial opinions based on a very strong belief that children should not be exposed to same-sex relationships. In the case of Mary Ward, her former husband was granted custody even though he had been convicted of the second degree murder of his first wife. *See* Ward v. Ward, No. 9-4184, 1996 Fla. App. LEXIS 9130, at *1 (Fla. Dist. Ct. App. Aug. 30, 1996); *see also* Bottoms v. Bottoms, No. 2157-96-2, 1997 Va. App. LEXIS 505, at *1 (Va. App. July 29, 1997) (awarding custody of child to grandmother over the protests of lesbian mother).

In response to the apparent increase in the number of same-sex couples seeking legal recognition of co-parenting arrangements, the House approved legislation that bans joint adoptions in the District of Columbia by couples who are not related by marriage or blood. *See* Katharine Q. Seelye, *House Approves Measure Barring Gay Adoptions in Washington,* N.Y. TIMES, August 8, 1998, at A12. Representative Steve Largent explained that "he was opposed to homosexuals adopting children because he believed they were using adoption as one way of acting like married heterosexual couples." *Id.* Speaking of the prospective adoptess, he said "it is simply wrong to turn them into trophies from the culture war, to exploit them in order to make some political point." *Id.*

Report of the Judiciary Committee stressed the "nexus between marriage and children."[313] After an ominous note regarding the "irreplaceable role that marriage plays in childrearing and in generational continuity," the House Report defined marriage as "a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their long-term relationship is socially important - a public concern, not simply a private affair."[314]

Testimony in favor of DOMA often used statements of pro-marriage gay and lesbian political activists who were encouraged by the potential transformative value of same-sex marriage to show that the goal of the gay agenda was to destroy marriage as we know it.[315] The House Report found that marriage is in a precarious state — "reeling because of the effects of the sexual revolution, no-fault divorce and out-of-wedlock births."[316] Invoking the image of Nero fiddling while Rome burned, Representative Barr warned: "The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit."[317]

The hostility toward recognizing same-sex marriages that were valid under state law was supported by appeals to historical evidence, Biblical

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313 H.R. REP. NO. 104-664, pt. 5, at 23 (1996).

314 *Id.* Later, the House Report responds to the objection that not all opposite sex couples have children. It notes that "requiring couples intending to marry to submit to a medical examination to determine whether they can reproduce, or to sign a pledge indicating that they intend to do so . . . would be both offensive and unworkable." *Id.*

315 *See id.* (stating that Evan Wolfson's "goal of revolutionizing society [is] served in part by revolutionizing marriage [in] a no-holds barred, take-no-prisoners struggle"). Representative Sensenbrenner stated that "[g]ay rights groups are scheming to manipulate the full faith and credit clause to achieve through the judicial system what they cannot obtain through the democratic process." 142 CONG. REC. H7480-05, H7484 (daily ed. July 12, 1996) (statement of Rep. Sensenbrenner).

316 HOUSE REPORT, *supra* note 313, pt. 5, at 25. The REPORT states, "[w]e have reaped the consequences of [marriage's] devaluation." *Id.* The quote continues: "It is exceedingly imprudent to conduct a radical, untested and inherently flawed social experiment on an institution that is the keystone in the arch of civilization." *Id.*

317 142 CONG. REC. H7480-05, H7482 (daily ed. July 12, 1996) (statement of Rep. Barr). Representative Barr explained that "[w]e must maintain a moral foundation, an ethical foundation for our families and ultimately for the United States of America." *Id.* Herman notes that analogies to the fall of Rome are standard fare in Christian antigay literature. *See* HERMAN, *supra* note 275, at 110 (describing Greco-Roman antiquity as a "reference point" for early Christians who had to withstand "extreme wickedness"); *see also id.* at 62 (quoting TIM LAHAYE, THE UNHAPPY GAYS that homosexuality "will eventually destroy America as it did Rome, Greece, Pompeii, and Sodom"). Continuing with this theme, former representative William Dannemeyer's anti-gay book compares gay and lesbian activists to "Genghis Khan's army" and alludes to a coming "dark night of the soul" that "has happened before." *Id.* at 63-64 (quoting from WILLIAM DANNEMEYER, SHADOW IN THE LAND: HOMOSEXUALITY IN AMERICA 139, 228 (1989)).

pronouncements, and a strong definitional argument regarding the nature of marriage. With regard to the potential costs of extending Federal benefits to same-sex partners,[318] Senator Gramm estimated the number of these potential new recipients to be "tens of thousands, hundreds of thousands, potentially more."[319] Recognizing same-sex marriages that were valid under state law would "throw open the doors of the U.S. Treasury to be raided by the homosexual movement"[320] and taxpayers would be forced to subsidize homosexual lifestyles.[321] Senator Byrd estimated the cost at "hundreds of millions of dollars, if not billions - if not billions - of Federal taxpayer dollars."[322]

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318 In his testimony before the Senate Judiciary Committee, Senator Don Nickles stated clearly that one of the reasons that DOMA was necessary was for purposes of defining the eligibility for federal benefits because "[t]he Federal Government extends benefits, rights, and privileges to persons who are married, and generally it accepts a State's definition." *Defense of Marriage Act, 1996: Hearings on S.1740 Before the Senate Committee on the Judiciary on the Defense of Marriage Act,* 1996 WL 468475 (July 11, 1996) (statement of Sen. Nickles). In floor debate, Senator Lott suggested that without DOMA, a same-sex spouse would be entitled to veteran's benefits. *See* 142 CONG. REC. S10,100-02, S10,101 (daily ed. Sept. 10, 1996) (statement of Sen. Lott). Senator Ashcroft stated unequivocally in his support for DOMA that "[i]t is time for the Federal Government to define what a marriage is for purposes of Federal benefits which . . . come at the expense of the taxpayers of this country." *Id.* at S10,121 (statement of Sen. Ashcroft).

The decision regarding Federal benefits was often considered separately from the "permission" granted states to ignore valid marriages from sister states. Representative Barr asserted strongly that "the Congress of the United States of America and not an individual State has the authority and the sole jurisdiction and responsibility to decide the use of Federal taxpayer benefits[.]" 142 CONG. REC. H7480-05, H7488 (daily ed. July 12, 1996) (statement of Rep. Barr).

319 142 CONG. REC. 10,100-02, S10,106 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm). His list of Federal benefits included: "Social Security, Federal retirement plans . . . military retirement plans . . . Federal health plans." *Id.*

320 142 CONG. REC. H7480-05, H7488 (daily ed. July 12, 1996) (statement of Rep. Barr) (speaking in response to an amendment offered by Barney Frank that would have mandated federal recognition of same-sex marriage where the state approval was based on legislative action rather than judicial action).

321 For example, Representative Lipinski reasoned that "[i]f the Federal Government does not act now, and Hawaii legalizes homosexual marriage, the Federal Government would then be obliged to provide the same benefits that heterosexual marriages currently receive." 142 CONG. REC. H7480-05, H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski). He warned that without DOMA "all Americans will then be paying for benefits for homosexual marriages." *Id.*

322 142 CONG. REC. S10,100-02, S10,111 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd). Of course, these taxpayers are not involved in same-sex relationships and share the disapproval of their elected representative. For example, Representative Funderburk noted that "people in my district in North Carolina are outraged . . . that their tax money could be spent paying veteran's benefits or Social Security based on the recognition of same-sex marriages." 142 CONG. REC. H7480-05, H7487 (daily ed. July 12, 1996) (statement of Rep. Funderburk). Another concern that first surfaced in the testimony of Gary Bauer, the President of the Family Research Council, which was later instrumental in shaping the marriage penalty legislation, is that without DOMA "[b]usinessmen would be forced to subsidize homosexuality or face legal sanctions." *Id.* The original quote from Bauer's testimony is "[b]usinessmen and women would be prosecuted if they failed to offer spousal health benefits to homosexual 'spouses.'" *Defense of Marriage Act, 1996: Hearings on S.1740 Before the Senate Committee on the Judiciary on the Defense of Marriage Act,* 1996 WL 387291 (July 11, 1996) (testimony of Gary L. Bauer, President, Family Research Council). For a discussion of Bauer's earlier involvement with marriage penalty reform and other "pro-family" tax reform see MCCAFFERY, *supra*

The recognition of same-sex marriage was considered tantamount to approval of homosexuality[323] and many members of Congress were concerned with the signal this would send to children.[324] For example, Representative Canady asked:

> Should this Congress tell the children of America that it is a matter of indifference whether they establish families with a partner of the opposite sex or cohabit with someone of the same-sex? Should this Congress tell the children of America that we as a society believe that there is no moral difference between homosexual relationships and heterosexual relationships? Should this Congress tell the Children of America that in the eyes of the law the parties to a homosexual union are entitled to all the rights and privileges that have always been reserved for a man and woman united in marriage?[325]

Members of Congress characterized the recognition of same-sex marriage as an attempt to usurp the moral authority of religious teachings.[326] This was stated most forcefully by David Zwiebel, general counsel for a national Orthodox Jewish organization,[327] when he testified before the Senate Judiciary Committee that "the government has no business" interfering in the moral training of children.[328] He

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note 20, at 205-10.

323 William Eskridge argues that same-sex marriage is not necessarily a governmental seal of approval. *See* WILLIAM ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 11 (1996).

324 *See supra* note 312 (discussing Representative Largent and the D.C. anti-gay adoption bill); *see also* HERMAN, *supra* note 275, at 84-85 (explaining the belief that access to children and the ability to influence them is part of the "gay agenda").

325 142 CONG. REC. H7480-05, H7491 (daily ed. July 12, 1996) (statement of Rep. Canady). Consistent with this theme, Representative Delay stated: "We should not be forced to send a message to our children that undermines the definition of marriage as the union between one man and one woman. Such attacks on the institution of marriage will only take us further down the road of social deterioration." *Id.* at H7487 (statement of Rep. Delay).

326 Representative Funderburk noted that "[i]f homosexuals achieve the power to pretend that their unions are marriages, then people of conscience will be told to ignore their God-given beliefs and support what they regard as immoral and destructive." *Id.* (statement of Rep. Funderburk).

327 For a discussion of the uneasy alliance between Orthodox Jewish organizations and conservative Christians see HERMAN, *supra* note 275, at 130 (describing Orthodox Jewish support for Colorado's Amendment 2).

328 *Defense of Marriage Act, 1996: Hearings on S. 1740 Before the Senate Committee on the Judiciary on the Defense of Marriage Act,* 1996 WL 387296 (July 11, 1996) (testimony of David Zwiebel, General Counsel and Director of Government Affairs, Agudath Israel of America).

said, "[e]xtending legal recognition to same-sex unions is government's way of telling those children that their parents are wrong, that their priests, ministers and rabbis are wrong, that civilized societies throughout the millennia have been wrong."[329]

The influence of "pro-family" conservative groups was felt throughout the debate, even to the point of being cited as authoritative sources of historical data.[330] Senator Gramm repeatedly referred to "5,000 years of recorded history" as proof that the traditional family would not support a same-sex couple.[331] In one of the most dramatic appeals to history, Senator Byrd offered an extended discussion of early western history to show how tolerance for homosexuality foretold the fall of ancient Rome.[332] To those who had read the statistics compiled by the "pro-family"

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329 *Id.*

330 Representative Delay attributed the following interpretation to the Family Research Council:

> Homosexuality has been discouraged in all cultures because it is inherently wrong and harmful to individuals, families, and societies. The only reason it has been able to gain such prominence in America today is the near blackout on information about homosexual behavior itself. We are being treated to a steady drumbeat of propaganda echoing the stolen rhetoric of the black civil rights movement and misrepresenting science. Now activists are demanding that society elevate homosexuality to the moral level of marriage.

142 CONG. REC. H7480-05, H7487 (daily ed. July 12, 1996) (statement of Rep. Delay).

Making a distinction between same-sex marriage and the civil rights movement was a popular rhetorical move among the supporters of DOMA. *See, e.g.*, 142 CONG. REC. H7949 (daily ed. July 12, 1996) (statement of Florence King); *see also* HERMAN, *supra* note 275, at 111-36. Likewise, opponents of DOMA often invoked the civil rights movement for an entirely different purpose. *See, e.g.*, 142 CONG. REC. H7480-05, H7490 (daily ed. July 12, 1996) (statement of Rep. Studds) (invoking Dr. Martin Luther King and calling same-sex marriage "the last unfinished chapter of civil rights in this country").

331 142 CONG. REC. S10,100-02, S10,105 (daily ed. Sept. 10, 1996) (statement of Sen. Gramm) (noting that DOMA defended the traditional family and "the traditional family has stood as the seminal institution which has formed the foundation for civilized society for some 5,000 years").

332 Senator Byrd stated

> [A]s history teaches us too often in the past, when cultures waxed casual about the uniqueness and sanctity of the marriage commitment between men and women, those cultures have been shown to be in decline. This was particularly true in the ancient world in Greece and, more particularly, in Rome.

142 CONG. REC. S10,100-02, S10,109 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

The Senator then regaled the floor with a retelling of the love between Achilles and Patroclus, Nero's "marriage" to Sporus, and Junvenal's taunts at same-sex ceremony and display. Nonetheless, this cavalcade of history seems to contradict the Senator's opening statement that no civilized society has countenanced such unions. William Eskridge, Jr. includes a section of the history of same-sex marriage in his book *The Case for Same-sex Marriage*. Although it came under sustained critical attack, John Boswell's book on same-sex marriages advances the question as to whether same-sex unions were tolerated in earlier societies. *See generally* JOHN BOSWELL, SAME-SEX UNIONS IN PRE-MODERN EUROPE (1994). Andrew Sullivan's anthology on same-sex marriage contains both a critical review of Boswell's book and a rebuttal. *See* Brent D. Shaw, *A Groom of One's Own?*, *in* SAME-SEX MARRIAGE: PRO AND CON A READER 7-17 (Andrew Sullivan ed., 1997); Ralph Hexter, *Same-sex Unions in Pre-Modern Europe: A Response*, *in* SAME-SEX MARRIAGE: PRO AND CON A READER 17-21 (Andrew Sullivan ed., 1997).

organizations on (male) homosexuality, Senator Byrd's prediction of a doomed bacchanal may not have seemed that misguided. Take for instance, Representative Coburn's unchallenged statement that "over 43 percent of all people who profess homosexuality have greater than 500 partners."[333]

In addition to historical references to homosexuality, the members of Congress also drew on Biblical references and did not shy away from quoting scripture.[334] To the contrary, Senator Byrd began his statement by summarizing the debate among mainstream religions regarding same-sex unions.[335] He then held up his family's King James Bible and quoted from Genesis.[336] He warned: "Woe betide that society . . . that fails to honor that heritage and begins to blur that tradition which was laid down by the Creator."[337] Not to be outdone, Senator Helms dusted off that old chestnut: "God created Adam and Eve — not Adam and Steve."[338]

On balance, there was little debate regarding whether same-sex marriage threatens marriage or family.[339] Although there were stories offered of deprivations

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333 142 CONG. REC. H7441-03, H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn) (continuing that homosexuality is a "perversion" and "immoral").

334 *See Defense of Marriage Act, 1996: Hearings on S.1740 Before the Senate Committee on the Judiciary on the Defense of Marriage Act*, 1996 WL 387296 (July 11, 1996) (testimony of David Zwiebel, General Counsel and Director of Government Affairs, Agudath Israel of America, a national Orthodox Jewish organization) (expressing the belief that homosexuality is an abomination based on *Leviticus* 20:13).

335 *See* 142 CONG. REC. S10,100-02, S10,108 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd). The Senator read from William Eskridge's book *The Case for Same-sex Marriage*, *supra* note 323.

336 *See* 142 CONG. REC. S10,100-02, S10,109 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd).

337 *Id.* at S10,110. The Senator ended his statement with the story of Belshazzar and the omen of the writing on the wall. *See id.* Daniel was the only man in the kingdom who could read the writing that foretold of Belshazzar's demise at the hands of Darius the Median. *See id.* The Senator quoted Daniel's interpretation of the writing: "God hath numbered thy kingdom and finished it. Thou art weighed in the balances and art found wanting. Thy kingdom is divided and given to the Medes and Persians." *Id.* at S10,111. Senator Bryd warned: "The time is now . . . Let us defend the oldest institution, the institution of marriage between male and female, as set forth in the Holy Bible. Else we, too, will be weighed in the balances and found wanting." *Id.*

338 142 CONG REC. S10,067-01, S10,067 (daily ed. Sept. 9, 1996) (statement of Sen. Helms) (attributing the statement to an African-American Baptist minister).

339 Representative Jackson was one of the exceptions. He said that "we would be truly addressing the moral crises confronting the institution of marriage," if DOMA "meant a job in every household and adequate education for all children . . . a single-family home . . . [and] universal health care for all Americans." 142 CONG. REC. H7480-05, H7496 (daily ed. July 12, 1996) (statement of Rep. Jackson); *see also id.* at H7498 (statement of Rep. DeFazio) (stating that DOMA was not drafted to deal with the "real problems with family disintegration in this country"); 142 CONG. REC. H7441-03, H7441 (daily ed. July 11, 1996) (statement of Rep. Kennedy) (asserting that "[t]his is not about defending marriage. It is about finding an enemy."); 142 CONG. REC. S10065-01 (daily ed. Sept. 9, 1996) (statement of Sen. Boxer) (noting that she had hoped the bill would address "the stresses on marriage" such as flextime, child care, and health coverage).

due to the inability to secure the recognition of same-sex relationships,[340] the threat of a "redefinition" of marriage loomed quite real in the minds of the majority of witnesses and members of Congress. After Representative Frank, an openly gay Congressman, repeatedly challenged his colleagues to explain how he threatened anyone's marriage, Representative Stearns replied: "You are right Mr. Frank you are not threatening my marriage. You do not threaten my marriage but you do threaten the moral fiber that keeps this Nation together. You threaten the future of families which have traditional marriage at their very heart."[341] In the end, Congress concluded that same-sex marriage would "belittle," "demean," "trivialize," and ultimately destroy real marriage.[342]

C. *"Pro-Family" Tax Reform and Tax Relief for Married Couples*

The goal of "pro-family" tax reform is to insure that the tax code provides benefits for all married taxpayers, thereby repealing the marriage penalty for some and increasing the existing marriage bonus for others. "Marriage" and "family" are used interchangeably because as Senator Kempthorne stated emphatically, "If we believe in family, we believe in marriage."[343] Using arguably expansive terms such as "marriage" and "family," one might assume that same-sex couples could be included under a favorable interpretation. DOMA makes such an interpretation impossible. For the conservative political actors who supported DOMA and other anti-gay measures, "pro-family" tax reform presents an opportunity to further their policies without "bashing anybody."[344]

Discussion of the marriage penalty typically begins with a recitation of how "families are under assault" by rising divorce rates, single parent families, and cohabitation.[345] These external forces buffeting families may be cause for concern,

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340 *See, eg.*, 142 CONG. REC. H7480-05, H7492 (daily ed. July 12, 1996) (statement of Rep. Gunderson) (relating story of a gay man who was not permitted to make funeral arrangements for his male partner of 13 years).

341 *Id.* at H7488 (statement of Rep. Stearns).

342 *Id.* at H7494 (statement of Rep. Smith).

343 The Senator preceded the quote with the statement that "[w]e must strengthen the bonds of family to strengthen the fabric of our society." 144 CONG. REC. S6018-03, S6026 (daily ed. June 10, 1998) (statement of Sen. Kempthorne).

344 *See* Melinda Henneberger, *Ralph Reed is His Cross to Bear*, N.Y. TIMES, Aug. 9, 1998, at A24 (quoting Sanford Bishop explaining why the marriage penalty was a productive political issue).

345 *See Letter to McIntosh From Conservative Groups on Marriage Penalty*, 98 TAX NOTES TODAY 82-33, Apr. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (quoting letter singed by Randy Tate, Executive Director of the Christian Coalition, Gary Bauer, President of the Family Research Council, Rev. Louis Sheldon President of the Traditional Values Coalition, Carmen Pate, Chairman, Concerned Women for America and Phyllis Schafley, President of the Eagle Forum). With only one exception, these are the same

but there is no excuse when tax policies are perceived as actually contributing to those very forces. According to the Congressional debate, the marriage penalty contributes to divorce,[346] single parent families, and cohabitation.[347] The constituent remarks collected on Representative McIntosh's web page clearly reflect the belief that tax policies have lead to the end of the two-parent, single wage-earner family.[348] Simply put, the marriage penalty "hurts working families who are playing by the rules."[349]

As discussed in Part III, from a tax policy standpoint, the marriage penalty raises serious concerns regarding equity and fairness or marriage neutrality. In Congress, however, many of these same concerns are expressed in terms of morality. Despite the recognition that the cause of the marriage penalty was unintended,[350] there is overwhelming consensus that it is "immoral" to allow it to continue.[351] To do otherwise, Senator Ashcroft warned, "puts Washington's politics at odds with our deepest social values."[352]

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conservative groups which sponsored the series of "homosexuals can change" advertisement in *The New York Times*, *The Washington Post*, and *USA Today*. *See, e.g.*, N.Y. TIMES, July 13, 1998, at A10.

346 *See McIntosh Calls for Ending Marriage Tax Penalty*, 97 TAX NOTES TODAY 197-44, Oct. 10, 1997, *available in* LEXIS, Fedtax Library, TNT file (noting statistics from the National Fatherhood Initiative that report an increase in divorce since the enactment of the marriage penalty); *see also Weller Testimony at Ways & Means Hearing*, 98 TAX NOTES TODAY 19-59, Jan. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (asking whether it is "right that our tax code provides an incentive to get divorced?").

347 *See Blunt Urges End of Marriage Penalty Tax*, 97 TAX NOTES TODAY 199-23, Oct. 15, 1997, *available in* LEXIS, Fedtax Library, TNT file (testifying in favor of the Marriage Tax Elimination Act, Representative Blunt quoted from a constituent letter that the "bill would do a lot to cut down on the incidence of cohabitation by unmarried couples and give more children two-parent families").

348 *See Voices of America: Emails to Congressman McIntosh on the Marriage Penalty*, <http://www.house.gov/mcintosh/voices.htm>.

349 *Letter to McIntosh From Conservative Groups on Marriage Penalty*, *supra* note 345 (asserting that "Washington tax policy hurts working families who are playing by the rules and contributes to family breakdown").

350 For example, a Report prepared by the Democratic Caucus of the House Budget Committee explains: "Past Congresses did not write specific provisions of tax law to 'punish' or discourage marriage. Marriage penalties are the by-product of the trade offs that were made in balancing competing goals." *Spratt 'Dear Colleague' Letter to House Democrats on Marriage Penalty*, 98 TAX NOTES TODAY 85-92, May 4, 1998, *available in* LEXIS, Fedtax Library, TNT file (enclosing the Report) [hereinafter *Spratt 'Dear Colleague' Letter*].

351 *See, e.g.*, *Weller Testimony at Ways & Means Hearing*, *supra* note 346 (asserting that the marriage penalty is the "most immoral provision in our tax code"); *see also Feenberg Testimony at Ways & Means Hearing*, 98 TAX NOTES TODAY 19-63, Jan. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (remarking that the potential impact of the marriage penalty on divorce rates is "morally troubling, to say the least"); *Release From Rep. McIntosh on Marriage Tax Relief*, 98 TAX NOTES TODAY 19-38, Jan. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (noting that "'[w]hile some may say Washington can't afford to eliminate the marriage penalty, I say families can't afford to continue suffering from it'").

352 *Ashcroft Release on Ending Marriage Penalty*, 98 TAX NOTES TODAY 113-23, Jun. 13, 1998,

The initial wave of "pro-family" tax reform was designed to reduce and eventually eliminate the marriage penalty. However, the concern that government should not "'punish American families for working hard, forming stable families and planning for the future'"[353] was very quickly eclipsed by the normative determination that government had "a moral obligation to promote the family."[354] This led to proposals that would benefit all married couples, even those who already received a marriage bonus. As Representative McIntosh urged, "'[a]t the same time that every American is concerned about the breakdown of the family, Washington should be helping families, not undermining them.'"[355]

The marriage penalty undermines families, the argument goes, because it prevents people from getting married. Sharon Mallory testified before the Ways & Means Committee that she and her boyfriend Darryl Pierce "love each other and very much want to be married. But the IRS won't let us."[356] Both Sharon and Darryl earn less than $10 an hour working in an electronics plant and their tax liability would increase by $2800 if they were to get married.[357] The appeal of Mallory differed from the testimony regarding marriage penalties offered in the early 1980s. At that time, the poster couple for marriage tax reform was a successful professional married couple who had made tax-motivated divorces a cottage industry and used the tax savings to pay for their annual Caribbean

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available in LEXIS, Fedtax Library, TNT file (referring to "[t]he tax on marriage"). For example, the release published by the Family Research Council asserted that "Society decays when government is hostile to marriage." *Family Research Council Release on Bill to End Marriage Penalty*, 98 TAX NOTES TODAY 82-46, Apr. 28, 1998, *available in* LEXIS, Fedtax Library, TNT file.

353 *RNC Defends GOP 'Push to Annul Marriage Penalty,'* 98 TAX NOTES TODAY 99-20, May 22, 1998, *available in* LEXIS, Fedtax Library, TNT file (quoting Jim Nicholson) (applauding efforts to end the marriage penalty).

354 *Riley Testimony at Ways & Means Hearing*, 98 TAX NOTES TODAY 19-62, Jan. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (stating there is "no more important pro-family initiative . . . than the repeal of the marriage tax penalty").

355 *McIntosh Release on 'Marriage Penalty,'* 98 TAX NOTES TODAY 30-20, Feb. 13, 1998, *available in* LEXIS, Fedtax Library, TNT file (quoting Rep. McIntosh). Of course, the family that Washington tax policies should support had already been narrowed to exclude same-sex couples, as well as other forms of alternative families.

356 *Mallory Testimony at Ways & Means Hearing*, 98 TAX NOTES TODAY 19-60, Jan. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (testifying on the impact of the marriage penalty). Mallory, a constituent of Representative McIntosh, wrote to her Congressman in February 1997 to bring the marriage penalty to his attention . McIntosh frequently reads from Mallory's letter to illustrate the potential harshness of the marriage penalty. Mallory wrote: "Darryl and I would very much like to be married and I must say that it broke our hearts when we found out we can't afford it. We hope someday the government will allow us to get married by not penalizing us." *Id.* It is interesting to note that in Mallory's testimony she laid the blame with the IRS and not with Congress, the appropriate responsible party. This is consistent with the demonization of the IRS which has occurred in the halls of Congress over the last several sessions.

357 *See id.*

vacation.[358] In contrast, Sharon Mallory and her boyfriend, Darryl Pierce, are hard-working people, barely scraping by, and just starting out in life.[359] The amount of the marriage penalty is described by Representative Weller as "real money for real people."[360] Sharon and Daryl's story fits perfectly with the theme of tax relief for working families.[361]

Marriage penalty relief has been on the table in one form or another since the *Contract with America*[362] which provided a small credit for couples subject to the marriage penalty.[363] The most recent attempt at marriage penalty relief began immediately after the enactment of the Taxpayer Relief Act of 1997, with the introduction of the Marriage Penalty Relief Act, and congressional leaders on both sides of the aisle point to the marriage penalty as a top legislative priority.[364]

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358 Michael Graetz details the story of David and Angela Boyter in the second chapter of his book *The Decline (and Fall) of the Income Tax*, including a discussion of their 1980 testimony before the Senate Finance Committee. *See* GRAETZ, *supra* note 91, at 35-39. Of particular note is their how-to publication entitled " Divorce for Fun and Profit." *Id.* at 36. For a discussion of the rules regarding when a taxpayer is deemed divorced for purposes of the tax code *see supra* note 127. Professor Graetz submitted a copy of chapter two of his book with his testimony before the House Ways & Means Committee in January of 1998. *See Graetz Testimony at Ways & Means Hearing*, 98 TAX NOTES TODAY 19-69, Jan. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file; *see also* Boyter v. Comm'r, 668 F.2d 1382 (4th Cir. 1981); Boyter v. Comm'r, 74 T.C. 989 (1980).

359 Nothing could be farther from the image presented by Vivien Kellems, a successful businesswoman, and Gloria Swanson when they descended on Congress to protest the singles penalty in 1969. *See* GRAETZ, *supra* note 91, at 32-33 (describing the tax protest orchestrated by Kellems). The result was the change in the rate structure which led to the marriage penalty. In a nod to traditional values, Kellems identified herself as someone who was single through no fault of her own. *See id.* at 32. She founded the War Widows of America to represent the women of her generation who did not marry because their future husbands had been killed in World War II. *See id.* For more background on Kellems' wartime relationship with a suspected German agent see *supra* note 91.

360 *House Begins Debate on Budget Resolution*, 98 TAX NOTES TODAY 113-46, June 12, 1998, *available in* LEXIS, Fedtax Library, TNT file. The phrase is reminiscent of the advertising campaign of the beef industry that touted beef as "real food for real people."

361 This is often expressed as "middle-class tax relief." *See, e.g., Weller Calls for Ending Marriage Tax Penalty*, 98 TAX NOTES TODAY 128-73, July 6, 1998, *available in* LEXIS, Fedtax Library, TNT file (characterizing the Marriage Tax Elimination Act as "additional middle-class tax relief"). Gene Steuerle has identified this characterization as the reason Congress has failed to provide "a principled approach to dealing with marriage penalties." Gene Steuerle, *Is It Worth Spending Money to Reduce Marriage Penalties?*, 98 TAX NOTES TODAY 119-67, June 22, 1998, *available in* LEXIS, Fedtax Library, TNT file (concluding that budget constraints should not be used as an excuse to forego marriage penalty reform "if marriage penalties violate our sense of equity").

362 *See* MCCAFFERY, *supra* note 20, at 205 (discussing the marriage penalty provisions in the *Contract With America*). With regard to the marriage penalty, the *Contract With America* stated: "We'll begin to repeal the marriage tax penalty. The government should reward, not punish, those who enter into the sacred bonds of marriage." *Id.*

363 The maximum amount of the credit was $145. *See id.* at 217.

364 *See, e.g., Letter to Lott From Pro-tax Cut Senators for Lowers Taxes*, 98 TAX NOTES TODAY 113-32, June 12, 1998, *available in* LEXIS, Fedtax Library, TNT file (urging lawmakers to "make the elimination

With regard to tax relief, the CBO Report provides a comprehensive outline of several different ways to address the marriage penalty: widen tax brackets and increase the standard deduction; exempt some of the earnings of the lower earning spouse; adjust all applicable floors, ceilings, and phase outs to twice that of individuals; require spouses to file individually; and allow spouses to choose whether to file individually or jointly.[365] Congress has not seriously proposed a return to individual filing, despite its wide academic appeal and its acceptance internationally.[366]

Initially, the marriage penalty legislative proposals were designed to alleviate the marriage penalty, but they quickly became viewed as an opportunity to provide tax relief to "families." The Marriage Tax Penalty Elimination Act of 1997 or H.R. 2456 enjoyed wide support with 236 co-sponsors.[367] It would have permitted a married couple to choose whether to file jointly or individually, depending upon which was more advantageous.[368] A similar provision was introduced in the Senate.[369] With no action in 1997, the early months of 1998 saw a considerable amount of activity regarding the marriage penalty. Prior to the 1998 State of the Union Address, President Clinton received numerous letters from

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of the marriage penalty a top priority").

365 *See* CBO REPORT, *supra* note 7.

366 The closest to a return to individual filing was the proposal to allow married couples to choose whether to file jointly or individually, depending upon which one was more advantageous. *See supra* text accompanying notes 367-69.

367 *See Spratt 'Dear Colleague' Letter, supra* note 350 (noting that H.R. 2456, 104th Cong. (1997) has 236 co-sponsors). The bill was most closely identified with its co-sponsors David M. McIntosh and Jerry Weller, who are both members of the House Ways & Means Committee. The Marriage Penalty Relief Act or H.R. 2593, 104th Cong. (1997) would have re-instituted a modified form of the second-earner deduction that was repealed by the Tax Reform Act of 1986. *See* Heidi Glenn, *Marriage Penalty Relief Act Endorsed by House Taxwriters*, 98 TAX NOTES TODAY 191-4, Oct. 2, 1997, *available in* LEXIS, Fedtax Library, TNT file.

368 This approach was criticized initially as unduly increasing complexity and creating an additional tax preparation burden on married taxpayers, who, in essence, would have to compute their tax liability twice. *See Spratt 'Dear Colleague' Letter, supra* note 350 (stating that "[a]llowing couples the option of filing as singles can enormously complicate tax preparation and planning"); *see also ABA Outlines Views on Eliminating Marriage Penalty, infra* note 444 (discussing the complications which would arise from individual filing).

369 *See* Jacqueline Rieschick, *Republicans Push to Eliminate Marriage Penalty Tax*, 98 TAX NOTES TODAY 30-4, Feb. 13, 1998, *available in* LEXIS, Fedtax Library, TNT file (announcing the introduction of the Marriage Tax Elimination Act or S. 1285, 104th Cong. (1997) sponsored by Lauch Faircloth, Kay Bailey Hutchinson, and Trent Lott). Senator Hutchinson supported the proposal on equity grounds, noting that "[t]he hallmark of a fair tax system is even-handedness, and the current law flunks this test." *Hutchinson Release Calling for the Elimination of 'Marriage Penalty,'* 98 TAX NOTES TODAY 30-22, Feb. 13, 1998, *available in* LEXIS, Fedtax Library, TNT file. The Senate version differed slightly in that it required couples to combine their income and then split the income between them and file as individuals. The House measure contained a greater degree of choice.

members of Congress urging him to endorse the elimination of the marriage penalty.[370] On January 28, the House Ways & Means Committee heard testimony on the marriage penalty in connection with its larger project to reduce the overall tax burden.[371] Two weeks later, the Republicans used Valentine's Day to underscore their commitment to eliminating the marriage penalty.[372] Senator Faircloth referred to the marriage penalty as "a tax on love."[373] The Senator was close, but actually it is a tax on marital status.[374]

In addition to concerns regarding complexity, the filing choice or income splitting option offered by H.R. 2456 was criticized on the grounds that it favored dual wage-earner married couples and did not provide tax relief for single wage-earner married couples.[375] "Pro-family" organizations objected to providing tax relief to only one type of married couple, particularly when that type was dual wage-earner couples. With the input of high profile "pro-family" conservative groups, some members of Congress revised the earlier approach of H.R. 2456 and a proposed a bill that would not only reduce marriage penalties but also increase

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370 *See, e.g.*, Ryan J. Donmoyer, *120 House Members Call for Clinton Support to End 'Marriage Tax,'* 98 TAX NOTES TODAY 10-2, Jan. 15, 1998, *available in* LEXIS, Fedtax Library, TNT file; Sen. Lauch Faircloth et al., *Three Senators' Letter to President on Marriage Tax,* 98 TAX NOTES TODAY 13-21, Jan. 21, 1998, *available in* LEXIS, Fedtax Library, TNT file; Bob Etheride et al., *Legislators Call for Elimination of Marriage Penalty,* 98 TAX NOTES TODAY 29-45, Feb. 12, 1998, *available in* LEXIS, Fedtax Library, TNT file (reproducing letters dated January 19 and 20, 1998 from legislators to President Clinton regarding marriage penalty reform).

371 *See Unofficial Transcript of W&M Hearing on Reducing Tax Burden,* 98 TAX NOTES TODAY 24-60, Feb. 5, 1998, *available in* LEXIS, Fedtax Library, TNT file.

372 *See, e.g.*, Rieschick, *supra* note 369 (outlining proposal to "eliminate the marriage penalty tax by this time next year"); *McIntosh Release on 'Marriage Penalty,' supra* note 355 (reporting joint news conference with Senate leaders); *Faircloth Release on Legislation to End 'Marriage Penalty,'* 98 TAX NOTES TODAY 30-21, Feb. 13, 1998, *available in* LEXIS, Fedtax Library, TNT file (including text of letter to President Clinton urging him to support the elimination of the marriage penalty); *Hutchinson Release Calling for the Elimination of 'Marriage Penalty,' supra* note 369 (describing proposed legislation).

373 The Senator stated:

> It is no secret that the federal government taxes a lot of things — estates, capital gains, and for all you cupids, even a tax on bows and arrows. But it will probably come as a shock to young couples thinking of marriage that the federal government even has a tax — on love.

Faircloth Release on Legislation, supra note 372.

374 *See* Steuerle, *supra* note 361 (remarking that "the marriage penalty is nothing more than a tax on marriage vows"). This is not far from the optimal tax proposal outlined *supra* Part III. *See supra* text accompanying notes 132-34.

375 Representative Riggs led this criticism. He recently sponsored legislation that would deny federal housing funds to municipalities which require city contractors to provide domestic partnership benefits to their employees. *See* Katherine Q. Seelye, *Republicans Introduce 2 Bills in Fight Against Homosexuality,* N.Y. TIMES, July 18, 1998, at A12.

marriage bonuses.[376] This new approach doubled the amount of the standard deduction and the tax rates applicable to married taxpayers.[377] At the press conference announcing the new proposal, "pro-family" groups who were on hand to praise the legislation[378] because it promised to "correct the inequity in our tax code without inadvertently penalizing couples that wish to have one spouse remain at home to take care of the children . . . ."[379] The call to "provide equal and significant relief to both single and dual earning married couples"[380] has influenced all subsequent attempts to address the marriage penalty.

In June of 1998, while Senate and House budget negotiators were in conference discussing, *inter alia*, the scope of the marriage penalty relief to include in the budget blueprint,[381] the marriage penalty arose in a very unlikely context. Senator Gramm proposed a modified form of marriage penalty relief as an amendment to the comprehensive Tobacco legislation.[382] His reasoning was simple. Referring to the slated per pack cigarette tax, Gramm stated, "'[w]e don't want to

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376 *See Riley Release on Bill to End Marriage Penalty*, 98 TAX NOTES TODAY 82-18, Apr. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file.

377 Representatives Weller, Herger, Riley, and McIntosh introduced H.R. 3734, 104th Cong., (1997) The Marriage Penalty Elimination Act, in the House. Senators Hutchinson and Faircloth revised their earlier legislation and introduced a comparable bill in the Senate. Although releases published by Representatives McIntosh and Weller are silent with regard to why they changed strategies in midstream, Representative Riley's release explains that the new bill does not contain "the bias against families with homemakers created by other 'marriage penalty' relief proposals." *Id.*

378 *See McIntosh Release on Bill to End Marriage Penalty*, 98 TAX NOTES TODAY 82-16, Apr. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (noting attendance of the Christian Coalition and other "national pro-family groups" at the press conference).

379 *Riley Release on Bill to End Marriage Penalty, supra* note 376 (quoting the "fact sheet" on the Marriage Tax Penalty Elimination Act of 1998).

380 *Weller Release on Bill to End Marriage Penalty*, 98 TAX NOTES TODAY 82-17, Apr. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (explaining one of the reasons for the change in legislative proposals).

381 *See* Heidi Glenn, *Conservative GOP Tells Lott: $101 Billion in Tax Relief or Else*, 98 TAX NOTES TODAY 111-1, June 10, 1998, *available in* LEXIS, Fedtax Library, TNT file (discussing budget conference) [hereinafter, Glenn, *Conservative GOP*]; *DeLay Statement on Passage of Kasich Budget*, 98 TAX NOTES TODAY 109-81, June 8, 1998, *available in* LEXIS, Fedtax Library, TNT file (approving of the attempt to "lower the tax burden on America's families when we currently have the highest surplus in history"). The push for tax relief was fueled by reports of a surplus. Speaking of the federal surplus, Senator Grams stated "[t]his money belongs to the people. Washington should not stand first in line to take this money. It is only moral and fair to return it to them. Washington again, has no right to spend it on their behalf." *Senate Continues Tobacco Bill Debate*, 98 TAX NOTES TODAY 118-50, June 19, 1998, *available in* LEXIS, Fedtax Library, TNT file.

382 *See* The National Tobacco Policy and Youth Smoking Reduction Act, S. 1415, 105th Cong. (1998). The proposed amendment 2686 also allowed self-employed individuals to deduct fully their health insurance costs. *See id.* It would have added section 222 to the tax code entitled "Deduction for Married Couples to Eliminate the Marriage Penalty."

impoverish blue collar workers who are addicted to smoking . . . . We're trying to find a way to give part of the money back in other tax cuts so that we get the benefits of increased cigarette prices . . . but we don't beat people economically into the ground.'"[383] Once the Tobacco legislation was characterized as a tax increase, the demand for a tax cut followed as a matter of course.[384]

The Gramm amendment would have required one-third, and later one-half, of the new tobacco tax revenue to be used for marriage penalty tax relief.[385] It created an above-the-line deduction for an amount expressed as the sum of the standard deduction allowed for heads of household and the standard deduction allowed for individuals reduced by the standard deduction allowed for married couples filing jointly.[386] Although designed to compensate married couples for the fact that the standard deduction for a married couple is not double that of an individual, it did not choose simply to grant married couples a standard deduction equal to two individual deductions. Instead, it chose to add an above-the-line deduction which would be more helpful in reducing adjusted gross income for the purposes of certain floors.[387] Further, it targeted the tax relief to those married couples with adjusted gross income of $50,000 or less.[388] In addition to the amendment's considerable technical shortcomings,[389] it provided "tax relief" to

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383 Heidi Glenn, *Senate to Try to Hold Hands on Marriage Penalty Relief*, 98 TAX NOTES TODAY 106-1, June 3, 1998, *available in* LEXIS, Fedtax Library, TNT file (quoting Sen. Gramm). Gramm used the "impoverishment of blue-collar workers" to justify tax relief for *all* married couples with adjusted gross income of $50,000 or below. "[I]n America smoking is primarily a blue-collar phenomenon. Obviously, people at all income levels smoke, but if you look at who pays this tax, it really brings home the fact that in our country most of the people who smoke are moderate-income, blue-collar workers." *Senate Continues Tobacco Bill Debate*, *supra* note 381.

384 The use of Tobacco money to "fund" marriage penalty relief was not supported by House GOP leaders. *See* Heidi Glenn, *Gingrich Angling for $60 - 70 Billion Tax Cut*, 98 TAX NOTES TODAY 116-1, June 17, 1998, *available in* LEXIS, Fedtax Library, TNT file (noting that "Gingrich flatly rejected the idea of using tobacco revenue to pay for tax relief"); *see also* Glenn, *Conservative GOP*, *supra* note 381 (reporting that House Majority Leader Richard Armey did not believe that marriage tax relief would be included as part of the tobacco bill).

385 *See* Glenn, *Conservative GOP*, *supra* note 381.

386 Professor Zelenak responded to its shortcomings. *See* Lawrence Zelenak, *Gramm Marriage Penalty Fix Needs Some Fixing of Its Own*, 98 TAX NOTES TODAY 114-75, June 15, 1998, *available in* LEXIS, Fedtax Library, TNT file (reprinting Professor Zelenak's letter to the editor critiquing the amendment).

387 For example, the medical expense deduction under section 213 is limited by a 7.5% floor. *See* I.R.C. § 213(a) (1994). In other words, a taxpayer can only deduct her otherwise deductible medical expenses to the extent that they exceed 7.5 % of the taxpayer's adjusted gross income. *See id.*

388 Actually, it is $50,000 of "modified adjusted gross income." The new above-the-line deduction would be from modified adjusted gross income which would be gross income less the section 62 deductions which reduce gross income to adjusted gross income.

389 For Zelenak's response to these various shortcomings see *supra* note 386.

couples who experienced a marriage bonus and not just those who were subject to the marriage penalty. Democratic attempts to offer "more targeted" relief were defeated.[390]

The discussion surrounding the Gramm amendment is illustrative of the extreme heteronormative nature of the debate regarding the marriage penalty. Responding to criticism that the amendment provided "relief" to those couples who actually received a marriage bonus, Gramm rejected the very concept of a marriage bonus.[391] Responding to the charge that the amendment was over broad, Gramm stated:

> There is something called a marriage bonus. If there has ever been a totally fraudulent concept, it is the marriage bonus. This thing that we call in the Tax Code a marriage bonus is, if you marry — and let me just speak from the point of view of a male — if you marry a lady and she comes and lives with you in marriage, you get to take her personal exemption and you also get an adjustment to your standard deduction . . . .
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> Something is called a marriage bonus when — let us say you have John and Josephine who fall in love. And Josephine is just getting out of college. Her father and mother have been taking a personal exemption for Josephine. She marries John. And John is already working. Josephine is getting ready to go into the labor market. They went to graduation and she got her diploma. Then they walked down the aisle and said, "I do." And sure enough,

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390 Ryan J. Donmoyer, *Talks on Marriage Penalty Snuffed Out as Dems Make Their Own Proposal*, 98 TAX NOTES TODAY 108-4, June 5, 1998, *available in* LEXIS, Fedtax Library, TNT file. Senator Daschle proposed a modified form of the second earner deduction as an alternative amendment. *See Daschle Bill, S. 2147, Would Provide Marital, Self-Employed Health Insurance Deduction*, 98 TAX NOTES TODAY 121-14, June 24, 1998, *available in* LEXIS, Fedtax Library, TNT file. However, the proposal was tabled. *See Senate Continues Tobacco Bill Debate*, *supra* note 381.

391 Even among those Senators who did seem to accept the concept of a marriage bonus, there was a wide disparity regarding the scope of the penalty or the bonus, despite the fact they were all referring to the same CBO Report. Senator Gramm at times referred to "31 million families in this country who pay higher taxes because they are married[.]" 144 CONG. REC. S6012-01, S6013 (daily ed. June 10, 1998) (statement of Sen. Gramm). He later stated that the marriage penalty "falls on 31 million Americans[.]" 144 CONG. REC. S6018-03, S6019 (daily ed. June 10, 1998) (statement of Sen. Gramm). And, he switched back to "31 million families" just several pages later. *Id.* at S6027. Senator Roth stated "more than 21 million married couples" paid more tax because they were married. 144 CONG. REC. S6012-01, S6017 (daily ed. June 10, 1998) (statement of Sen. Roth). Senator Moseley-Braun speaks with precision when she notes that 20.9 million couples pay a marriage penalty. *See* 144 CONG. REC. S6018-03, S6029 (daily ed. June 10, 1998) (statement of Sen. Moseley-Braun). Senator Torricelli gets the number right when he mentions 21 million couples. *See id.* (statement of Sen. Torricelli); CBO Report, *supra* note 7.

> John gets to declare $2,700 on his tax return for her personal exemption. And John gets $2,850 added to his standard deduction. But does anybody believe that John can feed, clothe, and house Josephine for $5,550? Some bonus. That is no bonus.[392]

The "pro-family" advocates of the marriage penalty relief amendment were clear that they would not support tax relief which did not include all married couples. The Democratic attempt to provide tax relief to those couples subject to the marriage penalty was seen as discriminating against families with a stay at home "spouse."[393] Again, Gramm summarized his position,

> I want this tax deduction to apply to families, whether they both work outside the home or whether they decide they will sacrifice, take less income, and one of them will stay home and raise their children. I am not trying to make a judgement as to whether that is better or worse . . . . Our colleagues say, . . . if you don't work outside the home, . . . you are not due any correction for this penalty.[394]

Apparently, the fact that these couples were not subject to the penalty in the first place was not a sufficient reason to deny them relief from the penalty.

Senator Gramm and other members of Congress went out of their way to say they were not attempting to pass judgement on those women who choose to work outside the home. However, they were adamant that government policies should not influence that decision.[395] Senator Gramm stated: "it is not the business

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392 144 CONG. REC. S6018-03, S6019 (daily ed. June 10, 1998) (statement of Sen. Gramm). Senator Gramm was quite confident that he could explain the fallacy of the marriage penalty. He stated, "[s]o I am sure that people will laugh at this, but since our colleagues are going to great lengths to talk about it, let me just destroy it, and we will not waste our time." *Id.* Senator Gramm also tells the Joe and Josephine story from a working person's perspective where Josephine marries Joe the day after she graduates from high school, instead of from college. *See id.* at S6028.

393 McCaffery reports that a similar sleight of hand occurred in connection with the Senate's version of the *Contract with America*. *See* MCCAFFERY, *supra* note 20, at 217. He writes:

> the *Contracts'* token nod toward two-earner families was apparently too much for the Republican-controlled Senate to swallow. In their version of the *Contract with America*, the marriage tax relief took the form of an increase in the standard exemption level for all married couples. That's a step which benefits *all* families[.]

Id. (emphasis in original).

394 144 CONG. REC. S6018-03, S6020 (daily ed. June 10, 1998) (statement of Sen. Gramm). The Senator stated "I do not believe the Tax Code should discriminate against people based on the decision they make about whether to work inside or outside the home." *Id.* at S6027.

395 *See* Brown & Fellows, *supra* note 20, at 4 (noting that "[f]reedom from governmental intervention in an individual's private life is a strong American political value that . . . carries considerable weight in debates about current tax law and proposed reforms of it").

of the Government to try to dictate through the Tax Code that very important personal family decision."[396] (Indeed those very strong words could be used by same-sex couples to assert why they should be included under the marital provisions.) The conservative "pro-family" organization, the Family Research Council, did not share the Senator's reticence to endorse single wage-earner families over dual wage-earner families.[397] Its release on the marriage penalty legislation stated that the legislation "paves the way for one spouse to be at home with the couple's children during the early years of life."[398]

Unwilling to wait for promised major tax relief in the fall,[399] Senate conservatives unsuccessfully attempted to link a marriage penalty relief amendment to the Legislative Branch Appropriations Bill,[400] and they vowed "to link the amendment to 'every available piece of legislation.'"[401] Despite this level of commitment, the 105th Congress failed to enact any marriage penalty relief.

The House passed an $80 billion tax cut measure which included marriage penalty relief.[402] The Taxpayer Relief Act of 1998 increased the size of the standard deduction for married taxpayers filing jointly to twice that of the standard deduction for unmarried taxpayers.[403] It also increased the amount of the standard

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396 To illustrate that he was not a foe of the working mother, Senator Gramm prefaced his statement with the following disclaimer: "My mama worked my whole life because she had to. My wife has chosen to work the whole life of our children because she wanted to." 144 CONG. REC. S6012-01, S6014 (daily ed. June 10, 1998) (statement of Sen. Gramm). He later reiterated: "I do not want the Government to be making the decision as to whether a parent works outside the home or works inside the home." 144 CONG. REC. S6018-03, S6018 (daily ed. June 10, 1998) (statement of Sen. Gramm).

397 The Family Research Council is headed by Gary Bauer who is one of the most influential leaders of the Christian right. Anti-gay projects comprise a major portion of the organization's activities. For a description of the Family Research Council and other Christian organizations with anti-gay platforms see HERMAN, *supra* note 275, at 14-17. To the Christian right, the tax measures emanating from Washington must have seemed to be as unpopular and ungodless as the funding choices made by the National Endowment for the Arts.

398 *Family Research Council Release on Bill to End Marriage Penalty*, *supra* note 352 (quoting letter from Gary Bauer which continues "[t]here is no substitute for the love and care parents provide for their children").

399 Senate Majority Leader Trent Lott had assured "pro-family" lawmakers that marriage penalty relief would be part of any budget resolution negotiations. *See* Heidi Glenn, *Kasich to Pitch Tax Cut Plan to GOP Leaders*, 98 TAX NOTES TODAY 139-1, July 21, 1998, *available in* LEXIS, Fedtax Library, TNT file.

400 *See* Heidi Glenn, *Key Senate Leaders Still on Surplus-for-Tax Cuts Sidelines*, 98 TAX NOTES TODAY 140-3, July 22, 1998, *available in* LEXIS, Fedtax Library, TNT file.

401 *Id.* (quoting an aide to Sen. Ashcroft).

402 *See* Rep. Charles Rangel et al., *House Passes Taxpayer Relief Act*, 98 TAX NOTES TODAY 194-26, Oct. 7, 1998, *available in* LEXIS, Fedtax Library, TNT file.

403 *See id.*

deduction for taxpayers who are married filing separately to that of an unmarried taxpayer.[404] Consistent with the "pro-family twist," the provisions were not targeted to those couples who currently experience a marriage penalty. The Senate failed to pass the Taxpayer Relief Act of 1998,[405] but Speaker Gingrich and other Republican members of Congress have declared that marriage penalty relief will be a priority for the 106th Congress.[406]

The "pro-family" tax reform debate in Congress has presented a very clear picture of what "family" means. The statements are unabashedly prescriptive. For example

> [I]f a lady washing dishes and a man who is a janitor in a school fall in love, we *want* them to get married. What society would want to discourage that from happening? They may get married, have a child; their child may become President of the United States.[407]

Another Congressman noted that "of course, our policies *should* encourage marriage because it is "a sacrosanct institution and the bedrock of our social structure."[408] Representative Armey noted that "we all tell our children, our best advice, young man, our best advice, young lady, is for you to get married and settle down."[409] And what will that family look like once they have settled down? The essence of "a family environment" Senator Kempthorne explained is "where a mother and father are there, where mother and father will tuck the child into bed, where mother and father will listen to their prayers — a mother and father, a married couple."[410] There is no room in this picture for same-sex couples.[411]

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404 *See id.*

405 *See* Ryan J. Donmoyer & Heidi Glenn, *House, Senate Polarized as Extenders Race to Finish,* 98 TAX NOTES TODAY 197-1, Oct. 13, 1998, *available in* LEXIS, Fedtax Library, TNT file.

406 *See* Heidi Glenn, *House GOP Makes Big Tax Cut Promises,* 98 TAX NOTES TODAY 203-2, Oct. 21, 1998, *available in* LEXIS, Fedtax Library, TNT file.

407 144 CONG. REC. S6018-03, S6019 (daily ed. June 10, 1998) (statement of Sen. Gramm) (emphasis added).

408 *Id.* at S6026 (statement of Sen. Kempthorne).

409 144 CONG. REC. H4135-02, H4137 (daily ed. June 4, 1998) (statement of Sen. Armey).

410 144 CONG. REC. S6018-03, S6027 (daily ed. June 10, 1998) (statement of Sen. Kempthorne).

411 Queer theory would explain this as the power of heteronormativity. For a discussion of heteronormativity see *supra* note 13.

VI. THE EXCLUSION OF SAME-SEX COUPLES AND PROPOSALS FOR REFORM

The intensely prescriptive nature of the marital provisions, their pervasiveness throughout the tax code, and the extent to which they are mandated by morality concerns all combine to make any proposals for reform a difficult task. This section makes two methodological suggestions regarding future proposals for reform. They are designed to provide a measure of "political realism"[412] and enable reform-minded scholars to craft proposals that are responsive to possible political objections and, therefore, have a more realistic chance of adoption.[413] This section stops short of advancing any concrete proposals for reform of the marital provisions. It does assert, however, that limiting proposals to simple tax parity for same-sex couples is in and of itself heteronormative.

First, proposals for reform should take into consideration voter demand or interest group activity because matters of family taxation appear extremely sensitive to such pressure. As explained in Part III, voter demand prompted the adoption of the 1948 filing provisions and the 1969 rate schedule changes.[414] It is also the driving force behind the current "pro-family" tax reform. This section uses public choice theory to help bring the demand side of the marriage penalty legislative initiative and that of DOMA into sharper relief.

Second, proposals for reform regarding the tax treatment of same-sex couples should consider and evaluate alternative institutional settings. As with any contested social goal, strategic institutional choice can help evaluate the likelihood of success for a given measure and place it within the context of a larger program of social change.[415] It provides a comparative analysis of the type and quantum of

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412 Zelenak, *supra* note 8, at 1524 n.24 (distinguishing between "technical realism" and "political realism").

413 For example, McCaffery clearly acknowledges that his reform proposal based on optimal tax theory "has little chance of being enacted into law anytime soon, if ever." MCCAFFERY, *supra* note 20, at 278. As a matter of institutional choice, McCaffery advocates the use of the tax system for social change because it "avoids many of the problems of a more heavy-handed, 'top-down' style of regulatory intervention." *Id.* at 277.

414 The events that led to the 1969 changes in the rate structure are unlikely to be replicated by any aggrieved group of singles. McCaffery states "by 1969 single taxpayers had grown in numbers and political importance." McCaffery, *supra* note 23, at 991. However, the singles who lobbied for the rate changes defined themselves by reference to the men they could not marry. *See supra* note 91.

415 For a discussion of same-sex marriage and domestic partnership in terms of strategic institutional choice see Knauer, *supra* note 1, at 338-39. The article notes:

> [I]t is possible that the "best" institutional alternative may not be politically feasible because the recognition and protection of same-sex relationships remains a hotly contested social goal. Accordingly, this Essay provides a strategic assessment of the relief available . . . and then uses efficiency and equity concerns to evaluate the competing institutional choices.

Id. at 339.

relief available from the alternative institutional settings, which in this case are the legislature, the executive, the courts, and marketplace[416] and evaluates the competing institutions in terms of equity, efficiency, and likelihood of success.[417]

Of course, before discussing the likely success or failure of a proposal, it is necessary to identify and assess the points for reform. Accordingly, this section first considers the impact on same-sex couples of their exclusion from the marital provisions. Drawing by analogy on the work detailing the effect of the marriage penalty, it discusses the impact of the exclusion in terms of tax liability, as well as other factors such as behavioral distortions, compliance costs, uniformity and fairness considerations.[418] It also recognizes that taxing is a major form of interaction with the government which carries with it considerable symbolic weight.[419]

A. Goal Assessment: Identifying Points for Reform.

The marriage penalty/bonus is generally measured by comparing the aggregate tax liability of two single individuals with their combined tax liability once married.[420] When discussing the impact of the marital provisions on same-sex

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[416] For a discussion of comparative institutional analysis see NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994). *See also* Rubin, *supra* note 37, at 1424 (proposing a new legal discourse that considers efficiency and social justice concerns). The relevant institutions will change depending on the social goal at issue. *See, e.g.*, Nancy J. Knauer, *Reinventing Government: The Promise of Institutional Choice and Government Created Charitable Organizations*, 41 N. Y. L. SCH. L. REV. 945 (1997) (comparing the government, the private sector, and the charitable sector).

[417] *See* Knauer, *supra* note 1, at 338-39 (describing the different measures).

[418] Steve Johnson contends that tax scholarship which deals with sexual orientation should not advance proposals for reform until it "convincingly demonstrate[s] that, on net, the failure to recognize same-sex couples as married hurts them by imposing substantially higher federal income tax liabilities on them." Steve R. Johnson, *Targets Missed and Targets Hit: Critical Tax Studies and Effective Tax Reform*, 76 N. C. L. REV. 1771, 1179 (1998). He notes that unless scholars first answer the distributive question, any reforms designed to help same-sex couples could end up benefitting them doubly if indeed they are already treated better than married couples. *See id.* at 1774. In lieu of extending "special rights," Johnson notes that "the question for those interested in equality would be how to reform the Code detrimentally to same-sex couples . . . not how to reform it beneficially to them." *Id.* In a recent article, Patricia Cain concludes that "[f]or wealthy couples at least, the benefits outweigh the detriments." Cain, *supra* note 25.

[419] For example, Nancy Staudt makes a powerful argument that the current progressive structure of the tax code exempts a large segment of society from participation in policy formation. *See* Nancy C. Staudt, *The Hidden Costs of the Progressivity Debate*, 50 VAND. L. REV. 919, 922 (1997); *see also* Carolyn C. Jones, *Taxes and Peace: A Case Study of Taxing Women*, 6 S. CAL. REV. L. & WOMEN'S STUD. 361, 364 (1997) (noting that "[t]axation is an encounter between the state and citizen that is ordinary and regular").

[420] According to the CBO Report, the overall net result in 1996 was that married couples paid an estimated $4 billion less in federal income taxes on account of their marital status. The CBO Report defines a marriage penalty or bonus as "the difference between the tax liability of a couple filing jointly and their liability if they could file as individuals." CBO REPORT, *supra* note 7. It further provides an extensive

couples, as opposed to single individuals, the benchmark is different. Here, the comparison is between married couples and couples who are not considered married for federal purposes regardless of the quality or strength of their relationship, the extent of their income pooling, or even a valid marriage under state law.[421] For same-sex couples, the immediate cost of the exclusion from the marital provisions is the marriage bonuses to which they are not entitled.[422]

Using married couples as the benchmark invites the conclusion that nothing short of formal equality between same-couples and married couples will address all the concerns enumerated below. This impulse to use the married couple as the reference point shows how even proposals designed to secure greater rights for same-sex couples can be fundamentally heteronormative. Why should the married couple represent the starting point for all discussions?

Tax parity for same-sex couples under the existing marital provisions is not the only reform one could propose. To the contrary, it is only a viable proposal if one accepts that marital status is a relevant and appropriate factor in determining tax liability. If marital status is not deemed a relevant factor, then one alternative would be to dismantle the marital provisions completely. Once the benchmark of the married couple is no longer privileged, there is no measurable harm to same-sex couples and the goal of tax parity is accomplished. Same-sex couples and married couples would be on equal footing because the law would recognize neither couple. Hopefully future tax scholarship informed by queer theory will address these very difficult questions.

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discussion regarding the alternate ways in which marriage penalties/bonuses could be estimated, noting that: "[t]he size and imposition of marriage penalties and bonuses depend on the benchmark used for comparison against actual tax liabilities." *Id.* For example, the CBO Report refers to the possibility of using a "divorce model" where the married couples' tax liability would be compared with their combined tax liability if they divorced. *Id.* (explaining that "[a] divorce model would be appropriate if the relevant baseline consists of the taxes that a couple would owe if they were to dissolve the marriage"). Additional methods of measurement could include assignment of income rules that would be either spouse specific or designed to minimize the couples' combined tax liability. *See id.* (noting that either such model "would more likely reflect possible changes that the Congress might make to alter the tax treatment of married couples").

421 *See* Chambers, *supra* note 104, at 471-72 (discussing the lack of adequate research regarding the extent of income pooling or other forms of sharing within same-sex relationships).

422 Zelenak has criticized Moran and Whitford's work regarding racial bias in the tax code on the grounds that they failed to justify their choice of a comprehensive income tax base as the standard against which to test for racial disparities. *See* Zelenak, *supra* note 8, at 1563. This is curious given that Patricia Cain very clearly frames her analysis as "[w]ho should be the taxable unit under an ideal income tax[.]" Cain, *Same-Sex, supra* note 19, at 100. Zelenak writes approvingly of Cain's work perhaps because she does not identify the joint filing provisions as proof of sexual orientation discrimination (hidden or otherwise), but instead accepts the provisions for the purpose of argument and asks for inclusion for same-sex couples. *See* Zelenak, *supra* note 8, at 1577-78 (stating Cain's work is distinguished from other critical tax scholarship because it details "politically feasible solutions"); *see also* Cain, *Same-Sex, supra* note 19, at 130 (stating "[i]f joint returns are the appropriate reporting device for husband and wife, then I believe joint returns should be available for same-sex couples who consider themselves just as committed as married couples and whose household is just as much a single economic unit.").

1. Tax liability

As explained in Part IV, the costs of the exclusion of same-sex couples in terms of tax liability will vary depending upon the individual tax circumstances of the couple. One thing is clear, however, the more a same-sex couple looks like a traditional married couple (i.e., a single-earner family), the greater the penalty.[423] In addition, the dual-earner high income same-sex couples who seem most likely to benefit from the exclusion are the hardest hit by the exclusion from the estate and gift tax marital deductions.[424] This highlights the fact that a same-sex couple may realize tax difficulties upon the dissolution of the partnership either by death or separation. Accordingly, the relative cost of the exclusion will vary greatly depending upon the individual tax situation of the taxpayers, and it will vary throughout their lives as a couple.[425]

If same-sex couples were subject to the current joint filing provisions, it is possible that a disproportionate number would incur a marriage penalty.[426] This is because probably a greater number of same-sex partners than opposite-sex partners have comparable income levels due to the absence of a wage differential based on gender. In addition, the absence of a gender difference makes it less likely that same-sex couples will have a readily identifiable secondary wage earner.[427]

2. Behavior

Beyond a measurement in tax dollars, the marriage penalty may exact a

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423 At least one commentator has suggested that if same-sex couples are willing to pay the price for marriage, then they should be granted their wish. *See* Debra J. Saunders, *Here Come The Brides*, S.F. CHRON., Mar. 22, 1996, at A25. On the topic of same-sex marriage, Debra Saunders writes:

> I believe in marriage. When it works, when two people are committed to each other's well-being, nothing beats it. If two lovers want to care for each other forever and are so committed that they're happy to pay the marriage penalty, I say, help retire the deficit and let them do it.

Id.

424 The notion of dual-earner high-income same-sex couples benefiting from the exclusion feeds into the rhetoric which paints gays as a wealthy privileged minority who are certainly not in need of "special rights." HERMAN, *supra* note 275, at 111-36; *see also* Johnson, *supra* note 418, at 1776.

425 The CBO Report specifically noted that "[t]he movement of people through a variety of tax statuses during their lifetimes" complicated the ability to measure and assess the relative unfairness of the marital provisions. CBO REPORT, *supra* note 7, at 23 (explaining that "[a]ssessing whether [a couple is] taxed fairly depends on whether their situation is considered in any given year or over their entire lifetime as a couple"). This is equally true of same-sex couples.

426 This is consistent with the observation regarding disproportionate impact made by critical race tax scholarship concerning African-Americans and the incidence of the marriage penalty. *See supra* note 109.

427 Obviously, disparities in income can continue due to differences in race, age, level of education, etc.

cost with regard to its impact on behavior.[428] This may include behavior that implicates certain relationship choices, workforce participation, or the use of various tax planning devices to shift income and resources.[429]

a. Relationship choices

Numerous members of Congress have expressed concern that the marriage penalty causes couples like Sharon Mallory and her live-in boyfriend Daryl to defer their marriages. [430] A related and oft-voiced concern is the fear that couples will divorce for purposes of tax economies.[431] The actual effect of marriage penalties or the potential for marriage penalties is difficult to measure and studies have produced inconclusive results.[432] The decision to marry (or divorce) is both difficult to isolate and very susceptible to considerations of individual emotions and societal mores.[433] The CBO Report notes that "[e]conomists investigating the impact of tax

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428 *See* MCCAFFERY, *supra* note 20, at 3 (noting "[h]ow society taxes married women with children has an impact on basic decisions about work, careers, and family").

429 For a description of devices designed to shift income and resources and their similarity to those Congress sought to eliminate with the joint filing provisions see *supra* note 86.

430 *See Mallory Testimony at Ways & Means Hearing, supra* note 356 (quoting Sharon Mallory's opening remarks to the committee: "[My live-in boyfriend] and I love each other and very much want to be married -- but the IRS won't let us").

431 The expressed concern is typically not that couples would engage in tax-motivated "sham" divorces. *See supra* note 127. Rather, the concern seems to be that couples would be "forced" to go to such lengths to minimize their tax bill. *See, e.g., McIntosh Testimony at Ways & Means Hearing*, 98 TAX NOTES TODAY 19-61, Jan. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (urging the committee to "get rid of the government penalties that push [single] moms toward divorce and illegitimacy"); *Weller Testimony at Ways & Means Hearing*, 98 TAX NOTES TODAY 19-59, Jan. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (asking "is it right that our tax code provides an incentive to get divorced?").

432 *See generally* Gene Steuerle, *Marriage Penalties: Why They Matter*, 98 TAX NOTES TODAY 50-89, Mar. 16, 1998, *available in* LEXIS, Fedtax Library, TNT file (noting that "[t]he effect of marriage penalties on behavior is open to debate"). Although Zelenak agrees that "widespread effects of the tax laws on decisions to marry are unproven," he notes two situations where the disincentive to marry might be significant: (1) the deferral of a year-end marriage until January and (2) a low-income couple who stand to suffer a severe marriage penalty as a result of the phase-out of the earned-income credit. Zelenak, *supra* note 31, at 364-65.

433 For example, the CBO Report explains:

> Couples decide to marry or divorce on the basis of the trade-offs between a broad array of benefits and costs of marriage. Social pressures, the desire for companionship, love, wanting to rear children, and economic considerations may induce people to marry, whereas issues of privacy and psychological and monetary costs may keep couples from marrying or induce them to seek divorce. The tax costs or benefits of marriage are of highly uncertain — but almost surely slight — importance.

CBO REPORT, *supra* note 7.

penalties on marriage have found only small or no effects."[434] The same was true for a decision to divorce.[435] Undeterred by the absence of empirical evidence, Congressional leaders have taken the position that with regard to deferring marriage or filing for divorce — "one family is too many."[436]

From a behavioral standpoint, there does not appear to be an equivalent quandary for same-sex couples. The questions of whether an individual would forego a same-sex relationship in order to avoid adverse tax treatment or whether an individual would marry an opposite-sex partner in order to take advantage of a marriage bonus seem ridiculous. The exceedingly high costs associated with a same-sex relationship in a homophobic society (i.e., threat of violence, legal discrimination, criminalization of intimacy in certain states) suggest that tax economies would not cause individuals to make a choice fundamentally contrary to their sexual orientation.[437] On the other hand, it is somewhat disappointing that no member of Congress has yet thought to argue for the end of the marriage penalty on the grounds that the marriage penalty might drive some taxpayers into same-sex relationships.

b. Work force participation

In addition to these fundamental relationship choices, commentators have identified a secondary wage earner bias that depresses the labor market participation of married women.[438] Empirical studies suggest that "taxing married couples may significantly affect the amount of paid work done by the secondary wage earner because a husband's and wife's incomes are combined to determine tax liability."[439] Not only are two-wage earner couples more likely to encounter a marriage penalty, but the progressive rate structure has the effect of "stacking" the income of the secondary wage earner so that it is taxed, in effect, at the couple's

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434 *Id.*

435 *See id.*

436 *Release From Rep. McIntosh on Marriage Tax Relief*, 98 TAX NOTES TODAY 19-38, Jan. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file. Zelenak responds that in the absence of behavioral effects, "the major objection [to the marriage penalty] must be on grounds of unfairness and inappropriate government favoritism of certain lifestyles." Zelenak, *supra* note 31, at 365. This is certainly something that could be said about the marital provisions in toto.

437 The potential list of the costs associated with a gay or lesbian lifestyle are far too numerous to catalogue in this Article. *See, e.g.*, James Brooke, *Gay Man Dies From Attack, Fanning Outrage and Debate*, N.Y. TIMES, Oct. 13, 1998, at A1 (describing brutal attack on gay college student and his eventual death).

438 *See* MCCAFFERY, *supra* note 20, at 19-20.

439 CBO REPORT, *supra* note 7 (summarizing various studies regarding workforce participation and joint filing provisions).

highest marginal rate.[440] Given that the income of the secondary wage earner is likely less than that of the primary wage-earner, the effect is to subject a relatively modest amount of income to a disproportionately high marginal rate of tax. The concept of "stacking" was specifically mentioned in the course of the congressional debate in which one member of Congress referred to the marriage penalty as "a slap in the face to working women."[441]

In the case of a same-sex couple, it is not clear whether either partner would view herself or himself as the secondary wage earner because the notion of a secondary worker is a gendered concept.[442] In an opposite-sex couple, existing (or traditional) beliefs regarding a woman's role in the household economy and her child rearing responsibilities dictate that more often than not women are considered and indeed see themselves as the secondary wage earner. As discussed above, the absence of a gender differential in a relationship makes it more likely that same-sex partners have comparable income levels, thereby compounding the difficulty of identifying the secondary worker.[443]

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[440] The disincentive for secondary wage earners is a separate, yet related concern. As has been discussed, the marriage penalty applies to two-earner couples, thereby creating one disincentive for the secondary earner to seek marketplace employment. The more important disincentive, however, is the stacking effect that is a product of the joint filing system and the progressive rate structure. The earned income of the secondary wage-earner is "stacked" on top of that of the primary wage-earner. This means that the earned income of the secondary worker is taxed at the couple's highest marginal rate. When this is viewed in conjunction with the marriage penalty, the non-deductibility of child care, the loss of household services, and the increased costs associated with paid employment, it just does not pay some spouses to work. McCaffery applies the insights of optimal tax theory to this analysis and concludes that the tax system should provide relief for secondary workers. *See generally* MCCAFFERY, *supra* note 20. Based on the relative elasticities of male and female workers, McCaffery concludes that optimal tax theory directs taxing married men more and married women less. *See id.* at 5. On a more limited scale, he suggests: "moving to separate filing under the income tax and a second-earner exemption or a sharing of earnings under the social security system; putting in place more generous allowances for child-care expenses; restructuring the fringe benefit system." *Id.*

[441] *Release From Rep. McIntosh on Marriage Tax Relief, supra* note 436 (characterizing the marriage penalty as "immoral" discrimination against working women and calling on Congress to "stand up and defend working women"); *see also McIntosh Testimony at Ways & Means Hearing*, 98 TAX NOTES TODAY 19-61, Jan. 29, 1998, *available in* LEXIS, Fedtax Library, TNT file (noting that the marriage penalty's "[e]ffects on working women and minorities are particularly devastating").

[442] *See* Chambers, *supra* note 104, at 476 (discussing the belief that in a same-sex relationship neither partner will view themselves as a secondary worker). On this point, Chambers writes:

> When neither partner in a couple considers himself or herself the "secondary" worker - when both partners, that is, have strong ties to the labor force - then, while the perversities of the tax laws may affect some decisions to marry, they are less likely to lead either partner to drop out of the labor force or feel economically useless in a manner that he or she resents or later comes to regret.

Id.

[443] Currently, the average female worker earns 75% of what the average male worker earns. *See* Tamar Lewin, *Equal Pay for Equal Work Is No. 1 Goal of Women*, N.Y. TIMES, Sept. 5, 1997, at A20 (citing Bureau of Labor Statistics indicating that a woman's median weekly pay was 75% that of a man's in 1996). This statistic undoubtedly works to increase the likelihood that an opposite-sex couple would have disparities

3. Compliance

Same-sex couples must be able to account to the IRS each year as if they were unrelated individuals. The costs involved in requiring a married couple to file as individuals are routinely cited as a reason against the adoption of individual filing.[444] The Report of the Democratic Caucus of the House Budget Committee rejected the proposal that individual filing be reinstated on the basis that it would "enormously complicate tax preparation and planning"[445] because "the couple will have to cope with a new set of rules on how to allocate income, deductions, and children between the two spouses."[446] Same-sex couples experience this forced allocation every year.

4. Ritual

In addition to compliance costs, same-sex couples are excluded from what has become almost a secular ritual — preparing and filing a joint tax return.[447] One only has to read the editorials in mid-April to see how much Americans love to hate the taxing authorities and tax preparation.[448] Each year 127.2 million taxpayers voluntarily prepare a report to the federal authorities summarizing their fortunes and failures as well as any life events such as marriage, divorce, birth of a child, sale of a personal residence, and death.[449] When same-sex partners report, they do

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in earned income and that a same-sex couple would have a greater correlation.

444 ABA testimony regarding the elimination of the marriage penalty discussed the filing burden imposed on married couples who would be forced to allocate items of income under a separate filing regime. *See ABA Outlines Views on Eliminating Marriage Penalty*, 98 TAX NOTES TODAY 63-31, Apr. 2, 1998, *available in* LEXIS, Fedtax Library, TNT file.

445 *Spratt 'Dear Colleague' Letter to House Democrats on Marriage Penalty, supra* note 350 (reproducing the text of the letter and the Report of the Democratic Caucus of the House Budget Committee on "The 'Marriage Penalty' and Related Proposals").

446 *Id.*

447 Zelenak has called other claims of the symbolic importance of tax measures "dubious." Zelenak, *supra* note 8, at 1528 (referring specifically to Nancy Staudt's assertion that the taxation of household labor would have independent symbolic value).

448 *See, e.g.*, Jonathan Weisman, *Tax Day Triggers Groans, Gripes*, LAS VEGAS REV. J., Apr. 15, 1998, at 1A; April M. Washington, *Barton-led Tax Fighters Make Symbolic Appeal*, DALLAS MORNING NEWS, Apr. 16, 1998, at 1A.

Many communities have begun to turn April 15th into an event complete with entertainment and food, giving the tax filing deadline the feel of a carnival or fair. *See, e.g.*, Tamara Lush & Kerry Hannon, *For Last-minute Taxpayers, Music and Puppies*, USA TODAY, Apr. 16, 1998, at 3A; Gene Meyer, *Celebrating Last-minute Tax Rush Bands, Free Ice Cream Turn Annual April 15 Deadline into an Event*, KANSAS CITY STAR, Apr. 16, 1998, at A1; Jody McPhillips, *Filers Facing Festive Free-for-all*, PROVIDENCE J.-BULL., Apr. 15, 1998, at B1.

449 *See CRS Provides Fact Sheet on Individual Income Taxpayers*, 97 TAX NOTES TODAY 81-59, Apr.

so as individual taxpayers — strangers. Imagine the strain of trying to unscramble your affairs in order to report two completely separate lives that are in fact lived jointly.[450] It is something that same-sex couples have to remember and keep track of throughout the year.

5. Uniformity

As discussed above, the continued exclusion of same-sex couples from the marital provisions violates an expanded definition of couples neutrality, assuming that one accepts that same-sex couples and married couples are similarly situated and that committed relationships should be a relevant consideration for tax purposes. The existence of DOMA suggests that the continued exclusion of same-sex couples could jeopardize horizontal equity among even legally married couples.

If at any point Hawaii, or one of the other states where same-sex marriage cases are pending, recognizes same-sex marriage, there would be a marriage valid under state law but not recognized for federal tax purposes.[451] This differs from the community property upheaval of the 1940s which led to the enactment of the joint filing provisions. There, the question was never whether the couple was legally married for federal purposes. Instead, the question was simply how to allocate spousal income for tax purposes. The uniformity concern with regard to same-sex marriages is more reminiscent of the foreign divorce cases which asked the question of when is a spouse not a spouse?[452]

28, 1997, *available in* LEXIS, Fedtax Library, TNT file (reporting that "127.2 million . . . is most frequently used for the number of individual income taxpayers").

450 When I first discussed this point with a colleague, she assured me in no uncertain terms that tax time is not a period of necessarily intense bonding for her and her husband. I tried to explain that the enforced unraveling of the relationship that tax time mandates is a particularly dislocating and time consuming process. Accordingly, I was very pleased to read Professor Cain's similar characterization: "The law generally refuses to recognize [lesbian] relationships and the tax law is no different. *Every year when they file income tax returns, they are required to fill out forms that force them into separate spheres from each other as though their lives were lived separately.*" Cain, *Taxing, supra* note 19, at 472 (emphasis added).

451 Currently, there are same-sex marriage cases pending in three states: Alaska, Hawaii, and Vermont. *See* Evan Wolfson, *Supreme Moments in the Battle to Win the Freedom to Marry,* (visited July 2, 1998) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=259>.

The pent-up demand for state-sanctioned same-sex marriages may induce many non-resident same-sex couples to travel to Hawaii (or other states) to marry. This would then lead to numerous foreign marriages that may or may not be recognized by the couple's state of residence. *See generally* Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-sex Marriage,* 68 S. CAL. L. REV. 745 (1995).

452 The divorce cases flourished before the advent of no-fault divorce when ex parte foreign divorces were an attractive option. Typically, taxpayers secured a divorce, returned to their state of residence, and remarried, often living for years with the new spouse as husband and wife. Upon the death of the divorced spouse, the IRS questioned the legitimacy of the divorce and refused to recognize the validity of the later marriage. The result was to pronounce that a taxpayer had not remarried but remained married to someone

To illustrate the concern for horizontal equity, assume that a same-sex couple who are residents of Hawaii are legally married under the law of their domicile. Prior to DOMA, they would have been considered married under section 7703, but now federal law will ignore the marriage.[453] If one partner provides more than one-half the support for the other, it may be possible for the supporting partner to claim the supported partner as a dependent for purposes of excluding employer-provided spousal fringe benefits, but the benefits would not be excluded because they were provided to a "spouse."[454] They would be excluded because they were provided to a "dependent."[455] The supporting partner may be able to claim an additional personal exemption for a dependent, if the supported partner's gross income does not exceed the amount of the exemption (i.e., $2700).[456] The only impact of their state recognized marriage would be to quiet any concern that the dependency claim would be disallowed under the "not contrary to local law" caveat of section 152(a)(9).[457] However, if the couple later moves to Georgia, not only would they be unmarried for state and federal purposes, but the additional personal exemption could be questioned in light of the Georgia sodomy statute.[458]

6. Fairness

The very existence of the marriage penalty/bonus creates a sense of unfairness among taxpayers which can seriously undermine the effectiveness of a tax system based on self-assessment.[459] Contributing to this sense of unfairness is the disparate impact of the marriage penalty on the working poor and African-

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whom the taxpayer would have described as his or her former spouse. *See* Estate of Steffke v. Comm'r of Internal Revenue, 538 F.2d 730, 736-37 (7th Cir. 1976), *cert. denied sub nom.* Wisconsin Valley Trust Co. v. Comm'r of Internal Revenue, 429 U.S. 1022 (1976) (decedent's spouse remained married to her first husband as a result of an invalid Mexican divorce); *see also* Estate of Goldwater v. Comm'r of Internal Revenue, 539 F.2d 878 (2d Cir. 1976), *cert. denied sub nom.* Lipowitz v. Comm'r of Internal Revenue, 429 U.S. 1023 (1976) (decedent remained married to first spouse because Mexican divorce was invalid).

For estate tax purposes, this meant that amounts payable to the "widow" did not qualify for the marital deduction because the property did not pass to a "surviving spouse." *See* I.R.C. § 2056(a) (1994).

453 *See* sources cited *supra* note 141.

454 *See supra* text accompanying notes 236-43.

455 *Id.*

456 *See* sources cited *supra* note 242.

457 *See supra* note 244 and accompanying text.

458 The constitutionality of the Georgia sodomy statute was upheld in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

459 For a discussion of the difficulties in instilling the virtue of self-assessment in the taxpaying public see Jones, *supra* note 91.

Americans.[460] It is this sense of unfairness that permeates much of the congressional testimony. As noted earlier, Michael Graetz has identified the marriage penalty as a prime reason that taxpayers have lost respect for the income tax.[461] In his recent book, Graetz concludes his chapter on the marriage penalty with the very strong statement that "when a tax system departs dramatically from the fundamental values of the people it taxes, it cannot sustain public support."[462]

The perception of unfairness among same-sex couples is possibly more pervasive than with opposite-sex couples. Married couples who suffer a marriage penalty may lose respect for the tax code, thereby leading to compliance issues. However, all same-sex couples are excluded from the marital provisions, and therefore, all same-sex couples can potentially perceive the tax code as unfair. Obviously, this undermines compliance and reinforces the alienation of same-sex couples from the federal government, particularly in the event that a couple could have a valid marriage under state law.[463]

Although the discussion of the marriage penalty on Representative McIntosh's web site shows the level of frustration that some married couples feel towards the federal taxing authorities, the couples also recognize that the penalty is an inadvertent result, perhaps thoughtless, but certainly not intentional.[464] That is not the case with same-sex couples and DOMA. There can be no mistake that DOMA signals an intentional exclusion of same-sex couples from the marital provisions of the tax code. In short, the "pro-family" tax legislation that is so popular in Congress does not include my family.

B. Voter Demand and the Public Choice/Public Interest Theory of Legislation

The element of voter demand is consistently absent from critiques of the marital provisions, yet it is arguably the most important point to consider when framing any proposal for reform that involves the recognition of same-sex couples or increasing the tax burden of married couples. The application of public

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460 *See* Brown, *supra* note 109, at 1502.

461 *See* GRAETZ, *supra* note 91, at 7. McIntyre and Oldman attributed the "unhappiness of the taxpaying public" with the joint filing provisions to the inability to justify the provisions under "any theory of an ideal income tax." McIntyre & Oldman, *supra* note 97, at 1595.

462 GRAETZ, *supra* note 91, at 39. It is not clear where this leaves same-sex couples. The majoritarian tone of this conclusion seems to suggest the continued heteronormativity of the tax code and the increasing alienation of same-sex couples.

463 *See* Katharine Q. Seelye, *Republicans Introduce 2 Bills in Fight Against Homosexuality*, N.Y. TIMES, July 18, 1998, at A12 (describing the measures as part of "a visible, broad-based anti-gay campaign by conservatives").

464 *See The Marriage Penalty: Do You Pay More for Taxes Just Because You're Married?* (visited Nov. 18, 1998) <http://www.house.gov/mcintosh>.

choice/public interest theory of legislation helps make the demand side of legislation visible and characterizes DOMA and "pro-family" tax reform as either "rents" secured by an influential interest group or governmental intervention necessary to correct for a perceived failure in the traditional family.[465]

A consistent objection to critical tax scholarship has been its "air of grievance."[466] This objection faults critical tax scholarship for seeming to attribute discriminatory motive or intent to the members of Congress. The critical response to this objection notes that certain institutionalized views do not require conscious animus on the part of lawmakers, simply a failure to look beyond the impact of the legislation on their own reference group. For example, Beverly Moran explains, "legislators who share the same background might create codes that favored their group without necessarily having any conscious, or even unconscious, ill will."[467] A public choice analysis clarifies this point and provides that interest groups are the source of legislation, whereas legislators are simply self-interested brokers. Thus, to the extent Part V illustrates Congress intentionally using the tax code as a means of transmitting values, it is in response to interest group demand.[468]

Central to public choice theory is the conviction that political actors are motivated by self-interest.[469] In the case of legislators this means maximizing his or her chances for reelection.[470] This differs from the traditional public interest view of

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465 A widely cited definition of public choice theory is that offered by Dennis Mueller. Mueller defines public choice theory as "the economic study of nonmarket decision making, or simply the application of economics to political science." DENNIS C. MUELLER, PUBLIC CHOICE II 1 (1989).

466 Zelenak, *supra* note 8, at 1525 n.26 (referring to "the air of grievance that runs through most of the [critical tax] literature").

467 Beverly I. Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax*, 76 N.C. L. REV. 1629, 1630 (1998).

468 *See* Michael Livingston, *Risky Business: Economics, Culture and the Taxation of Highrisk Activities*, 48 TAX L. REV. 163, 165 (1993) (arguing that risk incentives under the tax code are "a cultural phenomenon" designed to express "approval for risk takers in a society that celebrates risk"). He argues that cultural arguments "are properly a part of tax analysis and one that scholars should deal with on a more sophisticated level." *Id.* at 167. He reasons that a law which communicates values is "good" if the value is "appropriate" and the means of communication is "effective." *Id.* at 184-85. "As a general rule, cultural arguments are most persuasive for provisions that reach a large cross section of taxpayers, including taxpayers who need reinforcement in the relevant value." *Id.* at 185; *see also* Moran, *supra* note 467, at 1637 (stating that the tax code "tries to shape, punish, and reward behaviors").

469 This extends to legislators, bureaucrats, and voters. *See* ROBERT E. MCCORMICK & ROBERT D. TOLLISON, POLITICIANS, LEGISLATION AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT 5 (1981) (asserting that elected officials act in their own self-interest as opposed to in the public-interest). *See generally* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971) (analyzing the behavior or motivation of bureaucrats from a public choice perspective); MUELLER, *supra* note 465, at 348 (analyzing the behavior or motivation of voters from a public choice perspective).

470 *See* MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 93 (1981) (noting that reelection is a legislator's primary goal); Daniel Shaviro, *Beyond Public Choice and*

legislation which holds that legislators act to further the public interest by maximizing the general welfare.[471] These competing models of the legislator are equally valuable. Public choice focuses attention on voter demand, whereas public interest theory attempts to identify the aims of the legislation in terms of the general welfare. While neither model necessarily represents the "true" motivation of the legislator,[472] both are immensely helpful in assessing how receptive Congress would be to legislation creating tax parity for same-sex couples.[473] Instead of revealing the "true" motivation of a legislator, the models help clarify the role of voter demand in matters of family taxation and provide insight regarding the influence of interest groups in shaping broader social policy.[474]

Public choice theory posits that every piece of legislation represents a wealth transfer.[475] A demand for legislation is expressed by an interest group. The legislator acts as a broker and matches the demand for favorable legislation with available supply,[476] which is typically absorbed by diffuse constituents who have

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Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980's, 139 U. PA. L. REV. 1, 83 (1990) (characterizing reelection as a necessary prerequisite for future action).

471 Under the public interest theory of legislation, government intervention is the response to market failure, including the chronic under supply of public goods due to free-rider concerns. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) (detailing the nature of public or "collective" goods). For a discussion of public interest theory and its application to tax legislation see Shaviro, *supra* note 470, at 31-64.

472 For example:

> Knowledge of the real motive, if an individual can ever act based on a single motive, remains impenetrable, and testing for it is, at best, unreliable. No doubt the public choice and public interest theories will continue to be used as predictive, as well as prescriptive models. But strict adherence to either theory denies the ease with which motives travel the private/public continuum of human agency and offers only a limited ability to explain the human political condition.

Nancy J. Knauer, *How Charitable Organizations Influence Federal Tax Policy: "Rent-seeking" Charities or Virtuous Politicians?*, 1996 WISC. L. REV. 971, 980 (1996).

473 The determination of whether the legislation is the result of self-interested interest group pressure or concern for the general welfare is irrelevant to our analysis of voter demand and search for political realism. To some extent, the conclusion is foreclosed by the model of the legislator chosen. In other words, if you test for self-interested legislation you could probably find a powerful and influential interest group which can offer legislators a valuable package of benefits in exchange for the desired legislation. The same would be true if you accepted the model of the public interested legislator. "Both models invite a tautology where the actions of a legislator are explained by reference to underlying assumptions regarding the appropriate model of the political actor (self-interested v. public-interested)." Knauer, *supra* note 472, at 980; *see also* Shaviro, *supra* note 470, at 74.

474 The argument that legislators are not simply wealth-maximizing self-interested actors is a constant form of criticism leveled against public choice theory. *See* Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and 'Empirical' Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 206 (1988).

475 *See* MCCORMICK & TOLLISON, *supra* note 469, at 2.

476 Tax scholarship has introduced the concept of the legislator as a rent-seeking actor, rather than a passive broker simply mediating the forces of supply and demand. *See* Fred S. McChesney, *Regulation,*

not organized as an effective interest group.[477] As a broker, the legislator is paid for his or her services with votes or money.[478]

The "capture" of the legislature by an interest group refers to the interest group's disproportionate power to secure favorable legislation or forestall negative legislation.[479] This generally requires the ability to monitor the activities of the target institution and offer valuable items of exchange.[480] The "pro-family" interest groups are not shy about their desire to influence Congress. A visit to any of the numerous web sites maintained by the organizations reveals their overwhelming interest in what happens in Congress and Washington, D.C. in general.[481] The home page of the Christian Coalition includes an advertisement for its lobbying kit.[482] Organized on an ideological basis, their pursuit of broad-based "pro-family" tax reform is a form of "rent-seeking" comparable to attempts to secure favorable economic regulation.[483] In return for "pro-family" tax reform, they offer politicians votes, campaign contributions, and ideological appeal or the "pro-family" stamp of

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Taxes, and Political Extortion, in REGULATION AND THE REAGAN ERA: POLITICS, BUREAUCRACY AND THE PUBLIC INTEREST 223, 233-35 (Roger E. Meiners & Bruce Yandle eds., 1989).

477 *See* MCCORMICK & TOLLISON, *supra* note 469, at 15.

478 The medium of exchange can include items other than votes and money. *See* Knauer, *supra* note 472, at 1047-53 (citing votes and endorsements, campaign contributions and other revenue opportunities, future economic opportunities and present commitments, public relations, and taste for symbolic legislation). In addition, legislators engage in a wide range of activities that are designed to maximize chances of reelection, such as sponsoring "pork barrel" legislation, "logrolling," and constituent casework. *See generally id.* at 1044-45 (explaining these strategies).

479 Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 48 (1991) (discussing that the determination of "capture" depends on one's view of what level of influence is appropriate in the first place).

480 *See* Knauer, *supra* note 472, at 1040-47 (discussing the mechanics of capture). Edward Zelinsky has suggested that interest group capture of tax institutions should be relatively infrequent, at least when compared with single issue direct spending committees or agencies. *See* Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165, 1166 (1993). The apparent sensitivity of matters of family taxation to voter demand suggests an interesting avenue for future study.

481 The Christian Coalition home page has a congressional update section that offers hypertext links to position papers on various items of proposed legislation. *See* <http://www.cc.org>. It also offers a download for "Christian Coalition's 1998 Congressional Scorecard." *Id.*

482 The advertisement features Uncle Sam in his characteristic "I want you" pose. The text reads: "Politics is not just a hobby . . . it's your duty! Christian Coalition Lobbying Software." *Id.*

483 "Rent-seeking" refers to the process of securing monopoly rents through government intervention. *See* MUELLER, *supra* note 465, at 229-30 (explaining the monopoly rents are created by lost consumer surplus that would have existed in a competitive market). "Rent-seeking" activities have high transactions costs and may produce social waste. *Id.* at 230-31 (quoting James Buchanan).

approval.[484]

With this background, tax relief for married couples represents a degree of recognition or reward for preexisting or preordained marriages. Unlike the "pro-family" tax reform, DOMA seems to implicate wholly non-market interests. However, queer theory explains that the intense conviction that marriage must be "defended" from intrusion by same-sex couple is central to the maintenance of the hetero-homo binary relationship.[485] The assertion by gay and lesbian activists that same-sex couples are just like married couples threatens to blur the boundary between the heterosexual and the homosexual.[486] During the DOMA debate, members of Congress spoke ominously of the danger of "redefinition."[487] The threat posed by "redefinition" takes on new meaning when viewed within the context of the hetero-homo opposition. If marriage is defined to include homosexuals, what then is left to be heterosexual?

In the case of both DOMA and "pro-family" tax reform, it would be relatively easy to establish that they represent two clear examples of legislators acting in the public interest.[488] In each case, the wide support for the proposals signals a consensus that governmental intervention is needed to respond to something akin to a market failure: the perceived under supply of what the "pro-family" organizations refer to as "intact" families. As discussed in Part V, this government intervention then takes two different forms. First, traditional marriage is defended against redefinition and expansion. Second, Congress then provides tax incentives for the formation of traditional single-earner families. In each case, the public interest is served and general welfare maximized.

C. *Institutional Alternatives*

After identifying a goal and relevant institutions, it is important to evaluate the available alternatives. Here, it is important to incorporate the results of any

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484 For a discussion of legislators who exhibit a taste for ideology or symbolic legislation see Knauer, *supra* note 472, at 1052-53. *See also* Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191 (describing the role of ideology and taste); Shaviro, *supra* note 470, at 86 (discussing the motivation of some legislators to be known as superior policy makers).

485 *See supra* text accompanying notes 54-57.

486 *See* source cited *supra* note 54.

487 *See* sources cited *supra* note 318.

488 Even if one accepts that the legislation was enacted or received favorably because it was in the public interest, determining the public interest was certainly not a deliberative process. DOMA generated very little debate on the merits of same-sex marriage, but instead served as an occasion to confirm with near unanimity the sanctity of the male/female union. The broadening of "pro-family" tax reform to include all married couples was also accomplished by an appeal to the traditional family. Throughout this, the inherent value of the opposite-sex couple is assumed and is not a topic of debate or interrogation.

interest group behavior that might give rise to a conclusion of capture. For example, the recent experiences of DOMA and "pro-family" tax reform indicate that immediate legislative measures perceived as legitimizing same-sex couples might prove unlikely, at least in the short run.[489] To be successful, legislative action must counter a strong morality discourse. This notwithstanding, there remain several institutional alternatives that are competent to offer varying degrees of relief.

The desirability of any particular institution depends not just on its receptivity to interest group pressure but also on the nature and quantum of relief offered. If the goal is full tax parity under existing law for same-sex couples, then there is no suitable relief short of congressional action. However, given a less comprehensive goal, there are numerous steps that can be taken on the agency or judicial levels.

For example, the executive branch in the guise of the Department of Treasury and/or the IRS could be a site of future regulatory or administrative decision-making that benefits same-sex couples. Either of Patricia Cain's proposals regarding the tax treatment of support payments could be implemented in this way.[490] In the case of private rulings and same-sex relationships, the IRS has taken the position that DOMA forecloses the argument that domestic partnership grants spousal status.[491] On the other hand, there have also been several agency gestures that indicate a willingness to consider issues of sexual orientation in an objective manner, including the implementation of a sensitivity training program for IRS staff and an agency wide policy against discrimination on the basis of sexual orientation.[492] Even if the desired targeted relief regarding the characterization of support payments between same-sex partners were forthcoming, it would remain to be seen whether the IRS would act contrary to articulated public policy sentiment

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489 *See* Richard L. Berke, *Chasing the Polls on Gay Rights,* N.Y. TIMES, Aug. 2, 1998, at sec. 4, p.3 (reporting that 84% of those polled believed that gays should not be discriminated against in employment, whereas only 56% approved of same-sex marriage).

490 For a discussion of Cain's recommendation concerning the income tax consequences of support payments to a same-sex partner see *supra* note 25. For a discussion of Cain's recommendation concerning the gift tax consequences of support payments to a same-sex partner *see supra* text accompanying notes 217-19.

491 *See supra* text accompanying notes 141-70.

492 The IRS has recently relaxed its restrictions on gay and lesbian charitable organizations applying for tax-exempt status. *See Lesbian Group Gets Exempt Status After Flap with IRS,* 98 TAX NOTES TODAY 92-5, May 13, 1998, *available in* LEXIS, Fedtax Library, TNT file. It has also ordered a sensitivity training program for its field agents. *See IRS Will Train Agents to be Fair and Impartial to Gay Groups,* 98 TAX NOTES TODAY 155-3, Aug. 12, 1998, *available in* LEXIS, Fedtax Library, TNT file. The agency-wide policy prohibiting discrimination was in response to a complaint raised by the Lambda Legal Defense Fund. *See Owens Says IRS Will Train Agents to Treat Gay Groups Fairly,* 98 TAX NOTES TODAY 155-18, Aug. 12, 1998, *available in* LEXIS, Fedtax Library, TNT file (quoting Owens' letter to Lambda).

or if its actions would prompt a congressional over ride.[493] Although the IRS is less susceptible to interest group pressure than the legislature, lately it has been heavily monitored by Congress.[494]

The courts also offer potential relief, particularly to the extent that *Poe v. Seaborn* and *Lucas v. Earl* are pivotal cases in the tax treatment of income pooling arrangements. For example, overruling *Lucas v. Earl*[495] would remove a major stumbling block for same-sex couples who desire to pool income and would revitalize private contractual arrangements to split income for tax purposes.[496] Presumably, it would permit an anticipatory assignment of income provided the underlying contractual obligation was enforceable under state law.[497] This would be broader in scope than the limited exception for support payments discussed above and potentially would not apply solely to individuals in intimate relationships.

A decision overruling *Lucas v. Earl* would permit same-sex couples to shift income to realize tax economies, as well as non-tax relationship benefits.[498] However, without corresponding gift tax relief (and non-recognition of gain provisions), it would offer only a partial opportunity to wealthier same-sex couples.[499] Without this additional relief, even same-sex couples of moderate means could experience adverse tax consequences upon the dissolution of the partnership and any concurrent "unscrambling" of assets.[500]

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493 Congress recently let stand an Executive Order that banned job discrimination on the basis of sexual orientation in the ranks of the administration. *See* Lizette Alvarez, *House Supports Ban on Bias Against Gay Federal Employees,* N.Y. TIMES, Aug. 6, 1998, at A16. Although the inability of Congress to overturn the Order could be read as respect for the separation of powers, the Executive Order also dealt with job discrimination which is more palatable to members of Congress. It could represent congressional notice of the polls that indicate that 84% of those surveyed oppose workplace discrimination on the basis of sexual orientation. *See* Berke, *supra* note 489.

494 *See* Zelinsky, *supra* note 480, at 1192.

495 Such repeal could permit all income shifting or adopt the more limited proposal advanced by Patricia Cain that would permit the shifting of support payments. *See generally* Cain, *Same-Sex supra* note 19.

496 Another possibility is the repeal of *Poe v. Seaborn,* but this would have little impact without the concomitant repeal of the joint filing provisions.

497 *See* sources cited *supra* note 165.

498 These non-tax benefits include the ability to shift assets in order to avoid probate and possible will contests.

499 *See supra* text accompanying notes 211-13.

500 *See supra* text accompanying notes 250-74.

VII. TAX SCHOLARSHIP: TOWARD A SCHOLARSHIP OF ARTICULATION

The Introduction makes three basic observations regarding same-sex couples and federal tax policy: marital status is a pervasive factor throughout the tax code, the marital provisions are prescriptive and have symbolic impact, and questions involving same-sex couples (or even marriage in general) are articulated in terms of morality. These three initial observations offer corresponding recommendations to tax scholarship or political scholarship in general: interrogate assumptions, articulate difference, and evaluate avenues for reform based on strategic assessments. These points should help develop a scholarship that is sensitive to the complexity of identity, the pitfalls of essentialism, and the strategic considerations of "political realism."[501]

A. Caution What We Too Easily "Mistake for Nature"

Couples neutrality represented a demand by taxpayers/voters that the federal government recognize the fundamental ordering principal of society — the married couple — as the relevant taxable unit, regardless of the economic realities of the relationship. This signifies one of the many ways federal law privileges married couples, suggesting a strong, and largely unexplored, preference for marriage. The progressive critique of the marital provisions has focused primarily on the marriage penalty while leaving the marital provisions which do not disadvantage married couples in place and seemingly unremarkable. This targeting of the marriage penalty represents heteronormative "selection bias" and limits our understanding of the current marital regime.

Critical tax scholarship has analyzed the tax code through the lens of critical race theory and feminism. These efforts have caused us to view the joint filing provisions, the mortgage interest deduction,[502] and the child care credit[503] in a different light. However, the relative absence of sexual orientation from these critiques risks revealing a hidden bias while practicing the very type of exclusion that the critique purports to challenge. The effect is to produce a series of static

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501 Zelenak, *supra* note 8, at 1524 n.24.

502 *See* powell, *supra* note 22, at 83 (asserting that taxation is one means by which the United States has "penalized the African-American community and subsidized the white community by subsidizing and reifying racial segregation and racial inequality in the distribution of resources in the United States").

503 *See* Mary L. Heen, *Welfare Reform, the Child Care Dilemma and the Tax Code: Family Values, the Wage Labor Market, and the Race- and Class- Based Double Standard, in* TAXING AMERICA, *supra* note 20, at 322, 339 (contending that current tax policy regarding the child care expenses of low income taxpayers "operates at cross purposes to current welfare reform proposals and creates a double bind for welfare mothers"); MCCAFFERY, *supra* note 20, at 133 (arguing for a deduction for child care costs not to exceed the earned income of the secondary worker).

critiques which mask the interconnectedness of identity by an appeal to a false universal. Just as women have had to argue that all taxpayers are not men, lesbians have had to argue that all women are not married to men. Just as critical race scholars argue that all taxpayers are not white, gay men and lesbians of color have had to argue that all taxpayers of color are not heterosexual.[504]

Queer theory offers the opportunity to put it all up for grabs. As discussed in Part II, queer theory does not construct an alternative identity to gay and lesbian. Instead, it offers a position against the normal or the normative. Queer is simply a vantage point and a sex-same libidinal object choice is not a pre-requisite.[505] This vantage point equips one to see not simply as a gay or lesbian subject but ideally as any subject that is outside or opposite the normal. Thus, from an oppositional stance against the normal, one can begin to contemplate the impact of race, gender, sexual orientation, disability, class, and other outsider identifications.

Edward McCaffery's groundbreaking book TAXING WOMEN can help illustrate the application of this form of interrogation. Although titled "Taxing Women," the book deals almost exclusively with married women. This is consistent with the feminist perspective on the taxation of the family which has focused primarily on the marriage bonus/penalty and the gender specific allocation of responsibility within the marital relationship regarding child rearing and work outside the home. Like much critical scholarship written from a feminist perspective, the proposals for reform advocated by TAXING WOMEN are so gendered that they have no applicability to same-sex couples.[506] There is nothing wrong with this. The failure to consider how the recommendations translate to same-sex couples does not in any way diminish the book's considerable merit and insight into gender specific behavior within a marital relationship, such as the allocation of child rearing responsibility and work outside the home. It simply illustrates that a critique that places gender and only gender at the fore is inadequate to deal with issues of sexuality (or race).[507]

However, it is important to look at how McCaffery addresses the inapplicability of his proposals to same-sex couples, particularly lesbians who

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504 *See* Hutchinson, *supra* note 52, at 563.

505 *See* Thomas, *supra* note 59, at 85.

506 In fact, McCaffery's view of the family is so gendered that his proposal for reform assumes the existence of an essential husband who can be taxed more and a wife who can be taxed less. In a same-sex relationship this makes little sense even assuming gender roles because there is no outside force (i.e., gender expectations) determining whose salary is the secondary wage. There is also Nancy Dowd's concern that gendered reform can serve to reinforce existing gender roles. *See* Nancy E. Dowd, *Women's, Men's and Children's Equalities: Some Reflections and Uncertainties,* 6 S. CAL. REV. L. & WOMEN'S STUD. 587, 588 (1997). She notes that "by making it easier for women to do wage work we may be conveying the message that wage work is the preferred gender role for women." *Id.*

507 *See* Rubin, *supra* note 39, at 32 (rejecting feminism as the privileged site for the study of sexuality).

would otherwise be included within the category of "women." Although McCaffery notes in passing that issues affecting the taxation of same-sex couples could justify another book,[508] his major contention seems to be that the category of married mothers is so large that it affects all women.[509] This is because employers "consider all women in their relation to it [the class of married mothers]"[510] and the tax code was constructed with married mothers in mind.[511]

McCaffery's assumption that *all* women are primarily treated as if they were potential mothers is a prime candidate for interrogation. Truthfully, when applying for a new job, I have never worried that my prospective employer would think that I lacked commitment to the workforce because stay-at-home motherhood beckoned.[512] I have worried, however, that the employer did not approve of or like or even tolerate lesbians. Now, I could stop my interrogation there and be satisfied with identifying how this heteronormative assumption fails to take into account *my* particular identity configuration (*i.e.*, white, lesbian, lawyer). However, it is much more productive and enlightening to continue. Following an observation made by Mari Matsuda,[513] let's see what happens if I then ask what impact race, disability, or class would have on the universal statement that women are viewed by employers as secondary workers. Surely, it only takes a little bit of coalitional empathy to

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508 This relegates the tax concerns of "same-sex couples" or "racial or ethnic groups" to one of "many books [that] could follow." MCCAFFERY, *supra* note 20, at 3 (noting that "[m]any books could follow: about taxing men, single-parent households, racial and ethnic groups, same-sex couples, the elderly, nonresidents, and so on").

509 McCaffery notes the number of women who marry and the number of women who bear children and concludes that "all mothers, married or not, are affected by how the law treats married women with children." *Id.* at 2-3. This leaves out women without children regardless of marital status.

510 *Id.* at 3.

511 McCaffery's rationale is that the tax code views women as married mothers, so "we will miss much of the story if we fail to concentrate on working wives and mothers." *Id.*

512 Although McCaffery mentions the dangers of essentialism, I believe that his understanding of essentialism is linked to biological determinism, rather than to universalizing characterizations. In TAXING WOMEN, McCaffery acknowledges that "[t]here is of course much that is offensive in reducing women to categories like 'single mother' or 'married with children,' and I don't want to contribute to that effect." *Id.* In a later article, McCaffery remarks, "I do not take myself to be an essentialist -- someone who is committed to a view that there are distinct 'male' and 'female' natures, spirits or geists[.]" Edward J. McCaffery, *Afterword: Last Words(?): Towards a Feminization of Wealth*, 6 S. CAL. REV. L. & WOMEN'S STUD. 605, 608 (1997). Even if McCaffery does not ascribe to an essential female nature, the universalizing mantle of his book constructs an essential woman who is a married mother. For a discussion of the "geist" or "essence" brand of essentialism see Halley, *supra* note 2 (describing the differences of opinion within the lesbian and gay communities as well as in the antigay opposition regarding whether sexual orientation is an innate characteristic (i.e., essential) or socially constructed (i.e., fluid and contingent)).

513 *See* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (explaining the interlocking and mutually reinforcing nature of forms of subordination).

conclude that an African-American and/or disabled and/or poor woman would experience a similar (yet different) set of anxieties independent of any perception that the employer has about white, middle class, married, heterosexual, mothers.

B. Toward a Scholarship of Articulation[514]

The next step is to work toward articulating the endless differences and commonalities revealed by the process of interrogation. Although it is not possible to consider every identity configuration within every proposal or critique, at a minimum a scholarship of articulation requires learning to resist the totalizing impulse that drives us to declare that our scholarship speaks a universal truth just recently discovered.[515] Concerns of intellectual honesty and accuracy dictate that a "scholarship of articulation" make explicit the position of the author.[516]

In order to articulate difference, it is important to understand or be aware of different positional or identity configurations. For example, it is clear from the discussion of DOMA and "pro-family" tax reform in Part V that approaching issues of sexual orientation from a minority or ethnic model is insufficient to conceptualize the extent to which morality controls the debate concerning same-sex relationships. Remember, there is nothing unintentional about the exclusion of same-sex couples from the marital provisions.[517] Arguments for the inclusion of same-sex couples that are based on formal equality misapprehend the actual policy issue at hand. It is not simply an abstract question of what is the appropriate taxable unit, rather it is a demand for the validation of same-sex couples and what some would call pejoratively a gay or lesbian lifestyle.[518]

Arguments based on claims of formal equality do not engage or even acknowledge the strong bias in Congress (and elsewhere) against same-sex relationships. For example, with regard to a gift tax proposal that would benefit

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514 This phrase is borrowed from Evelynn Hammond's call for a "politics of articulation" offered in connection with her analysis of black lesbians under queer theory. *See* Hammonds, *supra* note 59, at 152.

515 *See* Hutchinson, *supra* note 52, at 563.

516 *See id.*

517 The recent commentary on critical tax scholarship has pointed disapprovingly to a conspiracy stance, despite attempts to explain that no one thinks that the members of Congress are staying up at night trying to devise ways to increase the incidence of taxation on African-Americans. In many ways, of course, the systemic racism that can lead to the unremarkable nature of the provisions outlined by Moran and Whitford is even more insidious and more difficult to address than vocal racism. *See also* Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1729 (1998) (noting that he had "some bones to pick with feminist scholarship in this area, namely, its innuendos of a male chauvinist plot").

518 For example, Patricia Cain frames the relevant question of tax policy as: "Who should be the taxable unit under an ideal income tax?" Cain, *Same-Sex*, *supra* note 19, at 100.

same-sex couples, Patricia Cain writes: "[t]here is no reason not to extend this rule to lesbian and gay couples."[519] As described in Part V, Congress seems to believe very strongly that there are indeed a wide variety of reasons not to extend federal benefits to same-sex couples. What Cain means is that there is no reason within a tax policy argument based on the principle of couples neutrality as justified by pooling behavior.

Even if we recognize that a discussion of sexual orientation is primarily a morality discourse, there are wide disparities with respect to the impact of this discourse depending on overlapping identity configurations. The experience of non-normative sexual orientation differs depending upon class, race, disability, gender, age, marital status, employment, geography, education, and political affiliation.[520] To assert otherwise, invites the same form of essentialism that have taken lesbians and/or women of color so long to unravel within feminism. Within the category of sexual orientation when gender and race are left unmarked, the default position is white and male.[521] Within feminism, the default setting is white and heterosexual.

The failure to articulate differences leaves the default settings in place. A scholarship of articulation requires new and innovative ways to disrupt or reveal those default settings. The easiest way to go about this is to include sexual orientation as an add on: race, gender, class, ethnicity, *or* sexual orientation. The shortcoming of this approach is that the reader is left with a sense that there are five

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519 *Id.* at 129.

520 *See* Rubin, *supra* note 39, at 22 (discussing the mitigating effects of race and class). Describing the intersection of sexuality with other identity configurations, Rubin writes:

> Sex is a vector of oppression. The system of sexual oppression cuts across other modes of social inequality, sorting out individuals and groups according to its own intrinsic dynamics. It is not reducible to, or understandable in terms of, class, race, ethnicity, or gender. Wealth, white skin, male gender, and ethnic privileges can mitigate the effects of sexual stratification. A rich, white male pervert will generally be less affected than a poor, black female pervert. But even the most privileged are not immune to sexual oppression. Some of the consequences of the system of sexual hierarchy are mere nuisances. Others are quite grave.

Id.

521 For a discussion of the absence of race from gay and lesbian scholarship see Hutchinson, *supra* note 52. Although queer theory has the potential to be inclusive of race, there is considerable concern that as currently practiced queer theory is white and male. Elisabeth Weed and Naomi Schor ask, "does 'queering' a primarily white heteronormative hegemony necessarily throw its previously unmarked whiteness into relief? Or is the political act of 'queering' in itself rooted in, and therefore reproductive of, a racial whiteness oblivious to its own conditions of privilege?" Elisabeth Weed & Naomi Schor, *Introduction* to FEMINISM MEETS QUEER THEORY x (Elisabeth Weed & Naomi Schor eds., 1997).

Expressing skepticism on the point of gay homogeneity, Joan Howarth offers the following food for thought: "You, me, James Baldwin, Gertrude Stein, J. Edgar Hoover: we are all gay together." Joan W. Howarth, *First and Last Chance: Looking for Lesbians in Fifties Bar Cases*, 5 S. CAL. REV. L. & WOMEN'S STUD. 153, 153 (1995). She correctly points out that contending that the term "gay" is simply a "generic term," such as "human being," is simply wrong. *Id.* "[T]he classification 'homosexual' or 'gay' highlights sexual orientation related to object choice and simultaneously submerges race, class and gender." *Id.*

different stories being described, not a multitude of stories or a convergence of stories.[522]

In this regard, critical tax scholarship can benefit greatly from the work on intersectionality that has stressed the importance of addressing the complexity of identity. Specifically in connection with queer theory, Darren Hutchinson advocates the use of the term "multidimensionality" in place of intersectionality, stating that "it more effectively captures the inherent complexity and irreversibly multilayered nature of everyone's identities and of oppression."[523] Discussing the reluctance of gay and lesbian legal theory to address issues of race, Hutchinson offers multidimensionality as a means to stop seeing issues of racism, classism, and homophobia "as separable, mutually exclusive, or even conflicting phenomena."[524] What this means for critical tax scholarship is that we should

> make explicit the racial and class (and other) assumptions that undergird our theories, realize these assumptions might (and likely do) limit the application of our theories, strive to discover the vast differences among individuals in oppressed social groups, and learn how these differences should (and do) affect theory and politics.[525]

The multivalent nature of identity[526] insures that every article will not incorporate every viewpoint.[527] There is no dishonor in writing a proposal or a critique that is less than comprehensive, but there is much to be lost in presenting a partial picture as a false universal. Returning for a minute to McCaffery's suggestion that the tax treatment of same-sex couples could warrant a separate book, the practice of articulation would suggest that McCaffery acknowledge the overlap and state who his book does not address within its title — lesbians and women in same-sex relationships. The claim of partiality would not detract from his creative proposals. It would not mean that I would not read the book. However,

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522 As Gloria Anzaldua explains, "[i]dentity is not a bunch of little cubbyholes stuffed respectively with intellect, race, sex, class, vocation, and gender. Identity flows between, over, aspects of a person. Identity is a river — a process." Ruth Goldman, *Who is That Queer Queer? Exploring Norms Around Sexuality, Race, and Class in Queer Theory, in* QUEER STUDIES 173, *supra* note 49 (quoting Anzaldua).

523 *See* Hutchinson, *supra* note 52, at 641.

524 *Id.* at 640.

525 *Id.*

526 *See also id.* at 846 (describing "identity formation" as "an ongoing and multivalent process").

527 Hutchinson notes that this "does not require every piece of scholarship to reflect everyone's personal histories." *Id.* at 640.

it would mean that I would not read it expecting to see me.[528]

As a final note, the practice of articulation can add considerably to any discussion of fundamental tax reform. Critical tax scholarship largely addresses pre-existing market distortions or gender role expectations under the current taxing system. In this way, it seeks to deploy the insight of critical study in an instrumental manner to address a present bias. The next step is to begin a foundational discussion regarding the construction of an (in)essential taxpayer.

At present, the assumptions regarding the nature of the taxpayer remain unspoken or unquestioned. The model taxpayer is a rational liberal subject; an actor imbued with considerable latitude of choice and autonomy. The taxpayer generally has no articulated identity, but of course that means that the taxpayer is white, male, heterosexual, and marries at least once.[529] This taxpayer exists in a competitive market where as a rational actor he seeks to maximize profit and gain. Decisions that are constrained by profit motive generally receive preferential tax treatment to those that are considered personal in nature.

This belief in the rational profit-maximizing taxpayer is clearly reflected in the demarcation between business expenses and personal non-deductible expenses. In the case of deductible business expenses, a taxpayer's choice is constrained by the demands of the market and those "appropriate and necessary" considerations to maximize profit and gain.[530] Outside of the business arena, however, personal taste dictates and the choice of work clothing, whether to commute to work or walk, and whether to have children are considered wholly personal choices.[531] Tax consequences arise when the taxpayer exercises his ability to choose — his autonomy — unconstrained by profit motive. Of course, this belief in unfettered choice and autonomy does not reflect the lived reality of many taxpayers.[532] Thus, the insights of critical tax scholarship can help construct a new (in)essential taxpayer informed by economics, political theory, concerns of equity, and yes, even

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528 This is because any discussion of my life under the tax system requires its own book. *See* MCCAFFERY, *supra* note 20, at 3.

529 The absence of articulated identity assumes majority identity from within which it is not necessary to be conscious of one's identity. For example, when one talks of race the immediate thought is non-white. When one discusses sexual orientation, the immediate thought is homosexuality. In this way, whiteness and heterosexuality are unmarked.

530 Brown and Fellows note that the "choices" made by an entrepreneur are considered "sufficiently constrained by the profit-making motive as to make choice irrelevant." Brown & Fellows, *supra* note 20, at 5.

531 As discussed in Part III, marriage is not considered a personal choice. *See supra* text accompanying notes 125-27.

532 *See* Brown & Fellows, *supra* note 20, at 9 (noting that the extent of available "choices" is related to "societal position"). This is something that never escapes notice of my students who seem to know intuitively that a taxpayer's choices in life bear some relationship to his class, race, gender, sexual orientation, and a wide variety of intersecting identity configurations.

queer theory.[533]

VIII. CONCLUSION

Critical tax scholarship has shown that tax is indeed political. Accordingly, it makes sense that the battle over the changing face of the American family is also taking place within the tax code. How tax legislation responds to this change can tell us a good deal about not just how society values families but how it defines them and why. A study of "pro-family" tax reform shows that it is part of a larger political agenda designed to strengthen traditional marriage which includes stopping same-sex marriage and securing tax benefits for all married couples.[534] Taxation is an attempt to resolve the most basic question of how to apportion the burdens of citizenship. The choices that a society makes concerning the definition of its tax base reveal fundamental judgments regarding issues of fairness, autonomy, and equality.[535] If Congress eventually adopts one of the bills geared to provide tax relief for all married couples, the result will be a massive tax cut for taxpayers who are in state-sanctioned relationships (i.e., opposite-sex married couples).[536] This presents a direct challenge to the truism of tax policy that taxation is morally neutral.[537]

The exclusion of same-sex couples from the marital provisions is intentional. As a result, there is nothing hidden or covert about the heterosexist bias of the tax code. There is no neutral principle at work. The rationale for the exclusion is not that same-sex couples do not pool their resources like opposite-sex married couples. Instead, the rationale for the exclusion is based on the beliefs that a same-sex couple is not a family, that no civilized society has ever countenanced such unions, and that our Judeo-Christian heritage forbids them.[538]

Although not hidden, heteronormativity remains difficult to identify because as an elemental ordering feature of society it is so pervasive that it is unremarkable.[539] Perhaps for this reason, the existing progressive critiques of the

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533 This would include feminist insights regarding gender and critical race insights regarding the construction of race.

534 *See supra* text accompanying notes 277-83.

535 *See* Kornhauser, *supra* note 20, at 1609 (noting that "[t]axes also tell us more generally about our society since what we tax and how we tax reflect a multitude of philosophical, social, and political choices").

536 *See supra* text accompanying notes 382-87.

537 *See supra* note 29 and accompanying text.

538 *See supra* text accompanying notes 292-339.

539 This is the definition of "heteronormativity." *See supra* note 13.

marital provisions have remained only partial. The feminist view focuses on the unfavorable tax aspects of spousal unity and produces a gender analysis that has little relevance to same-sex couples.[540] Scholars writing from a gay and lesbian perspective argue for equal treatment. Both fail to address the heteronormative starting point for the marital provisions — taxpayers demanded that the state recognize the fundamental unit of society as the fundamental unit of taxation.[541]

Queer theory does not get sidetracked by bare claims of equality or a gender-based analysis that ignores issues of sexual orientation. It offers a perspective from which to consider the marital regime in toto. It acknowledges that discussions of sexual orientation are primarily morality discourses and that heterosexual society will vigorously defend its institutions against any perceived encroachment by homosexuals.[542] This explains both the terms of the congressional debate on DOMA and its ferocity.[543] Finally, the insights of queer theory may help forestall the essentializing tendencies of some of the critical tax scholarship.

Although queer theory can help conceptualize the competing characterizations of marriage and family, it offers only a provisional, guerilla-type approach to political change.[544] Strategic institutional choice and a realistic assessment of the demand side of legislation can reduce the level of disconnect between the academy and the political process. Consideration of the demand side of legislation might further induce scholars to stop dismissing the morality discourse of the opponents of same-sex relationships as irrelevant. It may be time, as some scholars suggest, to abandon "the moral bracketing imposed by political liberal theory"[545] and begin a discussion of the moral good of same-sex relationships.[546]

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[540] The critical race analysis also does not address heteronormativity or the treatment of same-sex couples. *See* Hutchinson, *supra* note 52, 565-66.

[541] *See supra* text accompanying notes 82-89.

[542] *See* sources cited *supra* note 57.

[543] It also explains the strong prescriptive nature of any discussion regarding sexual orientation.

[544] The inability of queer theory to propose constructive political strategies is a reoccurring criticism. For a discussion of "queer politics" see SHANE PHELAN, GETTING SPECIFIC: POSTMODERN LESBIAN POLITICS 151 (1994) (defining "queer politics" as an "articulation of a coalitional identity").

[545] Chai R. Feldblum, *A Progressive Moral Case for Same-Sex Marriage*, 7 TEMP. POL. & CIV. RTS. L. REV. 485, 493 (1998); *see also* Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871 (1997).

[546] Returning for a moment to the lessons of queer theory, the pervasive nature of heteronormativity suggests that less instrumental "legal" objects are also potential sites for disruption such as media representations of same-sex relationships, militant visibility of same-sex couples, and perhaps, on occasion, a law review article.