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Taxing Polygamy

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ABSTRACT

The tax law treats married and unmarried taxpayers differently in several respects. Married persons, for example, can file and pay their taxes as a unified taxpayer, with rates that are different than those that apply to unmarried taxpayers. This different treatment of married persons has elicited criticism over the years. Some of the more salient criticisms include that married persons do not necessarily function as an economic unit, that joint filing discourages women from working, and that the various exclusions from the joint filing regime—including gay couples—is unfair.

This Article looks at joint filing through the lens of polygamy. Polygamy stretches joint filing beyond what it can handle: while the current tax rates could accommodate same-sex couples without any substantive changes, applying the current married-filing-jointly tax brackets to polygamous taxpayers would have absurd—and often unjust—results. Polygamous marriage is not only quantitatively different than dyadic marriage—it is qualitatively different. These quantitative and qualitative differences render traditional joint filing an untenable fit. Ultimately, I conclude that changing from a joint filing system to a mandatory individual filing system that recognizes marriage for certain purposes would be the fairest and most administrable way to treat marriage. Because most commentators think, however, that eliminating joint filing will not happen in the foreseeable future, I also provide a second-best solution that would fit within the confines of the current joint filing regime.

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I. INTRODUCTION

Overwhelmingly, Americans find polygamy distasteful, if not immoral.[1] For some, such distaste seems almost visceral, a reaction to what they consider a barbaric and backward practice.[2] Others point to concrete harms polygamy allegedly causes. For example, polygamy's critics frequently highlight the sexual exploitation of underage girls and the general inequality and abuse women face in polygamous communities to underscore polygamy's immorality.[3] But critics do not end their list of

1. A 2008 Gallup poll found that 90 percent of American adults surveyed considered polygamy immoral. Arland Thornton, *The International Fight Against Barbarism: Historical and Comparative Perspectives on Marriage Timing, Consent, and Polygamy*, *in* MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL AND LEGAL ISSUES 259, 283 (Cardell K. Jacobson with Lara Burton eds., 2011).

2. *See, e.g.*, *id.* at 274 ("Mormon polygamy was labeled as Asiatic or oriental barbarism and was viewed not only as a threat to future advancement but as a force for the destruction of thousands of years of European progress.").

3. *See, e.g.*, Martin Guggenheim, *Texas Polygamy and Child Welfare*, 46 HOUS. L. REV. 759, 781 (2009) ("Among the many reasons given to ban polygamy is that such relationships are bad for children and that states possess an inherent power to proscribe conduct inimical to the well-being of

polygamy's evils with the abuse of women and girls. As they dig deeper into the litany of evils perpetrated by polygamists, critics almost invariably mention a problem far less intuitive: tax evasion.[4]

Still, aside from a glancing mention of tax evasion, no scholarship has analyzed the tax environment polygamists face. Instead, nearly all academic discussion of polygamy focuses either on whether to decriminalize polygamy[5] or whether polygamists enjoy any level of constitutional protection.[6] Scholars have generally ignored analyzing the operation of other generally applicable laws to polygamous families.[7]

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children."); Mark Strasser, *Marriage, Free Exercise, and the Constitution*, 26 LAW & INEQ. 59, 88 (2008) ("Courts and commentators have discussed a number of harms associated with the practice of polygamy, ranging from the imposition of patriarchy to the abuse and neglect of women and children.").

4. *See, e.g.*, Victims of Polygamy Assistance Act of 2008, S. 3313, 110th Cong. § 2(3) (2008) ("The crimes perpetrated by [polygamous] organizations include child abuse, domestic violence, welfare fraud, tax evasion, public corruption, witness tampering, and transporting victims across State lines."); Brandon Griggs, *Polygamy Czar Forecasts More Prosecutions Soon; Critics: Not Enough Is Being Done*, SALT LAKE TRIB., May 12, 2003, at A1 ("Prosecutors also are focusing on tax fraud and abuses of the state's welfare system."); Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting* Reynolds *in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 244 (2001) ("According to anti-polygamy activists, welfare and tax fraud are commonplace in Utah's polygamous communities."); Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955, 1975 (2010) ("Polygamy offends a diverse array of interests . . . [including] those who argue polygamy provides a cover for a range of fraudulent behavior from welfare abuse to tax fraud.").

5. *See, e.g.*, Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101 (2006) (arguing that the criminalization of polygamy is based on incorrect understanding); Michael Lwin, *Big Love:* Perry v. Schwarzenegger *and Polygamous Marriage*, 9 GEO. J.L. & PUB. POL'Y 393 (2011) (comparing movement to decriminalize polygamy with movements to decriminalize sodomy and marijuana); Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353 (2003) (arguing that criminalizing polygamy serves the public interest).

6. *See, e.g.*, Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559, 581 (2008) ("The strongest arguments in favor of decriminalizing polygamy, however, are constitutional claims for religious freedom, Due Process, and Equal Protection."); Marci A. Hamilton, *The First Amendment's Challenge Function and the Confusion in the Supreme Court's Contemporary Free Exercise Jurisprudence*, 29 GA. L. REV. 81, 105–10 (1994) (discussing the Supreme Court's polygamy jurisprudence); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy, and Same-Sex Marriage*, 75 N.C. L. REV. 1501, 1593–94 (1997); Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 757 (2001) ("Very little effort has been put into the analysis of the current constitutionality of the nineteenth century polygamy cases in light of current trends in the American religious landscape, the modern American family, and First Amendment jurisprudence.") (footnote omitted); Guggenheim, *supra* note 3, at 763–64 (arguing that in light of *Lawrence*, polygamy may deserve constitutional protection).

7. Though there is no clear explanation for this scholarly oversight, it may, in part, result from the general distaste Americans have for polygamy. *See supra* note 1 and accompanying text. Moreover, because polygamist groups tend to be isolated and reclusive, they can be easy to forget and

Recently, however, Professor Adrienne Davis introduced a "different approach" to polygamy scholarship.[8] She proposes moving beyond questions of decriminalization and constitutional protections. In doing this, she challenges scholars to explore second-generation questions, including "whether and how polygamy might be effectively recognized and regulated . . . ."[9] Professor Davis goes on to propose that the default rules of polygamy could mimic commercial partnership law.[10]

In the spirit of Professor Davis's second-generation polygamy paradigm, this Article represents the first attempt to address polygamous families and the federal income tax.[11] Evaluating the appropriate tax treatment of polygamous families provides a necessary foundation for all scholars of polygamy who are interested in how polygamy in America should look. The legalization and regulation of polygamy remain relatively impractical unless we know how polygamists will file and pay their taxes; polygamists, like most Americans, must earn income. Furthermore, like most Americans, they will need to calculate and pay taxes on that income. The tax law, however, has no mechanism for dealing with polygamous taxpayers. Though changing the focus of the discussion from whether polygamy oppresses women to how polygamous families can file their taxes seems a descent from the sublime to the banal, paying federal income tax represents one of the few experiences common to nearly all Americans, irrespective of marital status. The tax system, then, represents one legal regime polygamists would need to navigate.

Much of the scholarship that addresses polygamy also addresses same-sex marriage.[12] Both opponents and proponents of polygamy point to

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to ignore. *See* Tim B. Heaton & Cardell K. Jacobson, *Demographic, Social, and Economic Characteristics of a Polygamous Community*, *in* MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL AND LEGAL ISSUES, *supra* note 1, at 151.

8. Davis, *supra* note 4, at 1958.

9. *Id.*

10. *Id.* at 1959.

11. This Article will not address whether, as a normative matter, states *should* legalize polygamy. Rather, it will focus on how to accommodate such a non-traditional family into the joint filing tax regime, and on what the struggle to make a polygamous family fit into the regime tells us about the viability of joint filing. Nonetheless, several people, in reviewing earlier drafts of this Article, have recommended that I lay out my position on the decriminalization and legalization of polygamy. I believe, as a normative matter, that polygamy should be decriminalized, though I find myself agnostic about its legalization. On a personal level, though, I am a romantic, invested in dyadic marriage. *See* Davis, *supra* note 4, at 1975 (those offended by polygamy include "romantics invested in the companionate bond that conventional marriage is imagined to engender").

12. *See generally* Elizabeth M. Glazer, *Sodomy and Polygamy*, 111 COLUM. L. REV. SIDEBAR 66 (May 26, 2011), http://www.columbialawreview.org/wp-content/uploads/2011/05/66_Glazer.pdf; Strassberg, *supra* note 6; Cheshire Calhoun, *Who's Afraid of Polygamous Marriage? Lessons for Same-Sex Marriage Advocacy from the History of Polygamy*, 42 SAN DIEGO L. REV. 1023 (2005);

growing legal and societal acceptance of homosexuality as paving the way toward legalized polygamy.[13] Same-sex marriage scholarship, moreover, has addressed issues of filing and paying taxes.[14] However, in this area, as in others, a polygamous marriage is not merely dyadic marriage *plus*.[15] Although some questions remain about *who* must file as married[16] after the Supreme Court's decision that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional,[17] the tax law will treat opposite-sex and recognized same-sex marriages identically. Although scholars have debated *whether* marriage should affect tax filing and tax liability,[18] once there are special rules applicable to married couples, those rules can apply in the same manner to all dyadic marriages.

Polygamous marriage, though, differs from dyadic marriage both quantitatively *and* qualitatively. Taxing a polygamous family under the current regime would not provide for horizontal equity between dyadic and polygamous households. Instead, the current regime would in fact exacerbate marriage penalties and marriage bonuses.[19] Polygamy represents the clichéd square peg to joint filing's round hole—to force polygamy into the current joint filing regime will necessarily damage polygamous families, the joint filing system, or both. Ultimately, this Article finds that polygamy constitutes the strongest justification to date for switching from joint filing to mandatory individual filing.

This Article proceeds in four parts. Part II discusses the provenance of joint tax filing in the United States, as well as the current criticisms and defenses of joint filing. Part III examines tax issues facing nontraditional

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Samuel C. Rickless, *Polygamy and Same-Sex Marriage: A Response to Calhoun*, 42 SAN DIEGO L. REV. 1043 (2005).

13. Polygamy advocates in fact point to the Supreme Court's decision in *Lawrence* as paving the way toward a right to marry, whether or not it actually does so. *See* Davis, *supra* note 4, at 1960 ("Others call for full recognition and licensure, frequently invoking *Lawrence* as a strategic step that sets the stage for recognition of plural marriage alongside gay marriage.").

14. *See infra* Part IV.A.

15. Following Professor Davis, this Article will use "dyadic" to describe any marriage between just two people, whether the same or opposite genders. *See* Davis, *supra* note 4, at 1966 ("Hence, the Article uses the term dyadic marriage, or occasionally conventional marriage, to characterize the current marital legal regime.").

16. *See* Roberton Williams, *Same-Sex Couples after DOMA*, TAXVOX (Aug. 15, 2013, 3:24 PM), http://taxvox.taxpolicycenter.org/2013/08/15/same-sex-couples-after-doma/ (explaining that it is unclear whether a same-sex married couple living in a state that does not recognize same-sex marriages will file as married or single).

17. United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (holding Section 3 of DOMA unconstitutional).

18. *See infra* Part II.B.

19. Moreover, the unfairness of the current taxing regime exists even if polygamy remains illegal. *See infra* Part V.A.

dyadic families, including domestic partnerships, civil unions, same-sex marriages, and contrast those with the issues facing polygamous taxpayers. Part IV discusses how polygamy implicates the fairness of current tax law. Finally, Part V explores a series of approaches that the tax law could implement to accommodate polygamous taxpayers. It discusses the pros and cons of these several approaches, and gives two proposals that would make the tax law's treatment of dyadic and polygamous taxpayers more equitable.[20]

II. TAXING MARRIAGE

Implementing a fair and progressive tax regime is complicated. Trying to maintain that fairness and progressivity with respect to married couples increases that complexity exponentially.[21] Once it acknowledges marriage, a tax regime must determine whether to treat the married couple as a taxpaying unit or whether each individual spouse must pay taxes separately. A fair tax system should include marriage neutrality, income pooling, and progressive tax rates.[22] Unfortunately, as Professor Boris Bittker famously illustrated, these principles conflict with each other, leaving Congress with the weighty task of choosing among these goals in designing a marriage tax.[23]

A. Prelude to the Joint Return

Although the federal income tax currently treats married couples as an appropriate taxpaying unit, the federal income tax has throughout its history alternated between treating individuals and married couples as that unit.[24] When Congress originally enacted the federal income tax, it chose

20. In general when talking about polygamy, this Article will assume polygynous (*i.e.*, one man with multiple wives) relationships. Although polyandry (one woman with multiple husbands) exists, polygyny is the most common form of polygamy. MIRIAM KOKTVEDGAARD ZEITZEN, POLYGAMY: A CROSS-CULTURAL ANALYSIS 58 (2008). But the problems and potential solutions discussed in this Article should generally apply to any legalized polygamous marriage.

21. Samuel D. Brunson, *Grown-Up Income Shifting: Yesterday's Kiddie Tax Is Not Enough*, 59 U. KAN. L. REV. 457, 468 (2011) ("Marriage throws a wrench into the design of a tax system.").

22. Jane M. Fraser, *The Marriage Tax*, 32 MGMT. SCI. 831, 831 (1986). Marriage neutrality means that a couple's tax burden should not change because of marriage or divorce. Income pooling means that a married couple's tax liability should depend only on their combined income, and not on their individual incomes. Progressivity means that higher-income families should pay a higher percentage of their incomes in taxes than lower-income families. *Id.*

23. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1395–96 (1975).

24. Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 807–08 (2008).

the individual as the appropriate taxable unit,[25] imposing tax on the "net income of every individual."[26] In spite of the plain language of the statute, the Bureau of Internal Revenue initially "took the position that the 1913 income tax . . . taxed married couples as units."[27] The next year, though, the Treasury Department reversed itself, requiring husbands and wives to file separate returns.[28] A mere four years later, in 1918, the Treasury Department changed course again, providing taxpayers an optional joint return that allowed married couples to aggregate their incomes if they desired.[29]

In principle, the joint return simplified tax filing for married couples "whose combined income was below the amount that would trigger the surtax rate."[30] However, when rates significantly increased with the United States' entry into World War I,[31] filing joint returns became considerably less appealing to high-income taxpayers.[32] The higher rates caused high-income taxpayers to work harder, when possible, to shift a portion of their income to lower-taxed individuals.[33] For example, a taxpayer in the 35 percent tax bracket would owe taxes of $700 on an additional $2,000 of income, leaving her with $1,300 after taxes. If, however, she could shift half of her income to a taxpayer in the 10 percent tax bracket, she would pay $350 of taxes on the $1,000 she kept, while the second taxpayer would only pay $100 of taxes on his $1,000. Collectively, they would keep $1,550, reducing their aggregate tax bill by $250.

Income-shifting created some risk for the high-income taxpayer, though. To the extent he shifted his income to another person, he risked losing control of that income and how it would be put to use. In order to maintain control over the income and benefit from it, a high-income taxpayer would need to shift the income to a person over whom he had

25. Bittker, *supra* note 23, at 1400.

26. Revenue Act of 1913, Section § 2(A)(2), 38 Stat. 114, 166.

27. Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have To Do With Joint Tax Filing?*, 11 NEV. L.J. 718, 723 (2011).

28. Cain, *supra* note 24, at 808.

29. *Id.*

30. *Id.*

31. STEVEN A. BANK ET AL., WAR AND TAXES 64 (2008) ("Designed to raise $850 million from income taxes, the [War Revenue Act] dramatically increased individual surtax rates, with the top rate rising from 13 to 50 percent.").

32. Cain, *supra* note 24, at 809. In 1918, a husband and wife who had $100,000 of taxable income paid total taxes of $24,000 if they filed separate returns reflecting $50,000 of income each. If, however, they filed jointly, they owed $36,500, $12,500 more than they would have owed filing separately. Dennis J. Ventry, Jr., *Saving* Seaborn*: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L.J. 1459, 1469–70 (2011).

33. Ventry, *supra* note 32, at 1470.

some control or whom he justifiably trusted. Often, therefore, he shifted his income to his wife or to other family members.[34]

The courts attempted to hold the line against taxpayers unilaterally reducing their tax bills without reducing their income. In general, courts held that a taxpayer "who earns or is otherwise entitled to receive income cannot assign it, for tax purposes, to another taxpayer, even if the transfer is effective under state law."[35] Ultimately, though, two Supreme Court decisions dealing with intra-spousal income-shifting caused the tax treatment of married couples in common law states to differ significantly from the tax treatment of married couples in community property states.[36]

The first of those cases involved an agreement between Mr. and Mrs. Earl. In 1901, the couple entered into a contract stipulating that they owned all current and future property and income as joint tenants with a right of survivorship.[37] Because his wife had a contractual right to half of Mr. Earl's income, the Earls argued that he should only report and pay taxes on half of his income, while his wife should pay taxes on the other half.[38] The Supreme Court acknowledged both the validity of the contract and its effect under California law.[39] Nonetheless, the Court determined that the Revenue Act of 1918 could and did tax salaries "to those who earned them."[40] Fruit, in the Court's analogy, could not be "attributed to a different tree from that on which [it] grew."[41] Taxpayers could not contractually change their tax liability.

That same year, however, the Supreme Court weakened its fruit-from-the-tree analogy in a second case involving an attempt to shift income from the earner to his spouse. In 1927, H.G. Seaborn and his wife lived in

34. *See, e.g.*, Brunson, *supra* note 21, at 457–58 ("Congress's principal direct assault on income shifting sought to prevent wealthy parents from unfairly reducing their tax bills by giving some of their dividend-paying stocks and interest-bearing bonds to their children.").

35. Bittker, *supra* note 23, at 1400.

36. Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 653–54 (2010).

37. Lucas v. Earl, 281 U.S. 111, 113–14 (1930).

38. *Id.* at 113. Although spouses with dissimilar incomes may have tried to evade the higher tax rates by contractually dividing their income, *see* James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409, 1413 (2010), the Earls had not entered into this contract to avoid taxes. In 1901, the 16th Amendment and the federal income tax were still twelve years away. Rather, their agreement was likely an estate-planning device. Patricia A. Cain, *The Story of* Earl*: How Echoes (and Metaphors) from the Past Continue to Shape the Assignment of Income Doctrine*, *in* TAX STORIES 305, 314–15 (Paul L. Caron ed., 2d ed. 2009).

39. *Earl*, 281 U.S. at 114.

40. *Id.*

41. *Id.* at 115.

Washington, a community property state.[42] That year, their income included his salary, dividends, interest, and gains on the sale of property, including real estate that was held solely in his name.[43] They filed separate returns for their 1927 taxable year, each reporting half of the collective income and claiming half of the deductions. While technically the law vested Mrs. Seaborn with half of the property, the Commissioner of Internal Revenue argued that Mr. Seaborn had so much control over the property that, as long as the marriage lasted, all of the income belonged to him.[44] As a result, the Commissioner claimed Mr. Seaborn should have declared all of his income on *his* return.[45] Rejecting the Commissioner's contention, the Supreme Court held that because the state law treated the Seaborn's income as belonging to the couple as a community, the couple was correct to file separate returns, each declaring half of their total income.[46]

The *Seaborn* decision created a rift between states. Married couples in community property states could file separate returns, splitting their income and potentially paying less in taxes than similarly-situated married couples in common law states. Moreover, as a result of the *Earl* decision, couples in common-law states had no way to replicate this intra-spousal income-shifting. As a result of this split, a married couple's tax bill differed depending on the state in which they lived.

In 1941, after an unsuccessful attempt at preventing income-shifting by itself, the Treasury Department convinced the House Ways and Means Committee to recommend that Congress enact a mandatory joint return for married couples.[47] As part of the Revenue Act of 1941, a married couple would have paid taxes on their consolidated income at the rate of a single person with the same amount of income.[48] The reaction to the mandatory joint return threatened to defeat the entire Revenue Act, and President Roosevelt withdrew the provision.[49] Although the Treasury tried again in

42. Poe v. Seaborn, 282 U.S. 101, 108 (1930).
43. *Id.* at 108–09.
44. *Id.* at 111.
45. *Id.* at 109.
46. *Id.* at 118.
47. Bittker, *supra* note 23, at 1408.
48. *Id.* at 1409.
49. Alice Kessler-Harris, *"A Principle of Law but Not of Justice": Men, Women and Income Taxes in the United States 1913–1948*, 6 S. CAL. REV. L. & WOMEN'S STUD. 331, 345 (1997). Under the Treasury's proposal, most married couples in community property states would pay higher taxes, as would married couples in common law states if both spouses earned income from services or investments. At the same time, two people with separate sources of income would pay more taxes if they married than if they remained single. Bittker, *supra* note 23, at 1409.

1942—this time with protection for wives' wages—the provision met the same demise as its predecessor did.[50]

While the federal government tried unsuccessfully to eliminate the disparity between common law and community property states, the states themselves worked to exploit the difference for the benefit of their residents. Oklahoma and Oregon enacted legislation allowing married couples to elect into a newly created community property regime in an attempt to give their residents the ability to split their income for federal income tax purposes.[51] However, the Supreme Court refused to allow these elective laws to alter the tax treatment of married couples, saying that, at best, "the present policy of Oklahoma is to permit spouses, by contract, to alter the status which they would otherwise have under the prevailing property system in the State."[52] The Court held that the Oklahoma statute functioned in essentially the same manner as the contract in *Earl*, and that such an elective property regime could not prevent the government from taxing the person who earned the income.[53]

In reaction to the Supreme Court's decision, Oklahoma and Oregon amended their community property statutes, making them mandatory.[54] Hawaii, Pennsylvania, Michigan, and Nebraska soon followed and, by 1948, New York and Massachusetts were considering community property laws.[55] The states did not necessarily desire to change to community property law—a study in New York warned of significant difficulties in the transition—but without a federal solution, they saw this self-help as necessary.[56] Still, in spite of their importance to married taxpayers, these moves from common law to community property caused "upheaval and uncertainty."[57] Skeptics argued that the laws had been passed too quickly and that they would upset individuals' earlier plans.[58] Moreover, it was not always clear how the community property laws could be grafted onto a state's existing common law foundation.[59]

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50. Kessler-Harris, *supra* note 49, at 345.
51. Bittker, *supra* note 23, at 1411.
52. Comm'r v. Harmon, 323 U.S. 44, 47 (1944).
53. *Id.*
54. Bittker, *supra* note 23, at 1411–12.
55. *Id*. at 1412.
56. *Id.*
57. Kahng, *supra* note 36, at 654.
58. Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 272 (1988).
59. *Id.* ("For example, in Oregon, questions arose as to whether historical Spanish law would be authoritative in construing Oregon's 1945 community-property statute.").

As common law states turned to self-help to achieve tax benefits for their residents, some demanded that the federal law change. In reaction to this lobbying—and buoyed by significant surpluses—Congress enacted the Revenue Act of 1948.[60] The Revenue Act of 1948 permitted married couples to file jointly and to enjoy a marginal tax bracket twice as large as the bracket applicable to an unmarried taxpayer.[61] Congress intended for this new joint filing option to equalize the taxation of married couples between common law and community property states and, as a result, eliminate the incentive for common law states to enact community property statutes.[62]

As long as the tax brackets for married couples filing jointly were twice the size of the brackets that applied to individuals, a married couple never paid more in taxes than two unmarried taxpayers with the same income.[63] More than two decades later, finally recognizing the unfairness toward unmarried taxpayers, Congress enacted a new rate schedule for married couples in 1969; a married couple's marginal brackets under the new schedule remained wider than, but not twice as wide as, the brackets of single taxpayers.[64]

B. Problems With Joint Filing

Though Congress introduced joint filing to solve the problem of taxing couples differently based on their state of residence, joint filing threw a wrench into the design of the tax system. A tax system that includes joint filing cannot have progressive tax rates and achieve both marriage *and* couples neutrality—all reasonable goals of a just tax system.[65] As long as married couples can file joint returns, then, lawmakers must choose whether to discard progressivity, marriage neutrality, or couples neutrality.

The tax system will not sacrifice progressivity. Even advocates of a flat tax recognize the need for some degree of progressive rates to protect the poorest taxpayers.[66] A progressive income tax applies increasingly higher

60. Revenue Act of 1948, Pub. L. No. 80-471, § 103, 62 Stat. 110 (1948); *see* McMahon, *supra* note 27, at 736.

61. Puckett, *supra* note 38, at 1414.

62. *Id.*

63. Kahng, *supra* note 36, at 655.

64. Bittker, *supra* note 23, at 1428.

65. Brunson, *supra* note 21, at 469.

66. *See*, *e.g.*, Robert E. Hall & Alvin Rabushka, *The Route to a Progressive Flat Tax*, 5 CATO J. 465, 466 (1985) ("[O]ur flat tax proposal puts a tax of 19 percent on all consumption above a generous exemption ($12,600 for a family of four). It is progressive where it counts most, for the poor and near-poor.").

rates of tax as a taxpayer's income increases.[67] And to the extent that marriage changes the taxpaying unit, a progressive tax cannot escape treating taxpayers differently depending on their marital status.[68]

Moreover, joint filing causes three significant departures from marriage and couples neutrality: the singles penalty, the marriage penalty, and the marriage bonus. Each of these departures violates the tax norm of horizontal equity, which holds that taxpayers with similar income should pay a similar amount of taxes.[69] To better understand the degree to which each of these departs from the principle of horizontal equity, it is useful to see how each operates in real terms.

The singles penalty applies when an unmarried individual has the same income as a married couple.[70] For example, compare Susan, an unmarried individual who has taxable income of $100,000, with Scott and Stacy, a married couple who each earn $50,000. In 2013, Susan would owe $21,293 in federal income taxes.[71] Scott and Stacy, on the other hand, would owe just $16,858 in taxes, significantly less than Susan.[72]

A married couple faces the marriage penalty when the couple pays more taxes than two unmarried individuals with the same taxable income.[73] The marriage penalty generally comes into play when both spouses earn approximately the same income.[74] John and Jane, for example, each has $85,000 in taxable income. In 2013, if John and Jane are married and file a joint return, their combined income puts them in the 28-percent tax bracket, and they owe $35,066.[75] If, however, John and Jane had chosen not to marry, each would be in the 25-percent tax

67. Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 339 (1994). Although periodically somebody argues for a flat (that is, non-progressive) income tax, even the most committed supporters of a flat tax do not advocate a "true flat-rate tax [that] would tax all income . . .[,] starting with the first dollar, at the same rate." Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 CHAP. L. REV. 157, 160–61 (1999). Americans generally recognize the need for some degree of progressivity in the tax system.

68. Zelenak, *supra* note 67, at 339–40.

69. *See, e.g.*, Richard A. Musgrave, *Horizontal Equity, Once More*, 43 NAT'L TAX. J. 113, 113 (1990) ("The call for equity in taxation is generally taken to include a rule of horizontal equity . . ., requiring equal treatment of equals, and one of vertical equity . . ., calling for an appropriate differentiation among unequals.").

70. Kahng, *supra* note 36, at 656.

71. Rev. Proc. 2013-15 § 2.01, 2013-5 I.R.B. 444 (2013).

72. *Id.* Moreover, because the married couple can take a deduction for two personal exemptions, as opposed to the single personal exemption available to an unmarried taxpayer, a married couple pays less in taxes while having a higher gross income than an unmarried individual. I.R.C. § 151 (West 2013).

73. Kahng, *supra* note 36, at 656.

74. Bittker, *supra* note 23, at 1429–30.

75. Rev. Proc. 2013-15 § 2.01, 2013-5 I.R.B. 444 (2013).

bracket.[76] Both John and Jane would owe $17,179 in taxes, for a combined tax liability of $34,358. Marriage costs John and Jane an additional $708 in taxes.

Where spouses' income differs significantly, on the other hand, a married couple may benefit from the marriage bonus.[77] Imagine Mary, who has taxable income of $170,000, and Mark, with no income. In 2013, if Mary and Mark are married, they would be in the 28-percent tax bracket, and would face a tax liability of $35,066, the same amount as the married John and Jane. If, however, Mary and Mark were not married, Mark, with no income, would owe no taxes. Mary would still be in the 28-percent tax bracket. But, because the tax brackets for unmarried individuals differ from those that apply to married couples, she would owe $40,893 in taxes.[78] In this case, marriage reduces Mary and Mark's collective tax bill by $5,827.

In addition to the inequities imposed by the joint filing regime, the different rules applicable to married persons filing jointly increase the complexity of the tax law. The tax law necessarily includes a "multiplicity of rules regarding who is (or is not) married for tax purposes."[79] And once a couple has passed this threshold, they "use different tax tables, have a different standard deduction, and are entitled to double the maximum exclusion from gain on the sale of a principal residence."[80]

As a result of the inequities and complexity that follow joint filing, a number of commentators argue for a return to the individual as the appropriate taxpaying unit. Few developed countries other than the United States still permit married couples to file joint tax returns.[81] Moreover, "the joint return was enacted not as a result of reasoned tax policy analysis, but rather out of political expediency."[82] As a result of the lack of policy undergirding the joint return, combined with the trends in the rest of

76. *Id.*

77. Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got to Do With It?*, 21 U. ARK. LITTLE ROCK L. REV. 759, 760 (1999) ("The marriage bonus is the greatest when only one spouse is contributing to total household income by working in the paid labor market."); *see also* Kahng, *supra* note 36, at 655.

78. Rev. Proc. 2013-15 § 2.01, 2013-5 I.R.B. 444 (2013).

79. Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 617.

80. Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 682–83 (2003).

81. *See, e.g.*, Kahng, *supra* note 36, at 652.

82. *Id.*

the world, commentators conclude that the United States should replace its joint filing with individual filing for all taxpayers.[83]

Proponents of an individual filing system also argue that marriage does not inherently equate to income-pooling. Although a married couple can act as an economic unit, most states do not require it to do so.[84] And some scholars argue that a significant percentage of married couples do not pool their incomes.[85] To the extent that the tax law permits joint filing to accurately reflect the income of married couples who share their incomes, evidence that married couples do not share their income argues against the necessity and sensibility of a joint return. The fact that the joint return increases the tax law's complexity and inequity strengthens this argument even more.

In addition, these commentators argue that joint filing hurts women. Under the U.S. federal income tax, a taxpayer pays a progressively higher rate of tax on income as her income increases. In 2013, an unmarried taxpayer pays ten percent of her first $8,925 of taxable income, then fifteen percent of her next $26,000; ultimately, she pays 39.6 percent of her income in excess of $400,000.[86] Two individual taxpayers each pay taxes on a portion of their income at the lower tax rates. A married couple, however, can take advantage of the lower rates only once. As a result, the secondary earner (traditionally the wife) feels like she pays the same percentage of taxes on her first dollar of income as her husband did on his last dollar of income.[87] She may decide, in light of her lower after-tax income, that such income is not worth the effort and expense of working and, therefore, stay out of the paid workforce.[88]

Proponents of individual filing also argue that joint filing creates significant inequities between taxpayers. For example, while a married couple may pay higher or lower taxes than an unmarried couple with the

83. *See* Stephanie Hunter McMahon, *London Calling: Does the U.K.'s Experience with Individual Taxation Clash with the U.S.'s Expectations?*, 55 ST. LOUIS U. L.J. 159, 161 n.2 (2010) (listing commentators in favor of eliminating joint returns).

84. *See, e.g.*, Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1519 (2006) ("In the forty-one states that apply common-law principles to marital-property matters, the wage earner is the wage owner during marriage.").

85. Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 108 (1993).

86. Rev. Proc. 2013-15 § 2.01, 2013-5 I.R.B. 444 (2013).

87. Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2009 (1996).

88. Amy C. Christian, *Joint and Several Liability and the Joint Return: Its Implications for Women*, 66 U. CIN. L. REV. 535, 601 (1998) ("Joint return rates, which incorporate both income splitting and aggregation, most likely discourage many married women from entering the work force or from remaining in it when they marry.").

same aggregate taxable income, the married couple will always pay less than a single person with the same amount of taxable income.[89] Moreover, the tax law treats a heterosexual married couple differently than an unmarried couple, even if that unmarried couple pools all of its income and expenses. And this different treatment cannot be justified purely on administrability grounds: couples in state-sanctioned civil unions or domestic partnership with the same rights and responsibilities as married couples cannot file a joint return.[90] Besides the unfairness of treating similarly situated taxpayers differently, this different treatment imposes real costs on taxpayers.[91]

Given the controversy and complexity of the joint return, it is worth inquiring whether there is any reason the tax law should take account of marital—or other familial—relationships. Notwithstanding the arguments against the joint return, some scholars argue that the tax law should continue to permit married couples to file joint returns. For example, although not all married couples pool all of their income, the extant studies demonstrate high levels of income pooling by married couples.[92] Moreover, some argue, even if joint returns cause some inequities, shifting

89. Kahng, *supra* note 36, at 660.

90. Cain, *supra* note 24, at 805. Recently, however, the I.R.S. Office of Associate Chief Counsel (Procedure and Administration) asserted that unmarried couples in a state-recognized civil union or domestic partnership could, under certain circumstances, file a joint return. Amy S. Elliott, *IRS Memo Indicates Civil Unions Are Marriages for Tax Purposes*, 133 TAX NOTES 794, 794 (2011). In its letter, the I.R.S. says that, for federal income tax purposes, opposite-sex couples "living in a relationship that the state would treat as husband and wife" can file joint tax returns. Letter from Pamela Wilson Fuller, Senior Technician Reviewer, I.R.S. Office of Associate Chief Counsel (Procedure and Administration), to Robert Shair, Senior Tax Advisor, H&R Block (Aug. 30, 2011), *available at* http://law.scu.edu/blog/samesextax/file/IRS%20Civil%20Union%20letter.pdf. Still, although it reflects current I.R.S. policy, the letter does not actually provide legal authority for taxpayers in civil unions or domestic partnerships to file joint returns. *See* Elliott, *supra*, at 794 ("David Lee Rice . . . cautioned that the letter holds no weight of authority."). Nonetheless, the letter demonstrates a recognition that joint filing can follow economic unity reflected by institutions other than just traditional marriage.

91. Cain, *supra* note 24, at 806. For example, if an employer provides health insurance to a same-sex spouse, the value of that insurance is treated as income. Moreover, same-sex spouses cannot take advantage of the estate tax's marital deduction. Peter Applebome, *A Doubly Trying Season for Same-Sex Couples*, N.Y. TIMES, Feb. 10, 2013, at BU8. Even the cost of tax return preparation is higher for same-sex spouses. Tara Siegel Bernard, *Gay Couples: Tax Challenge*, N.Y. TIMES, Mar. 3, 2012, at B4.

92. *See, e.g.*, Stephanie Hoffer, *Adopting the Family Taxable Unit*, 76 U. CIN. L. REV. 55, 78 n.148 (2007) ("As a result, the argument that family pooling is not supported by empirical data is not well founded, at least as regards basic expenses."); Zelenak, *supra* note 67, at 351 ("Far from indicating the weakness of the pooling assumption, Kornhauser's data . . . indicates that only 9% of couples deposit none of their earnings in joint accounts—and even among that 9%, the use of separate accounts does not necessarily negate pooling.").

to individual returns would create administrative and other difficulties that would ultimately result in deadweight loss.[93]

Moreover, as Professor Stephanie Hunter McMahon points out, the fact that other countries have switched from joint filing to individual filing provides an example of the costs and benefits of the switch.[94] She concludes that the change provided both benefits and detriments to women in the United Kingdom. Married women appear to own more investment property than they did before the change.[95] But there is no clear evidence that the change increased the number of British women who entered the workforce.[96] Professor McMahon concludes that eliminating the joint return will benefit some taxpayers while harming others. Ultimately, though, any tax system will create distortions, and these distortions need to be weighed as part of the debate over the future of joint filing. [97]

Another argument in continuing to recognize marriage for tax purposes is that marriage plays an important role in American life. It "has enormous value to Americans as an institution that makes social unity possible, even in a world in which individuality has been fully cultivated."[98] Even commentators who do not particularly like the institution of marriage recognize that it is "a dominant and normative institution, with life-altering formal and informal benefits."[99] The Internal Revenue Code reflects this primacy of marriage in the United States, with many special rules aimed at marital or other familial relationships.[100] Among other things, these special rules may take into account the fact that people act

93. McMahon, *supra* note 27, at 755.

94. McMahon, *supra* note 83, at 161–62 ("Most of the American scholars who agree with this conclusion do so without examining the many real world examples of [moving to individual filing] that can be found outside America's borders.").

95. *Id.* at 202–03 ("But while the study found that couples would not shift income to the maximum extent possible to secure a tax reduction, it did find an increase in three outcomes: the proportion of wives having any investment income; the fraction of household investment income owned by wives; and the fraction of households in which the wife held all of the investment income.").

96. *Id.* at 197–98.

97. *Id.* at 218 ("Instead, it requires deciding how to allocate a tax reduction among various family types. Unfortunately, when deciding the best tax unit, there is no choice that simply removes distortions in behavior. Each choice always benefits some family arrangement.").

98. Strassberg, *supra* note 6, at 1623–24. In her article, Professor Strassberg argues in favor of recognizing same-sex marriage while, at the same time, argues against decriminalizing, much less legalizing, polygamy. *Id.* at 1623.

99. Davis, *supra* note 4, at 1963.

100. Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1531 (2008).

altruistically in certain circumstances,[101] or they may provide married couples with a "zone of privacy" protected from I.R.S. inquiry.[102]

III. NON-TRADITIONAL FAMILIES AND THE FUTURE OF THE JOINT RETURN

A. Non-Traditional Dyadic Taxpayers

Notwithstanding the controversy surrounding joint filing, few—even those who prefer individual filing—believe that the United States will switch to a mandatory individual filing system, at least in the near future.[103] As a result of the joint return's apparent future, these commentators have focused on making joint filing fairer and more broadly available.[104] They provide a number of suggestions for how to accomplish these goals. They argued, prior to *Windsor*, that same-sex married couples should be permitted to file joint returns.[105] In addition to same-sex married couples, some argue that the tax law could permit anybody in a legally-recognized relationship (*e.g.*, marriage, civil union, domestic partnership) to file a joint return.[106] Congress could expand the availability of joint filing to virtually any couple that demonstrates that they pool their incomes (while possibly excluding married couples who do not pool their incomes).[107] The ability to file joint returns could even be based on ownership of income and assets.[108]

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101. Seto, *supra* note 100, at 1538.

102. Infanti, *supra* note 79, at 643.

103. *See, e.g.*, Motro, *supra* note 84, at 1513 ("However, though mandatory separate filing has many appeals, it is now widely regarded as politically unrealistic."); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 2–3 (2000) ("Although mandatory separate returns for all taxpayers would eliminate all marriage penalties (and all marriage bonuses), that does not seem to be a politically possibility in the near future."). Professor Anthony C. Infanti believes that the U.S. shifting to individual filing is "not as politically unrealistic as other commentators believe." Infanti, *supra* note 79, at 621. Even he, however, sees the change becoming more likely "as time passes," rather than immediately. *Id.*

104. *See, e.g.*, McMahon, *supra* note 27, at 756 ("That conclusion does not mean that the system should not recognize new forms of American families.").

105. *See, e.g.*, McMahon, *supra* note 27, at 756 ("So, too, should same-sex couples . . . .").

106. *See, e.g.*, Cain, *supra* note 24, at 851 ("Another possible solution for same-sex couples would be to extend spousal treatment to those couples whose relationships are recognized under state law.").

107. Motro, *supra* note 84, at 1545. Although this would be the most precise way to determine if a couple should be permitted to file a joint return, it would be administratively unfeasible. *Id.* Still, the fact that the tax law cannot implement a perfect joint filing regime does not argue against a next-best solution. "Every tax system, of course, trades off accuracy for simplicity to some degree." Kyle D. Logue & Gustavo G. Vettori, *Narrowing the Tax Gap Through Presumptive Taxation*, 2 COLUM. J. TAX L. 100, 104 (2011).

108. Ventry, *supra* note 32, at 1465 ("Eighty years after *Seaborn* and sixty years after passage of the income-splitting provision, ownership of income and property remains the guidepost of family taxation.").

None of these proposed expansions, however, requires any fundamental restructuring of the tax system. We know exactly how the current tax regime will treat married gay couples who can file jointly; moreover, we know how it would treat domestic partners and couples in a civil union if the tax law recognized their relationship. The current marginal rates applicable to a married couple filing jointly would work equally well for any of these couples. For that matter, ignoring problems surrounding the issue of *which* dyadic couples should be allowed to file joint returns, the current marginal rate structure could apply to any two-person taxpaying unit.[109] Actually implementing the change may require a minor legislative or administrative action; references to "husband and wife"[110] would need to become gender-neutral, for example. But such a change need not be burdensome or complicated: already under the Code, "words importing the masculine gender include the feminine as well."[111] A similar definitional provision could provide that "husband and wife" referred to any person in a specified relationship.

A tax regime that required individual filing would clearly reduce the inequities between heterosexual married taxpayers and other taxpayers in dyadic relationships, whether or not they pool their incomes. But the fact that the structure of the current tax system could permit other taxpayers in dyadic relationships to file jointly without adding complexity to the tax law suggests that perhaps expanding joint filing can similarly solve the fairness question. And if we assume that mandatory individual filing is currently a political nonstarter, it is worth noting that same-sex marriage does not challenge the structure or administration of the tax system as currently constituted.

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109. There may be enforcement and privacy reasons not to extend joint filing to any two people, or even to any two people who claim to be in a relationship in which they pool their income. Confirming that each couple that claimed economic unity acted as an economic unit would create a nearly insurmountable administrative burden for the I.R.S. Moreover, even if the I.R.S. has the resources to confirm that a couple was, in fact, an economic unit, the inquiry would likely prove overly-intrusive. As such, it makes sense that the tax system would use a proxy, such as state recognition. But if the tax law chooses a state-recognized relationship (in this case, opposite-sex marriage) as the proxy for economic unity, there is no reason not to also include other state-recognized relationships with similar legal rights and obligations, including same-sex marriage, domestic partnerships, and civil unions. Any administrative burden the I.R.S. would face in determining whether, in fact, a couple filing jointly had entered into a valid same-sex marriage, civil union, or domestic partnership would be qualitatively the same as the burden in currently faces in determining whether a couple filing jointly is legally married.

110. *See, e.g.*, I.R.C. § 6013(a) (2006) ("A husband and wife may make a single return jointly of income taxes."). Moreover, the Code defines "joint return" as "a single return made jointly under section 6013 by a husband and wife." I.R.C. § 7701(a)(38) (2006).

111. 1 U.S.C. § 1 (2006). The Code explicitly incorporates this definitional provision. I.R.C. § 7701(p)(1)(3) (2006 & Supp. V 2012).

B. Polygamous Taxpayers

Tens of thousands of polygamists live in the United States. Experts estimate that between 20,000 and 100,000 fundamentalist Mormons[112] living in the Western United States belong to polygamous households.[113] In addition to Mormon polygamists, an estimated 50,000 polygamist Muslims live in the United States.[114] Moreover, several thousand polygamous Hmong live in the United States.[115]

Though their experiences with polygamy undoubtedly differ in many ways, all polygamists share one common experience: by virtue of their polygamy, they violate the law. In 1862, Congress criminalized polygamy in U.S territories.[116] In response to a constitutional challenge to the law, the Supreme Court asserted that "civilized nations" had always considered polygamy "odious."[117] An "offence [*sic*] against society," polygamy was compatible only with despotic, rather than republican, government.[118] As a result, the Supreme Court determined that anti-polygamy laws did not violate the constitutional right to free exercise of religion.[119] Today, every state has laws prohibiting polygamy.[120]

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112. Although the Church of Jesus Christ of Latter-day Saints (*i.e.*, the Mormon church) formally discontinued polygamy in 1890, certain leaders and members believed that polygamy should continue, and formed their own schismatic sects. Janet Bennion, *History, Culture, and Variability of Mormon Schismatic Groups*, *in* MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL AND LEGAL ISSUES, *supra* note 1, at 101, 102. This Article uses the term "fundamentalist Mormon" to refer to these polygamous groups that trace back to, but broke from, the mainstream Mormon church.

113. *See, e.g.*, UTAH ATT'Y GEN.'S OFFICE & ARIZONA ATT'Y GEN.'S OFFICE, THE PRIMER: HELPING VICTIMS OF DOMESTIC VIOLENCE AND CHILD ABUSE IN POLYGAMOUS COMMUNITIES 12–24 (2006) (estimating more than 27,000 members of various polygamous Mormon groups); John Gibeaut, *Violation or Salvation?*, 93 A.B.A. J., Feb. 2007, at 26, 28 (estimating 30,000 polygamists in Western United States and Canada); JON KRAKAUER, UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH 5 (2003) (estimating 30,000 to 100,000 fundamentalist Mormons currently practicing polygamy).

114. *Some Muslims in U.S. Quietly Engage in Polygamy*, NPR (May 27, 2008, 12:49 AM), http://www.npr.org/templates/story/story.php?storyId=90857818. In fact, "Philadelphia has the highest density of polygamy, due to a combination of conversions to Islam, currents of racial nationalism, and the demographic effects of male incarceration and underemployment." Davis, *supra* note 4, at 1974.

115. ZEITZEN, *supra* note 20, at 166.

116. Morrill Anti-Bigamy Act, 12 Stat. 501 (1862).

117. Reynolds v. United States, 98 U.S. 145, 164–65 (1878).

118. *Id.* at 165.

119. *Id.* at 166.

120. Teri Dobbins Baxter, *Private Oppression: How Laws That Protect Privacy Can Lead to Oppression*, 58 U. KAN. L. REV. 415, 436 (2010) ("Polygamy is illegal in Texas and every other state.") (footnote omitted). In spite of polygamy's illegality, for political and practical reasons, states often hesitate to enforce their polygamy laws. *See* Shayna M. Sigman, *Everthing Lawyers Know About Polygamy is Wrong*, 16 CORNELL J.L. & PUB. POL'Y 101, 142 (2006) ("The era of under-enforcement began after Short Creek and persists now, over fifty years later.").

Although historically Americans have recoiled from polygamy, treating it as a primitive, inferior custom,[121] polygamy has recently started to emerge as less alien and more sympathetic. In no small part, HBO's *Big Love*, a television series chronicling a polygamous family in Utah, and TLC's *Sister Wives*, a reality television show following a polygamous family in Utah, may lie behind this change in attitude.[122] By exposing Americans to polygamous families, real or fictional, polygamy arguably loses some of its otherness and danger.[123] Moreover, in the wake of Texas's mishandled raid of the polygamous Yearning for Zion Ranch, polygamists began to look less like scary, despotic usurpers[124] and more like scared victims of democratically elected governments.[125] In addition, changes in the law may also make polygamy more visible in the future. As recently as 2011, polygamists cited the Supreme Court's decision in *Lawrence v. Texas*,[126] which held unconstitutional a Texas anti-sodomy law,[127] to argue that criminalizing polygamy also violates the Constitution.[128]

Even as polygamy transitions in the public mind from an odious and uncivilized practice to an acceptable, if unusual, practice by a minority

121. *See* Martha M. Ertman, *Race Treason: The Untold Story of America's Ban on Polygamy*, 19 COLUM. J. GENDER & L. 287, 289 (2010) ("According to this view, polygamy was natural for people of color, but unnatural for White Americans of Northern European descent. When Whites engaged in this unnatural practice, antipolygamists contended, they produced a 'peculiar race.'") (footnote omitted).

122. Davis, *supra* note 4, at 1956–57 ("Some have even predicted *Big Love* might do for polygamists what *Will & Grace* and *Queer Eye for the Straight Guy* did for gays: familiarizing the foreign and smoothing the way for recognition and real rights."); John Schwartz, *Polygamist, Under Scrutiny in Utah, Plans Suit to Challenge Law*, N.Y. TIMES, July 12, 2011, at A10 ("The [polygamous Brown] family is the focus of a reality TV show, 'Sister Wives,' that first appeared in 2010.").

123. *See, e.g.*, John Tierney, *Who's Afraid of Polygamy*, N.Y. TIMES, Mar. 11, 2006, at A15 ("This story of a husband with three wives in Utah will not terrify Americans. Polygamy doesn't come off as a barbaric threat to the country's moral fabric. It looks more like what it really is: an arrangement that can make sense for some people in some circumstances, but not one that could ever be a dangerous trend in America.").

124. *See, e.g.*, Strassberg, *supra* note 5, at 356 ("In particular, I argued that polygyny not only fails to produce critical building blocks of liberal democracy, . . . but promotes a despotic state populated by subjects rather than citizens.") (footnote omitted).

125. On April 3, 2008, Texas law enforcement raided the Yearning for Zion Ranch, a polygamous community, and removed more than 400 children from their families. Tamara N. Lewis Arredondo, *Toward a Viable Policing Model for Closed Religious Communities*, 35 AM. J. CRIM. L. 107, 110–11 (2008). A year later, with no evidence of danger to the children, all except for one had been returned to their families. Linda F. Smith, *Child Protection Law and the FLDS Raid in Texas*, *in* MODERN POLYGAMY IN THE UNITED STATES: HISTORICAL, CULTURAL AND LEGAL ISSUES, *supra* note 1, at 301, 317.

126. 539 U.S. 558 (2003).

127. *Id.* at 579.

128. *See* Complaint for Declaratory, Injunctive, and Other Relief at 7–8, Brown v. Herbert, No. 2:11-CV-00652 (D. Utah July 13, 2011).

group, polygamists will necessarily interact with legal regimes differently than do dyadic couples. Although polygamy, like same-sex marriage, domestic partnerships, and civil unions, represents an alternative to the traditional American family, it presents unique challenges in designing a tax regime.[129] Unlike dyadic same-sex marriage, polygamy presents a significant challenge to a tax filing system designed to treat married persons as an economic unit, where it assumes that an economic unit consists of two people. Specifically, legalized polygamy would challenge the design of the marginal tax brackets. The tax law includes four sets of marginal tax brackets, applying respectively to married persons filing jointly and surviving spouses, heads of household, unmarried individuals, and married persons filing separately.[130] Treasury adjusts the size of the brackets annually for inflation.[131] Currently, the tax brackets for married persons filing jointly range from twice the size of the brackets for unmarried individuals at the lower income levels to identical at the highest income levels.[132]

The current marginal tax brackets do not provide any assistance in determining the appropriate marginal tax brackets that would apply to polygamous families. In a world of legalized polygamy that treated spouses as an appropriate taxable unit, polygamous taxpayers would still encounter potentially significant marriage penalties in comparison to both four unmarried taxpayers and two dyadic couples.[133]

Take, for example, the polygynous Henrickson family portrayed in HBO's *Big Love* that consists of Bill and his three wives, Barbara, Nicki, and Margene.[134] In 2013, each earns $25,000. If the tax law permitted polygamous spouses to file jointly, but required them to use the current marginal tax brackets, the Henricksons would face a significant marriage penalty. Their collective income would put them in the 25-percent tax

129. *Cf.* Glazer, *supra* note 12, at 78 ("Polygamy is different from dyadic marriage, and it is different from homosexuality.").

130. I.R.C. § 1(a)–(d) (West 2013).

131. *Id.* § 1(f).

132. In 2013, the 10 percent and 15 percent tax brackets were twice as large as that for unmarried individuals in the same respective tax brackets. The ceiling for the 25 percent tax bracket for married individuals filing jointly terminated at about 166 percent of income level for married individuals, while the 28 percent bracket for married couples filing jointly ended at about 122 percent of the level for single individuals. The 33 percent bracket, on the other hand, ended at the same income level for married persons filing jointly and for single individuals, the 35 percent bracket for married couples filing jointly ended at about 113 percent of the bracket for single taxpayers, and the 39.6 percent bracket had no upper limit. Rev. Proc. 2013-15 § 2.01, 2013-5 I.R.B. 444 (2013).

133. *See infra* Part V.B.

134. The Henricksons were the main characters of HBO's *Big Love*. *See* Alessandra Stanley, *One Man, Three Wives and Many Troubles*, N.Y. TIMES, Mar. 10, 2006, at E21.

bracket, and they would owe taxes of $16,858.[135] By contrast, four unmarried individuals with $25,000 of taxable income would each be in the 15-percent tax bracket and would each pay taxes of $3,304. Collectively, the four would pay a total of $13,216.[136] As a result of being in a higher bracket, the Hendricksons would pay over $3,500 more than the four unmarried counterparts in this scenario, despite the fact that the two groups' collective income is exactly the same.

In addition to the marriage penalty applicable to polygamous taxpayers, applying the current brackets would accentuate the disincentive for the secondary (and, in the case of polygamous families, tertiary, etc.) earner to work. For a dyadic married couple, the secondary earner's income is stacked on top of the primary earner's income.[137] In a polygamous marriage, using current marginal tax brackets, the secondary earner's income would be stacked on top of the primary earner's, and then the tertiary earner's income would be stacked on top of both the primary and the secondary earner's. Each subsequent earner would potentially pay taxes on her first dollar of income at the highest marginal rate of the prior earner. Because each subsequent worker would enjoy progressively less after-tax income, work would become even less appealing for each additional plural spouse. Although increasing a family's size may increase the need for additional spouses to work,[138] the joint filing system discourages those additional individuals from working.

To ameliorate these heightened marriage penalty and secondary earner problems, Congress could create alternative brackets applicable to polygamous taxpayers. But creating such individualized tax brackets would create administrative burdens as Congress and the Treasury Department tried to determine how to design those brackets.[139]

In many cases, polygamous families' income lags behind that of the surrounding communities.[140] And yet, if the tax law continues to refuse to recognize polygamous marriage, polygamous families will pay higher

135. Rev. Proc. 2013-15 § 2.01, 2013-5 I.R.B. 444 (2013).

136. *Id.* Note that two dyadic couples, each with $50,000 in taxable income would also be in the 15-percent tax bracket, and would also collectively pay $13,216. *Id.*

137. *See supra* notes 87–88 and accompanying text.

138. *See* IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 84 (1996) ("Most contemporary plural families struggle financially and are hard put to make ends meet. . . . In most cases some wives—often many wives—and all husbands worked to earn money.").

139. *See infra* Part V.E.

140. *See, e.g.*, Heaton & Jacobson, *supra* note 7, at 158 ("[O]verall income is comparatively low in the [Hildale-Colorado City] polygamous community. The median family income is 37 percent lower than in Utah.").

taxes than dyadic married couples.[141] In spite of polygamous spouses' potentially pooling their assets—either informally or as a result of community property laws—the tax law would treat such polygamous taxpayers as economically independent. In cases where only one spouse worked, polygamous families forced to file as unmarried individuals would pay the same amount as unmarried individuals, and more than dyadic married couples with similar income. This higher tax bill could potentially prejudice low-income polygamous families with a single earner.

IV. TAX DISCRIMINATION AND FAIRNESS

Once a state legalizes polygamy, the federal government will need to determine how to deal with polygamous taxpayers. Until recently, of course, the federal treatment of polygamy was clearly moot: DOMA prevented the federal government from recognizing any marriage other than dyadic opposite-sex marriages, including polygamous marriage.[142] On July 26, 2013, the Supreme Court held Section 3 of DOMA unconstitutional.[143]

Looking at the effects of DOMA on same-sex marriages continues to be instructive, however, in spite of the Supreme Court's decision. In the first instance, DOMA may still apply to polygamous marriage. Justice Kennedy, in his majority opinion, explicitly limits the scope of the holding to "those lawful marriages."[144] The predicate to "those" appears to be "persons who are joined in same-sex marriages made lawful by the State."[145] Though the opinion never refers to polygamy, if it only applies to lawful *same-sex* marriage, DOMA may still apply to a future legal polygamous marriage.

Even if the *Windsor* decision entirely eliminates Section 3 of DOMA, though, it leaves room for the government to pass a DOMA-like statute preventing the federal recognition of polygamous marriage. One significant reason the Court finds DOMA unconstitutional is because

141. *See infra* Part V.A.

142. 1 U.S.C. § 7 (2006) ("[T]he word 'marriage' means only a legal union between one man and one woman as husband and wife . . . .").

143. United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (holding Section 3 of DOMA unconstitutional).

144. *Id.* at 2696.

145. *Id.* at 2695. This is Justice Scalia's understanding, as well, in the dissent: "The penultimate sentence of the majority's opinion is a naked declaration that '[t]his opinion and its holding are confined' to those couples 'joined in same-sex marriages made lawful by the State.'" *Id.* at 2709 (Scalia, J., dissenting).

"[t]he principal purpose is to impose inequality, not for other reasons like governmental efficiency."[146] Though the Court does not say as much, it implies that, if the government had a legitimate purpose, it could refuse to recognize state-sanctioned marriages. And, given the complications polygamy would create in a system designed with dyadic marriage in mind, the government could likely show efficiency reasons to refuse to recognize polygamous marriages.[147]

Even though Congress arguably could refuse to recognize polygamy for federal purposes, if polygamy becomes legal in one or more states, Congress should not attempt to use the tax law to show its disapproval of polygamy. Already the tax law's refusal to recognize same-sex marriage has led to harms, both to gay taxpayers and to the tax system, and its systematic refusal to recognize polygamous marriage would result in similar harms.

Special treatment of certain groups of taxpayers will inevitably disadvantage other taxpayers.[148] This implicit discrimination may be justified in certain circumstances.[149] Still, the principal purpose of the tax law is to raise revenue for the government in a fair manner.[150] Without a compelling tax justification, the tax law should avoid discrimination and, instead, strive to treat similarly situated taxpayers alike.[151]

One legitimate reason for tax discrimination is to prevent and to punish undesirable activities. For example, the tax law can explicitly prevent taxpayers from reducing their incomes in certain ways;[152] alternatively, it can create an unfavorable result in the hopes of discouraging revenue-

146. *Id.* at 2709.

147. *See infra* Part V.

148. JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES 88 (4th ed. 2008) ("A family benefits from the whole system of tax breaks only if it receives more of them than other families at the same income level receive. . . . [S]ome people benefit and others lose.").

149. *Id.* at 89–90.

150. Richard M. Bird & Eric M. Zolt, *Redistribution via Taxation: the Limited Role of the Personal Income Tax in Developing Countries*, 52 UCLA L. REV. 1627, 1630 (2005) ("[T]he main reason for a tax system is to allocate the cost of government in some fair way.").

151. LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 165 (2002) ("Insofar as these [goals] are legitimate goals of government, there is a case for the tax provisions that serve them, even if they are 'discriminatory.'"). And even then, there may be "some forms of tax discrimination [that are] just wrong in themselves, apart from their implications for economic justice or other legitimate social goals." *Id.* at 166.

152. For example, if a taxpayer acquires control of a corporation for the principal purpose of evading tax through a deduction, credit, or other allowance, the I.R.S. can disregard a taxpayer's putative deduction, credit, or other allowance. I.R.C. § 269(a) (2006).

reducing actions.[153] In addition, the tax law can penalize those who decide to engage in disfavored acts. It penalizes taxpayers who underreport their income,[154] who fail to file returns,[155] and even those who bounce their checks when they pay their taxes.[156] Taxpayers who engage in tax shelter transactions intended to illegally evade taxes must disclose their participation and, if they fail to disclose, face stiff penalties.[157]

Most of the undesirable activities that the tax law prevents or discourages relate to the tax law's revenue-raising provisions. But in certain cases, Congress has used the tax law to discourage behaviors not related to tax. The tax law may be uniquely situated to address certain non-revenue-related harms; for example, the tax law can discourage certain activities that create negative externalities by forcing a taxpayer to internalize the costs of those activities.[158]

Accordingly, absent the requisite negative externality worthy of internalizing or a tax evasion predicate, the tax law should not penalize a taxpayer's family structure. The tax law should minimize the ways in which it treats people differently.[159] But using it to disapprove of certain types of marriage—including same-sex marriage and polygamy—serves no revenue-related purposes.[160] Because a taxpayer's marriage does not implicate tax evasion, the tax law's disapproval of same-sex and polygamous marriage does not discourage tax-evasive behavior.

153. For example, some taxpayers would defer—possibly indefinitely—their payment of taxes by investing through a tax haven corporation. *See* Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 GEO. MASON L. REV. 667, 683 (2007). Rather than prohibiting taxpayers' use of tax havens, the Kennedy administration enacted the subpart F income rules, which taxed certain persons trying take advantage of tax havens on the income earned by the tax haven corporation, even if they did not currently receive that money. *Id.* at 684. Although U.S. taxpayers could still invest through tax havens, these rules made such investment less attractive.

154. I.R.C. § 6662(a) (2006).

155. I.R.C. § 6651(a)(1) (2006 & Supp. V 2012).

156. I.R.C. § 6657 (2006 & Supp. V 2012).

157. I.R.C. § 6707A(a) (2006); *see* Samuel D. Brunson, *Repatriating Tax-Exempt Investments: Tax Havens, Blocker Corporations, and Unrelated Debt-Financed Income*, 106 NW. U. L. REV. 225, 266 (2012) (detailing penalties for failing to report reportable transactions).

158. Victor Thuronyi, *The Concept of Income*, 46 TAX L. REV. 45, 93 (1990).

159. Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595, 645 (1993) ("[A] progressive tax system affects different people differently, although we try to minimize the differing effects through formal concepts such as horizontal equity, with its mandate to treat like cases alike.").

160. Tax laws have, in fact, been used to discourage and/or penalize polygamous relationships. Colonial African governments imposed head taxes, under which men had to pay a set amount for each wife. ZEITZEN, *supra* note 20, at 146. As a head tax is a highly regressive form of tax, Lawrence Zelenak, *The Puzzling Case of the Revenue-Maximizing Lottery*, 79 N.C. L. REV. 1, 21 (2000), the colonial governments intended for this type of tax to constitute such an economic burden that eventually polygyny would disappear. ZEITZEN, *supra* note 20, at 146. In fact, it merely converted *de jure* polygamy into *de facto* polygyny, in some places increasing the prevalence of polygamy. *Id.*

Moreover, alternative family structures do not create externalities that impose costs on other taxpayers.[161]

Penalizing these alternative family structures using the income tax is, therefore, unfair. And unfairness may irreparably harm the tax system, as taxpayers begin to lose faith in it.[162] To the extent it refuses to recognize certain families, though, the tax law unfairly causes real harm to them. The harms to taxpayers include the psychic harms of feeling excluded, devalued, or even discriminated against by the larger society,[163] in addition to the expense and administrative costs of paying taxes.[164]

A. DOMA and Same-Sex Marriage

Congress departed from the principles of fairness and nondiscriminatory taxation in its treatment of married same-sex couples under DOMA. In spite of the lack of negative externalities and revenue loss associated with same-sex marriage, Congress refused to recognize gay marriage in applying federal laws, including the federal income tax. Congress's failure to recognize same-sex couples as married for tax purposes has proven unfair and problematic. In essence, Congress's inaction in this regard exemplifies the institutional inappropriateness of using the federal tax law to discourage behavior states affirmatively permit.

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161. *See, e.g.*, Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 SOC. SCI. Q. 292, 305–06 (2009) ("The results above show that laws permitting same-sex marriage or civil unions have no adverse effect on marriage, divorce, and abortion rates, the percent of children born out of wedlock, or the percent of households with children under 18 headed by women.").

162. *See, e.g.*, Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129, 218 (1998).

163. Professor Anthony Infanti explains that, to him, as a gay man,

> My own view of the Code and its treatment of same-sex couples is necessarily colored by my experience of life as a gay man. The sum of this experience, which constitutes a narrative in its own right, casts a far less favorable light on the Code. For me, the Code is not neutral; rather, it appears to be just another manifestation of the fluid mixture of hostility, bewilderment, and discomfort that generally characterize society's reaction to homosexuality. From my perspective, I can't help but see the Code as another weapon for discrimination and oppression in society's already well-stocked arsenal.

Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763, 767–68 (2004). *See also* John V. Orth, *Night Thoughts: Reflections on the Debate Concerning Same-Sex Marriage*, 3 NEV. L.J. 560, 565 (2003) ("[C]ouples who cannot be legally married may feel that their relationship is devalued by society.").

164. Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. TIMES, Oct. 3, 2009, at A1 ("Even tax preparation can cost more, since gay couples have to file two sets of returns.").

In 2004, after the Supreme Judicial Court of Massachusetts determined that prohibitions on same-sex marriage violated the Massachusetts constitution,[165] Massachusetts became the first state to legalize same-sex marriage.[166] Other states followed, and as of the date of publication, fifteen states and the District of Columbia permit same-sex couples to marry.[167] In spite of this, the federal tax law did not recognize such couples as married.[168]

The tax law's refusal to recognize same-sex marriage did not rest on any tax policy consideration. Instead, its failure to treat same-sex married couples in the same manner as it treated heterosexual married couples resulted solely from the application of DOMA, a law intended to limit the viability of same-sex marriages and, at the same time, to signal Congress's disapproval of such marriages.[169] Various commentators have decried the application of DOMA to tax law, objecting to the inequity between opposite-sex and same-sex couples.

One such inequity is that of uncertainty. Because the tax law refused to recognize state-sanctioned same-sex marriage, married gay taxpayers were left in federal tax limbo: holding a state-sanctioned marriage license that offered them neither guidance nor change in status for federal tax purposes. Because the tax law refused to acknowledge their marriages, same-sex married couples had to "settle on an appropriate tax classification for transactions that occur[ed] within the couple."[170] But the proper application of the tax law to same-sex married couples was, at best, uncertain.[171] As they navigated the uncertainty, however, gay couples

165. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) ("The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not.").

166. Nan D. Hunter, *Introduction: The Future Impact of Same-Sex Marriage: More Questions Than Answers*, 100 GEO. L.J. 1855, 1863 n.57 (2012).

167. Soumya Karlamangla, *Hawaii Is 15th State to OK Gay Marriage*, L.A. TIMES, Nov. 14, 2013, at A10; Monica Davey & Steven Yaccino, *Illinois Sends Bill Allowing Gay Marriage to Governor*, N.Y. TIMES, Nov. 6, 2013, at A12. In addition, on November 5, 2013, the Illinois legislature has passed a law legalizing same-sex marriage and has sent it to the governor, who intends to sign it. *Id.* When he signs it, Illinois will become the sixteenth state to legalize same-sex marriage. *Id.*

168. *See* United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013); *see also supra* text accompanying note 17.

169. DOMA substantively defined marriage as consisting solely of a man and a woman for federal purposes and authorized states to refuse to recognize same-sex marriages performed in other states. *See, e.g.*, Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1561 (2002). In their public statements, however, members of Congress expressed animus toward same-sex marriage. *See, e.g.*, Gill v. O.P.M., 699 F. Supp. 2d 374, 378 (D. Mass. 2010).

170. *See* Infanti, *supra* note 163, at 783.

171. *See, e.g.*, Anthony C. Infanti, *Tax ~~Equity~~*, 55 BUFF. L. REV. 1191, 1238 (2008).

nonetheless needed to classify their transactions correctly. If they got it wrong, same-sex married couples could have faced significant civil and criminal penalties.[172]

Not treating married same-sex taxpayers as spouses for tax purposes also violated the norm of horizontal equity. Horizontal equity demands that similarly situated taxpayers pay similar amounts of tax.[173] While horizontal equity is not the sole criterion of a fair tax system, its presence remains a constant across several formulations of a just tax system.[174] Notwithstanding the importance of horizontal equity in a just tax system, however, under DOMA, a same-sex married couple faced a different tax bill than an opposite-sex married couple with precisely the same income, deductions, and credits.[175] And the lack of horizontal equity was more egregious for the fact that it had no tax-based justification. As a result, the tax law's refusal to recognize same-sex marriage, with its violation of horizontal equity, resulted in an unfair tax system.

In addition to the various examples of unfairness to gay taxpayers caused by the tax law's refusal to recognize same-sex marriage, this refusal can potentially lead to bad tax results. The tax law generally assumes that taxpayers will act selfishly, and uses that selfishness in part to police bad behavior by taxpayers.[176] In most arm's-length transactions, both parties attempt to negotiate the best deal for themselves. Usually, though, the best result for one party differs from—and, to some extent, conflicts with—the best result for the other.[177] As such, the parties'

172. *Id.*

173. *See* Musgrave, *supra* note 69, at 113.

174. *Id.* at 116 ("[T]he requirement of [horizontal equity] remains essentially unchanged under the various formulations of distributive justice, ranging from Lockean entitlement over utilitarianism and fairness solutions."); *see also* Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV. 1323, 1328 (2008) ("I argue that [horizontal equity] can be justified both by the unique purpose of the revenue function as well as on welfare grounds."). While an important goal of the tax law, however, the tax law does not *require* similarly situated taxpayers to be treated similarly in all situations. *See, e.g.*, Hostar Marine Transp. Sys., Inc. v. United States, 592 F.3d 202, 210 (1st Cir. 2010) ("Despite the goal of consistency in treatment, the IRS is not prohibited from treating such taxpayers disparately. Rather than being a strict, definitive requirement, the principle of achieving parity in taxing similarly situated taxpayers is merely aspirational.").

175. *See, e.g.*, Christopher T. Nixon, *Should Congress Revise the Tax Code to Extend the Same Tax Benefits to Same-Sex Couples as are Currently Granted to Married Couples?: An Analysis in Light of Horizontal Equity*, 23 S. ILL. U. L.J. 41, 44 (1998) ("As a result, the current Code continues to give preferential treatment to married couples as compared to same-sex couples by granting married couples tax benefits not granted to same-sex couples. Because of this preferential treatment, the current Code lacks horizontal equity and, thus, is violative of both tax and social policy.").

176. *See, e.g.*, Seto, *supra* note 100, at 1538 ("The Code's general rules are written on the assumption that taxpayers are self-interested, unaffiliated individuals—the atomistic rationalists of the classic economic model.").

177. A sale represents the simplest example of this conflict. The seller wants to receive the highest

ultimate agreement requires some compromise and, rather than resulting in collusion that permits the parties to evade taxes, approximates the true value of their deal. In certain relationships, including familial relationships, the tax law relaxes this assumption of selfishness, and, as such, may ignore transactions that lack economic reality.[178]

Because the tax law did not recognize same-sex couples' marriages as marriage for tax purposes, however, the tax law assumed that gay taxpayers would act selfishly. Where, instead, they acted altruistically, they could structure transactions in an abusive manner to take advantage of the tax law's assumption of selfishness.[179] Imagine, for example, that a taxpayer purchased a share of stock for $10. The value of the stock subsequently falls to $5. If the taxpayer sells the stock, she can deduct her $5 loss.[180] On the other hand, if she is unwilling to sell (because, for example, she believes the stock will appreciate), then she cannot deduct the loss.[181]

If, however, she could sell the stock to someone with whom she shared her economic life, she could realize and deduct the loss while preserving control over the stock and its potential appreciation. The tax law recognizes that people in certain relationships, including spouses, could act in such an opportunistic (and altruistic) manner. To prevent these artificial deductions, the tax law disallows the deduction of losses on sales between spouses.[182]

Finally, the federal government's refusal to recognize same-sex marriages recognized under state law violated the Constitution.[183] The current constitutional regime leaves to the states the right to define marriage.[184] Though defenders of DOMA argued that it did not limit state

price possible for her asset in order to maximize her gain. The buyer, on the other hand, wants to pay as little as possible. Because their positions are adversarial and in conflict, the price on which they eventually settle should approximate an objective value for the asset.

178. I.R.C. § 7701(o) (2006 & Supp. V 2012) (codifying economic substance doctrine).

179. *See, e.g.*, Seto, *supra* note 100, at 1544 ("But if my thesis is correct—one of the principal purposes of the related-party rules is to prevent tax-abusive transactions whenever the assumption of selfishness fails—then we should all be troubled by the tax-abusive consequences of not including gay marriage as a listed relationship automatically invoking those rules.").

180. I.R.C. § 165(a), (c)(2) (2006).

181. Treas. Reg. § 1.165-4(a) (1960).

182. I.R.C. § 267(a)(1), (b)(1), (c)(4) (2006).

183. United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013).

184. *See, e.g.*, Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221, 231 (1996) ("The Tenth Amendment, federalism, the absence of enumerated congressional power, and history all make clear that states, not the federal government, define and regulate civil marriage, subject only to U.S. constitutional constraints.").

definitions of marriage, but only served to create a single federal definition of marriage,[185] the Supreme Court held "that DOMA [was] unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[186]

B. Polygamists and Tax Evasion

The arguments in favor of the tax law's recognizing same-sex marriage would also press for its recognition of legalized polygamous marriage. Without such recognition, polygamists would face uncertainty, the tax law would violate horizontal equity, other bad tax results could follow, and the tax law's response could arguably violate the Constitution.

Still, the possibility exists that polygamists differ fundamentally from other taxpayers in such a way that they deserve to be treated differently.[187] One way in which polygamous marriage differs significantly from same-sex marriage in relation to tax is that nobody accuses same-sex couples of systemically evading taxes.[188] Critics of polygamy, on the other hand, cite tax evasion among the litany of evils perpetrated by polygamists.[189] If polygamists approach taxes in a way fundamentally different from other Americans, that would provide some justification for treating polygamous taxpayers differently, perhaps trumping the general fairness considerations.

Do polygamists evade taxes more than other Americans? No study has explored polygamists' tax compliance. Without such empirical evidence of how polygamists compare with non-polygamists in their payment of taxes, we cannot answer the question definitively. We can, however, look at the

185. Gill v. O.P.M., 699 F. Supp. 2d 374, 391 (D. Mass. 2010).

186. *Windsor*, 133 S. Ct. at 2695.

187. For example, Professor Strassberg claims that the "social and political implications" of same-sex marriage differ significantly from those of polygamous marriage. Strassberg, *supra* note 6, at 1615. The former she finds fundamentally democratic, while the latter she finds inherently despotic. *Id.*

188. This notwithstanding Professor Theodore Seto's documentation of tax advantages that committed same-sex couples can enjoy as long as the tax law does not recognize their relationship, *see generally* Seto, *supra* note 100, and notwithstanding Professor Anthony Infanti's call for civil disobedience by gay taxpayers. *See generally* Anthony C. Infanti, Homo Sacer, *Homosexual: Some Thoughts on Waging Tax Guerrilla Warfare*, 2 UNBOUND: HARVARD J. LEGAL LEFT 27, 53 (2006) ("To be clear, when I speak here of an 'open' challenge, I contemplate the filing of returns that *on their face* challenge the current application of the tax laws to same-sex couples.") (emphasis in original).

189. *See, e.g.*, Griggs, *supra* note 4, at A1; Vazquez, *supra* note 4, at 244; Davis, *supra* note 4, at 1975.

specific accusations of tax evasion leveled against polygamists and evaluate the strength of these accusations' connection to polygamy itself.

In general, individual U.S. taxpayers pay the taxes they owe. The I.R.S. estimates that, in 2001, it collected over 86 percent of the taxes that should have been paid.[190] But this high level of compliance is not evenly distributed; instead, compliance rates vary widely, depending on the type of income a taxpayer earns. Taxpayers declare and pay taxes on about 99 percent of their wages and other income subject to significant information reporting and withholding requirements.[191] On the other hand, taxpayers only declare and pay taxes on about half of their business income, which often consists of cash not subject to reporting or withholding rules.[192] And I.R.S. statistics indicate that taxpayers only reported and paid taxes on 28 percent of their farm income.[193]

Although critics of polygamy do not have data on whether and how polygamists evade taxes, they do provide anecdotal examples. For example, on July 24, 2008, the Senate Judiciary Committee held a hearing entitled, "Crimes Associated with Polygamy: The Need for a Coordinated State and Federal Response."[194] In his introduction to the hearing, Senator Harry Reid explained that witnesses at the hearing would "describe a web of criminal conduct that includes welfare fraud, tax evasion, massive corruption and strong-arm tactics to maintain what they think is the status quo."[195] In the hearings, witnesses alleged that the Fundamentalist Church of Jesus Christ of Jesus Christ of Latter-Day Saints ("FLDS"), one of the largest Mormon polygamous communities, believed in "bleeding the beast," meaning "F.L.D.S. members should avoid paying taxes at all costs and should also apply for every possible type of government assistance that is available, whether they are eligible or not."[196]

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190. I.R.S. AND U.S. DEP'T OF THE TREASURY, REDUCING THE FEDERAL TAX GAP: A REPORT ON IMPROVING VOLUNTARY COMPLIANCE 1 (2007) [hereinafter REDUCING THE FEDERAL TAX GAP], *available at* http://www.irs.gov/pub/irs-news/tax_gap_report_final_080207_linked.pdf. The I.R.S. calculated this compliance rate after factoring in late payments and I.R.S. enforcement actions. *Id.*

191. *Id.* at 14.

192. Susan Cleary Morse et al., *Cash Businesses and Tax Evasion*, 20 STAN. L. & POL'Y REV. 37, 39 (2009).

193. REDUCING THE FEDERAL TAX GAP, *supra* note 190, at 14.

194. *Crimes Associated with Polygamy: The Need for a Coordinated State and Federal Response Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110shrg44773/pdf/CHRG-110shrg44773.pdf.

195. *Id.* at 5 (Statement of Sen. Harry Reid).

196. *Id.* at 95 (Submission for the Record by Carolyn Jessop); *but see id.* at 50 (Testimony of Dr. Dan Fischer) ("While you'll probably gather important information related to tax fraud and welfare fraud, there are probably some who pay their taxes fairly and for sure there are some who are eligible for welfare and should be the recipients of its benefits.").

Polygamists allegedly avoid paying taxes in two ways: they claim credits and deductions to which they are not entitled and they fail to report some or all of the income they earn. For example, in the Senate Judiciary Committee hearing, one witness testified that "[i]t was standard procedure for 'spiritual wives' [*i.e.*, plural wives not legally married to their husband] to list themselves as the 'head of household' on their income tax returns for the benefit of the tax credit."[197] This accusation is problematic, however, for one major reason: these plural wives probably qualify to file as heads of households. Filing as a "head of household" entitles a tax filer to "take advantage of special tax rates."[198] A taxpayer qualifies for these special tax rates if, at the end of the year, she is unmarried, her dependent child (or children) live with her for at least half the year, and she provides at least half of the cost of maintaining her household.[199] Because neither the states nor federal law recognizes polygamous marriage, most polygamous spouses are not married for tax purposes. Provided that a polygamous wife's children live with her and she provides half of their support, she in fact qualifies as the head of household and, by filing using that status, follows the tax law and does not evade her taxes.

Critics of polygamy also claim that polygamists "avoid income taxes by paying each other wages under the table."[200] But, in light of the I.R.S.'s compliance statistics, the evasion problem appears to result less from the taxpayers' status as polygamists and more from their work in less-formal industries.[201] And, at least among some groups of Mormon polygamists, men are more likely to work in agricultural and construction jobs than is the surrounding population.[202] Taxpayers in these fields tend to underreport their incomes in general.[203] Critics of polygamy have not provided any evidence that polygamists are so different from other Americans that, if they worked in jobs subject to wage withholding and reporting, they would continue to evade taxes. Making it easier for polygamists to join the more-formal job market would thus likely provide

197. *Id.* at 52 (Testimony of Dr. Dan Fischer).
198. Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 385 (1995).
199. I.R.C. § 2(b)(1) (2006).
200. Griggs, *supra* note 4, at A1.
201. *See* Morse et al., *supra* note 192, at 67 ("Tax cheating follows opportunity, not complexity or immorality . . . .").
202. Heaton & Jacobson, *supra* note 7, at 157.
203. *See, e.g.*, REDUCING THE FEDERAL TAX GAP, *supra* note 190, at 13 (72 percent net misreporting percentage for farm income).

a better solution to their tax evasion than refusing to recognize their marriages for tax purposes.[204]

Then, should polygamy become legal, Congress's historic failure to treat same-sex marriages equitably under the tax law would fail to justify its continued refusal to acknowledge and deal with polygamy for tax purposes. Refusing to provide rules for polygamous families would create the same inequities, uncertainties, and opportunities for abuse that refusing to acknowledge the marriages of same-sex couples did. At the same time, it would do nothing to prevent polygamists' alleged tax-evasive behavior.

V. FILING SOLUTIONS

The current absence of legal polygamy in the United States poses a significant impediment to designing a tax regime that can handle polygamous taxpayers. Although supporters call polygamy the "next civil rights battle,"[205] no state has made any serious move toward recognizing, legalizing, or even decriminalizing it. Even assuming polygamy gains the necessary critical mass of cultural and political acceptance, the legal framework that would underlie legalized polygamy remains a mystery. Given the differences between the various groups that practice polygamy—and the basic structural difference between polygamy on the one hand and both traditional and non-traditional dyadic marriages on the other—it remains unclear how polygamous families would function, legally or economically.

Still, even without a clear idea of how legalized polygamy would look or when it would arrive, a number of important considerations justify asking the second-generation question of how the tax law could accommodate polygamous taxpayers for at least two reasons. As a practical matter, when and if polygamy becomes legal, polygamous

204. Legalizing—or even just decriminalizing—polygamy could help polygamists transition into the formal economy. Currently, polygamy is against the law in many states. And polygamists may justifiably believe that, if the state notices them, it will prosecute them. For example, "David O. Leavitt, the Juab County prosecutor . . ., said he had not heard of Tom Green [a polygamist] until he saw him several years ago on a television talk show, discussing his life. To Mr. Leavitt, . . . it was an admission of guilt worth pursuing." Michael Janofsky, *Trial Opens in Rare Case of a Utahan Charged With Polygamy*, N.Y. TIMES, May 15, 2001, at A12. And, more recently, shortly after a reality television show featuring polygamist Kody Brown and his family began to air, Utah law enforcement officials announced "that the family was under investigation for violating the state law prohibiting polygamy." John Schwartz, *Polygamist, Under Scrutiny in Utah, Plans Suit to Challenge Law*, N.Y, TIMES, July 12, 2011, at A10. There is no guarantee, however, that polygamists would want to join mainstream American culture, even if mainstream culture were to accept them.

205. Davis, *supra* note 4, at 1957 (quoting *Polygamy=Marriage*, PRO-POLYGAMY, http://www.pro-polygamy.com) (last visited by Davis on Sept. 10, 2010).

families will immediately need to file tax returns and pay taxes. Although Congress could determine how such families should file and pay their taxes after a state legalized polygamy, it would have a limited amount of time to do so. Moreover, if the discussion of tax and other rules governing the interaction of polygamous families and the outside culture occur at the same time as the discussion of rules governing such families' internal dynamics, the rules can be better tailored to polygamists' unique experiences and needs.

Further, even without legalized polygamy, up to 150,000 polygamists live in the United States.[206] Although neither federal nor state governments legally recognize their relationships, those relationships provide the best determinant of their appropriate taxpaying unit. Commentators urge that the tax law recognize relationships beyond heterosexual marriages for purposes of determining tax liability,[207] and, by treating some civil unions as marriage for tax purposes, the government has made tentative steps toward doing so.[208] To the extent this trend continues, and the tax law looks at actual, rather than legal, relationships, it will need to deal with polygamous families, even without legalized polygamy.

Even if polygamy never becomes legal and the tax law does not look to substantive, rather than merely formal, relationships, considering how the tax law would treat polygamous families provides a new and instructive perspective on tax policy. All policy discussions about joint filing for married couples have assumed a baseline of dyadic couples. Whether the couple in question was of the same or opposite gender, in a legally-sanctioned relationship or not, whether they shared their income and assets or not, the stakes did not change. But adding one or more partners to the taxable unit raises the stakes, potentially increasing both the benefits and burdens of the joint filing system. Even without polygamy, such new perspective may help to crystallize the benefits and burdens of joint filing.

In order to propose a series of potential tax regimes, and to analyze their pros and cons, this Article must make certain assumptions. First, the potential solutions proposed in this Article assume either that at least one state legalizes and regulates polygamous marriage or that the tax law recognizes relationships beyond state-sanctioned marriage.[209] Second, the

206. *See supra* notes 112–15 and accompanying text.

207. *See supra* notes 105–08 and accompanying text.

208. *See supra* note 90.

209. There may be reasons to prefer the tax law to recognize only state-sanctioned relationships, in spite of the unfairness such treatment imposes. Treating polygamists whose marriages are not recognized by a state as married for tax purposes could present both political and administrative problems. Without some sort of officially-sanctioned and recorded relationship, the process of

proposed solutions assume a certain type of polygamous relationship. Although providing an individualized tax system tailored to each family would perhaps create the fairest system, doing so would add unnecessary complexity to the tax law and would be virtually unadministrable. People who enter into polygamous marriages do so with different motivations, and polygamous families differ in interpersonal and economic configurations.[210]

Thus, the proposed regimes assume that a polygamous marriage is structured in a hub-and-spoke configuration. The hub-and-spoke model posits polygamy as a series of dyadic relationships between the "hub" spouse (in polygyny, the husband) and each individual spoke (in polygyny, the wives).[211] Admittedly, there are other possible structures for polygamous marriage, including group marriage and other variants of interrelationships.[212] But many, and perhaps most, polygamist marriages in the United States fit into the hub-and-spoke model, making this a practical and logical underlying assumption.[213]

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determining the economic reality of a polygamous family would require significant I.R.S. resources, and would likely also require intrusive verification of the facts of the polygamous relationship. Ultimately, it may be preferable to recognize chosen families, or to otherwise take into account a broader definition of family in dealing with the tax law. But the question of whether the tax law should recognize a non-state-sanctioned family is beyond the scope of this Article; electivity in the tax law can create its own problems, both for the taxpayer and the government. *See, e.g.*, Heather M. Field, *Choosing Tax: Explicit Elections as an Element of Design in the Federal Income Tax System*, 47 HARV. J. ON LEGIS. 21, 26 (2010) ("While there is not an extensive body of literature explaining the aversion to the use of explicit elections, scholars' discomfort with the use of tax elections is not surprising given that explicit elections raise many of the same normative concerns as general tax planning opportunities, which have garnered a substantial amount of academic attention. The availability of tax planning opportunities is criticized as complex, costly, wasteful, revenue reducing, and inequitable, and these critiques may resonate particularly strongly in the context of explicit elections.") (footnotes omitted). I intend to address issues of electivity as it relates to the taxation of non-traditional families in a future article.

210. *See* ZEITZEN, *supra* note 20, at 182 ("Polygamy is not a monolithic mould that people fill, but takes shape from the way people practice it. Like all societal institutions, it can be manipulated to fit the needs and purposes of its practitioners."). This variation exists, not only internationally, but also between polygamists in the same social and religious groups. "There is . . . the same wide variety of polygamous family patterns in today's [fundamentalist Mormon] plural marriages as there was in the nineteenth century." *Id.* at 100.

211. Davis, *supra* note 4, at 2017.

212. *See, e.g.*, Diane J. Klein, *Plural Marriage and Community Property Law*, 41 GOLDEN GATE U. L. REV. 33, 49 (2010) ("Asymmetric polygamy and group marriage would both be legal if bigamy were decriminalized, and they would probably cover a significant fraction of the actual arrangements people might desire. But they do not exhaust the possibilities. Although these two arrangements are 'scalable' for groups of four or more persons, there are also distinctive forms for larger groups.") (footnote omitted).

213. *See, e.g.*, *id.* at 46–47 ("This asymmetric model, when instantiated by one husband with multiple wives, is what is most commonly meant by those using the term 'polygamy.' It is the model adopted by those for whom these marriage practices have a strong customary foundation, even a

In addition, the proposed solutions assume that some degree of economic unity exists in polygamist marriages. This assumption may prove controversial; questions remain about whether spouses in dyadic marriages truly split income and assets and otherwise act as an economic unit.[214] Nonetheless, the evidence suggests that, while not all spouses pool all of their income, a significant portion of spouses pool at least some of their income.[215] Similarly, while it is likely some polygamous spouses do not act as economic units, a significant portion pool the spouses' income (whether as dyads or collectively) and allocate it between the spouses.[216] As long as the tax law treats dyadic marriages as economic units, it is difficult to justify treating polygamous marriages otherwise. Moreover, if a community property state legalized polygamous marriage, presumably the spouses' income and property would become income and property of the marital unit. In that case, the tax law would be forced to confront the appropriate taxation of polygamous families.[217]

The rest of this Part will present five potential tax regimes that could account for polygamous relationships.[218] Because of the tensions inherent in a progressive tax system that looks for marriage neutrality and recognizes income pooling,[219] no solution is perfect. Instead, each involves

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religious mandate, including FLDS and independent Mormon polygamists, some Muslims, and some Africans.") (footnotes omitted); *see also* Davis, *supra* note 4, at 2017 ("This is a radically different proposition from the way many polygamists currently practice plural marriage in the United States, conceiving it in effect as a series of legal dyads, each of which runs through the husband, like spokes around the hub of a wheel.").

214. *See supra* notes 84–85 and accompanying text.

215. *See supra* note 92 and accompanying text.

216. Irwin Altman, *Polygamous Family Life: The Case of Contemporary Mormon Fundamentalists*, 1996 UTAH L. REV. 367, 389.

217. *Cf.* I.R.S. Chief Couns. Mem. 200608038 (Feb. 24, 2006) (holding that, in light of California's extension of community property rules to domestic partners, each partner was required to report and pay taxes on half of the community income).

218. Especially in light of Professor Davis's recommendation that states base their default rules for polygamous marriage on commercial partnership law, *see* Davis, *supra* note 4, at 1959 and *supra* text accompanying note 10, it is tempting to provide a sixth possible treatment: treating polygamous spouses as a partnership or other business entity for tax purposes. But treating families as entities for tax purposes would not necessarily be fair or simple; in fact, the partnership tax rules are so complicated that "partnership tax experts expend considerable time and energy mastering" them. Bradley T. Borden, *The Allure and Illusion of Partners' Interests in a Partnership*, 79 U. CIN. L. REV. 1077, 1083 (2011). The potential need to consult tax experts places a heavy burden to put on individuals who just want to pay their taxes. Moreover, ultimately, individuals, not entities, pay income taxes, even where the entity is the nominal taxpayer. George K. Yin, *The Taxation of Private Business Enterprises: Some Policy Questions Stimulated by the "Check-the-Box" Regulations*, 51 SMU L. REV. 125, 139 (1997) ("Despite the nominal incidence of the tax on the business, some people will still pay it; we just will not know who."). Rather than solving the problems of whom and how much to tax, then, imposing entity taxation would merely push those questions back one step.

219. *See supra* notes 22–23 and accompanying text.

tradeoffs between competing policy goals. In analyzing the pros and cons of each regime, I conclude that a mandatory individual filing regime that takes familial relationships into account would provide the fairest treatment of all taxpayers.[220] Given the current unlikeliness of the United States abandoning joint filing, however, I offer a second-best, attainable solution: a balkanized joint filing regime. Taking into account the practical realities and entrenchment of joint filing, my proposal for balkanized joint filing constitutes the fairest and most administrable way for a joint filing system to accommodate polygamy.[221]

A. Refuse to Recognize Polygamous Marriage

As one possible solution, the government could maintain the status quo, refusing to recognize polygamous spouses for tax law purposes. On its face, this would appear to be the easiest solution: among other things, it would not require any change to current practice. Under current law, a husband and wife are permitted to file a joint tax return.[222] In general, the tax law recognizes as spouses, couples who were married under state law as of December 31 of the year in question.[223] No state currently recognizes polygamous marriages,[224] meaning that currently, polygamists cannot generally file joint tax returns.[225]

The federal government's refusal to treat legalized polygamous relationships as marriage for tax purposes would harm polygamous families in certain ways. By treating polygamous spouses as atomized individuals, in many cases, such families' tax liabilities would not reflect the economic reality of their lives. In families where some spouses earned the majority of the family income, while other spouses earned little or no income, the family unit would be overtaxed relative to a family of the same size and income where all of the spouses earned similar amounts, violating the norm of horizontal equity.

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220. *See infra* Part V.E.

221. *See infra* Part V.D.

222. I.R.C. § 6013(a) (2006).

223. I.R.C. § 7703(a)(1) (2006); Toni Robinson & Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 792–93 (1989).

224. Elizabeth Warner, *Behind the Wedding Veil: Child Marriage As a Form of Trafficking in Girls*, 12 AM. U. J. GENDER SOC. POL'Y & L. 233, 245 (2004) ("[P]olygamy is illegal in Utah as it is in every other state.").

225. In a polygynous household, where the husband and first wife had legally married, they could file a joint return. Because none of the other marriages would be recognized under state or federal law, however, none of the other wives would be eligible to file a joint return.

Moreover, by refusing to recognize a state-sanctioned relationship, the tax law would reinforce the second-class nature of polygamous families.[226] Even if the majority of Americans consider polygamists second-class citizens,[227] their disapproval should not impact the appropriate tax treatment of such families.[228]

In addition, the tax law's failure to recognize polygamous relationships essentially would require polygamists to make difficult filing decisions. Because the tax law would not recognize polygamists' marriages, they would not be permitted to disregard property flows and other transactions between themselves; instead, they would need to figure out how to characterize all of the transactions between spouses over the previous year.[229] The need to document every transaction that occurred between family members, and paying taxes on those transactions, would penalize families for acting like families.

The tax law's nonrecognition of polygamous marriage does not entirely prevent polygamists from filing joint returns. In many current polygamist families, the first marriage is a legal civil marriage, while subsequent marriages "are not performed by publicly authorized officials or documented in civil records."[230] The initial couple, married under state law, must file tax returns as married persons, not as single persons, whether they file jointly or separately. But any subsequent spouse must file as an unmarried individual, because the subsequent marriages are not legal under state law.

Permitting one dyad to file jointly does nothing to resolve the inequities the other spouses face as a result of separate filing. Moreover, if polygamy were legal, permitting one dyad to file jointly while requiring all other spouses to file as single taxpayers would create more complexity than currently exists. If all spouses were legally married, the tax law would have to determine which dyad could file jointly, and whether the dyad could change from year to year, or at some other periodic interval. Any electivity introduced into the system, moreover, would increase the

226. *Cf.* Infanti, *supra* note 188, at 28 ("Completing my federal income tax return reminds me that the government has singled out for condemnation my partner and me, my sister and her partner, and every other lesbian and gay man in the United States.").

227. *See supra* note 1 and accompanying text.

228. *See supra* Part IV.A.

229. *See infra* note 273 and accompanying text; *cf.* Infanti, *supra* note 188, at 28 ("In tax limbo, members of lesbian and gay couples are told what they are *not* (i.e., married), but they are never told what they *are* (and, concomitantly, how they should report transactions between them).") (emphasis in original).

230. ALTMAN & GINAT, *supra* note 138, at 132.

chances of inequity, with polygamous families choosing which dyad filed jointly and thus determining what arrangement would result in the lowest collective tax obligation.

B. Treat the Entire Polygamous Family as an Economic Unit

Rather than refusing to recognize polygamous marriages for tax purposes, Congress could instead decide to treat all polygamous spouses as a single economic unit.[231] Polygamous spouses would elect whether to file joint or separate tax returns and would pay taxes at the same marginal tax rates as dyadic married couples.

Although the tax law does not currently permit more than two people to file a joint return, it does, in certain circumstances, treat more than two people as the appropriate taxpaying unit. The "kiddie tax," for example, does not literally require children to file a joint return with their parents.[232] However, it taxes a child's "unearned income" at her parents' top marginal tax rate if doing so would result in a higher tax liability for the child.[233] Although technically the child files her own return (and, as a result, escapes joint and several liability with her parents), the tax law nonetheless treats her as being part of an economic unit with her parents for purposes of her unearned income.[234]

Permitting all polygamous spouses to file a joint return would provide certain benefits over ignoring polygamy altogether. Doing so would not attempt to illegitimize a relationship that one or more states had approved. It would permit polygamists to disregard transfers of property and the performance of services within the family, easing their administrative burden and potentially improving horizontal equity in relation to their dyadic peers. Additionally, it would not present significant administrative challenges to the I.R.S. The I.R.S. would have to make minimal changes to Form 1040—the form would need to have space for more than two spouses—but otherwise, permitting all spouses to file a joint return would not require significant alteration of current tax law and practice.

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231. This, and any other solution that would recognize polygamy for tax purposes, would require either that the Supreme Court's decision in *Windsor* declaring DOMA unconstitutional apply to polygamy, as well, or that Congress affirmatively repeal or amend DOMA with respect to polygamous marriages.

232. It does provide the option, however, for children to include the income that would be subject to the kiddie tax on their parents' return. I.R.C. § 1(g)(7) (West 2013).

233. I.R.C. § 1(g)(1).

234. *See* Brunson, *supra* note 21, at 467.

However, nakedly treating polygamous spouses in the same manner as dyadic spouses also raises significant fairness issues. Such treatment violates the norm of horizontal equity. Horizontal equity requires that similarly situated taxpayers should be treated similarly for tax purposes.[235] And, although a two-person marriage and a five-person marriage are both families (and, potentially, economic units), the additional three spouses create real differences between the two families. In 2009, the median U.S. household earned about $50,000.[236] Such a family would presumably fall into the middle class. A five-person marriage that also earned $50,000, however, would have a much lower standard of living. The family would have to split the $50,000 between five adults, rather than just two, while requiring more expenditure for basics such as food, clothing, and housing.[237] Still, under this regime, the five-person polygamous family would pay approximately the same amount in taxes as the two-person family.[238] Even as an economic unit, polygamous marriage differs qualitatively, and not just quantitatively, from dyadic marriage, and treating them identically does not advance horizontal equity.

Moreover, requiring a polygamous family to file joint returns would exacerbate the secondary-earner problem.[239] With a joint return, only one person's income can absorb the lower tax rates. The secondary earner pays taxes at the primary earner's top rate on her first dollar of income. With a polygamous family, the tertiary earner would then start paying taxes at the top rate of the secondary earner. Each spouse would face an increasing disincentive to work, as she had less after-tax income from her first earned dollar. Not only that: as the collective income increased, the family would begin to face phaseouts of deductions and other tax benefits, increasing the cost to the family of additional earners.[240] Joint returns, with their stacked brackets, are, then, antithetical to polygamous families, with their several spouses.

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235. Richard Schmalbeck, *Income Averaging After Twenty Years: A Failed Experiment in Horizontal Equity*, 1984 DUKE L.J. 509, 547.

236. Amanda Noss, *Household Income for States: 2008 and 2009*, AM. CMTY. SURVEY BRIEFS 4 (Sept. 2010), *available at* http://www.census.gov/prod/2010pubs/acsbr09-2.pdf.

237. This example does not take children into account. In theory, the couple could have five children, while the polygamists have none. The tax law allows deductions for children, however, that in part offset the additional costs associate with them.

238. The law could ameliorate this problem by providing a generous personal exemption available to each of the spouses.

239. *See supra* notes 87–88 and accompanying text.

240. Phaseouts reduce the amount of deductions a taxpayer can take as the taxpayer's income increases. Zelenak, *supra* note 103, at 8.

C. Index Tax Brackets to Family Size

Rather than dropping polygamous taxpayers into the current dyadic brackets, Congress could redesign the tax brackets to accommodate polygamous and dyadic married taxpayers. Redesigned tax brackets could solve the horizontal equity problem[241] and reduce the secondary-earner problem polygamous taxpayers would face using current brackets.[242] While requiring polygamous families to use the same tax brackets as dyadic couples creates these problems, if the marginal tax brackets varied depending on the number of spouses filing jointly, the fairness analysis changes.

Varying the tax brackets based on the number of spouses would solve the horizontal equity problem. Assuming that the spouses pool their incomes,[243] two polygamous families, each with five spouses and each with $50,000 of annual income, are similarly situated. The fact that in the first, one spouse earns the full amount, while in the second, each of the spouses earns $10,000, does not matter. Assuming that both families act as economic units, treating them the same for tax purposes comports with the requirements of horizontal equity.

Moreover, expanding the size of the brackets based on the number of people filing jointly reduces the secondary-earner problem. Larger brackets would mean that a family could earn more income before progressing to the next marginal tax rate. While the tertiary earner still pays taxes on her first dollar of income at the secondary earner's top marginal rate, expanded brackets reduce the top tax rate paid by the secondary earner. As such, while the tertiary earner still faces some disincentive to work, she will keep a higher percentage of her after-tax income. Moreover, if this indexing to family size were carried over to deduction phaseouts, this could substantially reduce the secondary-earner problem.[244]

However, indexing the tax brackets based on the number of spouses has its own problems. As an initial, significant impediment, Congress

241. *See supra* notes 236–38 and accompanying text.

242. *See supra* notes 239–40 and accompanying text.

243. *See supra* notes 214–17 and accompanying text. Although they may not actually be acting as economic units, it seems to be worth the inaccuracy to avoid the intrusive and administratively burdensome job of requiring the I.R.S. to determine (or confirm) the economics of individual families.

244. That is, if each additional spouse increased the amount of income a polygamous family could earn before losing deductions, the family could add workers without increasing its marriage penalty. *See, e.g.*, Zelenak, *supra* note 103, at 8 ("To completely avoid marriage penalties, the threshold amount . . . should be twice as high for joint returns as for unmarried taxpayers.").

would need to decide how to calculate the size of the tax brackets. When first implemented, the tax brackets for married persons filing jointly were twice as large as the tax brackets for unmarried individuals.[245] In the ensuing years, however, this straightforward relationship has changed. As illustrated in Table 1, the tax brackets for a married couple filing jointly currently range from twice as large as that of an unmarried person at the lowest tax rate to the same size at the highest tax rate.[246] Congress would have to determine whether to maintain these percentage differences for each additional spouse, or whether to change the indexing—a significant administrative burden indeed.[247]

TABLE 1[248]

Tax Rate	Ceiling for an Unmarried Taxpayer	Ceiling for a Married Taxpayer Filing Jointly	Percentage by Which Married Bracket Exceeds Unmarried
10%	$8,925	$17,850	100%
15%	$36,250	$72,500	100%
25%	$87,850	$146,400	66.7%
28%	$183,250	$223,050	21.7%
33%	$398,350	$398,350	0%
35%	$400,000	$450,000	12.5%
39.6%	Over $400,000	Over $450,000	N/A

245. *See supra* note 61 and accompanying text.

246. The highest marginal tax rate begins at the same point for married and unmarried taxpayers.

247. Even using the same percentages would not solve all of the complexity. If Congress indexed the tax brackets to the number of spouses while maintaining the same ratios as currently exist, the new brackets might look something like this:

Tax Rate	Unmarried	Two Spouses	Three Spouses	Four Spouses	Five Spouses
10%	$8,925	$17,850	$35,700	$71,400	$142,800
15%	$36,250	$72,500	$145,000	$290,000	$580,000
25%	$87,850	$146,400	$244,049	$406,829	$678,185
28%	$183,250	$223,050	$271,452	$330,357	$402,044
33%	$398,350	$398,350	$398,350	$398,350	$398,350
35%	$400,000	$450,000	$506,250	$569,531	$640,723
39.6%	Over $400,000	Over $450,000	Over $506,250	Over $569,531	Over $640,723

This table suggests a mathematical problem with indexing, however: because the percentage difference between unmarried and married taxpayers differs depending on the brackets, multiple spouses cause the brackets to overlap in ways that. For example, using the same percentage differences, for a family with four spouses, the ceiling on the 25-percent tax bracket would exceed the ceilings on the 28-percent and the 33-percent brackets. And for a family with five spouses, the 15-percent and the 25-percent tax bracket ceilings exceed the 28-percent and the 33-percent ceilings. As a result, mathematically, simply extending the percentages for each spouse would be unworkable.

248. Rev. Proc. 2013-15 § 2.01, 2013-5 I.R.B. 444 (2013).

Moreover, indexing tax brackets to the number of spouses creates certain fairness issues. In polygamous families where one spouse earned all or most of the family's income,[249] increasing the size of tax brackets in relation to the number of married persons would greatly increase the marriage bonus. Although the five-spouse polygamous family where one spouse earned all $50,000 would pay approximately the same taxes as the five-spouse polygamous family where each spouse earned $10,000, it would pay significantly less in taxes than an unmarried individual, or a dyadic married person, who earned $50,000.

Such a solution would also introduce additional tax-induced distortions into marriage decisions.[250] Where possible, tax policymakers try to avoid causing distortions, because distortions "impose[] an otherwise avoidable welfare cost" on taxpayers.[251] If Congress indexed tax brackets to the number of spouses, polygamous spouses would face tax incentives to add additional low-income or no-income spouses, whether the family had a single earner or each spouse earned a similar income. Adding additional spouses would increase the size of the tax brackets under which the family calculated its tax liability. If the new spouse did not contribute any additional income, her presence as a family member would reduce the family's collective tax liability.[252]

Allowing polygamous families to file joint returns, whether they use the tax brackets applicable to dyadic marriage or indexed brackets, raises other issues as well. Treating all of the spouses as a single economic unit may not reflect the economic reality of a polygamous marriage. Because the structure of polygamous marriages varies widely, designing a tax system that accurately reflects all polygamous families would be highly impractical and imprudent. Still, treating a polygamous family as a single economic unit assumes that all of the spouses share property and income,

249. Although most polygamous households need more than one person earning income, about half of the polygamous wives in Altman and Ginat's study worked roughly full-time. *See* ALTMAN & GINAT, *supra* note 138, at 85. This indicates that, in at least some polygamous households, some of the spouses are not working.

250. Empirical evidence suggests that tax consequences have a measurable, statistically significant (albeit small) impact on the probability of a person's marrying. James Alm & Leslie A. Whittington, *For Love or Money? The Impact of Income Taxes on Marriage*, 66 ECONOMICA 297, 299 (1999).

251. Michael S. Knoll, *Reconsidering International Tax Neutrality*, 64 TAX L. REV. 99, 100 (2011).

252. For example, using the sample indexed brackets, *supra* note 247, a three-spouse polygamous family with $40,000 of income would pay $4,215 in taxes (*i.e.*, 10 percent of their first $35,700 of income plus 15 percent of their remaining $4,300). If they brought in an additional spouse, however, who had no income, they would only pay $4,000 in taxes. Of course, there may be non-tax constraints that would prevent the family from marrying another spouse, including the family's not wanting more spouses and the additional cost that they would incur in supporting another spouse.

and that the family members function as a unified group. If this is how state property law treats polygamous families, it may make sense to tax them collectively. But if state property law allocates ownership differently, this collective taxation may be inappropriate.

Congress would also need to address whether it would require all spouses in a polygamous family to file consistently. That is, if a five-person marriage decided to file a joint return, would all five spouses necessarily file jointly? Or could four file a joint return, with one filing a separate return? In general, it seems unlikely that one spouse would file separately. If she did, both she and the spouses filing jointly would face higher taxes.[253] However, if she suspected that those spouses filing jointly had filed an inaccurate return, she may want to file separately to avoid joint and several liability for the tax liability.[254] Permitting the same marriage to file jointly and separately, though, would add complexity to the tax system. Either solution has advantages and disadvantages, but, if Congress chooses to adopt one, it will need to grapple with the many implications, distortions, and inequities that may arise—taking into account a fuller spectrum of interests that includes both traditional and non-traditional taxpaying relationships.

D. Balkanized Filing

Even if the tax law acknowledged polygamous marriages, Congress could structure joint filing in such a way that it continued to use two-person taxpaying units. In order to both maintain the dyadic structure of joint filing and recognize polygamous marriages, though, Congress would have to make some significant, and potentially complicated, adjustments to the current rules. As with any other tax filing regime, these changes would reflect the economics of some, but not all, polygamous marriages. No formulation of the tax law can accurately reflect all families, however.

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253. Imagine that each spouse earns $25,000 of taxable income. Under the hypothetical tax brackets proposed in this Article, *see supra* note 247, if the family filed a joint return for 2013, they would owe $12,500 in taxes. If only four filed a joint return, those four would owe $11,430 in taxes. The fifth spouse would file using the rates applicable to a married taxpayer filing separately. *See* Rev. Proc. 2013-15 § 2.01, 2013-5 I.R.B. 444 (2013). She would owe $3,304, for a family tax liability of $14,734. One spouse filing a separate return would increase the family's tax liability by $2,234.

254. The Internal Revenue Code provides that, in some situations, an eligible spouse can be relieved from her joint and several liability for taxes. I.R.C. § 6015(a) (2006). But few spouses manage to qualify for innocent spouse relief. *See, e.g.*, Richard C.E. Beck, *The Innocent Spouse Problem: Joint and Several Liability for Income Taxes Should Be Repealed*, 43 VAND. L. REV. 317, 321 (1990) ("Commentators generally agree that the innocent spouse rules are overly restrictive and foreclose relief in many deserving cases."). A polygamous spouse with any doubt about the family's tax compliance may not want to rely on the availability of such innocent spouse relief.

At best, the tax law can aim for a regime that reflects the majority of polygamous families, notwithstanding some variation at the margins.

Many, though not all, polygamous relationships in the United States are structured in a hub-and-spoke pattern.[255] In a polygynous household, this means that one man is simultaneously married to more than one woman, but the women are not married to each other.[256] If the tax law assumed such a marital structure, it could treat a polygamous family as a collection of dyadic economic units, the hub spouse and each spoke spouse separately deciding whether to file jointly. Ultimately, even for polygamous families, only couples would file joint returns.

Balkanizing the polygamous family for filing purposes would permit the tax system to recognize polygamy without requiring any fundamental change to current joint filing. Although it would force square polygamous taxpayers into the round hole of dyadic marriage, no proposal can reflect the economics of all families, let alone all polygamous families. Moreover, although balkanized filing ignores the unique qualities of the polygamous taxpayer, it validates polygamous marriage by recognizing it.

Merely dropping balkanized polygamous couples into the current joint filing world does not provide for tax justice, however. Making balkanized filing fair requires some changes to existing joint filing. Specifically, balkanized filing would have to determine how to treat the hub spouse. There are two broad ways in which a balkanized joint filing system could treat the hub spouse's income. It could require him[257] to include his full income in each dyad or it could allow him to split his income among the various dyads.

As for the first option, forcing the hub spouse to include his full income on each joint return he filed would be unjust. The hub spouse would pay taxes multiple times on the same income, potentially leaving him with little or no after-tax income. In fact, requiring him to include the same income on several tax returns could result in his paying taxes at a rate in excess of 100 percent.[258] In any event, he would pay a significantly larger

255. *See supra* notes 211–13.

256. *See* ZEITZEN, *supra* note 20, at 9 ("*Polygyny* is a form of plural marriage in which a man is permitted more than one wife.") (emphasis in original). Contrast polygynous or polyandrous marriage with group marriage, where each spouse is married to every other spouse. *See id.* at 12 ("*Group marriage* is a polygamous marriage form in which several men and women have sexual access to one another and consider themselves married to all other members of the group.") (emphasis in original).

257. In a polyandrous relationship, of course, the hub spouse would be a woman. But because the vast majority of polygamous relationships in the United States are polygynous, this Article refers to the husband as the hub spouse.

258. If each dyad paid taxes at a 25-percent rate, and the hub spouse earned $100,000, his after-tax income would depend on how many spouses he had. With one spouse, he would pay $25,000 and have

percentage of his income in taxes than an unmarried individual or a person in a dyadic marriage with the same income.

The tax law could resolve this double taxation problem. For instance, it could provide him with a tax credit for taxes paid on other returns.[259] But such a solution creates additional problems. The tax law would have to determine on which joint return he had to pay the tax, and on which returns he would get the credit. The dyad that did not get the credit would face a higher tax bill. While this would not violate any fairness norm if the family pooled all of its income and assets, the balkanized filing treats a polygamous family as if it only pools its assets and income in the various dyads. Thus, for the dyad not receiving the credit, the balkanized system would treat that dyad significantly worse than the others. Moreover, even if the family did pool all of its assets, presumably a balkanized joint filing regime would only impose joint and several liability between the hub spouse and the spoke spouse with whom he filed. If the hub spouse lied on one tax return, the spoke spouse with whom he did not take the tax credit would be subject to additional taxes, even if she subsequently exited the marriage.[260]

To avoid these problems, the tax law could instead adjust the marginal tax brackets applicable to polygamous taxpayers. Such adjustments would be significantly different, and less administratively burdensome, however, than the adjustments necessary to index the tax brackets to the size of the family.[261] Essentially, a hub spouse would split his income pro rata between each of his wives.[262] At the same time, the applicable brackets would be multiplied by a fraction, determined by the number of returns that would be filed.

Specifically, in order to determine the tax brackets applicable to a balkanized tax return, each tax bracket would be multiplied by (n+1)/2n,

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$75,000 of after-tax income. But, under a balkanized system that required him to include his full income on every return, with two spouses, he would have to include the $100,000 on two tax returns, and would pay $25,000 on each return, leaving him with $50,000 of after-tax income. If he had four spouses, he would pay his full $100,000 in taxes, and with five, he would owe $125,000 of taxes on his $100,000 of income.

259. Such a tax credit could be modeled on the foreign tax credit, which provides taxpayers a credit against their U.S. income tax for foreign income taxes they paid. I.R.C. § 901 (2006).

260. Christian, *supra* note 88, at 576 ("Under joint and several liability, . . . a wife can be held liable for the tax of her former husband for tax years in which they filed jointly even if the couple has since divorced and executed a final property settlement agreement.").

261. *See supra* Part V.C.

262. Alternatively, he could allocate his income differently between each wife, but this would create unnecessary complexity and would provide him with the ability to reduce his tax liability unfairly, allocating the most income to the wife with the least, so that no dyad paid taxes in a higher bracket than any other dyad.

where n = the number of returns the polygamous family files.[263] Effectively, this leaves half of the bracket the same as it would be in the case of a joint return by a non-polygamous couple. That half represents the income earned by the spoke spouse, all of which will be on the joint return in question. The other half of the tax bracket represents income of the hub spouse, which he divides evenly between all of the spouses. The half of the bracket attributable to the hub spouse must be divided evenly among all spouses.

To make the proposal more concrete, imagine a polygynous family with one husband, Henry, and four wives, Abby, Becky, Cathy, and Dora. In 2013, Henry has $40,000 of taxable income. Abby has $80,000 of taxable income, Becky has $35,000, Cathy has $15,000, and Dora does not earn any taxable income that year. The family will file four joint returns, and Henry will include $10,000 of income on each return. Table 2 provides the 2013 tax brackets applicable to income of married taxpayers filing jointly.

TABLE 2[264]

Income	Tax Rate
Up to $17,850	10 percent
Over $17,850 but not over $72,500	15 percent
Over $72,500 but not over $146,400	25 percent
Over $146,400 but not over $223,050	28 percent
Over $223,050 but not over $398,350	33 percent
Over $398,350 but not over 450,000	35 percent
Over 450,000	39.6 percent

In determining their tax liability, Henry and his family would multiply each income amount by 5/8.[265] Table 3 provides the adjusted tax brackets that would apply to each of the four dyads of Henry's family. With $90,000 of taxable income on their joint return, Henry and Abby would be in the 28-percent tax bracket. Henry and Becky, with $45,000, would be in the 25-percent tax bracket. Henry's and Cathy's $25,000 taxable income

263. Note that n will always equal the number of people in the polygamous marriage minus one. This is because the hub spouse would file a joint return with each spoke spouse, but no return by himself.

264. Rev. Proc. 2013-15 § 2.01, 2013-5 I.R.B. 444 (2013).

265. Because they will file four returns, n = 4. Therefore, (n+1)/2n = 5/8.

would put them in the 15-percent tax bracket, and Henry's and Dora's $10,000 of taxable income would put them in the 10-percent tax bracket.

TABLE 3[266]

Income	Tax Rate
Up to $11,156	10 percent
Over $11,156 but not over $45,313	15 percent
Over $45,313 but not over $91,500	25 percent
Over $91,500 but not over $139,406	28 percent
Over $139,406 but not over $248,969	33 percent
Over $248,969 but not over $281,250	35 percent
Over $281,250	39.6 percent

This version of the balkanized tax brackets has some significant advantages over other possible ways of treating polygamous families. Just like the first balkanized filing proposal presented above, this option also recognizes the state-sanctioned relationship, and does not cause the psychic harms attendant to disregarding the marriages. Moreover, by treating polygamous marriage as a series of dyads, it corresponds to the economics of at least some polygamous families. In addition, although the brackets must be adjusted, the adjustment is formulary, and is based on the standard brackets applicable to dyadic marriages. As such, the Treasury Department would not have to determine the appropriate tax brackets applicable to polygamous families, either initially or on an ongoing basis. And, as opposed to the first balkanized proposal, this option avoids potential double-taxation of the hub spouse, removes the cumbersome and inequitable credits-for-tax-paid scenario, and at the same time, does not permit any taxpayer to avoid paying taxes altogether.

Still, notwithstanding its advantages, this solution also presents challenges to the tax system. It clearly does not reflect the economics of each polygamous family.[267] And, while it reduces the tax advantages of marrying an additional low-earning spouse, it does not eliminate them. For example, though the tax brackets shrink with every additional spouse, an additional spouse with little or no income would permit the hub spouse to

266. Rev. Proc. 2013-15 § 2.01, 2013-5 I.R.B. 444 (2013).

267. For example, balkanized filing would fail to accurately reflect the structure of a group marriage, where every spouse was married to every other spouse.

cycle an additional portion of his income through the lowest marginal tax rates.

Balkanized joint filing presents additional complications given the polygamous dynamic—most notably, what to do about transfers of property between spoke spouses. The tax law disregards transfers of property between spouses filing joint returns, because, for tax purposes, if married persons file a joint return, income earned or received by either spouse goes on the same return and is taxed at the same rate. The same presumably would apply to transfers of property between the hub spouse and a spoke spouse. But transferring property between spoke spouses would change the taxpaying unit responsible for paying taxes on that income, and, as such, would present opportunities for tax arbitrage. Suppose that Abby held a bond paying $100 of interest annually. Because Abby is in the 25-percent tax bracket, she will pay $25 of tax on that interest, and will only have $75 of after-tax income. If she could give her bond to Dora, the interest would only cause a $10 tax liability, leaving $90 of after-tax income. Without policing these intrafamilial transfers, a polygamous family could significantly reduce its tax liability.

E. Mandatory Individual Filing

The fifth potential solution would radically reconfigure the current joint filing regime. Rather than trying to shoehorn polygamous spouses into the existing dyadic joint filing system, the tax law could shift away from joint filing altogether and replace it with mandatory individual filing. Mandatory individual tax filing would require each taxpayer, married or single, to file a tax return. On that return, she would include her income, including, among other things, wage income she earned, gains on the sale of her property, and dividends and interest on stocks and bonds she held. Based on that return, she would pay taxes, at her own marginal rate, on her income. If the tax law moved to a mandatory individual filing regime, all of the questions about tax bracket size and the appropriate taxpaying unit would become moot, irrespective of an individual's marital status. The tax law would not devalue polygamous marriage, because it would treat polygamous marriage in the same way it treated dyadic marriage.

Many commentators advocate replacing joint filing with mandatory individual filing.[268] Doing so, they argue, would be better for women, would make the income tax fairer between married and unmarried persons,

268. *See, e.g.*, Infanti, *supra* note 79, at 607; Kahng, *supra* note 36, at 651; Zelenak, *supra* note 67, at 405; Puckett, *supra* note 38, at 1412; Kornhasuer, *supra* note 85, at 109.

and would not reflect outdated views on family and society. Until now, commentators have not justified individual filing by invoking polygamy. However, the exercise of trying to fit polygamy into a joint filing system lends support to their argument that the joint filing system has become inadequate. Through its inability to equitably accommodate polygamous marriage within its regime, the joint filing system reveals its decidedly dyadic bias—a bias rooted in normative political social engineering, rather than pragmatic tax policy.

Individual tax filing presents a number of advantages over joint filing. Individual tax filing would eliminate the secondary-earner problem, because each taxpayer would take full advantage of the lower marginal rates.[269] It would not assume an artificial economic unity within all marriages,[270] and would not discriminate between approved economic units (*e.g.*, dyadic heterosexual married persons) and unapproved economic units, such as domestic partners, cohabitating couples, and other non-traditional families.[271] Moreover, individual filing provides for marriage neutrality: because single people and married people would pay taxes at the same rates, tax would not factor into the decision to enter into or to exit marriage. Additionally, for polygamous families, tax considerations would not influence decisions about whether or not to add another spouse or what level of income that additional spouse should have.

Admittedly, replacing the current joint filing system with mandatory individual tax filing would hurt some taxpayers. Individual tax filing does not treat married persons as an economic unit, in spite of the fact that many married people act with some degree of economic unity. To the extent that married persons pool their incomes, expenses, and assets, it is logical to tax them as a unit, and ignoring their economic unity would tax them in a manner that did not reflect the economics of their lives. In addition, changing to individual filing would raise the taxes of families where one spouse earns significantly more than the other.[272]

Moreover, even within an individual filing system, the tax law would need to acknowledge family relationships for some purposes. A pure separate filing regime would "force couples to commodify the flow of

269. *See supra* notes 87–88 and accompanying text.

270. *See supra* notes 84–85 and accompanying text.

271. *See supra* notes 105–08 and accompanying text.

272. Currently, if a couple filing a joint return collectively has taxable income of $100,000, the couple owes $16,858 in taxes. Under an individual filing regime, if both spouses had $50,000 of taxable income, they would collectively owe the same amount of taxes. If, however, the wife earned $100,000 and the husband nothing, they would owe $21,293. *See* Rev. Proc. 2013-15 § 1.01, 2013-5 I.R.B. 444 (2013).

goods and services within the relationship."[273] Joint filing allows married couples to ignore the informal exchanges that characterize an economically interdependent relationship. Requiring a married person to keep track of all the services and goods she provides informally to her spouse(s) would be extremely time-consuming and burdensome.[274]

The burden involved in keeping track of these informal flows of services and goods extends beyond merely creating a spreadsheet to record their value. Not all flows involve transferring a portion of the paycheck, a percentage of an asset, or a service with a clear price tag. This lack of a clear valuation can create perverse incentives for a married couple where the spouses share their income and assets.

To illustrate these incentives, imagine a married couple that shares all of their income and assets evenly. The wife works as an entrepreneur, and the husband has left the paid labor market to take care of the couple's home and children. In a system with mandatory individual filing that did not take marriage into account, the tax law would necessarily treat the wife as transferring some portion of her income to her husband, in the form of food, clothing, and shelter she provided for him, for example.

Because the tax law treats different kinds of transfers differently, the couple would need to characterize the putative transfer. For example, if the couple treated the transfer as a gift, it would not constitute gross income to the husband, and he would not pay taxes on his receipt of the gift.[275] But treating the transfer of value as a gift potentially creates unfavorable tax consequences for the couple. She cannot deduct the value of a gift,[276] so she will pay taxes on the full value of her income. The couple would prefer that the husband be taxable on some part of the income, however, because he pays taxes at a lower marginal rate than does his wife.

Moreover, although the husband would not owe taxes on his receipt of the gift, her gifts may subject the wife to the gift tax.[277] The gift tax

273. Motro, *supra* note 84, at 1536.

274. Admittedly, people in committed relationships that are not recognized by the tax law currently face these burdens. But the better solution would seem to be expanding the cloak of informal exchanges to these relationships rather than eliminating the cloak altogether. Professor Douglas A. Kahn proposes doing just that by taxing "only . . . transactions in which the taxpayer has, either voluntarily or involuntarily, entered into a commercial transaction," and ignoring noncommercial interactions for tax purposes. Douglas A. Kahn, *Exclusion From Income of Compensation for Services and Pooling of Labor Occurring in a Noncommercial Setting*, 11 FLA. TAX REV. 683, 686 (2011). Of course, exempting noncommercial transactions from tax poses a "difficult question," and one that policymakers would have to address. *Id.* at 687.

275. I.R.C. § 102(a) (2006).

276. I.R.C. § 262 (2006) (personal, living, and family expenses not deductible).

277. *See* I.R.C. § 2501(a)(1) (2006) (imposition of the gift tax); I.R.C. § 2502(c) (2006) (gift tax paid by donor).

provides some respite to donors, in the form of an annual exclusion and a lifetime exclusion. The wife could give up to $5 million over the course of her life free from the gift tax.[278] But the annual gift tax exclusion is much lower—in 2013, just $14,000.[279] If, however, she earns $50,000 in a year and constructively gives $25,000 to her husband, she would owe a gift tax on $11,000 a year, at rates of between eighteen and thirty-five percent.[280]

Alternatively, the couple could treat the transfer as payment for services. Because the tax law treats these payments differently, however, they would have to allocate the payments. Perhaps the husband helps his wife brainstorm business ideas.[281] How should the couple value the brainstorming services? Under current law, provided her husband's brainstorming assistance qualifies as a business expense for the wife, she will be able to deduct her payments to him.[282] Assuming he is in a lower income tax bracket than she is, and they act as an economic unit, she should value his services as highly as she can, because by shifting her income to him, they will reduce their collective tax liability.[283] On the other hand, because the wife cannot deduct the value of husband's cooking, cleaning, or caring for children,[284] she would be taxed on the income when she earned it, and he would be taxed on the portion of the income they allocated to cooking, cleaning, and child care.[285] The couple would therefore face incentives to overvalue certain types of services and undervalue others, and would need to justify the internal dynamics of their marriage to the I.R.S.[286]

To reflect these dynamics, then, any mandatory individual filing regime would necessarily recognize that, in certain circumstances, taxpayers act as part of a larger economic unit (to avoid, for example, overly onerous recordkeeping requirements and to preserve a level of taxpayer privacy).[287] Discussing the actual details of such a regime goes well beyond the scope of this Article, which focuses instead on fairness as

278. I.R.C. § 2505(a) (2006 & Supp. V 2012); I.R.C. § 2010(c) (2006 & Supp. V 2012).

279. I.R.C. § 2503(b) (2006); Rev. Proc. 2012-41 § 3.19, 2012-45 I.R.B. 539.

280. I.R.C. § 2001(c) (2006 & Supp. V 2012); I.R.C. § 2502(a)(2) (2006 & Supp. V 2012); American Taxpayer Relief Act of 2012, H.R. 8, 112th Cong. § 101(c)(1) (2013).

281. *See* Motro, *supra* note 84, at 1537.

282. I.R.C. § 162(a)(1) (2006 & Supp. V 2012).

283. *See* Motro, *supra* note 84, at 1537–38.

284. I.R.C. § 262 (2006).

285. Motro, *supra* note 84, at 1538.

286. *See id.*

287. *See, e.g.*, *id.* at 1540 ("This brings us to the most compelling and internally consistent justification—or, to be precise, the true cultural explanation—for income splitting. When husbands and wives share income, we are most comfortable viewing each spouse's efforts as 'by and for' the marital unit.").

it relates to polygamy, but, nonetheless, the Article will lay out a few broad questions an individual filing regime would need to address.

First, it would need to determine what categories of taxpayers would qualify for certain exceptions from pure individual taxpaying permitted by the tax law. Different commentators have suggested a range of ways to determine the appropriate economic unit. The suggestions range from permitting taxpayers to "identify their economically interdependent relationships for themselves"[288] to providing the special rules to all "persons who are living together in economically interdependent relationships,"[289] from providing some sort of income-splitting solely to married persons[290] to providing this income splitting to all "economically united couples."[291]

Although any of these proposals could produce fair results, I would propose that, at least initially, the special rules apply to relationships established under state law that include non-tax obligations. This category would include marriage, whether straight or gay, dyadic or polygamous, provided the marriage were valid under state law. It would also include domestic partnerships and civil unions recognized by a state. This proposal would not perfectly map onto the set of economically interdependent relationships; particular spouses may not act as an economic unit, while a specific cohabitating couple may share all of their income and assets equally. But state-sanctioned relationships carry with them costs and obligations—people must work to enter the relationship, and have legal obligations when it ends. These non-tax costs and obligations provide prima facie evidence of a relationship entered into for reasons other than (or at least more than) tax purposes, without requiring an invasive inquiry into the actual facts of the relationship.[292]

After determining what relationships will qualify for the exceptions from purely individual taxpaying, we must determine what exceptions the tax law will permit. For instance, should the tax law permit married persons, domestic partners, and couples in civil unions to split their

288. *See* Infanti, *supra* note 79, at 646.

289. *See* LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS 89 (2001), available at http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf.

290. *See* Bittker, *supra* note 23, at 1421. Professor Bittker was referring solely to dyadic married couples, of course, but there is no reason this could not be expanded to polygamous married persons.

291. *See* Motro, *supra* note 84, at 1559.

292. Admittedly, such a standard is both over- and under-inclusive. But no administrable and politically-acceptable proposal can perfectly capture just those relationships that are economically interdependent without capturing some relationships that are not interdependent or without ignoring some that are interdependent.

incomes on their separate returns? Doing so would seem to negate the purpose behind individual filing by eliminating marriage neutrality.

On the other hand, permitting members of an economic unit to transfer goods or perform services for one another without tax consequences would cause individual filing to better comport with taxpayers' assumptions of economic unity within altruistic relationships. It would also eliminate the recordkeeping burden on the taxpayers and eliminate the threat of an invasive I.R.S. audit of the internal dynamics of the relationship.

In addition, because each person would file her return and pay taxes separately, the tax law would need to provide rules for determining who could claim deductions for children and other dependents.[293] It would need to provide rules for determining how to allocate other deductions currently available to married persons, especially those relating to shared property such as the mortgage interest deduction.[294] It would also need to determine whether a taxpayer who paid a deductible expense on behalf of her spouse could take a deduction for such payment.[295]

Moreover, the tax law would also need to provide anti-abuse rules. Under current law, as under the proposed regime, the tax law ignores transfers of property between spouses. Under current law, ignoring such transfers between spouses filing jointly makes sense: no matter who owns the property, they must include any income it produces, or any gains from its sale, on their joint return. In a separate return world, however, absent an anti-abuse rule, a high-income spouse could transfer income-producing property to a low-income spouse and, by doing so, reduce their collective

293. Under current law, if parents are divorced, the parent with whom the child resides for the longest period of time can claim the dependency deduction. I.R.C. § 152(c)(4)(B)(i) (2006 & Supp. V 2012). With separate filing, though, the child could live with both parents for the same amount of time. In the case of divorced parents, where a child lives with both parents for the same period of time, the parent with the highest adjusted gross income takes the deduction. I.R.C. § 152(c)(4)(B)(ii). That would appear to be a good solution in the case of separate filing.

294. I.R.C. § 163(h)(2)(D) (2006). Specifically, if the spouses pool their income, and use such pooled income to pay the mortgage, should only one spouse take the deduction, should they evenly split the deduction, should they split it pro rata according to their income, or should they split it in some other manner? Pro rata according to their income would seem to make sense, but the law would have to address the question.

295. For example, under current law, a taxpayer can deduct medical expenses paid on her own behalf or on behalf of her spouse or dependent to the extent those expenses exceed 7.5 percent of her adjusted gross income. I.R.C. § 213(a) (2006 & Supp. V 2012). In a separate filing world, Congress would need to determine whether she could continue to deduct payments made on behalf of her spouse and, if she could, whether payments in excess of 7.5 percent of her adjusted gross income would suffice (which could drastically increase the amount of the deductible expense) or whether appropriate adjusted gross income would also include her spouse's income.

tax liability.[296] They could similarly reduce the tax on capital gains by transferring appreciated property from a high-income spouse to a low-income spouse, or increase the value of loss deductions by doing the reverse. In order to prevent this, the tax law would need the ability to reallocate some income or gains to the donor spouse.

VI. CONCLUSION

Although recently polygamy has received increased scholarly attention, that attention has largely focused on the questions of whether states should decriminalize, or even legalize, polygamous marriage, and how such marriage should function. They have largely ignored other law in their analysis. Professor Davis has begun to shift the debate, however, to second-generation questions about the contours of a legalized polygamy. This Article has taken up the essential second-generation question of how polygamists should pay taxes. The answer is not obvious, nor should it be—polygamous marriage differs both quantitatively and qualitatively from dyadic marriage.

Fundamentally, the current joint filing regime reflects a decidedly dyadic bias into which polygamous families do not fit. The tax law treats married couples as an appropriate taxpaying unit, but its treatment of dyadic married persons provides little insight into the appropriate treatment of polygamous married persons. But as soon as the first state legalizes polygamous marriage, polygamous families would need to know how the tax law applies to them. Before polygamy becomes legal, then, we need to determine how polygamists will fit into these legal regimes—or as I have shown—how these legal regimes will need to adjust in order to accommodate polygamy equitably. In spite of its importance, though, this Article is the first to address the appropriate tax treatment of polygamous taxpayers.

Ultimately, the analysis of how the tax law could take account of polygamy undermines the basis of the current joint filing regime. While there is no single "correct" way to tax married persons,[297] joint filing appears to be unworkable in a world of expanded familial options. Commentators have demonstrated that the joint return makes unwarranted assumptions about the economic unity of marriage, that joint filing may harm women, and that joint filing is unfair to the many people who cannot

296. *Cf.* Brunson, *supra* note 21, at 463.

297. Zelenak, *supra* note 67, at 404–05 ("There is no absolutely right or wrong way to tax married couples. A system that is right for one time and place may be wrong for another.").

file jointly. This Article goes beyond those objections to demonstrate that, in order to accommodate non-dyadic relationships, Congress would need to make significant, complex changes to joint filing. And the necessary changes may be difficult, if not impossible, to design and implement.

As a result, the thinking about polygamy adds more weight to the argument that the United States should move to mandatory individual tax filing, albeit an individual filing that takes account of familial relationships. Individual filing removes the need to adjust tax brackets in order to achieve horizontal equity and fairness. It eliminates the secondary earner problem that polygamy magnifies in any version of joint filing. And it eliminates the tax incentive for a family to add more spouses. Still, as discussed above, given the importance of marriage and family, even mandatory individual filing would necessarily make allowances for familial relationships, both in recognition of the unselfish behavior that often characterizes family, and in order to provide some amount of privacy.

In spite of the growing evidence in favor of mandatory individual filing, however, most commentators believe that the tax law will continue to permit married couples to file jointly for at least the near future. To the extent Congress has not adopted mandatory individual tax filing when polygamy becomes legal, however, the tax law will need a fallback position. Of the possible solutions discussed in this paper, balkanized filing appears to be the next-best option.

Ultimately, moving from arguing about the rightness or wrongness of polygamy to the second-generation questions of how to implement and regulate it provides two significant benefits. First, it provides a more fruitful look at polygamy itself, allowing scholars to look clearly and carefully at the actual implementation and regulation of polygamous relationships. In addition, it presses scholars to reexamine dyadic couples with a new perspective. And, just as exploring polygamy provides additional support for mandatory individual tax filing, asking the second-generation questions may also provide further insight on dyadic relationships.