

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

1-1-2004

One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation

Bridget J. Crawford

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Family Law Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Bridget J. Crawford, One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation, 6 Fla. Tax Rev. 757 (2004), <http://digitalcommons.pace.edu/lawfaculty/41/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

FLORIDA TAX REVIEW

VOLUME 6

2004

NUMBER 8

CONTENTS

ARTICLE

ONE FLESH, TWO TAXPAYERS: A NEW APPROACH TO MARRIAGE AND WEALTH TRANSFER TAXATION

Bridget J. Crawford

The Florida Tax Review is a publication of the Graduate Tax Program of the University of Florida College of Law. Each volume consists of ten issues published by Tax Analysts. The subscription rate, payable in advance, is \$125.00 per volume in the United States and \$145.00 per volume elsewhere. If a subscription is to be discontinued at expiration, notice to that effect should be sent; otherwise it will be automatically renewed. Subscriptions and changes of address should be sent to: Customer Service Dept., Tax Analysts, 6830 North Fairfax Drive, Arlington, VA 22213. Requests for back issues should be sent to: William S. Hein & Co., Inc., 1285 Main Street, Buffalo, NY 14209. Please notify Tax Analysts of your changes of address one month in advance. If you have any questions regarding a subscription, you may call Customer Service at (352)392-9381 or email FTR@law.ufl.edu.

© 2004 Bridget J. Crawford with specific perpetual, unlimited and nonexclusive rights assigned to the *Florida Tax Review*. This article was originally published in Volume 6, Number 8 of the *Florida Tax Review*.

FLORIDA TAX REVIEW

VOLUME 6

2004

NUMBER 8

ONE FLESH, TWO TAXPAYERS: A NEW APPROACH TO MARRIAGE AND WEALTH TRANSFER TAXATION

*Bridget J. Crawford**

INTRODUCTION	759
I. THE TWO SHALL BECOME ONE: THE HISTORY OF THE ESTATE AND GIFT TAX MARITAL DEDUCTION	762
A. <i>Income Tax Consequences of Community Property and Common Law Property Rules</i>	<i>762</i>
B. <i>Horizontal Equity, Joint Income Tax Returns and the Wealth Transfer Tax Marital Deduction</i>	<i>764</i>
C. <i>Triumph of Substance Over Form</i>	<i>768</i>
D. <i>The Incipient One Flesh, One Taxpayer Theory of Wealth Transfer Taxation</i>	<i>769</i>
E. <i>Vertical Equity and the Full Marital Deduction</i>	<i>773</i>
II. CURRENT TAX TREATMENT OF MARITAL WEALTH TRANSFERS ..	775
A. <i>The Unlimited Marital Deduction, or "What's Mine Is Yours"</i>	<i>775</i>
1. <i>The Terminable Interest Rule</i>	<i>776</i>
2. <i>The Economic Importance of the Estate and Gift Tax Marital Deduction</i>	<i>779</i>
B. <i>Gift-Splitting By Spouses, or "What's Mine Is Ours"</i>	<i>780</i>
C. <i>Disclaimers By Spouses and Others, or "What Was Theirs Is Now Yours"</i>	<i>781</i>
III. WHY MARITAL WEALTH TRANSFERS SHOULD BE TAXED	784
A. <i>The Current Tax Rules Reinforce Traditional Gender Roles ..</i>	<i>784</i>
1. <i>Coverture, Legal Personhood and Taxation</i>	<i>784</i>
2. <i>Women Should Pay More Tax</i>	<i>787</i>
B. <i>The Current Tax Rules Disregard Economic Unity</i>	<i>792</i>
1. <i>Under-Inclusivity</i>	<i>792</i>
2. <i>Heterosexual Privilege</i>	<i>795</i>

* Assistant Professor, Pace University School of Law. B.A. Yale University 1991. J.D. University of Pennsylvania Law School 1996. I gratefully acknowledge the input and guidance of Jonathan G. Blattmachr, David N. Cassuto, Don L. Doernberg, Derek B. Dorn, James J. Fishman, Mitchell M. Gans, Bennett L. Gershman, Lissa Griffin, Anthony C. Infanti, Ronald H. Jensen, Janet A. Johnson, Darryll K. Jones, Jeffrey G. Miller, Nanette Morrison and Darren Rosenblum. B. Brian Brittingham, Rebecca L. Juice and William A. Onofry provided able research assistance.

IV. THE ONE FLESH, TWO TAXPAYER SOLUTION	797
A. <i>Overview</i>	797
B. <i>A \$10 Million Exemption From Wealth Transfer Taxation</i> ..	797
C. <i>Increased Tax Revenue</i>	799
D. <i>Tax Simplicity and Neutrality</i>	800
E. <i>Theoretical Implications</i>	801
1. <i>Taxation and Legal Personhood</i>	801
2. <i>All Taxpayers Are Created Equal</i>	802
F. <i>Impact on Geographic Equality</i>	803
CONCLUSION	805

INTRODUCTION

Marriage is an excellent estate planning strategy. Generally speaking one spouse can transfer assets to the other during life and at death without adverse estate or gift tax consequences.¹ This has two principal economic advantages. First the tax-free status of marital transfers allows a comparatively wealthy husband or wife to shift assets to his or her less wealthy spouse so that each may take maximum advantage of all available tax deductions, exemptions, exclusions, special valuation rules, credits and lower tax rates.² Second the tax-free status of marital transfers allows a married couple to postpone the payment of estate tax until the death of the second spouse.³ For these reasons property transfers between spouses form the cornerstone of the vast majority of married couples' estate plans.⁴

In permitting tax-free transfers during life and at death, the federal wealth transfer tax⁵ system treats a married couple as a single taxpayer. Just as marriage causes a man and woman to "become one flesh"⁶ for biblical purposes, it causes them to become one taxpayer for federal estate and gift tax

1. See IRC §§ 2056 (estate tax marital deduction) and 2523 (gift tax marital deduction). Unless otherwise specified all references to the Internal Revenue Code (hereinafter the "Code") refer to the Internal Revenue Code of 1986, as amended. Special rules limit the types of property interests eligible for the marital deduction. See IRC §§ 2056(b)(1) (no deduction disallowed where spousal interest will terminate, *inter alia*, on lapse of time) and 2523(f) (in case of property passing to spouse in trust, spouse must be entitled to all income from the property, payable at least annually). Note that the Code limits the marital deduction for transfers to a spouse who is not a United States citizen. See IRC §§ 2056(d) (disallowance of estate tax marital deduction except for property in a passing in a qualified domestic trust) and 2523(i) (denying gift tax marital deduction for transfers to non-citizen spouse, but permitting annual exclusion gifts of up to \$100,000 to non-citizen spouse).

2. See discussion *infra* Part II.A.2.

3. See discussion *infra* Part II.A. As the surviving spouse may use and even consume the first decedent's entire estate (including any amount that would have been used to pay estate taxes, if any had been due upon the death of the first spouse to die), the surviving spouse benefits from the property during the survivor's lifetime, and the successor beneficiaries generally receive a lower tax bill on the combined estates of both spouses.

4. See Kathryn G. Henkel, Estate Planning & Wealth Preservation: Strategies & Solutions ¶¶ 4.01, 4.03 (2004); Jeffrey N. Pennell, Estate Tax Marital Deduction § A-1 (BNA 2002).

5. As used herein, the phrase "wealth transfer taxation" refers to the estate and gift taxes. The same phrase often includes generation-skipping transfer taxes, as well, but these taxes are outside the scope of this article. For discussion of generation-skipping transfers, see, e.g., Jonathan G. Blattmachr, *The Complete Guide to Wealth Preservation and Estate Planning* 238-44 (1999).

6. See, e.g., Genesis 2:25 ("[A] man leaves his father and his mother and cleaves to his wife, and they become one flesh."); Mark 10:7-10 ("[A] man shall leave his father and mother and be joined to his wife, and the two shall become one flesh.' So they are no longer two but one flesh. What therefore God has joined together, let not man put asunder").

purposes. The tax law embraces a "one flesh, one taxpayer" approach to marital wealth transfers.⁷

The "one flesh, one taxpayer" rules are undesirable because they are based on gender stereotypes and because they deny estate and gift tax benefits to socially important non-marital relationships. Legislative history cites economic unity as the rationale for the estate and gift tax marital deduction, but unmarried taxpayers who in fact are economically unified are ineligible for the deduction. The one flesh, one taxpayer rules thus penalize those who do not want to marry, but could marry (such as cohabitating heterosexual partners),⁸ those who want to marry, but cannot marry (such as some same-sex partners)⁹ and those who do not want to marry and cannot in any case (such as elderly cohabitating siblings or an adult child who cares for an elderly parent).¹⁰

Congress should eliminate the estate and gift tax marital deduction and adopt a "one flesh, two taxpayer rule" for marital wealth transfers.¹¹ Gratuitous transfers between spouses should be fully taxable,¹² but each taxpayer should have a large credit against the tax, so that, in effect, the wealth transfer tax system will be inapplicable to the vast majority of taxpayers. By increasing the estate and gift tax unified credit to a sufficiently high number, such as 10 million dollars, legislators can simplify the administration of the tax system and, somewhat counterintuitively, increase overall tax revenue.¹³

Although the construction of husband and wife as a single economic unit seems ingrained in estate and gift tax jurisprudence,¹⁴ married couples have not always enjoyed special tax status. Part I of this article traces the historic development of the "one flesh, one taxpayer" approach to wealth transfer taxation. In 1948 Congress used federal tax law to cure the economic impact of

7. The phrase "marital wealth transfers" refers to transfers of property by one spouse to another during life or at death.

8. See discussion *infra* Part III.B.

9. See discussion *infra* Part III.B.

10. See discussion *infra* Part III.B.

11. But see generally Joseph M. Dodge, A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction, 76 N.C. L. Rev. 1729, 1729 (1998) (suggesting that feminist legal scholarship on the estate and gift tax marital deduction has failed to "come up with a plausible solution" to gender bias in the Code); Lawrence Zelenak, Symposium: Taking Critical Tax Theory Seriously, 76 N.C. L. Rev. 1521, 1524 (1998) ("The most serious problem [with critical tax scholarship] is the failure to think through proposed solutions with sufficient care.")

12. Even in the proposed one flesh, two taxpayer system, one spouse could make gifts to the other under the protection of the annual exclusion. See IRC § 2503(b).

13. See discussion *infra* Parts IV.B and C. The one flesh, two taxpayer rule does not contemplate any change to the tax rules applicable to charitable transfers. See IRC §§ 170(c), 2055(c) and 2522(a).

14. "[T]he 1948 statutory principle of equal taxes for equal income married couples has been 'almost universally accepted' by tax theorists." Boris I. Bittker, Federal Income Taxation and the Family, 27 Stan. L. Rev. 1389, 1395 (1975) (citation omitted). Professor Lily Kahng suggests that the construction of husbands and wives as one person for tax purposes is "difficult to challenge because of its status as a first principle. Those who object to the harms inflicted on women by the fiction bear the burden of establishing that these harms are serious enough to require abandoning this fiction that masquerades as a first principle." Lily Kahng, Fiction in Tax, in *Taxing America* 25, 38 (Karen B. Brown & Mary Louise Fellows eds., 1996).

differences in married couples' property rights under state law. Over a period of more than thirty years, the marital deduction then evolved from a tool for achieving jurisdictional uniformity¹⁵ into an institution based on an unreal and idealized story of proper gender roles for men and women and the economic significance of marriage.¹⁶

Part II of this article details the benefits of marriage under present wealth transfer tax laws. Apart from the estate and gift tax marital deduction,¹⁷ a married couple may "split" lifetime gifts to achieve a low (or no) tax bill. Unique among beneficiaries, a surviving spouse can disclaim property to a trust for his or her own benefit without adverse tax consequences.

Part III analyzes the jurisprudential implications of the "one flesh, one taxpayer" approach to wealth transfer taxation. Notwithstanding the law's gender neutrality, the current estate and gift tax approach to marriage is a vestige of the common law rule of coverture that suspended a woman's legal identity during marriage.¹⁸ Furthermore, in departure from important tax policy goals, federal wealth transfer tax laws privilege heterosexual marital relationships over other socially important relationships with economic or emotional characteristics similar to marriage. By failing to recognize the economic unity of taxpayers who may be opposite-sex unmarried domestic partners, same-sex domestic partners or adult children who support elderly parents, the one flesh, one taxpayer rule discourages relationships that benefit society as a whole.

Part IV proposes the elimination of the marital deduction in favor of a "one flesh, two taxpayer" approach to marriage that would cause all gratuitous transfers to be subject to taxation, regardless of the identity of the recipient. At the same time, the wealth transfer taxation system should accommodate a dramatically increased applicable exclusion amount. That way, even though all transfers will be subject to taxation, the vast majority of transfers will not result in actual payment of tax.¹⁹ This Part illustrates how increasing the exemption amount will increase federal tax revenue and enhance the vitality of common law and community property systems. The article concludes by connecting the estate and gift tax treatment of marriage to the larger issue of estate tax repeal and reform.

15. See discussion *infra* Part I. The marital deduction initially was limited to one-half of a decedent's adjusted gross estate tax and one-half of lifetime gifts. See Pennell, *supra* note 4, at A-2. As part of the Tax Reform Act of 1976, Pub. L. No. 94-455, § 2002(a), 90 Stat. 1520 (1976), Congress considered expanding the marital deduction to 100 % of a decedent's gross estate, but instead expanded the marital deduction to the greater of \$250,000 or one-half of the adjusted gross estate. See discussion *infra* Part I.D. As part of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403(a), 95 Stat. 172 (1981) (hereinafter "ERTA"), Congress removed the percentage limitation on the marital deduction and radically relaxed the rules on the types of spousal property interests that qualify for the marital deduction.

16. See discussion *infra* Part I.E.

17. See *supra* text accompanying note 4.

18. See discussion *infra* in Part III.A.

19. In effect, the applicable exclusion amount is the cumulative amount that any taxpayer may transfer tax-free during lifetime or at death. See IRC § 2010.

**I. TWO SHALL BECOME ONE:
THE HISTORY OF THE ESTATE AND GIFT TAX MARITAL DEDUCTION**

A. Income Tax Consequences of Community Property and Common Law Property Rules

The current estate and gift tax treatment of intra-spousal transfers derives historically from related income tax rules. Prior to 1948 joint income tax returns were unknown for the most part.²⁰ Each taxpayer filed a separate return, regardless of marital status.²¹ For that reason, married couples developed strategies designed to shift income from high-income spouse to the lower-income (or no-income) spouse in order to take advantage of exemptions available to each individual taxpayer. As an example, Guy C. Earl entered into an agreement with his wife pursuant to which each spouse agreed that any property acquired by either of them, including salaries, would be treated as their joint property. For several years Mr. Earl, an attorney, earned legal fees. Pursuant to their agreement, Mr. and Mrs. Earl each owned one-half of these fees. Mr. and Mrs. Earl each filed an individual income tax return reporting income for the relevant tax years in the amount of one-half of the legal fees earned by Mr. Earl that year.²² The Earls reasoned that because the property ownership was divided equally between them, their taxable income should be as well.

In 1930 the United States Supreme Court rejected the taxpayers' argument in *Lucas v. Earl*:

There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew.²³

20. See, e.g., Kahng, *supra* note 14, at 26-28. Prior legislation provided for limited joint filing by spouses. See Edward J. McCaffery, *Taxing Women: How the Marriage Tax Penalty Affects Your Taxes* 30-31 (1997); Marjorie E. Kornhauser, *Love, Money and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 *Hastings L.J.* 63 (1993); Angela V. Langlotz, *Tying the Knot: The Tax Consequences of Marriage*, 54 *Tax Law.* 329, 329 (2001).

21. Kahng, *supra* note 14, at 26-28.

22. The applicable federal income tax statutes imposed a tax on "income derived from salaries, wages, or compensation for personal services," among other items. Revenue Act of 1918, Pub. L. No. 254, § 213(a), 40 Stat. 1057, 1065 (1919); Revenue Act of 1921, Pub. L. No. 67-98, ch. 136, 42 Stat. 227, 238 (1921).

23. *Lucas v. Earl*, 281 U.S. 111, 114-115 (1930).

The Court assumed, and the government did not contest, that for property law purposes, the *Earls*' contract was valid.²⁴ The Court acknowledged that spouses could fix property rights as between the two of them, causing property earned by one of them to be owned legally by both of them (thus dividing "fruit" from "tree"). But the Court held that such a contract had no impact for federal income tax purposes. In other words, spouses could contract for property law results but not for tax results. Private property contracts could not change a tax system that precluded joint income tax returns.

Approximately eight months after the decision in *Lucas v. Earl*, the Supreme Court held in *Poe v. Seaborn*²⁵ that state property laws accomplished what private contracts did not – a change in the default federal income tax rules. The *Poe* Court held that for spouses residing in community property jurisdictions, federal income tax liability followed state law property ownership. In other words, because each spouse in a community property jurisdiction owned one-half of all property earned or held by the other,²⁶ each spouse was taxable for federal income tax purposes on one-half of the community income, regardless of which spouse earned the income. Thus if Spouse 1 earned a salary and Spouse 2 did not work outside the home, each spouse could file a federal income tax return and pay tax on one-half of Spouse 1's salary. By using the exemptions allotted to each taxpayer, the two spouses together could shelter greater income from taxation than either one of them could alone. The income might even escape taxation entirely.

The impact of state property law rules on federal income taxation can be illustrated by a simple example. Assume that Spouse 1 and Spouse 2 are married. Spouse 1 earns \$100,000 per year for paid labor, but has no income from any other source. Spouse 2 has no income at all. Assume further that the hypothetical tax system does not permit joint filing, but exempts from taxation the first \$20,000 of any individual's income. Any amounts over \$20,000 are taxed at a rate of 50%. Disregarding the impact of other available exemptions or deductions, the combined federal income tax liability of Spouse 1 and Spouse 2 will depend on how applicable state property law treats the \$100,000. If the couple resides in a common law jurisdiction, Spouse 1 owns the \$100,000 and must report it on his or her individual income tax return. Spouse 1's hypothetical tax liability will be \$40,000 (50% of the amount by which \$100,000 exceeds \$20,000). Because Spouse 2 has no income, Spouse 2 will not file a tax return and owes no tax. Taken together, the couple's combined income tax liability is \$40,000.

In contrast, after the decision in *Poe* and before the creation of the joint return in 1948, if Spouse 1 and Spouse 2 resided in a community property jurisdiction, then regardless of who actually earned the income, one-half of \$100,000, or \$50,000, was attributed to each spouse. Spouse 1 would have income tax liability of \$15,000 (50% of the amount by which \$50,000 exceeds \$20,000). Spouse 2, who owned one-half of the community's income, also

24. "The validity of the [*Earls*'] contract is not questioned, and we assume it to be unquestionable under the law of the State of California, in which the parties lived." *Earl* 281 U.S. at 114.

25. 282 U.S. 101 (1930).

26. William A. Reppy, Jr. & Cynthia A. Samuel, *Community Property in the United States* 1-11 (6th ed. 2004).

would have income tax liability of \$15,000 (again, 50% of the amount by which \$50,000 exceeds \$20,000). Taken together, couple's combined income tax liability would be \$30,000, or \$10,000 less than the common law couple's.

The *Poe* decision confirmed that state community property law accomplished spousal income splitting without gift tax consequences. For that reason, community property resident spouses enjoyed favorable tax treatment compared with their common law counterparts²⁷ from 1930 until 1948, when Congress authorized income splitting by means of the joint income tax return.

B. Horizontal Equity, Joint Income Tax Returns and the Wealth Transfer Tax Marital Deduction

In 1948 Congress altered the income, estate and gift tax laws in response to the *Poe* court's exposure of the disparities in the federal tax treatment of married couples in common law and community property jurisdictions.²⁸ In its report accompanying the Revenue Act of 1948,²⁹ the

27. The community property jurisdictions in 1948 were Arizona, California, Hawaii, Idaho, Louisiana, Michigan, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Texas, Washington and Wisconsin. Pennsylvania's community property statute had been declared unconstitutional. Today, the states with community-property or quasi-community property rules are Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington and Wisconsin. See S. Rep. No. 1013, at 302 (1948). Most notably, Alaska permits married residents and married non-residents to elect community property treatment for some or all of their assets. Alaska Stat. §§ 34.77.010-995 (Michie 2003). In order to create Alaska community property, a married couple not resident in Alaska must transfer assets to a trust meeting certain requirements, including that one of the Trustees must be an individual who is domiciled in Alaska, or a bank or trust company organized under Alaska law and having its principal place of business in Alaska. Alaska Stat. § 34.77.100(a). For general discussion of Alaska's elective community property law, see Jonathan G. Blattmachr et al., *Tax Planning With Consensual Community Property*, 33 Real Prop. Prob. & Tr. J. 615 (1999); Alan Newman, *Incorporating the Partnership Theory Of Marriage Into Elective-Share Law*, 49 Emory L.J. 487 (2000); David G. Shaftel & Stephen Greer, *Obtaining a Full Stepped-Up Basis Under Alaska's New Community Property System*, 23 Est. Plan. 109 (1999); <http://www.alaskatruster.com/www/homepg2.html> (last visited July 28, 2004).

28. S. Rep. No. 80-1013, at 1 ("Equalization is provided for the tax burdens of married couples in common-law and community-property States. The bill corrects existing inequalities under the estate and gift taxes, as well as the individual income tax"). Both in 1948 and now, in states such as California, each spouse legally owns one-half of the community property, regardless of the form in which the property is held. State law accomplishes this division of property without any adverse tax consequences. See Boris I. Bittker et al., *Federal Estate and Gift Taxation* 236-237 (8th ed. 2000); Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 Law & Hist. Rev. 259, 266, 273-74; Kahn, supra note 14, at 28; Pennell supra note 4, at A-2.

Furthermore, in community property jurisdictions, at death, the first spouse to die may dispose of only his or her share of the community property. Only the first decedent's share of the community property is subject to estate tax, with the other half escaping taxation until the second decedent's death. See *Poe v. Seaborn*, 282 U.S. 101, 111 (1930) ("[I]t is clear that income of community property is owned by the community and that husband and wife have each a present vested one-half interest therein"); Bittker et al. at 237; Reppy & Samuel, supra note 26, at 13-21.

Post-*Poe*, state property rules had important consequences for not only income taxes, but for wealth transfer taxes as well. Assume for example that Spouse 1 and Spouse 2 resided in a common law jurisdiction prior to 1948, and that Spouse 1 died with a gross estate of \$100,000 passing entirely to Spouse 2. Assuming a 50% rate of

Senate Finance Committee acknowledged the likelihood that several states would convert to community property systems so that their citizens would experience no financial disadvantage:

[T]he fact which makes action at the present session imperative is the potential rapid extension of community

taxation, Spouse 1's estate would owe \$50,000 in estate tax (50% of \$100,000). If, however, same couple resided in a community property jurisdiction where the \$100,000 was a community asset, Spouse 1's gross estate would be one-half of \$100,000, or \$50,000. Even if Spouse 1 held the \$100,000 in a bank account titled in Spouse 1's sole name, by operation of state law, Spouse 1 legally owned (and could dispose of at his death) only \$50,000. The other \$50,000 already belonged to Spouse 2. Again assuming an estate tax rate of 50%, Spouse 1's estate would owe \$25,000 (50% of \$50,000). This is one-half of the tax imposed if Spouse 1 had resided in a common law jurisdiction (\$50,000).

Compare as follows:

	Common Law Jurisdiction		Community Property Jurisdiction	
	Spouse 1	Spouse 2	Spouse 1	Spouse 2
Assets at death	\$100,000	\$0	\$50,000	\$50,000
Estate taxes (50%)	(50,000)		(25,000)	0
Net estate	50,000		25,000	50,000
Bequest to Spouse 2	(50,000)	50,000	(25,000)	25,000
Net assets	0	\$50,000		\$75,000

To achieve a \$50,000 gross estate, common law resident Spouse 1 would have needed to consume or give away a portion of the \$100,000 to Spouse 2 or to others. Prior to the institution of the marital deduction, any lifetime gifts by Spouse 1 would be subject to gift tax. If the gift tax rate were, say, 50%, common law residing Spouse 1 with assets \$100,000 could make a taxable gift of \$33,333. Spouse 1 then would pay a gift tax of \$16,667 (rounded) (50% of \$33,333). Spouse 1 would then have a remaining gross estate of \$50,000 (\$100,000 minus \$33,333 minus \$16,667) and estate tax bill of \$25,000 (50% of the remaining gross estate). Spouse 2 would have total assets of \$58,333 (\$33,333 received during Spouse 1's lifetime plus \$50,000 upon Spouse 1's death). Note that community property resident Spouse 1 did not have to make any lifetime taxable transfers to achieve the gross estate of \$50,000; state law effected Spouse 2's ownership of \$50,000. At death, Spouse 1 would transfer \$50,000 net to Spouse 2. Spouse 2 would have total assets of \$75,000. Compare as follows:

	Common Law Jurisdiction		Community Property Jurisdiction	
	Spouse 1	Spouse 2	Spouse 1	Spouse 2
Assets at inception	\$100,000	\$0	\$50,000	\$50,000
Lifetime transfers	(33,333)	33,333		
Gift taxes (50%)	(16,667)		0	
Gross assets at death	50,000		50,000	
Estate taxes (50%)	(25,000)		(25,000)	0
Net estate	25,000		25,000	50,000
Bequest to Spouse 2	(25,000)	25,000	(25,000)	25,000
Net assets	0	\$58,333	0	\$75,000

property to a large number of common-law States. The adoption of community property has been advocated widely in spite of a growing awareness of the substantial differences between community property and common law which make a transition to one system extremely difficult [T]here is a lively fear that the tax advantages of community property will produce a migration of the relatively well-to-do taxpayers [from common law states] If the necessary action is not taken, there will be a flood of State legislation . . . which has the most unfortunate consequences, not only for the taxpayers involved, but also for the persons who must use or administer the property laws of the States which rush into the community-property system.³⁰

The Finance Committee predicted a “difficult transition” as common law states moved to community property³¹ and created mass confusion and administrative nightmares. Even if the potential wave of state property law change and confusion was not strictly a federal problem, Congress addressed it with a federal solution. As legislators framed the issue, if similarly situated spouses were taxed differently because of differences in state property law, federal tax law, not state law, should change. In the Congressional view, geographic differences meant that federal tax law failed to achieve its important policy goal of horizontal equity, the principle that “people with about the same income should pay about the same tax.”³² Geographic equalization then became the rallying cry behind the enactment of the joint income tax return in 1948.³³

In addition to the joint income tax return, Congress saw gift-splitting and the estate and gift tax marital deduction as primary equalizing vehicles.³⁴ With the enactment of IRC § 2513,³⁵ spouses could agree to have any transfer made by either of them treated as made one-half by each spouse. The marital deduction itself initially was limited to one-half of a decedent’s gross estate or one-half of any lifetime transfer by gift.³⁶ This new tax rule achieved for common law resident spouses the same tax treatment of gifts made by community property resident spouses. With the deduction, a common law resident spouse could transfer all property to his or her spouse at death, but owe estate tax only on half of the estate (as one-half did not qualify for the marital

30. S. Rep. No. 1013, at 302-03.

31. *Id.* at 302.

32. Daniel Q. Posin & Donald B. Tobin, *Principles of Federal Income Taxation* 26 (6th ed. 2003). See generally Walter J. Blum & Harry Kalven, Jr., *The Uneasy Case for Progressive Taxation*, 19 U. Chi. L. Rev. 417 (1952); Walter J. Blum, *Revisiting the Uneasy Case for Progressive Taxation*, 60 *Taxes* 16 (1982).

33. S. Rep. No. 1013, at 302. Uniformity is a constitutional requirement: “[A]ll duties, imposts, and excises shall be uniform throughout the United States.” U.S. Const. art. I, § 8, cl. 2.

34. Revenue Act of 1948, Pub. L. 80-471, § 372, 62 Stat. 110, 125-27, reprinted in 1948-1 C.B. 211, 223-24; S. Rep. No. 1013, at 303-06. For further discussion of the history of the wealth transfer tax marital deduction, see, e.g., Richard B. Stephens et al., *Federal Estate & Gift Taxation* ¶ 5.06[1] (8th ed. 2002).

35. IRC § 2513 (1948).

36. E.g., Bittker et al., *supra* note 28, at 337-38.

deduction). For most practical purposes, then, the new rules achieved the desired geographic parity between common law and community property resident spouses.³⁷

Under the estate and gift tax laws enacted in 1948, a limited category of transfers apart from outright gifts and bequests qualified for the marital deduction. The new laws generally prohibited deductions for terminable interests,³⁸ or interests subject to the spouse's divestiture, although the law allowed a deduction for a spouse's income interest in a trust over which the spouse had a specific type of general power of appointment.³⁹ In recognizing this limited exception to the terminable interest rule, Congress treated a life estate coupled with a general power as equivalent for transfer tax purposes to outright ownership even though the spouse lacked full ownership rights over the property.⁴⁰ The construction of substantively different property interests as equivalent for tax purposes played an important role in the estate and gift tax marital deduction from its inception. This equivalency theme recurred prominently in later Congressional debates over the marital deduction.

Contemporary commentators reacted unfavorably to the level of control by a surviving spouse that was required to qualify transfers for the marital deduction.⁴¹ Outright ownership or a general power of appointment enabled a widow to "cut off the objects of [the husband's] bounty and leave his estate to a gigolo second husband,"⁴² or "cut off" a husband's intended beneficiaries "by the stroke of a mother's pen."⁴³ Even if husbands and wives were theoretical economic partners, that partnership lasted only as long as they (or their marriage) did. Truly equal spousal ownership of property was problematic because women were too weak (and thus prey for "a gigolo second husband")

37. Precise geographic equalization remained somewhat elusive, for technical reasons relating mostly to the tax treatment of spousal joint tenancies. See, e.g., S. Rep. No. 1013, at 304 (in its report, the Senate Finance Committee noted that "the widespread use of life tenancies in common-law States" presented particular challenges). For a detailed discussion of the tax treatment of joint tenancies, see Stephens et al., *supra* note 34, ¶ 5.06[3][d].

38. Pub. L. No. 591-736, § 2056, 68A Stat. 1, at A318 (1948). For a general explanation of the relaxed terminable interest rule, see S. Rep. No. 1013, at 335-36; S. Rep. 1622, at 125 (1948).

39. In a broad sense, a general power of appointment is "[o]ne exercisable in favor of any person the donee may select." Black's Law Dictionary 685 (6th ed. 1990). For federal estate and gift tax purposes, however, in order for a trust to qualify for the marital deduction under IRC § 2056(b)(5), the spouse must have the power to appoint all or a specific portion of the trust property in favor of the surviving spouse or his or her estate, whether or not the power is exercisable in favor of others, and with no power in any other person to appoint any part of the trust to any person other than the surviving spouse. IRC § 2056(b)(5). Cf. IRC § 2041 (general power of appointment is a power exercisable in favor of the taxpayer himself, herself, his or her estate and the creditors of his or her estate, except in certain circumstances).

40. In 1954, the marital deduction rules were relaxed to permit explicitly a life estate to qualify for the marital deduction. See H.R. Rep. No. 1337, at 91-92 (1954).

41. Kahng, *supra* note 14, at 33-35.

42. Charles Looker, *The Impact of Estate and Gift Taxes on Property Disposition*, 38 Cal. L. Rev. 44, 62 (1950).

43. *Id.* at 67.

or too strong (capricious evil-doers who cut off beneficiaries with a "stroke of a mother's pen").

C. Triumph of Substance Over Form

In 1966, almost twenty years after the enactment of the provisions authorizing the joint income tax return and the estate and gift tax marital deduction, Congress amended the marital deduction provisions to address perceived "inequities and discrimination"⁴⁴ in the transfer tax treatment of disclaimed property. In particular, legislators saw economic discrimination in the non-recognition for transfer tax purposes of disclaimers by persons other than a surviving spouse.⁴⁵ To illustrate, if an unrelated third party disclaimed a testamentary bequest, even if the disclaimed property passed to the decedent's surviving spouse, the transfer would not qualify for the estate tax marital deduction.⁴⁶ In the case of disclaimed property, tax results depended on the process by which a surviving spouse received property, not its receipt alone. Thus for transfer tax purposes prior to 1966, form vanquished substance.

Echoing Congress's 1948 dismay at the "unfortunate" conversion of common law jurisdictions to community property systems,⁴⁷ the House Ways and Means Committee labeled the pre-1966 disclaimer rules as "unfortunate"⁴⁸ for causing estate tax consequences to deviate from underlying substantive property ownership. In most of these "unfortunate" disclaimer cases, the Committee observed, "the failure to make provision for the marital deduction stemmed from an absence of knowledge concerning estate tax law by the decedent."⁴⁹ "This is an area of the law which, of necessity, contains complexities and frequently is not understood by an individual preparing his own will."⁵⁰ In the face of complex and confusing laws, Congress believed that taxpayers should be saved from their own mistakes, and that wealth transfer taxation rules should be flexible where possible in granting the marital deduction.

In 1966 Congress ratified revised disclaimer rules. Under the new transfer tax rules, whether a surviving spouse received property became more important than how he or she received it. In other words, a bequest directly to a surviving spouse was equivalent for tax purposes to an indirect transfer to the surviving spouse via disclaimer. In either case, the surviving spouse became entitled to the property. Congress again showed preference for tax rules that tracked economic or beneficial ownership of property.⁵¹

44. S. Rep. No. 1599, at 1-6 (1966).

45. IRC § 2056(d).

46. *Id.*

47. See *supra* note 30 and accompanying.

48. H. R. Rep. No. 1513, at 2-7 (1966).

49. *Id.*

50. *Id.*

51. In stating its rationale for supporting the legislative change, the Senate Finance Committee employed language substantially similar to the House Ways and Means Committee's:

Where the beneficiary disclaims his right to receive property and, as a result, the property is received by the surviving spouse, it is difficult to see why a larger tax should be recovered from the estate than

D. The Incipient One Flesh, One Taxpayer Theory of Wealth Transfer Taxation

The next significant development in the history of the estate and gift tax treatment of marital transfers occurred in 1976. The Tax Reform Act of 1976 ("1976 TRA")⁵² is landmark legislation best known for substantially unifying the estate and gift tax systems.⁵³ Less well known is that the 1976 TRA implemented (albeit temporarily and ineffectively) the nation's first generation-skipping transfer tax.⁵⁴ Furthermore, in connection with the 1976 TRA's increase of the marital deduction to the greater of \$250,000 or one-half of a decedent's adjusted gross estate,⁵⁵ Congress considered, but did not pass, an increase in the marital deduction to 100% of a decedent's estate for transfers at death, regardless of estate size, and the entire value of property for transfers by lifetime gift.⁵⁶

would be true where the property goes directly to the surviving spouse (rather than indirectly as a result of a disclaimer). In both cases the economic effect of the transaction is the same. Moreover, frequently the failure to make provision for the marital deduction in the first instance stems from an absence of knowledge concerning estate tax law by the decedent. This is an area of the law which, of necessity, contains complexities and frequently is not fully understood by an individual preparing his own will.

S. Rep. No. 1599, at 1-6 (1966).

52. Tax Reform Act of 1976 Pub. L. 94-455, 90 Stat. 1520 (1976). For discussion of the impact on estate planning by the 1976 TRA's important changes to the federal tax system, see, e.g., Jonathan G. Blattmachr & Thomas J. McGrath, *Carryover Basis Under The 1976 Tax Reform Act* (1977); Joseph M. Dodge, *Generation-Skipping Transfers After The Tax Reform Act of 1976*, 125 U. Pa. L. Rev. 1265 (1977).

53. As Ronald D. Aucutt explains, the Tax Reform Act of 1976 partially 'unified' the gift and estate taxes

by making the estate tax cumulative with the gift tax through the concepts of 'adjusted taxable gifts' and a 'unified credit,' with the same stated rates. The Act repealed the former specific exemptions of \$30,000 for gift tax purposes and \$60,000 for estate tax purposes. Ronald D. Aucutt, *The Statute of Limitations and Disclosure Rules for Gifts*, SJ073 ALI-ABA 1345, 1348 (citations omitted).

For further discussion of the unification of the wealth transfer tax system, see, e.g., Paul R. McDaniel et al., *Federal Wealth Transfer Taxation* 8-9 (5th ed. 2003).

54. A generation-skipping transfer occurs when, for example, a taxpayer makes a gift to a trust for the benefit of his or her child, with remainder to the grantor's grandchild. See IRC §§ 2515, 2602-2603, 2611-2613, 2621-2623, 2631, 2641-2642, 2651-2653; Treas. Reg. §§ 26.2601-1(a), (b), 26.2611-12, 26.2612-1, 26.2613-1, 26.2642-2(a)(1), (2), 26.2652(a)(1)-(4).

The provisions of the 1976 TRA relating to the generation-skipping transfer tax were repealed retroactively in 1986 and a new generation-skipping transfer tax system was enacted. See Stephanie J. Willbanks, *Federal Taxation of Wealth Transfers* 6 (2004). For a superb analysis of the generation-skipping transfer tax, see Carol A. Harrington et al., *Generation-Skipping Transfer Tax* (2d ed. 2001).

55. Tax Reform Act of 1976, Pub. L. 94-455, § 2002(a), 90 Stat. 1520 (1976). See generally Pennell, *supra* note 4, at A-3.

56. See generally Pennell, *supra* note 4, at A-3.

Although lawmakers ultimately did not agree in 1976 to increase the marital deduction to the full value of the decedent's gross estate,⁵⁷ in considering the possibility Congress laid the foundation for the "one flesh, one taxpayer" approach to marriage and wealth transfer taxation.⁵⁸ Close analysis of the legislative history and supporting materials, including the Studies and Proposals of the Treasury Department, the House and Senate Committee Reports and testimony before Congressional Committees, reveals a shift in policy focus. Congress moved away from the horizontal equity⁵⁹ concerns of 1948 toward a new goal of vertical equity in taxation.⁶⁰ Specifically, lawmakers focused on the supposed ability of wealthy couples to avoid estate tax entirely (albeit through lifetime taxable gifts) and the expansion of this "right" to married couples of all levels of wealth.⁶¹

In arguing for an increased estate and gift tax marital deduction, the bill's supporters construed marriage as a unique economic partnership that deserved special tax treatment. Four particular themes emerge from the legislative history. First, according to Congress, husbands and wives treat all assets belonging to either of them as belonging to both of them.

[M]any families regard their property as being generated by their combined efforts and, thus, "ours" rather than "his" and "hers" [T]hey often transfer property from separate ownership to joint ownership or community property without paying much attention to the legal change in ownership. There is a serious question whether it is appropriate to tax such

57. Congress did increase the estate tax marital deduction from one-half of the decedent's adjusted gross estate to the greater of (a) \$250,000 or (b) one half of the decedent's adjusted gross estate. The increased gift tax marital deduction was unlimited with respect to the first \$100,000 and 50% of lifetime transfers in excess of \$200,000. Pub. L. 97-34, § 339, 95 Stat. 172 (1981).

58. See *supra* note 6 and accompanying text.

59. In this context, horizontal equity refers to the idea that all married couples, regardless of their state of residence, should be subject to the same level of wealth transfer taxation. For further discussion of the role of horizontal equity in taxation, see generally Michael A. Livingston, *Taxation Law, Planning & Policy* xxv-xxxvi (2003). See also 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 (1998) (comparing tax treatment of same-sex couples to tax treatment of opposite-sex married couples).

60. Here vertical equity refers to the idea that all married couples, regardless of their level of wealth, should be subject to the same level of wealth transfer taxation. For further discussion of the role of vertical equity in taxation, see generally Livingston, *supra* note 59; Philip D. Oliver, *Tax Policy* 1-4 (2d ed. 2004).

61. In the Tax Reform Studies and Proposals published jointly by the House Ways and Means Committee and the Senate Finance Committee, the Treasury Department explained that wealthy married taxpayers typically exploited lower gift tax rates to make lifetime instead of death time transfers to the less wealthy spouse. Joint Comm. on Tax Ref., *Tax Reform Studies and Proposals* 257-259 (1969).

transfers that are basically just incidents in the common management of the family's pooled resources.⁶²

Congress viewed the legal form of marital property ownership as less important than how spouses themselves approach the property.

In support of the assertion that most married couples treat property owned by either of them as "'ours' from the time of its acquisition since it was acquired with family funds,"⁶³ lawmakers in 1976 entertained little direct testimony about taxpayers' attitudes toward marital property. Sociologists now would suggest that Congress was mistaken in its assertions. Historically husbands have controlled marital finances,⁶⁴ and even today in a couple where both spouses frequently engage in paid labor, a wife frequently regards her earnings as "for personal frills" and husbands "are still more likely than their wives to retain personal spending money."⁶⁵

The second theme that emerges from the 1976 legislative history is that economic dependents deserve special insulation from the negative impact of the estate tax. Statistically speaking, in 1976 the majority of adult taxpayers were married.⁶⁶ Most married women did not work outside the home⁶⁷ and the average family had more than one minor child.⁶⁸ These data help explain the Treasury Department's emphasis on the "especially difficult burden [that] may be imposed by the [estate] tax when property passes to a widow, particularly if there are minor children."⁶⁹ Through images of bereft widows and orphans, advocates appealed for legislative sympathy for those who were unable to provide financially for themselves.

A third theme of the 1976 legislative history is that taxation of wealth transfers should be postponed until the death of the second spouse. "It does not appear . . . that transfers between husband and wife are appropriate occasions for imposing tax," asserted the Treasury Department.⁷⁰ "[T]he [full marital

62. Tax Reform (Administration and Public Witnesses): Public Hearings Before the House Comm. on Ways and Means, 94th Cong., 2d Sess. Part 2, 1187 (Mar. 22, 1976) (testimony of Treasury Secretary William E. Simon). For an analysis of the partnership approach, see Marjorie E. Kornhauser, *Deconstructing the Taxable Unit: Intrahousehold Allocations and the Dilemma of the Joint Return*, 16 N.Y.L. Sch. J. Hum. Rts. 140 (1999). Kornhauser asks, "If marriage is a partnership, why do only 10% of married women use a name other than their husband's?" *Id.* at 150.

63. Tax Reform Studies and Proposals, *supra* note 61, at 258.

64. Viviana A. Zelizer, *The Social Meaning of Money: Pin Money, Paychecks and Other Currency* 43-66 (1994).

65. *Id.* at 68-69.

66. Arlene F. Saluter & Terry A. Lugaila, *Current Population Reports, Population Characteristics P20-496* (Mar. 98), available at <http://www.census.gov/prod/3/98pubs/p20-496.pdf>.

67. Howard N. Fullerton, Jr., *Labor Force Participation: 75 Years of Change, 1950-98 and 1998-2025*, 122 Monthly Lab. Rev. 3 (1999), available at <http://www.bls.gov/opub/mlr/1999/12/art1full.pdf>.

68. *Average Population Per Household and Family: 1940 to Present*, U.S. Bureau of the Census, at <http://www.census.gov/population/socdemo/hh-fam/tabHH-6.xls> (last modified June 11, 2003).

69. Tax Reform Studies and Proposals, *supra* note 61, at 258.

70. *Id.* at 199.

deduction] proposal is designed to provide that property of a married couple will be taxed once as it passes to the next generation."⁷¹ Note that the proposed tax law did not contemplate an exemption for wealth transfers between unmarried members of the same generation (although generational differences between taxpayers formed the backbone of the ill-fated generation-skipping transfer tax provisions of 1976).⁷² The proposed full deduction applied only to transfers between spouses, regardless of any age difference between them. Thus the marital unit itself took on greater importance than the characteristics of either member of the couple.

This focus on the marital unit itself grew out the joint income tax return. If married couples filed one return for income tax purposes, the logical extension of that argument was that they should, in effect, file one estate tax return (or at least pay only one estate tax). Even if a full marital deduction meant lost federal revenue, advocates insisted that it would facilitate smooth administration of the wealth transfer tax system.⁷³

Building on the notion of a merged husband and wife taxpayer, the fourth theme from the debate over the marital deduction is the relationship among substance, form and tax results. Specifically, Congress considered revising the terminable interest rule to provide that a mere life estate in a surviving spouse without a general power of appointment qualified for the marital deduction. Turning a blind eye to the limited rights of a life beneficiary, the Treasury Department asserted that "whether the husband or wife makes provision as to who gets the property ultimately" was insignificant to the federal government "so long as it is agreed that the property will be taxed on the death of the spouse."⁷⁴ Limiting the federal interest in this way accorded generally with the previously articulated viewpoint that a married couple, not an individual taxpayer, was the appropriate taxable unit for estate and gift tax purposes.

Yet the claim that the federal interest was limited to the eventual taxation of property masked an entirely different agenda. Specifically the estate and gift tax rules forced men to relinquish too much control over their property in order to qualify their transfers for the marital deduction.⁷⁵

Under present law, the bequest [of a terminable interest] only qualifies for the marital deduction if the spouse has control over the property underlying her income interest that is considered her property (and taxable at her death). A husband may want to leave the income from his property to his wife but ensure that the property goes on her death to his children. Ordinarily . . . the bequest would not qualify under present law for the marital deduction.⁷⁶

71. *Id.* at 260.

72. See *supra* note 54 and accompanying text.

73. Tax Reform Studies and Proposals, *supra* note 61, at 260.

74. *Id.*

75. With respect to the legislative history of ERTA, Kahng, *supra* note 14, at 32-34, makes a similar point. Kahng does not address the legislative history of the 1976 TRA, however.

76. Tax Reform Studies and Proposals, *supra* note 61, at 259.

In a certain sense, the two arguments in favor of a naked life estate's qualification for the marital deduction contradicted each other. If husband and wife had identical or substantially identical economic interests, they arguably deserved recognition as one person for transfer tax purposes. The male half of the taxable "person" (and the legislative history indeed contemplates a male taxpayer⁷⁷) would require no control over the ultimate disposition of the property, if the female half of the taxable "person" exercised her general power of appointment on her subsequent death in a manner consistent with the male's intentions. The real concern behind the strict qualifications for marital property, however, was that husband and wife were not economic alter egos of each other. At a time when the national divorce rate was 5.0 per 1,000 total population,⁷⁸ spouses frequently had divergent dispositive interests.

E. Vertical Equity and the Full Marital Deduction

The Economic Recovery Tax Act of 1981 ("ERTA")⁷⁹ finally codified the one flesh, one taxpayer approach to marital wealth transfers that had been developing since 1948. ERTA made two substantial refinements to the marital deduction. First lawmakers increased the marital deduction so that a decedent's entire estate and the full value of any lifetime denotive transfer could qualify for the marital deduction. Second the prohibition on terminable interests was relaxed, so that the first spouse to die could retain substantial control over a trust for the surviving spouse's benefit, without sacrificing eligibility for the marital deduction.

The successful arguments made in 1981 in favor of an unlimited marital deduction resounded the themes of 1976. In language borrowed directly from the legislative history of the 1976 TRA, the Treasury Department opined: "Many couples view their property as 'ours' rather than 'his' or 'hers,' especially if the property is purchased with 'family' funds."⁸⁰ The House Ways and Means Committee also claimed that economic dependents deserved special insulation from the negative impact of the estate tax. In an appeal to legislative sympathy, the Committee report called the estate tax the "widow's tax," because it "falls most heavily on widows," an echo of the sentiments of 1976.⁸¹ The Senate Finance Committee emphasized the proper time for imposition of

⁷⁷ *Id.*

⁷⁸ Table 2-1, Estimated Number of Divorces and Annulments and Rates, With Percent Changes From Preceding Year; United States 1920-1976, Vital Statistics of the United States 1976, Vol. III - Marriage and Divorce, available at http://www.cdc.gov/nchs/data/vsus/mgdv76_3.pdf (June 10, 2004). In 1976, the rate of marriage was 10 per 1,000 population. *Id.* at Table 1-1. In 2001, the divorce rate was 4.0 per 1,000 total population; the marriage rate was 8.4 per 1,000 total population. Births, Marriages, Divorces and Deaths: Provisional Data for 2001, National Vital Statistics Report (Sept. 11, 2002), available at http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_14.pdf.

⁷⁹ Economic Recovery Tax Act of 1984, Pub. L. No. 97-34, as stat. 172 (1981).

⁸⁰ Treasury Department's General and Technical Explanation of H.R. 3849: Administration's Economic Recovery Tax Act of 1981, 97th Cong., 1st Sess., at 39 (June 23, 1981).

⁸¹ See *supra* note 69 and accompanying text.

the estate tax as well as the complex relationship among substance, form and tax result.⁸²

Congress intended the increased marital deduction to implement the vision of "husband and wife as a single economic unit for transfer tax purposes, as they are generally treated for income tax purposes."⁸³ Advocates of tax reform emphasized the urgent need for simplification of the marital deduction, citing overwhelming difficulty in determining ownership of marital property,⁸⁴ and "the pressure to engage in complex estate planning."⁸⁵ Yet in adopting relaxed terminable interest rules in connection with the full marital deduction, Congress in fact complicated tax administration and estate planning.⁸⁶

The enactment of the qualified terminable interest rules of section 2056(b)(7)⁸⁷ represented the ultimate triumph of form over substance. By allowing sharply circumscribed property interests, such as an income interest in a trust without any power of appointment, to qualify for the marital deduction, federal tax jurisprudence turned full circle from its 1948 position that the substance of state law community property rights should control federal tax results. Congress permitted a decedent's estate to take a deduction for the full value of property passing to a trust for the benefit of a surviving spouse, even though the actuarial value of the spouse's interest, depending on the spouse's age and other factors, could be far less than the value of the entire property.⁸⁸ With ERTA, lawmakers reasoned that a mere income interest was equivalent, for transfer tax purposes, to outright ownership.⁸⁹ This equivalency argument was crucial to preserving the (typically male) testator's ultimate control over property.⁹⁰

ERTA's adoption of the modified qualified terminable interest ("QTIP") rules in 1981 exposes the ultimate hollowness of the one flesh, one taxpayer approach to marital wealth transfers. Under the pre-1981 marital deduction rules, only outright ownership or a life estate coupled with a general power could qualify for the marital deduction. The law required a taxpayer who sought to qualify a transfer for a full estate tax marital deduction to choose "between surrendering control of the entire estate to avoid imposition of the estate tax at his death or reducing his tax benefit at his death to insure inheritance by the children."⁹¹ Congressional recognition of this "difficult"⁹² choice amounted to an acknowledgment that the construction of husbands and wives as one taxpayer was legal fiction,⁹³ or at least inconsistent with human

82. See S. Rep. No. 97-144, at 127 (1981).

83. *Id.*

84. *Id.*; H.R. Rep. No. 97-201, at 158 (1981).

85. Treasury Department's General and Technical Explanation, *supra* note 80, at 39.

86. Several scholars aptly critique the contribution of the QTIP provisions to a simplified tax system. See, e.g., Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 *UCLA Women's J.L.* 301 (1995).

87. IRC § 2056(b)(7)(B)(i)(I).

88. See *id.*

89. Compare H.R. Rep. No. 1337, at 91-92.

90. See generally Kahng, *supra* note 14.

91. H.R. Rep. No. 97-201, at 160.

92. 127 Cong. Rec. S:8346 (daily ed. July 24, 1981) (remarks of Sen. Boren).

93. See generally Kahng, *supra* note 14.

nature. The surviving spouse could not be relied upon to serve as a dispositive extension of the first spouse to die, either because the spouses had different objects of their bounty or because the survivor's needs and wishes changed over his or her ongoing life. Yet instead of honoring the principle that tax results should follow from substantive property ownership, Congress indulged anxieties about a transferor-spouse's loss of control by changing the tax law.

Tangled in the construction of husbands and wives as one economic unit, in 1981 Congress enacted the QTIP rules to permit the first spouse to die to control the disposition of the transferred property upon the surviving spouse's subsequent death. Husbands and wives might be one taxpayer, when convenient, but the construction strained in the face of a surviving spouse's potential outright ownership of all marital property.⁹⁴

II. CURRENT TAX TREATMENT OF MARITAL WEALTH TRANSFERS

A. *The Unlimited Marital Deduction, or "What's Mine Is Yours"*

Since the enactment of ERTA in 1981, a married person generally may transfer an unlimited amount of property to his or her spouse without triggering the imposition of an estate or gift tax,⁹⁵ provided that the property is in a qualified form.⁹⁶ The favorable wealth transfer tax treatment of transfers

94. In 1980, approximately 147,000 estate tax returns were filed. Internal Revenue Service, Statistics of Income Winter 2003-2004 Bulletin, Table 22, Selected Returns and Forms Filed or To Be Filed By Type During Specified Calendar Years 1975-2004 (May, 2004), available at <http://www.irs.gov/pub/irs-soi/04al22sr.xls> (last visited Aug. 9, 2004). The federal government collected an estimated \$6,282,247 in estate taxes for that year. Internal Revenue Service Data Book Fiscal Year 2003, Table 7 – Internal Revenue Gross Collections, by Type of Tax, Fiscal Years 1973-2003, available at <http://www.irs.gov/pub/irs-soi/03db07co.xls> (last visited Oct. 5, 2004).

95. Except in the case of transfers to a spouse who is not a United States citizen, the gift tax marital deduction is unlimited. IRC § 2523(i)(1) (marital deduction disallowed where spouse is not a citizen of the United States). A donor may transfer up to a certain statutory amount to his or her non-citizen spouse each year. However, IRC § 2523(i)(2) states that when the spouse of the donor is not a United States citizen that IRC § 2503(b) applies to gifts and the deduction allowable. In 2004, that amount was \$114,000. Rev. Proc. 2003-85, 2003-49 I.R.B. 1184.

96. In the estate tax context, IRC § 2001 imposes a tax on the "taxable estate" of every citizen or resident of the United States. IRC § 2001(a). A decedent's taxable estate is defined in IRC § 2051 as his or her gross estate (as further defined in IRC § 2031(a)) minus certain deductions. Permissible deductions include expenses, indebtedness and taxes under IRC § 2053, losses under IRC § 2054, charitable bequests, legacies, devises or transfers under IRC § 2055, and most significant for purposes of this discussion, under IRC § 2056, "the value of any interest in property which passes or has passed from the decedent to his or her surviving spouse, but only to the extent such interest is included in determining the value of the gross estate." IRC § 2056(a).

Similarly, in the gift tax context, IRC § 2501 imposes a tax on all property transferred by gift during a calendar year by any individual. IRC § 2501(a)(1). In essence, the gift tax is imposed on all "taxable gifts." Under IRC § 2503(a), "taxable gifts" are the total amount of gifts made during the calendar year, other than annual exclusion gifts made pursuant to IRC § 2503(b), less the deductions permitted by subchapter C of Chapter 12 of the Code (IRC §§ 2522-2524). IRC § 2503(b). The

between spouses is accomplished by means of a tax deduction. In calculating the amount of total taxable gifts, a decedent's executor or a living taxpayer, as the case may be, may deduct all transfers to a surviving spouse (for estate tax purposes) or a current spouse (for gift tax purposes), provided that certain requirements are met. The five requirements are:

- (1) The gross estate of the decedent includes the property with respect to which the marital deduction is sought.⁹⁷
- (2) The recipient of the property must be a surviving spouse or a current spouse.⁹⁸
- (3) In the case of transfers at death, the property must be included in the decedent's gross estate for federal estate tax purposes.⁹⁹
- (4) The property must "pass" from the decedent/transferor to the surviving spouse or the current spouse.¹⁰⁰
- (5) The interest may not be a non-deductible terminable interest.¹⁰¹

The last of these, the prohibition on non-deductible terminable interests, is the source of many significant estate and gift tax controversies.¹⁰²

1. *The Terminable Interest Rule* – In lay terms the terminable interest rule provides that only an outright transfer or its very near equivalent will qualify for the wealth transfer tax marital deduction. In technical terms a terminable interest is one "which will terminate or fail on the lapse of time or

taxpayer may exclude from the calculation of his or her taxable gifts transfers that qualify for the annual exclusion under IRC § 2503(b)(1). In 2004, the annual exclusion is \$11,000. Rev. Proc. 2003-85, 2003-49 I.R.B. 1184. The annual exclusion is indexed for inflation each year. IRC § 2503(b)(2). Deductions for gift tax purposes include transfers to or for the use of charity and transfers to a spouse. IRC §§ 2522 (charity), 2523(a) (spouse). The recipient must be the donor's spouse at the time of the gift.

97. Willbanks, *supra* note 54, at 457. See IRC §§ 2056(a), 2523(a); Treas. Reg. §§ 20.2056(a)-1, 25.2523(a)-1. *Certain decedents or donors not subject to estate tax.* See, e.g., IRC §§ 2101, 2106 (no estate tax imposed on an individual who is not a citizen or resident of the United States if he or she does not own property situated in the United States).

98. IRC §§ 2056(a), 2523(a); Treas. Reg. §§ 20.2056(a)-1, 25.2523(a)-1. Professor Willbanks describes survivorship in the estate tax context as a separate requirement. Willbanks, *supra* note 54, at 457-58.

99. Willbanks, *supra* note 54, at 459. See also IRC §§ 2056(a); Treas. Reg. § 20.2056(a)-1.

100. Willbanks, *supra* note 54, at 459. This rule "limits the amount of the marital deduction to the net value of the property received by the surviving spouse." *Id.* See also IRC 2056(b)(4) (calculation of amount of property passing to surviving spouse must take into account the net property interest passing to the spouse).

101. The double negative is statutory. IRC §§ 2056(b)(1), (b)(7), 2523(f)(1) and (f)(2). See Willbanks, *supra* note 54, at 464, 467-68, 473-92.

102. See, e.g., Priv. Ltr. Rul. 92-42-006 (Jul. 15, 1992) (transfer of life estate in art qualifies as QTIP property). Private letter rulings are binding only on the requesting taxpayer and may not be relied on as precedent. IRC § 6110(k)(3).

on the occurrence or the failure to occur of some contingency.”¹⁰³ Conversely a non-terminable interest is one, like outright ownership, that will *not* terminate or fail on the lapse of time or on the occurrence or the failure to occur of some contingency. Two examples illustrate this rule.

First assume that Husband transfers to Wife a life estate in Blackacre. Because Wife’s interest in the life estate expires upon her death, Husband’s transfer does not qualify for the gift tax marital deduction.¹⁰⁴ If Husband transfers Blackacre to Wife outright, however, the transfer does qualify for the marital deduction.¹⁰⁵ Unlike a life estate, outright ownership does not expire upon Wife’s death, insofar as she may transfer Blackacre to designated beneficiaries or heirs at her death.

A term of years is a second example of a terminable interest that does not qualify for the marital deduction. Assume that Wife transfers Greenacre to Husband to use and enjoy until Daughter attains the age of twenty-one or sooner dies. If Daughter dies before her twenty-first birthday, Greenacre will be transferred to Son. If Daughter survives to her twenty-first birthday, Greenacre will be transferred to Daughter.¹⁰⁶ Wife’s transfer of time-limited use and enjoyment of Greenacre to Husband does not qualify for the marital deduction because Husband’s interest will be defeated at Daughter’s twenty-first birthday or earlier death.¹⁰⁷ In contrast, if Wife gives Greenacre to Husband outright, the transfer qualifies for the marital deduction. An outright ownership

103. Treas. Reg. § 20.2056(b)-1(b). See also IRC § 2056(b)(1) (“Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed.”).

104. IRC §§ 2056(b)(1), 2523(b)(1) (no deduction for interests that expire upon lapse of time).

105. This assumes that Wife is a United States citizen. See IRC § 2523(i) (disallowance of marital deduction in the case of transfers to a non-citizen spouse).

106. The examples in this Part I.A.1. illustrate two separate transfers to which the reciprocal trust doctrine would not apply. See *United States v. Grace’s Estate*, 395 U.S. 316 (1969); *Lehman v. Commissioner*, 109 F.2d 99 (2d Cir. 1940), cert. denied, 310 U.S. 637 (1940). In *Grace*, the Court ruled that the value of a trust created by wife is includible in husband’s gross estate under IRC § 2036(a)(1) where husband and wife created “crossed” trusts in which “the trusts [are] interrelated, and . . . the arrangement, to the extent of mutual value, leaves the settlors in approximately the same economic position as they would have been in had they created the trusts naming themselves as life beneficiaries.” 395 U.S. at 324. In a recent private letter ruling the Internal Revenue Service offered further guidance on the circumstances in which the reciprocal trust doctrine will apply. See Priv. Ltr. Rul. 2004-26-008 (June 25, 2004) (ruling that life insurance trusts created by each of husband and wife for the other were not interrelated and therefore not subject to the reciprocal trust doctrine). Private letter rulings are binding only on the requesting taxpayer and may not be relied on as precedent. IRC § 6110(k)(3). Nevertheless, private letter rulings may provide insight into the Internal Revenue Service’s approach to a particular issue. For further analysis of the reciprocal trust doctrine, see Elena Marty-Nelson, *Taxing Reciprocal Trusts*, 75 N.C.L. Rev. 1781 (1997); Timothy P. O’Sullivan & Stewart T. Weaver, *Using Two Trusts With Reciprocal Spousal General Powers of Appointment*, 30 Est. Plan. 283 (June, 2003).

107. IRC §§ 2056(b)(1), 2523(b)(1) (no deduction for interests that terminate upon a certain event or contingency). Other terminable interests include annuities, patents and copyrights. Treas. Reg. §§ 20.2056(b)-1(b), 25.2523(b)-1(a)(3).

interest does not "fail on the lapse of time or on the occurrence or the failure to occur of some contingency."¹⁰⁸

While mere life estates (without a general power of appointment) and terms of years, as examples, do not qualify for the marital deduction, one special form of terminable interest does qualify. If property meets four specific conditions, it will be treated as "qualified terminable interest property"¹⁰⁹ ("QTIP") that is deductible for wealth transfer tax purposes. First, the property must pass from the transferor to the surviving spouse, in the case of testamentary transfers,¹¹⁰ or the current spouse, in the case of lifetime transfers.¹¹¹ Second, the transferor or the transferor's executor affirmatively must elect QTIP treatment for the transfer, or it will not qualify for the marital deduction and will be subject to taxation.¹¹² Third, the spouse must be entitled to all income from the transferred property, payable at least annually.¹¹³ Fourth, no person may have the power to transfer any portion of the transferred property to any person other than the spouse.¹¹⁴

108. Treas. Reg. § 20.2056(b)-1(b). See also IRC § 2056(b)(1) ("Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, an interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed.").

109. IRC §§ 2056(b)(7)(A), 2523(f)(1).

110. IRC § 2056(b)(7)(B)(i)(I).

111. IRC § 2523(f)(2)(A).

112. IRC §§ 2056(b)(7)(B)(i)(III), 2523(f)(2)(C).

113. IRC §§ 2056(b)(7)(B)(i)(II), (ii)(I), 2523(f)(2)(B). The surviving spouse must have the authority to demand that the trust property be made productive. Treas. Reg. § 20.2056(b)-7(h) Example 2.

114. IRC §§ 2056(b)(7)(B)(i)(II), (ii)(II), 2523(f)(2)(B). A typical QTIP transfer is made by means of a trust that requires the Trustee to pay all income at least annually to the spouse for life, with discretionary ability to invade principal for the benefit of the spouse alone. See, e.g., James S. Sligar & Bridget J. Crawford, Form 7, in David Westphall & George Mair, *Estate Planning Law and Taxation* A-61(4th ed. 2003).

The beneficiary-spouse of a QTIP trust has the right to demand that the trust property be made productive (or sold and reinvested in productive property). Treas. Reg. § 20.2056(b)-7(h) Example 2. Although there is no case or ruling that indicates the minimum amount of interest that trust property must earn to be productive, the threshold probably is as little as 3% per annum. Cf. Treas. Reg. § 1.643(b)-1 (definition of income interest for purposes of subparts A, B, C and D of Part I of Subchapter J of the Code governing income taxation of estates and trusts). Under this regulation, a 3% unitrust payment may constitute an "income" interest for purposes of determining whether a trust will be treated as a "simple" (pay all income) or "complex" (no requirement to pay all income) trust for income tax purposes. *Id.* Such a unitrust interest should qualify as a sufficient "income" interest for purposes of the marital deduction. IRC §§ 2056(b)(8), 2523(g); Treas. Reg. §§ 20.2056(b)-8, 25.2523(g)-1. See Jonathan G. Blattmachr & Mitchell M. Gans, *The Final "Income" Regulations: Their Meaning and Importance*, 103 Tax Notes 891 (May 17, 2004).

To qualify for QTIP treatment and the marital deduction, the beneficiary-spouse need not have a power of appointment over the trust property. If the spouse does have both the requisite income interest and a general power of appointment over the transferred property, the transfer will qualify for the marital deduction under IRC § 2056(b)(5) (estate tax) or IRC § 2523(e) (gift tax). By dispositive provisions of the governing instrument, the trust's grantor (or the testator under whose Will the QTIP trust

In effect, the QTIP rules allow a taxpayer to obtain tax-advantaged treatment for transfers of property to his or her spouse, even though the beneficiary-spouse has a limited interest in (and possibly no control over) the property. By way of illustration, assume that Husband's Will directs that his entire estate be held QTIP trust for the benefit of Second Wife for her life, remainder to pass on Wife's death to Husband's children from his marriage to First Wife. Husband could name Third Party as Trustee with sole and absolute discretion to pay trust principal to Second Wife. Husband also could prohibit Third Party from invading trust principal for Second Wife's benefit. For tax purposes, it is irrelevant that Third Party may be an ally of Husband's children from his marriage to First Wife (and hostile to Second Wife) or that Second Wife has no ability to control the disposition of the trust property at her death. Second Wife's mere authority to cause the Trustee to make the trust property productive means that she has a qualifying income interest¹¹⁵ and Husband's transfer to the trust will be eligible for the marital deduction.

2. The Economic Importance of the Estate and Gift Tax Marital Deduction – Whether a person is motivated by love, affection or tax law, transferring assets to a spouse has positive estate tax consequences. Because the marital deduction allows one spouse to transfer assets to the other without adverse tax consequences, it is a powerful estate planning tool. Unless each spouse separately owns assets equal to or in excess of the amount that can be protected by the unified credit,¹¹⁶ the credit will be “wasted” in a tax sense. In other words, if any taxpayer may transfer up to \$X without attracting transfer tax, a taxpayer who does not have \$X cannot use his or her exemption. Because the exemption is not transferable to another taxpayer, it will never be used. Consider a scenario in which the applicable exclusion¹¹⁷ for wealth transfer taxes is \$1,000,000:

Assume that A and B are married, A owns \$2 million, and B owns nothing. If A dies first, she can leave \$1 million to a trust

is created) can control the disposition of the property upon the beneficiary-spouse's death without jeopardizing the trust's QTIP treatment.

115. See text accompanying note 114.

116. IRC §§ 2001, 2010(a). The unified credit is also known as the applicable credit. Under the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 70 (2001) (hereinafter “EGTRRA”), “to the extent not used with respect to lifetime taxable gifts, the unified credit allowed under Section 2010 of the Code may protect \$1,000,000 of assets in 2003 (and years after 2010); \$1,500,000 in 2004 and 2005; \$2,000,000 in 2006 through 2008; and \$3,500,000 in 2009. Under EGTRRA, the federal estate tax is repealed for 2010.” Sligar & Crawford, *supra* note 114, at A-42 n.1. See also Jonathan G. Blattmachr & Lauren Y. Detzel, *Estate Planning Changes in the 2001 Tax Act – More Than You Can Count*, 95 J. of Tax'n 74 (Aug. 2001) (discussion of changes under EGTRRA); Jonathan G. Blattmachr & Mitchell M. Gans, *Wealth Transfer Tax Repeal: Some Thoughts on Policy and Planning*, 90 Tax Notes 393 (Jan. 15, 2001) (analysis of estate and gift tax planning opportunities under EGTRRA).

117. IRC § 2010. The term “applicable exclusion amount” refers to the amount that may be protected from tax (starting with the lowest tax bracket) by reason of the unified credit under IRC § 2010. See IRC § 2010(c).

[that does not qualify for the marital deduction] to pay the income to B for life with remainder to the children. This trust will not qualify for the marital deduction The remainder of the property can be left outright to B or in a trust that qualifies for the marital deduction A ends up with a taxable estate of \$1 million but pays no estate tax because of the applicable credit.

If, however, B dies first, A ends up with a \$2 million taxable estate This tax could have been avoided had A given B \$1 million during B's life. B could then have bequeathed this \$1 million As long as the [bequest via a] trust does not qualify for the marital deduction, it will remain in B's taxable estate and be sheltered from tax by the applicable credit.¹¹⁸

A comparatively wealthy spouse can transfer assets to a less wealthy spouse so that each spouse's estate will be of sufficient size to take maximum advantage of all available tax deductions, exemptions, exclusions, special valuation rules, credits and lower tax rates.¹¹⁹ Tax-advantaged inter vivos gifts, then, form a key part of wise estate planning.

B. Gift-Splitting By Spouses, or "What's Mine Is Ours"

Married couples benefit from not only the marital deduction, but also from the ability to "split" gifts. Under section 2513,¹²⁰ spouses may agree to have any gratuitous transfer by one spouse to a third party treated for gift tax purposes as made one-half by each spouse.¹²¹ One-half of a taxpayer's gifts will be attributed to the non-donor spouse if the non-donor spouse indicates his or her consent on the donor's timely filed gift tax return.¹²² Gift-splitting can minimize (or even eliminate) gift tax liability, especially when applied in connection with a series of annual exclusion gifts under section 2503(b).¹²³ To illustrate, assume that Wife gives each of her three children a gift of \$22,000 cash. If Husband consents to split the gifts, Wife is treated for tax purposes as making three gifts of \$11,000 each and Husband is treated as making three gifts of \$11,000 each. Because each \$11,000 transfer is made under the protection of the annual exclusion, neither Wife nor Husband will owe any gift tax, and

118. Stephanie J. Willbanks, *Federal Estate and Gift Taxation: An Analysis and Critique* ¶ 13.05 (3rd ed. 2004) (citations omitted). Note that at the time this example was written, the applicable exclusion amount was \$1,000,000.

119. See, e.g., IRC § 2010 (unified credit against estate tax).

120. IRC § 2513.

121. IRC § 2513(a). Gift-splitting is available only with respect to transfers by spouses who both are citizens or residents of the United States at the time of the transfer. IRC § 2513(a)(1).

122. The regulations set forth the manner and time of signifying consent. Treas. Reg. §§ 25.2513-1, 25.2512-2.

123. Under IRC § 2503(b), the first \$10,000 of gifts by a donor to any person in a taxable year is exempt from gift tax. For 2004, this amount has been indexed for inflation to \$11,000. Rev. Proc. 2003-85, 2003-49 I.R.B. 1184.

Wife can diminishes her taxable estate. If Wife had not "split" the gifts with Husband, one-half of each transfer would have been subject to taxation.

Gift-splitting is consistent with the treatment of a married couple as a single economic unit for wealth transfer tax purposes. Theoretically the identity of the actual transferor is immaterial if all property held by either spouse is treated for wealth transfer tax purposes as belonging equally to both. If both spouses agree, the transferor-spouse acts for tax purposes as a quasi-agent, and the gratuitous transfer is treated as made one-half by each taxpayer.

C. Disclaimers By Spouses and Others, or "What Was Theirs Is Now Yours"

As a matter of property law, an intended recipient may disclaim, or refuse to take ownership of, a gratuitous transfer. In the estate administration context, disclaimers commonly are used for tax planning purposes. This is because a disclaimer that is "qualified" for federal wealth transfer tax purposes causes the disclaimed property to be treated as passing directly from the decedent/donor to the alternate named beneficiary or a statutory taker in default, as the case may be.¹²⁴ Generally speaking, for a disclaimer to be "qualified" for federal transfer tax purposes, the disclaimer must be made in writing¹²⁵ no later than nine months after the transfer creating the interest (or the purported transferee's twenty-first birthday, if later);¹²⁶ the disclaimant must not accept the property or any of its benefits;¹²⁷ and the interest must pass without any direction on the part of the disclaimant¹²⁸ to either the decedent's spouse or a person other than the disclaimant himself or herself.¹²⁹ If a disclaimer does not meet all of these criteria, then for transfer tax purposes, the disclaimant, not the decedent/donor, is the transferor for tax purposes.¹³⁰

In the estate tax context, whether a disclaimer is qualified for tax purposes has important estate tax consequences. If a testamentary gift, devise or bequest to an intended beneficiary ordinarily would qualify for an estate tax deduction,¹³¹ for example, but the intended beneficiary makes a qualified disclaimer, the estate's anticipated tax bill may change depending on the identity of the person who succeeds to the property by reason of the disclaimer. The transfer resulting from the disclaimer may or may not be eligible for the

124. IRC § 2518(a) ("For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.")

125. IRC § 2518(b)(1).

126. IRC § 2518(b)(2)(A), (B).

127. IRC § 2518(b)(3).

128. Where one person makes a written transfer of his or her entire interest in property to a person who would have received the property had the disclaimer been "qualified" for federal wealth transfer tax purposes, the transfer will be treated as a qualified disclaimer for purposes of IRC § 2518. IRC § 2518(c)(3).

129. IRC § 2518(b)(4)(A), (B).

130. Stephens et al., *supra* note 34, ¶ 10.07.

131. E.g., IRC §§ 2056 (marital deduction), 2055 (charitable deduction).

same tax treatment. If the disclaimed amount is sizeable, the change could be significant.¹³²

Disclaimers by a surviving spouse are subject to rules that are different from those that apply to disclaimers by other persons. A disclaimer by a spouse or surviving spouse that otherwise meets the requirements of a qualified

132. To illustrate the important tax implications of the disclaimer rules, consider a scenario in which Father dies, leaving a Will with the following bequest:

I give and bequeath the amount of One Hundred Thousand Dollars (\$100,000) to my adult daughter, Daughter, if she survives me, or, if she does not survive me, or if she shall effectively disclaim all or any portion of this bequest, I give and bequeath all of such property, or the portion so disclaimed, as the case may be, to Charity, if at the time of such disposition it is an organization described in and meeting the requirements of IRC §§ 170(c) and 2055(a).

"Charity" is used in this example as a generic stand-in for the class of beneficiaries transfers to which qualify for the estate tax charitable deduction. An actual Will typically would contain the specific name of an organization described in and meeting the requirements of IRC §§ 170(c) (income tax charitable deduction) and 2055(a) (estate tax charitable deduction). If, within nine months of Father's date of death, Daughter delivers to Father's executor an irrevocable written refusal to accept the \$100,000 bequest, the property passes to Charity. Note that the bequest passes to Charity pursuant to the terms of Father's Will, without direction on Daughter's part and without Daughter's having accepted any portion of the bequest. Assuming she has accepted no benefits from the offered legacy (such as interest earned by it), then for federal transfer tax purposes Daughter's disclaimer is "qualified." IRC § 2518(a). The property is treated as passing directly from Father to Charity. Id. Father's estate will be entitled to an estate tax charitable deduction. IRC § 2518(a).

If Daughter's disclaimer is not "qualified" for estate tax purposes, the tax consequences to Father's estate change. Assume the same facts as above, but that five months after Father's death, Daughter requests and receives payment of the \$100,000 bequest. Daughter spends \$5,000 of the bequest on a luxurious vacation but then decides she does not want any of the money. Assume that Daughter is independently wealthy. Daughter then wants to disclaim the bequest, causing the money to pass to Charity. Before the ninth month after Father's death, Daughter reimburses the estate from her own funds for the entire \$100,000 bequest. Daughter also delivers to Father's executor an irrevocable written refusal to accept the bequest. Pursuant to the terms of Father's Will, the executor pays \$100,000 to Charity.

As before, for estate tax purposes, the bequest passes to Charity. Yet in this case, Daughter first accepted the benefit of the bequest by spending part of it on a luxurious vacation and then decided to disclaim it. Even though Charity ultimately receives \$100,000, Father's estate will not be eligible for the deduction under IRC § 2055(a) for transfers to charity. Daughter's disclaimer is not "qualified" for transfer tax purposes, and Daughter, not Father's estate, will be treated as the transferor of the property. IRC § 2055.

The tax law gives Daughter an opportunity to accept the property (and fix the tax consequences to Father's estate), but once she has decided to accept it, she may not change her mind (for tax purposes, at least). Note, however, that because Daughter's disclaimer is not qualified for transfer tax purposes, she may be eligible for an income tax charitable deduction with respect to all or a portion of the bequest passing to Charity. IRC § 170(a). In any event she would not incur any gift tax on the transfer to Charity. IRC § 2522(a).

disclaimer¹³³ will not lose its tax-favored status if the spouse accepts or receives benefits from the disclaimed property. In fact many sound estate plans rely on disclaimers by a surviving spouse for post-mortem estate tax planning.¹³⁴ A testator may give his or her entire estate to the surviving spouse, but typically provides that if the surviving spouse disclaims all or any portion of such property, the property so disclaimed will be held in a trust, such as a discretionary trust for the benefit of the testator's surviving spouse and descendants that intentionally does not qualify for the marital deduction.¹³⁵ In such a case the spouse's potential or actual benefit from the trust property does not render the disclaimer "unqualified" for estate tax purposes. The decedent remains the transferor for estate tax purposes¹³⁶ and the unused unified credit¹³⁷ applies to "cover" the transfer to the discretionary trust, resulting in a non-taxable estate.

By allowing the surviving spouse to disclaim to a trust for his or her benefit, the tax law does not force the surviving spouse to make the all-or-nothing choice faced by other disclaimants. Instead the tax law treats the surviving spouse as an extension of the decedent himself or herself, by granting the surviving spouse the ability to control, to a certain extent, the estate tax consequences of the decedent's death, without forfeiting the benefit of the

133. IRC § 2518(b); Treas. Reg. § 25.2518-2(a). For the requirements of a qualified disclaimer, see discussion *supra* Part I C.

134. This is especially true for estates of married couples having modest wealth. So that neither spouse will "waste" the unified credit available under IRC § 2001, each spouse's Will typically provides for an outright bequest of the entire estate to the surviving spouse. At the survivor's election (i.e., upon effective disclaimer of all or a portion of the decedent's estate), a trust that does not qualify for the marital deduction is created for the benefit of the decedent's surviving spouse and descendants. Such a flexible estate plan allows the surviving spouse to take into account all circumstances at the time of the decedent's death and the nine months after death. IRC §§ 2031 (valuation at time of death), 2032 (alternate valuation date). If the surviving spouse does not anticipate needing all of the assets bequeathed outright, the surviving spouse will disclaim an amount equal to the decedent's unused applicable exclusion amount. Because the entire estate then qualifies for either the estate tax marital deduction under IRC § 2056 or will be covered by the unified credit under IRC § 2010, no estate tax should be owed upon the death of the first spouse to die. See IRC §§ 2001, 2010.

135. A disclaimer typically funds such a trust with an amount equal to the testator's unused applicable exclusion amount, or the maximum amount that the testator can transfer without incurring an estate tax. IRC § 2010. Estate planners frequently refer to this type of trust as a by-pass or credit shelter trust. See, e.g., Henkel, *supra* note 4, at ¶ 4.04.

136. Ordinarily if an intended beneficiary accepts a disclaimed property interest or derives any benefit from it, the disclaimer will not be "qualified" and the intended beneficiary, not the decedent's estate, will be treated as the property's transferor of the disclaimed property for wealth transfer tax purposes. Yet where the intended beneficiary is the decedent's surviving spouse, if all other requirements of a qualified disclaimer are met, the surviving spouse's disclaimer will remain qualified for tax purposes, even if the surviving spouse derives benefit from the disclaimed property. See discussion *supra* Part I C.

137. See IRC § 2010.

disclaimed property. In this sense, a husband and wife are treated as one tax planner for wealth transfer purposes.

III. WHY MARITAL WEALTH TRANSFERS SHOULD BE TAXED

The one flesh, one taxpayer rules are undesirable because they reinforce traditional gender roles and because they fail to recognize non-marital, economically unified couples. The estate and gift tax rules may favor marriage, but they generally hurt women by invigorating antiquated jurisprudence that denies women legal personhood. The marital deduction rules in particular prevent a less wealthy spouse (typically the wife) from achieving economic autonomy. In disregarding the importance of many non-marital relationships, the law of wealth transfer taxation encourages dependence on the state. This Part describes how current tax rules hurt women and explains why women and others should want to pay more taxes.

A. The Current Tax Rules Reinforce Traditional Gender Roles

1. *Coverture, Legal Personhood and Taxation* – The persistent appeal of the one flesh, one taxpayer approach to wealth transfer taxation is based in part on its gender neutrality and in part on its familiarity. Legal unity of married couples is a common law tradition. Marital unity formed the backbone of the system of coverture that dominated English and American jurisprudence well into the nineteenth century.¹³⁸ Although the tax legislative history contains no reference to coverture,¹³⁹ many legislators would have been aware that treatment of a married couple as one person was not unique to tax law. The historic context of coverture and critiques of that institution illuminate the problems that result from the tax law's embrace of it.

a. Historical Background

From as early as perhaps the tenth century, a married woman at English common law was a *feme covert*.¹⁴⁰ Her legal identity was "covered" or subsumed by her husband's.¹⁴¹ A wife had no legal authority to act independently from her husband except in limited circumstances. As one nineteenth century commentator explained, "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of husband: under whose wing, protection, and cover, she performs

138. Coverture is an antiquated way to define "[t]he condition of being a married woman." Black's Law Dictionary (8th ed. 2004). For a discussion of the role of coverture in the development of American law, see generally Hendrik Hartog, *Man and Wife in America: A History* (2000); Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (2002).

139. See, e.g., S. Rep. No. 80-013 (1948), reprinted in 1948 U.S.C.C.A.N. 1163; H.R. Rep. No. 83-1337 (1954), reprinted in 1954 U.S.C.C.A.N. 4017.

140. Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth Century New York* 19-23 (1982); see also Hartog, *supra* note 138, at 43.

141. *Id.*

everything."¹⁴² Marriage traditionally caused a woman to lose her legal identity for at least as long as the marriage lasted.

Historian Norma Basch links the legal concept of marital unity to the Judeo-Christian religious tradition. Coverture, she explains, arose from the biblical "doctrine of the unity of the flesh."¹⁴³ According to the book of Genesis, upon marriage "a man leaves his father and his mother and cleaves to his wife, and they become one flesh."¹⁴⁴ If marriage were a merger of spiritual identities,¹⁴⁵ then it was not surprising that it resulted in a merger of legal identities, too. But coverture went beyond mere merger. In Blackstone's words, "husband and wife are one person in law,"¹⁴⁶ and that person was the husband.

b. *Early Critiques of Coverture*

Nineteenth century women's rights advocates vigorously critiqued women's legal subordination. At a political gathering at Seneca Falls, New York in 1848,¹⁴⁷ attendees adopted a "Declaration of Sentiments" that was drafted principally by Elizabeth Cady Stanton. Stanton modeled her Declaration on the Declaration of Independence. She boldly asserted that the "history of mankind is a history of repeated injuries and usurpations on the part of man toward woman." Stanton objected strongly to women's exclusion from civic affairs and their inability to vote. She railed against coverture for rendering a married woman "in the eye of the law, civilly dead In the covenant of marriage, she is compelled to promise obedience to her husband, he becoming, to all intents and purposes, her master – the law giving him the power to

142. 1 William Blackstone, *Commentaries on the Laws of England* 430, 442. As Blackstone explains, "[A] man cannot grant any thing to his wife, or enter into covenant with her; for the grant would be to suppose her separate existence; and to covenant with her would be only to covenant with himself." *Id.*

143. Basch, *supra* note 140, at 22.

144. See Genesis 2:24 (RSV). New Testament writers echoed this language in their teachings on marriage and divorce. See, e.g., Mark 10:7-10 (RSV). ("[A] man shall leave his father and mother and be joined to his wife, and the two shall become one flesh.' So they are no longer two but one flesh. What therefore God has joined together, let not man put asunder.").

145. Historian Hendrik Hartog explains that coverture (a legal status) and unity of the flesh (a religious status) were interrelated. In his excellent discussion of men's and women's experiences with coverture, Hartog describes one eighteenth century woman's philosophy of marriage. "When Abigail Bailey thought of herself as a wife, she did not think in terms of merger, of 'one flesh,' of an obliteration of a prior self. Instead, she thought of a self 'covered' by her husband during marriage. Submission was not a denial of her self. On the contrary, it constituted the central test of her self and of the strength of her religious identity To Abigail Bailey, [coverture] suggested the task for a lifetime, a way of establishing credentials as a worthy Christian. Coverture was hard but necessary work for a distinctively female self that would realize salvation through submission." Hartog, *supra* note 138, at 43-44.

146. Blackstone, *supra* note 142, at 442.

147. The meeting at Seneca Falls typically is considered to mark the formal commencement of the woman suffrage movement. See, e.g., Aileen Kraditor, *Ideas of the Woman Suffrage Movement 1890-1920* 1 (1965).

deprive her of her liberty, and to administer chastisement.”¹⁴⁸ Similarly Stanton claimed that in religious affairs, men “usurped the prerogative of Jehovah himself” by excluding women from participation in church life and religious governance.¹⁴⁹ Stanton framed women’s loss of legal personhood and religious subordination as loss of liberty and utter abridgement of the freedoms and responsibilities of citizenship.¹⁵⁰ Like the signers of the Declaration of Independence,¹⁵¹ Stanton used emotionally charged arguments to stir her audience.

c. Coverture and the QTIP Rules

Insofar as the Internal Revenue Code is gender neutral, the one flesh, one taxpayer approach to marital wealth transfers resembles the nineteenth century construction of marriage as a spiritual “merger”¹⁵² more than coverture. In contrast to coverture, which recognized only a husband’s legal identity, the one flesh, one taxpayer approach advocates recognition of the marital unit itself as the appropriate taxable entity. Far from a pro-women’s rights theory of taxation, however, the one flesh, one taxpayer approach to wealth transfer taxation responded to destabilization in women’s legal identities in the years following the Seneca Falls Convention.

Between the Seneca Falls Convention of 1848 and the implementation of the joint income tax return in 1948, married women gained unprecedented legal rights.¹⁵³ Recall that lawmakers explained the 1948 tax reforms as a response to the possible widespread conversion by states to community property law systems.¹⁵⁴ Although they framed the rationale as concern for

148. I History of Woman Suffrage, 70 (Elizabeth Cady Stanton et al., eds., 1881-1922, reprint ed. 1985).

149. *Id.* at 71. For further discussion of the nineteenth century critiques of the relationship between women’s exclusion from politics and religion, see Elizabeth B. Clark, Religion, Rights, and Difference in the Early Woman’s Rights Movement, 3 *Wis. Women’s L.J.* 29 (1987); Elizabeth B. Clark, Self-Ownership and the Political Theory of Elizabeth Cady Stanton, 21 *Conn. L. Rev.* 905 (1989).

150. “[I]n view of this entire disenfranchisement of one-half the people of this country . . . in view of the unjust laws above mentioned, and because women do feel themselves aggrieved, oppressed, and fraudulently deprived of their most sacred rights, we insist that they have immediate admission to all the rights and privileges which belong to them as citizens of the United States.” I History of Woman Suffrage, *supra* note 148, at 71.

151. See John Phillip Reid, *Constitutional History of the American Revolution: The Authority to Tax* 271-79 (1987).

152. See *supra* text accompanying note.

153. In 1848, New York State became the first state to accord significant rights to married women. See generally, Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 *Geo. L.J.* 1359-1425 (1983); Elizabeth Bowles Warbasse, *The Changing Legal Rights of Married Women, 1800-1861* (1987). Known as the Married Women’s Property Acts, these laws were designed to limit a husband’s “right to and control of his wife’s property which the common law gave him. The purpose of those acts was to protect married women against unkind, thriftless, or profligate husbands, by securing to them the separate and independent control of all their own property.” *Coleman v. Burr*, 93 *N.Y.* 17, 24 (1883).

154. See discussion *infra* Part II.A.

administrative costs,¹⁵⁵ lawmakers' likely motivation for tax reform was preventing further erosion of male property interests in an era of expanding women's rights through the Married Women's Property Acts,¹⁵⁶ for example. The prospect of nation-wide equal property ownership by husbands and wives was too far-reaching for many legislators. Federal tax law therefore was used to limit the expansion of women's property rights. If common law resident husbands and wives could be construed as one for tax purposes, then residents of common law jurisdictions likely would not demand conversion to community property.¹⁵⁷ Husbands stood to gain nothing – and lose control over one-half of their property – from conversion to a community property law system.¹⁵⁸

At least initially the one flesh, one taxpayer rules required one spouse to grant the other spouse meaningful rights over transferred property in order to qualify transfers for the marital deduction.¹⁵⁹ The 1981 QTIP rules, however, practically embraced legal suspension of the transferee spouse's property rights. By allowing a marital deduction for property over which a spouse had little control, the QTIP rules marked the elevation of the transferor spouse's legal personhood and property rights over the transferee spouse's.

2. *Women Should Pay More Tax* – Unlike coverture, the tax rules do not discriminate on the basis of gender. Estate tax is imposed on “the taxable estate of every decedent who is a citizen or resident of the United States,”¹⁶⁰ without regard to gender. Similarly, gift tax is imposed “on the transfer of property by gift,”¹⁶¹ without regard to the gender of the donor or recipient. Both men and women can avail themselves of the marital deduction, gift-splitting and special disclaimer rules. Regardless of whether a property transferor is a husband or a wife, the same rules apply.¹⁶² In every sense men and women are treated as formal equals for wealth transfer tax purposes.¹⁶³

Although the one flesh, one taxpayer approach to wealth transfer taxation violates no constitutional principles, those committed to gender equality nevertheless have reason to regard it with suspicion. The estate and gift tax rules constitute a quasi-coverture system in which one spouse's “right” to control the disposition of property trumps the other's. Although this may not

155. See *supra* text accompanying note 30.

156. See, e.g., Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 *Geo. L. J.* 2127 (1994).

157. Kahng, *supra* note 14, at 32-36.

158. See generally, Chused, *supra* note 153; Warbasse, *supra* note 153.

159. See discussion *supra* Part II.A.

160. IRC § 2001(a).

161. IRC § 2501(a)(1).

162. See IRC §§ 2056(b), 2523(f); Regs. §§ 20.2056(b)-7, 25.2523(f)-1(b) (definition of qualified terminable interested property).

163. “Formal equality is a principle of equal treatment: individuals who are alike should be treated alike, according to their actual characteristics rather than assumptions about them based on stereotypes What makes an issue one of formal equality is that the claim is limited to treatment in relation to another, similarly situated individual or group and does not extent to a demand for some particular, substantive treatment.” Katharine Bartlett et. al., *Gender and Law: Theory, Doctrine and Equality* 117 (3d ed. 2002).

constitute recognizable legal "harm," it has negative social, political and economic implications for women.¹⁶⁴ The QTIP rules hurt women:

The QTIP provisions . . . were enacted to enable men to control the ultimate disposition of property but nonetheless the provisions qualify QTIP transfers for a marital deduction. The framers of this new exception to the terminable interest rule further degraded women because they assumed that widows would be content with receiving only one of the indicia of property ownership, e.g., current beneficial enjoyment, and would not protest against the enactment of such a provision.¹⁶⁵

If enhanced social and legal rights for women depend on increasing women's financial power, women "would be better served by requiring husbands to make outright transfers of property to their wives."¹⁶⁶ By implication, through greater wealth, women will have greater social and political clout.¹⁶⁷ The QTIP rules are a primary stumbling block in women's advancement.

In treating partial interests in trusts, for one, as equivalent to outright ownership, the estate and gift tax rules preclude accurate assessment of women's economic position.

[T]he QTIP rules, along with other estate tax provisions built upon the fiction of marital unity, undermine the prospect of women's achieving equal status with men as wealth holders. . . . The idea that women are increasingly wealthy has permeated the popular press. The data, however, are misleading. They obscure the true wealth holdings of men and women because they are based on estate tax returns. On these returns, QTIP property is now included in [a widow's] estate and accounted for as her wealth. The effect of this decision is to inflate the wealth holdings of women artificially. . . . Through the QTIP trust, the fiction has created an illusory class of women wealth holders.¹⁶⁸

164. In an unrelated context, Professor David Cassuto suggests "that the inherent contingency of language renders it impossible to define harm or injury without acknowledging the systemic perspective from which the concepts are viewed." David N. Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 *Harv. Envtl. L. Rev.* 79, 79 (2004).

165. Gerzog, *supra* note 86, at 320. See also Wendy C. Gerzog, *The Illogical and Sexist QTIP Provisions: I Just Can't Say It Ain't So*, 76 *N.C. L. Rev.* 1597 (1998).

166. Gerzog, *supra* note 86, at 321.

167. David Cay Johnston argues that there is a direct correlation between wealth and political influence: "Politicians insist[] that no one bought their vote with their donation and that was true. But what donations did buy, every politician acknowledged, was access. That access meant that every senator and representative was listening primarily to the concerns and ideas of the super rich, of the political donor class." David Cay Johnston, *Perfectly Legal: The Secret Campaign to Rig Our Tax System to Benefit the Super-Rich and Cheat Everybody Else* 41-42 (2003).

168. Kahng, *supra* note 14, at 39-40.

The "legal fiction" of merged marital identity portrays marriage as an economic partnership when, in fact, men are far more powerful financially than women.¹⁶⁹ In this sense, then, the real harm of the one flesh, one taxpayer rule is its obscuring effect. Women's apparent wealth diminishes the need for unbiased empirical investigation into men's and women's comparative financial and economic positions.

The tenacity of the "fiction" of marital unity is, in some sense, a legacy of the feminist movement itself. Beginning in the 1970's lawyers successfully challenged a wide range of laws as discriminatory on the basis of gender.¹⁷⁰ Thereafter, for a law to be non-discriminatory, it must be gender neutral on its face or, if not, serve "important governmental objectives" and be "substantially related to achievement of those objectives."¹⁷¹ Because the estate and gift tax rules are gender neutral on their face, they seemingly do not violate any constitutional right. Tax statutes appear to conform to the goal of treating men and women equally under the law.

In at least one sense, however, criticism of the estate and gift tax rules¹⁷² does not go to the tax laws' legality per se. Instead it attempts to identify how the estate and gift tax treatment of marital wealth transfers makes women's economic, social and political advancement more difficult. But at the same time, criticism of the estate and gift tax rules makes a theoretical claim, too. It demands consistency in tax jurisprudence. The 1948 tax rules established a framework in which the estate and gift taxation of marital transfers followed from the economic substance of the transferee spouse's property rights.¹⁷³ Only outright ownership or its very near equivalent qualified for the marital deduction in 1948. The current tax system should take the same approach.

The one flesh, one taxpayer system of wealth transfer taxation is pernicious because it emphasizes the marital unit over an individual's legal personhood. Traditionally feminist activists and scholars have criticized aspects of marriage and the family that tend to de-emphasize a woman's

169. *Id.* at 38-41.

170. See, e.g., *Reed v. Reed*, 404 U.S. 71 (1971) (statutory rule for the appointment of an administrator of an intestate estate is invalid because of preference for males among persons otherwise equally entitled to appointment as administrator), *Frontiero v. Richardson*, 411 U.S. 677 (1973) (unconstitutional to require female member of military is to prove dependency of her spouse in order to obtain certain benefits, where male member of the military is not so required).

171. *Craig v. Boren*, 429 U.S. 190, 197 (1976). This approach, commonly referred to as "intermediate" scrutiny, has been applied to invalidate laws that "have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members." *Frontiero*, 411 U.S. at 687. See also *Orr v. Orr*, 440 U.S. 268 (1979) (invalidating state statute that required husbands but not wives to pay alimony).

172. See, e.g., Mary Louise Fellows, *Wills and Trusts: The Kingdom of the Fathers*, 10 *Law & Ineq.* 137 (1991); Gerzog, *supra* note 86; Carolyn C. Jones, *Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s*, 1994 *U. Ill. L. Rev.* 265 (1994); Kahng, *supra* note 14; Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 *UCLA L. Rev.* 983 (1993).

173. See discussion *supra* Part II A.

individuality.¹⁷⁴ Feminists have insisted on a woman's right to retain her birth name after marriage,¹⁷⁵ to be free from discrimination in employment,¹⁷⁶ and to make decisions about her own health and well-being.¹⁷⁷ The tax law may be gender neutral, but it submerges each spouse's individual identity in the couple and should be subject to great scrutiny.

Many commentators have explored the law's role in conferring privilege and status. Professor Patricia Williams has described the experiences she and a colleague had in searching separately for an apartment in a new city.¹⁷⁸ When Peter, her white male colleague, finds an apartment for himself, he concluded the transaction with a handshake and a large cash deposit. In contrast, Williams, who is African-American, signed a detailed written agreement with her new landlord:

In my rush to show good faith and trustworthiness, I signed a detailed, lengthily negotiated, finely printed lease firmly establishing me as the ideal arm's-length transactor. . . . [Peter and I] could not reconcile our very different relations to the tonalities of law. Peter, for example, appeared to be extremely self-conscious of his power potential (either real or imagistic) as white or male or lawyer authority figure. He seemed, therefore, to go to some lengths to overcome the wall that image might impose. . . . On the other hand, I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute. . . . [T]o show that I can speak the language of lease is my way of enhancing trust of me in my business affairs.¹⁷⁹

Williams explained her and Peter's different approaches to law as a function of experience: "On a semantic level, Peter's language of . . . informality . . . sounded dangerously like the language of oppression to someone like me who was looking for freedom through the establishment of identity. . . ."¹⁸⁰ The

174. In connection with her 1855 marriage to Henry Blackwell, antislavery and women's rights advocate Lucy Stone insisted that "[a] wife should no more take her husband's name than he should hers. My name is my identity and must not be lost." As part of the larger campaign for women's rights, activists brought litigation in 1881 to guarantee the "right of married women to use their own surnames with state and federal agencies." Omi Morgenstern Leissner, *The Name of the Maiden*, 12 *Wis. Women's L.J.* 253, 255 (1997).

175. See, e.g., 1 *Forbush v. Wallace*, 341 F. Supp. 217 (M.D. Ala. 1971) (unsuccessful litigation challenging requirement that a married woman use her husband's surname on state driver's license).

176. See, e.g., 29 U.S.C. § 206(d) (1994) (Equal Pay Act of 1963); 42 U.S.C. § 2000e (1994) (Title VII of Civil Rights Act of 1964).

177. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (invalidating Missouri law requiring spousal consent to abortion).

178. Patricia J. Williams, *The Alchemy of Race and Rights* 146-47 (1991).

179. *Id.* at 147.

180. *Id.* at 148.

importance of legalities and law depend significantly on one's race and gender, Williams explained.¹⁸¹ For this reason, "stranger-stranger" (formal) interactions are preferable to "stranger-chattel" (informal) ones.¹⁸² As a member of an historically disadvantaged group, Williams intentionally invoked law and became subject to it. This was her way of asserting equality.

If becoming subject to the law asserts a rights claim, then the one flesh, one taxpayer theory disadvantages both women and men. In treating husbands and wives as one, the tax law diminishes the importance of each (or at least one) spouse's individual identity.¹⁸³ As suggested by the apartment-hunting experiences of Professor Williams and her colleague, being free from (or invisible to) the law may be positive for someone with "power potential" but "oppression" for someone else. Women historically have not had significant "power potential" compared to men. Women have had fewer political rights,¹⁸⁴ property rights,¹⁸⁵ employment prospects,¹⁸⁶ and educational opportunities¹⁸⁷ than men have had. For that reason especially, women should be skeptical of the individual's relative invisibility in the wealth transfer taxation of marriage.¹⁸⁸

Undoubtedly the suggestion that women should want more estate and gift taxation is counterintuitive. Most taxpayers do not relish tax bills; yet paying taxes, in a certain sense, is foundational to the claims of citizenship and equality. In advocating for woman suffrage, Elizabeth Cady Stanton highlighted

181. See *id.*

182. *Id.*

183. See discussion *supra* Part III.A.

184. Women were not permitted to vote in national elections, for example, until 1920. See, e.g., U.S. Const. amend. XIX § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (denying women's right to vote). For a history of the woman suffrage movement, see generally Nancy F. Cott, *The Grounding of Modern Feminism* (1987); Ellen Carol DuBois, *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869* (1978); Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998).

185. See, e.g., Hartog, *supra* note 138, at 161-64 (description of husband's superior rights over marital property in 1830's).

186. See, e.g., *Bradwell v. The State*, 83 U.S. (16 Wall.) 130 (1872). In denying Myra Bradwell's claim that women had a constitutional right to become lawyers, the Supreme Court stated, "The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband." *Id.* at 141.

187. Women were not admitted to the forerunner of the University of Pennsylvania Law School, for example, until 1883. See, e.g., Bridget J. Crawford, "Daughter of Liberty Wedded to Law:" Gender and Legal Education at the University of Pennsylvania Department of Law 1870-1900, 6 *J. Gender Race & Just.*, 131, 131-32 (2002). The school had formal instruction for almost 100 years before the first woman was admitted. See Hampton L. Carson, *An Historical Sketch of the Law Department of the University of Pennsylvania* 9-12 (Oct. 10, 1882) (speech delivered at University of Pennsylvania describing formal instruction in law beginning in 1790).

188. At her sentencing in 1873 for violating the law by voting, Susan B. Anthony demanded that she be subject to full legal consequences. "[F]ailing to get . . . justice — failing, even, to get a trial by jury not of my peers — I ask not for leniency at your hands — but rather the full rigors of the law." II *History of Woman Suffrage*, *supra* note 148, at 700

women's financial contribution to government in the form of taxes. Women are "property-holders, taxpayers; yet we are denied the exercise of our right to the elective franchise. We support ourselves, and, in part, your schools, colleges, churches, your poor-houses . . . and yet we have no vote in your councils," she asserted.¹⁸⁹ In Stanton's reasoning, because women were subject to the same tax laws as men, women have a claim of right to civic participation.¹⁹⁰

B. The Current Tax Rules Disregard Economic Unity

1. *Under-Inclusivity* – The one flesh, one taxpayer approach to wealth transfer taxation is based on the assertion that husband and wife are a "single economic unit,"¹⁹¹ but married couples need not show actual economic unity to qualify property transfers for the marital deduction,¹⁹² gift-splitting,¹⁹³ and special disclaimer rules.¹⁹⁴ Marriage alone between a man and a woman¹⁹⁵ entitles these taxpayers to special tax treatment regardless of the couple's resources, consumption patterns, or allocation of responsibility for financial management.¹⁹⁶ Under present law taxpayers who are not married (or who

189. I History of Woman Suffrage, *supra* note 148, at 595.

190. See also Jones, *supra* note 172, at 265-66.

191. See *supra* notes 52-78 and accompanying text.

192. See discussion *supra* Part II.A.

193. See discussion *supra* Part II.B.

194. See discussion *supra* Part II.C.

195. 1 U.S.C. § 7 (2000). Pursuant to the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (hereinafter DOMA) signed by President Clinton in 1996, for federal law purposes, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." *Id.* Accordingly, even if two same-sex taxpayers are treated as married for state law purposes, they would not be considered married for federal tax purposes. See *id.* Several commentators have questioned DOMA's constitutionality. See, e.g., Mark Strasser, The Privileges of National Citizenship: On *Saenz*, Same-Sex Couples, and the Right to Travel, 52 Rutgers L. Rev. 553 (2000); Evan Wolfson & Michael F. Melcher, The Supreme Court's Decision in *Romer v. Evans* and Its Implications for the Defense of Marriage Act, 16 Quinnipiac L. Rev. 217 (1996); Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage Note, 117 Harv. L. Rev. 2684 (2004).

196. It is certainly true that some married couples structure their finances so that all assets bear the label "ours" instead of "mine" and "yours," but not all married couples share their assets in this fashion. See *supra* text accompanying note 62. Even among those who do, the degree to which property is "ours" may vary from marriage to marriage and from time to time during the marriage. The estate and gift tax laws' presumption that all husbands and wives are economic units missteps theoretically in its essentialism. In feminist legal theory, essentialism refers to the propensity for scholars to "focus only on what all women have in common: their subordination to men" and to ignore that "men are never just men . . . not all men have equal access to 'male' power." Katharine T. Bartlett et al., *supra* note 163, at 1193. Marjorie Kornhauser questions the extent to which husbands' and wives' beliefs about their shared financial management matches reality. Kornhauser, *supra* note 20, at 80-84.

A couple may choose to organize finances at any point on a spectrum that has complete resource sharing at one end and total financial separation at the other end.

cannot marry at least for federal purposes)¹⁹⁷ are not eligible for transfer tax benefits even if they demonstrate that they function as a single economic unit. Consider the following scenarios:

(a) Man and Woman live together as husband and wife. Although they equally share all financial resources and responsibilities, Man and Woman are not married. Assume that applicable state law would not recognize their relationship as a common law marriage.

(b) Man 1 and Man 2 live together as spouses, but their state and local government do not recognize domestic partnerships or same-sex marriage. They are not married under the laws of any other state. Man 1 works full-time outside the home. Man 2 is a full-time parent to the couple's minor child.

(c) Sister and Sister are elderly, unmarried siblings who live together in order to save costs. Each has a small amount of retirement income, but neither is able to support herself on her individual income alone. The Sisters live modestly and share all costs evenly.

(d) Elderly Parent lives with Adult Child. Elderly Parent has no assets or income, except what Adult Child provides. Adult Child is Elderly Parent's sole source of financial support.

The taxpayers in these scenarios economically resemble the married couple of the one flesh, one taxpayer rule. Yet none of these taxpayers may transfer assets tax-free to the other member of the "couple." If Man from example (a) above leaves all of his property to Woman, assuming that his estate exceeds the minimum threshold for the imposition of estate tax,¹⁹⁸ Man's estate will be taxable. This couple presumably could have married, but chose not to do so. Man and Woman are not "one flesh" and therefore are not one taxpayer for present wealth transfer tax purposes. Similarly, if Man 1 from example (b) above leaves a large estate to Man 2 or to their minor child, Man 1's estate would be taxable. This couple is not married¹⁹⁹ or recognized as domestic partners²⁰⁰ by the state of their domicile. Federal tax law does not recognize same-sex partnerships as marriage.²⁰¹ For the couples in examples (c) and (d) above, the Sisters and Elderly Parent living with Adult Child, marriage is

Many couples likely fall somewhere in between and may vary their location on the spectrum at different times in their relationship

197. See 1 U.S.C. § 7 (2000). For a critical perspective on the tax laws, see generally Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 Santa Clara L. Rev. 763 (2004) (describing the Internal Revenue Code as "another weapon for discrimination and oppression in society's already well-stocked arsenal." *Id.* at 768).

198. See *supra* note 116.

199. The Massachusetts Supreme Court has invalidated the state's prohibition on same-sex marriage. *Goodridge v. Dep't. of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003).

200. Same-sex couples may register their domestic partnership in Vermont. *Vt. Stat. Ann. tit. 15, § 1202* (2004).

201. See 1 U.S.C. § 7 (2000).

prohibited (and likely not desired in any case).²⁰² Any of these taxpayers' estates, if above a certain size,²⁰³ will be taxable at death. Regardless of economic showing, then, wealth transfer taxation benefits inure only to opposite-sex married couples. This is unfair from a policy perspective because taxpayers who economically are similarly situated are taxed differently.²⁰⁴

The estate and gift tax law's encouragement and support for marriage comports with the state's asserted interest in marriage.²⁰⁵ The present national debate on same-sex marriage has made commonplace proclamations about the "sacred institutions of marriage and the family."²⁰⁶ Apart from media-friendly sound bites, though, the focus on the legality of same-sex marriage has required proponents of traditional marriage to articulate precisely why marriage is a "sacred institution."²⁰⁷

One scholar summarizes the state's interests in marriage as one or more of procreation, child rearing, tradition, and interstate uniformity.²⁰⁸ A Washington State court succinctly proclaimed, "[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race."²⁰⁹ In a litigation to defend the State of Hawaii's denial of a marriage license to a same-sex couple, lawyers for the State declared that, "all things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female."²¹⁰ In the view of the State's lawyers, any significant change to marriage laws, such as the recognition of gay marriage, might "disrupt long-settled expectations and deeply-held beliefs" of citizens.²¹¹ On the question of interstate uniformity, the Ninth Circuit has recognized a governmental interest in minimizing uncertainty surrounding the obligation of one state to recognize a marriage conducted in another state.²¹²

202. See, e.g., N.Y. Dom. Rel. Law § 5 (McKinney 2004) (prohibiting incestuous marriages between ancestor and descendant; siblings; uncle and niece; or aunt and nephew).

203. See *supra* note 116.

204. See *supra* note 32 and accompanying text.

205. See, e.g., 8 Wigmore, Evidence §§ 2332-2341 (McNaughton rev. 1961) (spousal privilege).

206. 142 Cong. Rec. S10,068 (daily ed. Sept. 9, 1996) (remarks by Senator Helms).

207. *Id.*

208. William C. Duncan, Law and Culture: The State Interests in Marriage, 2 Ave Maria L. Rev. 153, 154 (2004).

209. *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (discussed in Duncan, *supra* note 208, at 154-156).

210. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *3, (Haw. Cir. Ct. Dec. 3, 1996) (from defendant's memorandum). See, e.g., Brad K. Gushiken comment, The Fine Line Between Love and the Law: Hawaii's Attempt to Resolve the Same-Sex Marriage Issue, 22 U. Haw. L. Rev. 149, 160 (2000).

211. Duncan, *supra* note 208, at 160 quoting Defendants' Brief at 30, *Lewis v. Harris*, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Law Div., Nov. 5, 2003).

212. *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (discussed in Duncan, *supra* note 208, at 161).

2. *Heterosexual Privilege* – Regardless of the state interest in marriage,²¹³ according tax benefits exclusively to married heterosexuals is unjustified and unfair. The economic rationale has limited validity if married taxpayers who offer no proof of economic unity receive tax benefits, but unmarried taxpayers who can prove economic unity never receive tax benefits.²¹⁴ The one flesh, one taxpayer theory functions not as a needs-based benefit, then, but as a glorification of relationships that conform to traditional male-female relations.²¹⁵ Men and women are expected to marry each other (not members of the same gender) and form traditional, two-parent households. The law of wealth transfer taxation devalues non-conforming affinity or economic unions such as heterosexual partners who could marry but do not; same-sex couples who cannot marry; elderly siblings who cohabitate for economy; and an adult child who supports an elderly parent.²¹⁶

213. Discussion of the relative strengths of these claims is beyond the scope of this article. For a constitutional law analysis, see, e.g., Deborah A. Batts, *Repeal DOMA*, 30 *Hum. Rts. 2* (Sum. 2003); Brett P. Ryan, *Love and Let Love: Same-Sex Marriage, Past, Present, and Future, and the Constitutionality of DOMA*, 22 *U. Haw. L. Rev.* 185 (2000); Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 *Creighton L. Rev.* 457 (1998); Anita Y. Woudenberg, Note, *Giving DOMA Some Credit: The Validity of Applying Defense of Marriage Acts to Civil Unions Under the Full Faith and Credit Clause*, 38 *Val. U. L. Rev.* 1509 (2004).

214. See discussion *supra* Part III.B.1.

215. Professor Carolyn Jones suggests that “stereotypical notions of family relationships as hierarchical” provided the basis for legal and popular opposition to the partnership theory of marriage, and, by extension, community property. Jones, *supra* note 28, at 265-68, 274-80.

Philosopher Carole Pateman suggests that the traditional view of marriage as a bilateral contract mischaracterizes the relationship:

Freedom of contract (proper contract) demands that no account is taken of substantive attributes – such as sex. If marriage is to be truly contractual, sexual difference must become irrelevant to the marriage contract; “husband” and “wife” must no longer be sexually determined.” Indeed, from the standpoint of contract, “men” and “women” would disappear. There can be no predetermined limits on contract, so none can be imposed by specifying the sex of the parties. In contrast, the fact of being a man or a woman is irrelevant. In a proper marriage contract two “individuals” would agree on whatever terms were advantageous to both. The parties to such a contract would not be a “man” and a “woman” but two owners of property in their persons who have come to an agreement about their property to their mutual advantage.

Carole Pateman, *The Sexual Contract* 167 (1988). Instead, Pateman sees marriage as an instrument of a patriarchal social system in which women trade access to their bodies in return for physical safety and satisfaction of material needs. *Id.* at 57.

216. Feminist theorist Catharine MacKinnon suggests that law’s emphasis on heterosexuality is a form of subordination of women.

[S]ex inequality takes the form of gender; moving as a relation between people, it takes the form of sexuality. Gender emerges as the congealed form of the sexualization of inequality between men and women. So long as this is socially the case, the feelings or acts or

Two urgencies pressed by feminist jurisprudence are recognition of women's connectedness to others²¹⁷ and support for women's traditional care-taking roles.²¹⁸ Professor Martha Fineman, for one, asserts that women, more so than men, are responsible for care-taking of children, the elderly, and the sick.²¹⁹ She advances a theory of the "derivative dependency" of care-takers: "[T]hose who care for others are themselves dependent on resources in order to undertake that care. Caretakers have a need for monetary or material resources. They also need recourse to institutional supports and accommodation, a need for structural arrangements that facilitate caretaking."²²⁰ Estate and gift tax reform admittedly is not at the forefront of the feminist agenda. Yet applying Fineman's thesis revisions to the tax law would be at the forefront of the feminist agenda. The tax law can support and accommodate women's care-taking relationships by extending marital-type transfer tax benefits to an adult child who provides an elderly parent's sole financial support.

Tax breaks for caregivers would lead to lessened economic dependency. By way of illustration, assume that Adult Child from example (d) above predeceases her Elderly Parent. If Adult Child could make tax-free transfers at her death to Elderly Parent, Adult Child's full estate will be available to support Elderly Parent. The more assets that are available to Elderly Parent, the less likely that Elderly Parent will become a ward of the state. Conversely, if Adult Child's estate is fully taxable, less will be available to support Elderly Parent. If Adult Child's estate, after payment of taxes, is

desires of particular individuals notwithstanding, gender inequality will divide their society into two communities of interest. The male centrally features hierarchy of control.

Catharine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 6 (1985). If gender is "sexualized inequality," then heterosexual marriage is a formalization of that inequality. By providing benefits exclusively to heterosexual married taxpayers, the transfer tax system reinforces the metaphoric and literal value of traditional male-female relationships. The tax law further entrenches marriage and therefore perpetuates inequality between men and women.

217. In Professor Robin West's view,

Women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly "connected" to another human life when pregnant. . . . The potential for material connection with the other defines women's subjective, phenomenological and existential state, just as surely as the inevitability of material separation from the other defines men's existential state.

Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1, 2, 14 (1988). West's "connection thesis" posits "four recurrent and critical material experiences" of women: pregnancy, heterosexual intercourse, menstruation and breast-feeding. *Id.* at 2-3.

218. Cf. Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. Chi. Legal F. 21, 22 (critical of strands of feminist theory advocating that women "adopt traditionally feminine attributes and repress masculine ones").

219. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 Am. U. J. Gender Soc. Pol'y & L. 13, 20, (1999).

220 *Id.*

inadequate for Elderly Parent's care, then Elderly Parent will need support from the state. Elderly Parent's care may cost the state more than the tax revenue generated by Adult Child's estate.²²¹ Even if the cost of Elderly Parent's care does not exceed the estate tax revenue, the state could be in a negative fiscal posture depending on the administrative costs associated with the tax collection process.

IV. THE ONE FLESH, TWO TAXPAYER SOLUTION

A. Overview

Legislators should revise the wealth transfer tax laws to implement a one flesh, two taxpayer rule for marital wealth transfers.²²² Treating husbands and wives as separate taxpayers for estate and gift tax purposes will make large gratuitous transfers between spouses fully taxable.²²³ No longer will estate or gift tax treatment depend on the relationship between the transferor and transferee. This proposal contemplates some adjustments to state law in order to minimize any new geographic inequality between spouses in common law and community property jurisdictions.

B. A \$10 Million Exemption From Wealth Transfer Taxation

A key feature of the proposed one flesh, two taxpayer system is a significant increase in the amount that any taxpayer may transfer free from estate or gift tax.²²⁴ This exemption should be high enough so that the wealth transfer tax laws will apply to only a small minority of taxpayers, but low enough that taxpayers cannot transfer excessive wealth without paying tax. What constitutes "excessive wealth" necessarily is a subjective determination.²²⁵ What one taxpayer may consider minimally necessary, another

221. The term "state" refers here to the government generally. The complex relationship between wealth transfer tax revenue and publicly-funded support for the elderly is beyond the scope of this discussion. Suffice to say for purposes of this article that if an individual state loses significant tax revenue on account of the phase-out of the state death tax credit, then that state's funded programs for the elderly could be impacted negatively. See generally Blattmachr & Detzel, *supra* note 116 (discussion of the phase out of the state death tax credit).

222. But see generally Joseph M. Dodge, *A Feminist Perspective on the QTIP Trust and the Unlimited Marital Deduction*, 76 N.C. L. Rev. 1729, 1729 (1998) (suggesting that feminist legal scholarship on the estate and gift tax marital deduction has failed to "come up with a plausible solution" to gender bias in the Code); Lawrence Zelenak, *Taking Critical Tax Theory Seriously*, 76 N.C. L. Rev. 1521, 1524 (1998) ("The most serious problem [with critical tax scholarship] is the failure to think through the proposed solutions with sufficient care.").

223. Even in a one flesh, two taxpayer system, one spouse could make gifts to the other under the protection of the annual exclusion. See IRC § 2503(b).

224. See, e.g., IRC § 2010.

225. William Gates, Sr. and Chuck Collins believe that wealth in excess of \$15 million "has moved beyond the point of meeting its needs and aspirations of itself and its heirs." William H. Gates, Sr. & Chuck Collins, *Wealth and Our Commonwealth: Why America Should Tax Accumulated Fortunes* 17 (Beacon Press 2002).

may consider luxurious. In any case, a \$10 million wealth transfer tax exemption would allow almost all taxpayers to provide very comfortably for themselves and their families.

A \$10 million wealth transfer tax exemption would greatly simplify tax administration. With the exclusion set at \$10 million, only the wealthiest taxpayers²²⁶ will owe tax on account of gratuitous transfers made during life or at death. If such an exemption had been in place in 2002, the Internal Revenue Service would have received far fewer estate tax returns.²²⁷ The Internal Revenue Service estimates that of the 98,359 estate tax returns filed in 2002, only 1.9% came from gross estates valued at \$10 million or more.²²⁸ Approximately one-third of those gross estates valued at \$10 million or more were non-taxable.²²⁹ The other two-thirds of the estates contributed more than 36% of the total estate tax revenue for 2002.²³⁰ In other words 1.9% of estates paid 36% of the estate taxes.

The new one flesh, two taxpayer proposal addresses, although partially and incompletely, the claim by some critics that the wealth transfer tax penalizes success.²³¹ These critics especially target the estate tax: "The threat of having a tax like [estate tax] takes away all incentive of growing your business."²³² In the critics' view the estate tax is "unfair double taxation since taxpayers are taxed twice – once when the money is earned and again when you

226. See *id.*

227. See Table 1, Estate Tax Returns Filed in 2002: Gross Estate by Type of Property, Deductions, Taxable Estate, Estate Tax and Tax Credits, by size of Gross Estate, IRS Statistics of Income Division, Unpublished Data (July 2004), available at <http://www.irs.gov/pub/irs-soi/02es01ge.pdf>.

The one flesh, two taxpayer rule does not contemplate any change to the tax rules applicable to charitable transfers. See IRC §§ 170(c), 2055(c) and 2522(a). See also Gates & Collins, *supra* note 225, at 17, and accompanying text ("[t]he amassing of great wealth, above a certain point, becomes an accumulation of social and political power.").

228. See Table 1, Estate Tax Returns Filed in 2002: Gross Estate by Type of Property, Deductions, Taxable Estate, Estate Tax and Tax Credits by size of Gross Estate, *supra* note 227.

229. *Id.*

230. *Id.*

231. During the 2000 presidential campaign, a spokesman for George W. Bush said, "The death tax assaults families, it creates a disincentive for hard work and savings and it is fundamentally unfair and all Americans should be concerned about an unfair tax that penalizes families that build a business or farm with all their energies, efforts and savings." Matthew I. Pinzur, Estate Tax Seldom an Issue for Most, *Fla. Times-Union*, Sept. 20, 2000, at B1 (quoting Tucker Eskew).

232. Glenn Kessler, Estate Tax Repeal Bill Delivered; Democrats Assail GOP Measure as a Giveaway to the Rich, *Wash. Post*, Aug. 25, 2000, at A4.

[sic] die.”²³³ The so-called “death tax”²³⁴ represents to opponents of the estate tax the worst possible overreaching by the federal government.

The imposition of a tax on transfers in excess of \$10 million will make the one flesh, two taxpayer system unacceptable to advocates of complete repeal of the estate tax. The present proposal insists on taxation of the wealthiest taxpayers on philosophical grounds:

Americans who possess great wealth have a special obligation to pay back a debt to society. We live in a society that has enabled a wide variety of people to attain wealth and comfort. And those who accumulate great wealth – \$10 million, \$50 million, \$500 million, and more – are people who have benefitted disproportionately from the system of public investment that we together, as taxpayers and givers to charity, have put in place in our society.²³⁵

The one flesh, two taxpayer system embraces the notion that progressive²³⁶ wealth transfer tax is an appropriate price for “a society enhanced by public investments that have been made over the centuries.”²³⁷

C. Increased Tax Revenue

Eliminating the marital deduction and increasing the applicable exclusion amount to \$10 million necessarily will impact federal revenue. That impact should be determined with greater precision than is possible here. It would appear, however, that the one flesh, two taxpayer system will increase tax revenue. Consider the example of a \$100 million estate that qualifies for the full marital deduction under the existing estate tax rules.²³⁸ The entire estate of

233. Advertisement, African American Business Leaders Call for an End to the Estate Tax, N.Y. Times, Apr. 4, 2001, at C3.

234. The origins of the phrase “death tax” are not entirely clear:

California congressman Christopher Cox (R-Calif.), a lead sponsor of repeal legislation, notes that there were many references to “death taxes” in professional tax journals dating back to the 1970s. Californians, who repealed their state inheritance tax in 1982, deployed the “death tax” phrase throughout the campaign. President Reagan first used the term in a Minnesota speech in 1982.

Gates & Collins, *supra* note 225, at 57 (citations omitted).

235. *Id.* at xi.

236. Progressivity in taxation generally refers to the concept that those who are able to pay more should. See, e.g., Marvin A. Chirelstein, *Federal Income Taxation* 4-5 (9th ed. Foundation Press 2002); Posin & Tobin, *supra* note 32, at ¶ 1.02 (in a progressive income tax system, “the higher income individual not only pays more but pays a higher percentage of his income in tax. The effective rate is higher on the higher income individual. With a progressive system, the tax system is serving, to one degree or another, to redistribute the wealth.”).

237. *Id.* at xi.

238. See IRC § 2057. For simplicity purposes, this example assumes unrealistically that the estate is not eligible for any other exemption, deductions or credits.

First Decedent passes outright or in qualified form to his or her Surviving Spouse. Under present law no estate tax is due until Surviving Spouse's subsequent death. Assuming a tax rate of 55% (and absent consumption of the bequest from First Decedent), Surviving Spouse's estate will owe \$55 million in estate tax at his or her subsequent death. The government may wait many years to receive the \$55 million, depending on Surviving Spouse's age, health and other factors.²³⁹ Furthermore if Surviving Spouse consumes any portion of the \$100 million bequest, the government will receive far less than \$55 million in estate tax (and conceivably nothing at all). Under the present one flesh, one taxpayer system, the couple's combined wealth transfer tax liability is \$55 million.

Under the proposed one flesh, two taxpayer system, a \$100 million estate will generate immediate revenue and greater revenue overall. First Decedent again may transfer \$10 million²⁴⁰ to Surviving Spouse tax-free. The remaining \$90 million passing to Surviving Spouse will be subject to taxation at a rate of 55%. First Decedent's estate therefore will owe \$49.5 million in estate tax. The net \$40.5 million will pass to Surviving Spouse, giving Surviving Spouse a total gross estate of \$50.5 million. Assume that Surviving Spouse does not consume any of this property. Upon Surviving Spouse's subsequent death, the first \$10 million will pass tax-free to any designated beneficiaries. The remaining \$40.5 million will be subject to taxation at a rate of 55%. Surviving Spouse's estate therefore will owe \$22,275,000 in estate tax. Under the proposed one flesh, two taxpayer system, the couple's combined estate tax liability is \$71,775,000.

D. Tax Simplicity and Neutrality

Eliminating the favorable treatment of marital wealth transfers will have salutary practical and theoretical consequences. Perhaps most significantly, the vast majority of American taxpayers will be able to make dispositive decisions free from tax considerations.²⁴¹ In this sense, the one flesh, two taxpayer approach is more consistent with the stated goals of the marital deduction than the present marital deduction itself. When Congress revised the law in 1966 to recognize for tax purposes disclaimers made by persons other than the surviving spouse,²⁴² the House Ways and Means Committee lamented the tax law's complexity and emphasized the need to save taxpayers from their

239. Maudie Celia Hopkins, age 89, has outlived her husband by 70 years. Ms. Hopkins is believed to be the oldest living widow of a Confederate soldier who served in the United States Civil War. See Melissa Nelson, *Civil War Widow Provides Link to History*, Monterey County (Ark.) Herald, June 20, 2004, at A17. Also if Surviving Spouse left his or her entire estate to charity, no estate tax would be due. See IRC §§ 170, 2055.

240. This assumes that First Decedent had used none of his or her unified credit during life.

241. According to the 2000 Census, the median income for nonfamily households in the United States was \$25,705 in 1999. The mean income for the same year was \$36,609. U.S. Census Bureau, QT-P32, *Income Distribution in 1999 of Households and Families: 2000*.

242. See discussion *supra* Part I.C.

own mistakes.²⁴³ In 1981 the same Committee supported the QTIP rules on the grounds that "tax laws should be neutral and . . . tax consequences should not control an individual's disposition of property."²⁴⁴ The existing estate and gift tax rules are neither simple nor neutral, however. If anything, they complicate the tax system²⁴⁵ and now dominate estate planning.²⁴⁶

E. Theoretical Implications

1. *Taxation and Legal Personhood* – On a theoretical level eliminating favorable treatment for marital wealth transfers affirms each spouse's legal personhood. The one flesh, two taxpayer system will not permit the disparity between tax result and property ownership that is allowed under the current QTIP rules.²⁴⁷ All completed transfers of the exemption threshold by one spouse to another will be subject to taxation.²⁴⁸ Gift-splitting is based on an unproven notion that husbands and wives are a single economic unit and will not be allowed. The special disclaimer rules also should be eliminated because they will not be necessary in a system without a marital deduction. With an increased applicable exclusion amount of \$10 million, however, most spouses in fact will not owe any transfer tax, even if they give away all of their property.²⁴⁹ There will be minimal (if any) incentive to engage in tax-strategic behavior. The one flesh, two taxpayer system will simplify estate planning and tax administration.

Eliminating the estate and gift tax marital deduction removes a powerful incentive for spousal transfers. Under current law if a spouse fears "releasing his hand from the control of the property on his wife's death and the risk that when she dies some alien hand will be guiding her actions,"²⁵⁰ the spouse typically creates a testamentary QTIP trust that entitles the surviving spouse to a lifetime income interest, but little else.²⁵¹ Note that with the one flesh, two taxpayer system's generous applicable exclusion amount, the QTIP trust is unnecessary. Practically speaking this means that the first spouse to die could leave his or her entire testamentary estate to children from a prior marriage. If so, the surviving spouse would have a limited legal remedy, i.e., his or her state property law right to elect against the decedent's Will. Whether the

243. See discussion *supra* Part I C.

244. H.R. Rep. No. 97-201, at 160 (1981).

245. In 1950, Professor Stanley Surrey called the marital deduction rules a "sorry mess." Stanley S. Surrey, *An Introduction to Revision of the Federal Estate and Gift Taxes*, 38 Cal. L. Rev. 1, 14 (1950).

246. See, e.g., Lauren B. Epstein, *The QTIP Trust and the Elective Share Trust: Are They Really Parallel?*, 53 Fla. L. Rev. 965 (2001); Julia B. Fisher, *Maximizing the Tax Effectiveness of the QTIP Trust: Pre-Mortem and Post-Mortem Planning Strategies*, SF17 A.L.I.-A.B.A. 349 (2000).

247. See discussion *supra* Part I A.1.

248. See IRC §§ 2001, 2501(a)(1).

249. See *Id.*

250. Surrey, *supra* note 245, at 14.

251. See discussion *supra* Part I D.

elective share is fair or adequate²⁵² is open to question, but it is a question that should be answered by state law, not federal estate and gift tax law.

2. All Taxpayers Are Created Equal – In the one flesh, two taxpayer system, all gratuitous transfers above the exemption threshold will be subject to taxation, regardless of the relationship between the donor and the donee. As described in Part III.B.1, transfers between members of the hypothetical “couples” described in that section would be fully taxable in the new system. Regardless of any showing of economic unity, a tax would be imposed if, say, unmarried Man makes a gift to his opposite sex partner, Woman; or if Man 1 sets up a discretionary trust for his same-sex partner, Man 2; or if one elderly Sister devises property to the other Sister at death; or if Adult Child predeceases Elderly Parent and leaves her entire estate to Elderly Parent in trust.²⁵³ Whether those transfers will result in the payment of any transfer tax, however, will depend on the size of the transfer and whether the transferor has used some or all of his or her \$10 million applicable exclusion amount.

The one flesh, two taxpayer system embraces the similarity among the many relationships that people form but rejects special treatment for dependency relationships. The tax results of a transfer by one person to another should not depend on the existence of a legalized sexual relationship between a man and a woman. Women in particular may develop affinity relationships on account of their roles as care-takers, and there is no logical reason to treat these economic relationships any different from marriage.²⁵⁴ These relationships should not be treated as “better” than traditional marriage but should not be treated any worse, either.

Note the similarities among a married couple (as envisioned by the current Code) and the hypothetical taxpaying couples described in Part III.B.1. All the couples arguably could demonstrate economic unity. Recall, however, that tax results in the new one flesh, two taxpayer system do not depend on either the identity of the donor and the donee or the presence or absence of an economic unity of interest. Although an argument could be made for the non-taxation of transfers to economic dependents, such an exemption is undesirable. It would complicate and increase the costs of administration of the tax system. Furthermore a dependency exemption would necessitate a factual inquiry into personal relationships that would be unwelcome by many taxpayers.²⁵⁵ The

252. In most jurisdictions, a surviving spouse may elect against the Will to receive a statutory share of the decedent's estate. See, e.g., Restatement (Third) of Prop.: Wills & Other Donative Transfers, § 9.1 cmt. d (2003); Restatement (Second) of Prop. Donative Transfers, § 34.1 reporter's note 15 (1992); Lawrence W. Waggoner, *The Uniform Probate Code's Elective Share: Time for a Reassessment*, 37 U. Mich. J.L. Reform 1 (2003).

253. See discussion *supra* Part III.B.

254. *Id.*

255. The present Code provides for an income tax exemption amount with respect to each dependent of a taxpayer. IRC § 151(c). For income tax purposes, a dependent is any member of a specified class over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, is received or is treated as received from the taxpayer. IRC § 152(a). The specified class is comprised of the following members: (1) A son or daughter of the taxpayer, or a descendant of either; (2) A stepson or stepdaughter of the taxpayer; (3) a brother, sister, stepbrother or stepsister

number of dependency exemptions theoretically available to a taxpayer could not be limited, absent a normative judgment about appropriate family configurations. Furthermore there might be an undesired "daisy chain" effect if Taxpayer 1 can transfer assets tax-free to Taxpayer 2 upon a showing of economic dependency, and then Taxpayer 2 can transfer assets tax-free to Taxpayer 3 upon a showing of economic dependency, and so on. Finally, a dependency exemption would provide a negative incentive for a taxpayer's spouse and children to become self-supporting, productive members of society.²⁵⁶

F. Impact on Geographic Equality

Notwithstanding the positive revenue effect of the proposed one flesh, two taxpayer system, the new rules admittedly would disrupt the geographic equality created by the marital deduction.²⁵⁷ Under the proposed system, gratuitous transfers in excess of \$10 million by a common law resident husband or wife to his or her spouse would be subject to taxation. In community property jurisdictions, most "transfers" between spouses would continue to be accomplished by operation of state law (and therefore would not be subject to wealth transfer taxation).²⁵⁸

In a one flesh, two taxpayer federal wealth transfer tax system, community property states should not be expected to change their laws so that wealthy residents of those states would be subject to just as much taxation as common law residents. Therefore any state law response to the recreated geographic inequality likely would occur in common law states. Legislators in common law states might choose to adopt community property laws in whole or in part. Comprehensive change could be administratively prohibitive, however, and could lead to years of uncertainty (and litigation) over property rights.²⁵⁹ Legislators might contain the administrative costs of converting to a community property system by limiting its application to taxpayers who earn or accrue more than \$10 million during lifetime. Such a system might raise accounting questions, however, in the absence of specific, simple and fair rules to determine what assets "count" toward the \$10 million limit. A third option would be for legislators in common law jurisdictions to enact a voluntary

of the taxpayer, (4) The father or mother of the taxpayer, or an ancestor of either, (5) A stepfather or stepmother of the taxpayer, (6) A son or daughter of a brother or sister of the taxpayer, (7) A brother or sister of the father or mother of the taxpayer, (8) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer, (9) or An individual [other than the taxpayer's spouse] who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household. IRC § 152(a)(1)-(9).

256. Minimal or no expectation of financial support may motivate children of wealthy taxpayers to undertake full-time employment. See, e.g., David Rockefeller, *Memoirs* 73 (Random House 2002) (self-description of the motivations of the youngest son of businessman and philanthropist John D. Rockefeller, Jr., and grandson of Standard Oil founder John D. Rockefeller, for a long and productive career with The Chase Manhattan Bank).

257. See discussion *supra* Part II.B.

258. *Id.*

259. See discussion *supra* Part II and accompanying text.

community property system similar to Alaska's Community Property Trust Act.²⁶⁰ Alaska law permits spouses in any jurisdiction to elect community property treatment for property transferred to a trust, provided that certain conditions are met.²⁶¹ In the absence of a special federal exemption, however,

260. Alaska Stat. §§ 34.77.010 to 995 (Michie 2003). In reality many common law states have de facto community property rules that provide for the equal or nearly equal division of marital assets upon divorce. See, e.g., N.J. Stat. Ann. § 2A:34-23.1 (2004); 23 Pa. Cons. Stat. § 3502 (2004). A court may look at a variety of factors in making an equitable distribution upon dissolution of a marriage. The New Jersey statute provides that a court shall examine:

- a. The duration of the marriage;
- b. The age and physical and emotional health of the parties;
- c. The income or property brought to the marriage by each party;
- d. The standard of living established during the marriage;
- e. Any written agreement made by the parties before or during the marriage concerning an arrangement of property distribution;
- f. The economic circumstances of each party at the time the division of property becomes effective;
- g. The income and earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage;
- h. The contribution by each party to the education, training or earning power of the other;
- i. The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property, as well as the contribution of a party as a homemaker;
- j. The tax consequences of the proposed distribution to each party;
- k. The present value of the property;
- l. The need of a parent who has physical custody of a child to own or occupy the marital residence and to use or own the household effects;
- m. The debts and liabilities of the parties;
- n. The need for creation, now or in the future, of a trust fund to secure reasonably foreseeable medical or educational costs for a spouse or children;
- o. The extent to which a party deferred achieving their career goals; and
- p. Any other factors which the court may deem relevant

N.J. Stat. Ann. § 2A:34-23.1 (2004).

261. Alaska Stat. §§ 34.77.010 to 995 (Michie 2003). See generally Blattmachr et al., *supra* note 27; Newman, *supra* note 27; Shaftel & Greer, *supra* note 27. Some commentators are critical of the Alaska statute, among other state laws, as responding too directly to federal tax law. See, e.g., Ira Mark Bloom, *How Federal Transfer Taxes Affect the Development of Property Law*, 48 *Clev. St. L. Rev.* 661, 671 (2000); Mitchell M. Gans, *Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance?*, 48 *Emory L.J.* 871, 877 (1999). However, this criticism appears to go to the desirability – not the legality or effectiveness – of Alaska's elective community property law.

a taxpayer with over \$10 million in assets could be subject to gift tax if he or she elects into a community property system.²⁶²

Ultimately if substantive state law differences cause very wealthy spouses in common law and community property jurisdictions to be treated differently, principles of federalism would suggest that the appropriate remedy lies not with federal tax law.²⁶³ At worst, legislators in common law states may take no action in response to the federal tax changes. Geographic inequality would exist, but would not be widespread because the vast majority of taxpayers will never have, let alone transfer, \$10 million.²⁶⁴ But the specter of geographic inequality in taxation, however minimal, should be avoided if possible. Hopefully, the implementation of a one flesh, two taxpayer federal tax rule would cause citizens and state lawmakers to confront state property laws and evaluate their fairness with respect to all taxpayers.

CONCLUSION

The one flesh, two taxpayer system implicates two ongoing political debates. At the same time that voters, legislators, and courts in every state consider the legal and moral validity of same-sex marriage,²⁶⁵ national leaders contest the importance of estate tax repeal.²⁶⁶ The current tax treatment of marital wealth transfers frequently diverges from the underlying economic substance of property transfers. Treating husband and wife – or any two taxpayers – as a single economic unit is inconsistent with the privileges and responsibilities of citizenship as they have evolved over time. The one flesh, two taxpayer system proposes an increase in the applicable exclusion amount so that any taxpayer, regardless of marital status, can transfer up to \$10 million tax-free. The new rule will shrink the administrative costs associated with estate and gift tax assessment and collection, overall tax revenue will increase, and the tax burden will be shifted more effectively to those who are most able to pay.

Former Commissioner of the Internal Revenue Service Sheldon Cohen famously said that “[i]f you know the position a person takes on taxes, you can tell their whole philosophy. The tax code, once you get to know it, embodies all the essence of life: greed, politics, power, goodness, charity. Everything’s in

262. An elective community property trust would allow wealthy taxpayers to secure some of the estate tax benefits of community property, most notably the double step-up in basis upon the death of the first spouse to die under IRC § 1041.

263. Cf. Gans, *supra* note 261, at 876-83 (raising concerns about overemphasis in federal transfer tax jurisprudence on state law property rights).

264. See *supra* notes 225-26, 241.

265. Monica Davey, *Missourians Back Amendment Barring Gay Marriage*, *N.Y. Times*, Aug. 4, 2004, at A13.

266. See, e.g., Martin Vaughan, *As Estate Tax Repeal Emerges as Pivotal Budget Issue*, *Congress Daily*, Mar. 8, 2004.

there."²⁶⁷ The one flesh, two taxpayer proposal is no exception. Its greatest hope is a wealth transfer tax system that is just, simple and progressive.²⁶⁸

267. Jeffrey H. Birnbaum & Alan S. Murray, *Showdown at Gucci Gulch: Lawyers, Lobbyists, and the Unlikely Triumph of Tax Reform* 289 (1987). (quoting Sheldon S. Cohen).

268. The "fundamental tax policy objectives," according to one Treasury Department official, are fairness, efficiency, and simplicity. Leslie B. Samuels, Remarks of Leslie B. Samuels, Assistant Treasury Secretary for Tax Policy, Federal Bar Association Section of Taxation Report 11 (Spring 1995). Scholars traditionally consider Adam Smith to have articulated these goals and several related variations. See Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (E. Cannan ed., 1937). See also Edward J. McCaffery, *The Holy Grail of Tax Simplification*, 1990 Wis. L. Rev. 1267, 1312 (1990); M. Scotland Morris, *Reframing the Flat Tax Debate: Three Not-So-Easy Steps for Evaluating Radical Tax Reform Proposals*, 48 Fla. L. Rev. 159, 178 (1976).