Pace Law Review

Volume 34
Issue 1 *Winter 2014*

Article 9

January 2014

Moving Beyond Marriage: A Proposed Unit of Presumed Economic Interdependence for Joint Filing Purposes in Bankruptcy and in Tax

Heather V. Graham

Moving Beyond Marriage: A Proposed Unit of Presumed Economic Interdependence for Joint Filing Purposes in Bankruptcy and in Tax

Heather V. Graham*

> *Relational definitions that do not focus on the relevant factual attributes of relationships will miss their mark, excluding some relationships that ought to be included, and including some relationships that ought to be excluded. Thus, carefully tailoring relational definitions to the objectives of particular laws will eliminate inequalities and enable laws to accomplish their objectives more effectively.*[1]

A man and woman stand at the altar on their wedding day, while their family looks on with admiration, and the ring bearer stands nearby holding the golden fourteen karat rings on a tiny pillow, waiting for his cue. The officiant stands before them and prompts the couple to recite their chosen vows, asking if they should take each other in sickness and in health, for richer or poorer, and if they should love and cherish. With an affirmation of "I do" from each, the officiant looks to the ring

*J.D. Pace University School of Law; B.A. The Richard Stockton College of New Jersey; A.A. Ocean County College. I wish to sincerely thank Prof. Bridget J. Crawford, Prof. David Cohen, Prof. Erez Aloni, Prof. Noa Ben-Asher, my mother Lisa Ann Graham, my father Howard Graham, and Charlene Cavalcante for providing me with the valuable commentary, advice, and support that made this work possible.

1. LAW COMM'N OF CAN., *Beyond Conjugality: Recognizing and Supporting Close Personal Adult Relationships* 36 (2001), *available at* http://www.samesexmarriage.ca/docs/beyond_conjugality.pdf [hereinafter, LAW COMM'N OF CAN.].

bearer to hand his rings to the couple. Once the rings are exchanged, the officiant announces that the new couple is now husband and wife, and permits a kiss for all to see. The newly wedded couple parade down the aisle to the delight of family and friends, as they begin a new life as husband and wife.

The relationship of husband and wife entails recognition of the marital unit not just from family and friends, but also from the government.[2] It is through the legally recognized relationship of marriage that a married couple may act as a single economic unit for bankruptcy and tax purposes.[3] For the newly married couple that files their income tax for the first time, this means having to declare themselves as either married and filing jointly or married and filing separate returns.[4] Their decision as to how to file their income tax will be based largely on their relative incomes and whether or not they will be benefitted or penalized for doing so.[5] Should financial tragedy strike, the married couple will likewise be able to act as a unit and jointly petition the court in a bankruptcy proceeding, if they so choose.[6] For the financially devastated couple, this means saving on the cost of an additional filing fee and an additional legal fee.[7]

The traditional scene of marriage described above, however, is becoming both more and less familiar, as some strive to be permitted to marry while others no longer marry at all.[8] The end result is that the demographics of the American

2. *See infra* note 42 (discussing the legal and social status of marriage).

3. 11 U.S.C. § 302(a) (2012) (permitting a married couple to file a joint bankruptcy petition); 26 U.S.C. § 6013(a) (2012) (permitting a married couple to file a joint income tax return).

4. 26 U.S.C. § 1(a) (2012) (tax rates for individuals who are married and filing jointly); § 1(d) (tax rates for individuals who are married yet filing separate returns).

5. *See infra* notes 140-61 and accompanying text (discussing the marriage penalty and the marriage bonus).

6. 11 U.S.C. § 302(a) (2012).

7. S. REP. NO. 95-989, at 32 (1978).

8. *Compare Marriage in America: The Fraying Knot*, ECONOMIST (Jan. 12, 2013), http://www.economist.com/news/united-states/21569433-americas-marriage-rate-falling-and-its-out-wedlock-birth-rate-soaring-fraying (describing the decline in marriage rates and efforts directed at encouraging marriage), *with* WHY MARRIAGE MATTERS, *Love, Commitment, Family: Why Marriage Matters*, *available at*

household are rapidly changing while the determination for whether one may file jointly for bankruptcy and tax purposes—marital status—has not.[9] Given these changing demographics, it would seem that a new determination for when one may file jointly, other than marital status, should be used.[10] In this context, tailoring the objectives of laws to relational definitions will help to eliminate inequalities so long as equality also remains an objective.[11] In keeping with this premise, this Comment will look to the history[12] and original objectives[13] of the laws which permit married couples to file jointly for tax and bankruptcy purposes, and will articulate a unit which matches these objectives with the relational demographic realities of American life by exploring alternatives to a marriage-based joint filing regime.[14] Since both bankruptcy and tax law permit married individuals to file as a unit to the exclusion of unmarried individuals by permitting joint filing, the treatment of married persons in the two fields of law will be examined simultaneously, with the goal of articulating a unit that can operate within both.[15]

In order to promote both equality and efficiency, this Comment proposes that individuals should have the opportunity to file jointly for tax and bankruptcy purposes when they have a relationship predicated upon economic interdependence, as opposed to basing the opportunity to file

http://freemarry.3cdn.net/e46734c7784ca7c65f_o7m6bxr76.pdf (educational flyer describing why gay and lesbian couples desire the right to marry).

9. *See infra* notes 231-60 and accompanying text (citing statistics concerning the changing demographics of the American household). *See also* 11 U.S.C. § 302 (2012) (permitting married couples to file their bankruptcy petitions jointly); 26 U.S.C. § 6013(a) (2012) (permitting married couples to file a joint income tax return).

10. *See infra* Part V.A.

11. LAW COMM'N OF CAN., *supra* note 1, at 36. The Law Commission of Canada proposes that tailoring the objectives of laws to relational definitions will eliminate inequality. *Id.* This statement holds true, of course, so long as equality itself remains an additional objective of the law.

12. *See infra* Parts II and III.

13. *See infra* notes 268-74 and accompanying text.

14. *See infra* Parts V.B and V.C.

15. 11 U.S.C. § 302(a) (2012); 26 U.S.C. § 6013(a) (2012). *See also infra* Parts V.B and V.C (articulating a new unit which can be applicable within both bankruptcy and tax law).

jointly upon marital status. Part I of this Comment will briefly discuss the history of marriage in the United States. In particular, Part I will discuss the role that the government has had in promoting and regulating marriage and how the treatment of married persons operates to the exclusion of the unmarried. Parts II and III of this Comment will provide a history of the joint income tax and joint bankruptcy petition. In Parts IV(A) and IV(B), this Comment will evaluate and critique both the benefits and drawbacks of allowing individuals to file jointly for tax and bankruptcy purposes, and discuss the implications of joint filing. In Part V(A), this Comment will analyze and critique the relevance of the current system, and will conclude that both the Bankruptcy Code and the Internal Revenue Code must be modernized in order to reflect the changing demographics of the American household. In Parts V(B) and V(C), this Comment will present the reader with two alternative options for modernization: a strictly individual or modified individual system or allowance of a unit based on presumed economic interdependence. Ultimately, this Comment will conclude that a unit based on presumed economic interdependence would achieve the most equitable result.

I. An Introduction to Marriage in the United States

By proposing that individuals may file jointly when they have a relationship predicated upon economic interdependence, this Comment is necessarily also proposing that marriage no longer be the sole determinative factor in deciding whether or not to allow two individuals to file jointly for bankruptcy and tax purposes. This is both a big and a small step. It is small in that the answer regarding the sensibility of using marital status as the sole determinative factor for joint filing purposes does not have to reach the ultimate question of what marriage means in our society, yet it is large enough to encompass it and at least beg the question in this regard. Currently, under federal law, the act of marriage will trigger approximately 1,100 rights and privileges.[16] It is important to recognize that

16. *See* Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Acct.

the promotion of marriage in this regard operates to the exclusion of the unmarried, who may be just as much or more deserving of a particular right or privilege.[17] In some instances, the stigma that results from exclusion can be considered a harm in its own right.[18] In not only American society, but in most other societies as well, marriage remains "the measure of all things."[19] Thus, it is important to briefly examine marriage in the United States, both to understand the foundation for joint filing today and to evaluate the wisdom of basing joint filing privileges on marital status in the future.

Historically speaking, marriage has been "more in the service of domestic economies than domesticated love."[20] As young people became more economically independent in the eighteenth century, however, the idea that love could have a place in marriage set the stage for the "'love revolution.'"[21] Couples began investing more of their emotions in one another, and focusing more on their interpersonal relationship.[22] The idea that love could have a place within marriage was initially met with resistance, as critics of the idea thought that the institution of marriage could somehow be undermined by the

Offic, to Bill Frist, Majority Leader, U.S. S., (January 23, 2004), *available at* http://www.gao.gov/assets/100/92441.pdf (providing an updated account to an original report that sought to compile legal provisions in which marital status played a significant role).

17. *See* Cynthia Grant Bowman, *The New Family: Challenges to American Family Law*, 22 CHILD & FAM. L.Q. 387, 392 (2010) ("From what we know about the characteristics of cohabiting couples - their economic interdependence, the presence of children in their households, and other sources of vulnerability - there is reason to believe that these couples may in fact need the protections of family law even more than married couples do.").

18. *See* Katherine M. Franke, *Longing for Loving,* 76 FORDHAM L. REV. 2685, 2687 (2008) (describing how she condemns laws that prohibit same-sex couples from marrying, not because of a strong feelings regarding the right to marry, but from the injustice that results from refusing to "distribute this public benefit and status to same-sex
couples . . . .").

19. *Id.* at 2689. *But see* Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 577 (2013) (describing how France and Belgium have taken significant steps toward recognition of cohabitating couples).

20. ELIZABETH BRAKE, MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW 10 (2012).

21. *Id.*

22. Stephanie Coontz, *The World Historical Transformation of Marriage,* 66 J. MARRIAGE & FAM. 974, 978 (2004).

instability of love.[23] This idea emerged concurrently with the idea that women were naturally domestic, and that men and women had sexual differences between them that mandated sharply defined marital roles.[24] Thus, although some thought that love might have a place in marriage, marriage retained its institutional role by regulating both the domestic economy and the relative roles of men and women.[25] According to Norma Basch, even during nineteenth century America, marriage was "a contract unlike any other."[26]

During this time, it was divorce that made revocable an otherwise irrevocable contract.[27] Divorce, at least throughout early American history, was extremely difficult to obtain.[28] In some states, divorce was impossible to obtain, and in others, it was permitted only in a narrow range of instances that often treated men and women quite differently.[29] Only a couple of states permitted divorce due to unhappiness in the mid-1800s, and these laws were eventually overturned.[30] Essentially, the avenues to divorce were severely restricted until the advent of the no-fault divorce in the 1970s.[31] That is not to say that Americans were forever bound by their marriages or that marriage in itself was not a subject of contention—many Americans who would have otherwise divorced would choose to separate, while others who wished to avoid the stigma of separation would travel to another state to either obtain a divorce under more forgiving laws or reinvent themselves as if they were never married at all.[32]

23. BRAKE, *supra* note 20, at 10. *See also* Coontz, *supra* note 22, at 978 (stating that contemporaries at the time feared that love would lead to problems both in personal and gender relations).

24. BRAKE, *supra* note 20, at 10.

25. *Id*. (discussing how the idea that men and women were inherently different and suited to differing marital roles ultimately shaped the dynamic of the workforce).

26. NORMA BASCH, FRAMING AMERICAN DIVORCE 3 (1999).

27. *Id.* at 3.

28. BRAKE*, supra* note 20, at 11.

29. *Id.*

30. *Id.* In 1849, Connecticut and Maine liberalized their divorce laws to permit no-fault divorce, but these laws were eventually overturned by the 1880s. *Id.*

31. *Id.*

32. HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 20, 31

Throughout much of American history, the marital roles of men and women were either directly or indirectly shaped by the doctrine of coverture. According to this doctrine, the person of the wife was legally covered by that of her husband, and her identity subsumed and incorporated, if existent at all.[33] In the earliest part of American history, this meant the inability of a woman to form a contract, own property, and file a lawsuit, in addition to being subjected to her husband's "domestic chastisement."[34] The doctrine of coverture, however, experienced gradual erosion during the nineteenth century.[35] As it eroded, it left vestiges in its wake and indirectly affected the lives of Americans in the twentieth century by doing so.[36]

Although the history of marriage in the United States may make it seem a stark contrast to modern marriages today,

(2000).

33. BRAKE *supra* note 20, at 10-11; 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *430 (1765-1769) ("By marriage, the husband and wife are one person in the 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 the husband").

34. HARTOG, *supra* note 32, at 115-16 (internal quotation marks omitted). Due to their identities being covered, husbands were largely considered responsible for the acts of their wife, which prevented women from being held liable for certain felonies if they were committed in his company. *Id.* at 116. According to this logic, a husband was permitted to engage in "domestic chastisement" in the form of violence, since he would be held liable for her misdeeds. *Id.* (internal quotation marks omitted).

35. *Id.* at 290-91. One casebook, written in 1899, stated that the old common law doctrines regarding husband and wife no longer existed "in full force in any jurisdiction." *Id.* at 290. The author recommended studying the doctrines, however, because few, or perhaps none, of the states had completely rid themselves of the common law doctrines altogether. *Id.* One can see this very gradual erosion as women began to enter the field of law. *Compare* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (citing the doctrine of coverture as a reason to affirm Bradwell's rejection of a license to practice law, due to her status as a married woman), *with Admission of Women to Practise at the Bar*, 8 HARV. L. REV. 174, 174 (1894) (describing how the doctrine of coverture was once cited as a reason for women to not practice law, since they could use coverture to avoid responsibility to client or contract, but that women are almost universally liable for their contracts, and as a result there is no reason why they should not practice law).

36. HARTOG, *supra* note 32, at 308. Marital rape laws are an ideal example of how vestiges of the doctrine of coverture persisted well into the twentieth century. In the 1970s, feminists pushed for rape to be a crime not only outside of marriage, but within it as well. *Id.*

there are some very important similarities. First, marriage is still an institution that is regulated by the States.[37] Second, the States still decide who is married and who is not, and along with the federal government, allocate privileges accordingly.[38] In the past, the States strived to regulate the race of those who married, and to ensure that marriage remained a monogamous institution.[39] Today, the States still regulate marriage, with the current debate often centering around the sex and gender of those who marry.[40]

The precise meaning of marriage, however, is debatable and often subjective. Debate exists as to whether or not marriage is a natural or social construct, a religious mandate, a

37. Anne B. Brown, *The Evolving Definition of Marriage*, 31 SUFFOLK U. L. REV. 917, 922 (1998). Generally speaking, courts give the states great deference in regulating marriage as a whole, which includes when marriage can be created and terminated. *Id.* Any regulation created by a state, however, is subject to constitutional limitation. *Id.* at 922-23.

38. *Id.* at 922. A recent decision by the Supreme Court is illustrative of the tenuous relationship between the states and the federal government regarding the regulation of marriage. In *United States v. Windsor*, the Supreme Court held that § 3 of the Defense of Marriage Act ("DOMA") was unconstitutional. 133 S. Ct. 2675, 2696 (2013). Section 3 amended the Dictionary Act to define marriage as between one man and one woman for federal purposes. *Id.* at 2683. Justice Kennedy, writing for the majority, acknowledged that the federal government does, in certain instances, regulate marriage and its incidental privileges. For instance, Justice Kennedy provides that federal immigration law prohibits aliens who procured marriages for the purpose of gaining admission into the United States from obtaining immigrant status. *Id.* at 2690. Additionally, common law marriages are recognized in certain instances for Social Security purposes. *Id.* at 2690. Justice Kennedy reiterated, however, that although the federal government regulates marriage in certain instances, "[b]y history and tradition the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States." *Id.* at 2689-90.

39. BRAKE, *supra* note 20, at 11. Marriage, at one time, was a privilege only accorded to full-blooded white citizens. Following the emancipation of African Americans, the states still strived to prevent those of different races from marrying. *Id.* States were likewise concerned with the perceived Mormon threat and enforced monogamy by disenfranchising polygamous Mormon men. *Id.* at 11-12. At one time, fornication outside marriage was a criminal act in all fifty states and culminated in severe legal discrimination against unwed mothers and illegitimate children until the 1970s, at least in its most severe forms. *Id.* at 12. Thus, choice of marriage and sexual relations in the past could result in evisceration of legal rights, disenfranchisement, or loss of freedom.

40. *See infra* note 255 (providing the current state of the law with regard to gay marriage and civil unions).

means of oppression, or whether it simply a means of expressing love.[41] Thus, marriage can mean something to one person that it does not to another. Yet separate and apart from all the meanings that may or may not be attached to it, there exists the undeniable legal and social status that it confers.[42] As much as marriage may have changed over time, the marital status still confers economic benefits and penalties that ultimately shape the role of marriage in American society.[43]

The economic consequences of marriage are likewise apparent when the married couple is permitted to act as a single economic unit. In our society, this happens in at least two instances: when the married couple submits their tax return and when they file for bankruptcy.[44] The married couple is permitted to do so, however, to the exclusion of the unmarried. Contrary to its singular terminology, the phrase "unmarried" encompasses a wide variety of groups and individuals who may or may not be as financially intertwined as those who are married.[45] In this light, it is imperative to examine whether or not acting as a single economic unit is desirable in light of the benefits that it confers and if marriage is still relevant in light of the current state of the joint filing regime. In the end, the answers to such questions will reveal a message about the implications of marriage and its relevance

41. BRAKE, *supra* note 20, at 8-9.

42. Nancy Cott, *The Public Stake*, *in* JUST MARRIAGE 33-34 (Mary Lyndon Shanley ed., 2004). Marriage confers a status, just as being a minor versus an adult confers a status, and designates certain rights and privileges in that respect. *Id.* It is also a contract, not solely between the married couple, but with the state as well. *Id.* at 34. *See also* Milton C. Regan Jr., *Between Justice and Commitment*, *in* JUST MARRIAGE 72 (Mary Lyndon Shanley ed., 2004) ("Marriage serves [a] process of social validation with respect to the value of commitment. It bestows on partners a formal legal status that is the basis for impersonal rights and obligations.").

43. *Compare* BRAKE, *supra* note 20, at 12 (marriage grants over 1,100 rights and privileges), *with infra* notes 140-61 and accompanying text (discussing the marriage penalty that can result in taxation).

44. 11 U.S.C. § 302(a)(2012); 26 U.S.C. § 6013(a)(2012).

45. *See generally* Bowman, *supra* note 17 (describing a variety of potentially non-marital households, such as extended family households, single-parent households, cohabitation, and gay partnerships). Bowman also notes that "[t]he majority of cohabitants pool their incomes in some way, and they are no different . . . from married couples if they have a child." *Id.* at 390.

that reach far past the realm of our bankruptcy and tax laws.

II. A History of Joint Income Taxation

The joint income tax has a long and arduous history that can perhaps best be described as a constant battle. Income taxation, in and of itself, was once a source of great controversy. In 1895, the income tax was held unconstitutional.[46] Thus, in 1913, the Sixteenth Amendment was enacted, which permitted taxation on income "from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."[47] When the Sixteenth Amendment was enacted in 1913, however, little thought was given as to the appropriate unit for taxation.[48] Since the Sixteenth Amendment was ratified, contentious debate has ensued over whether or not the proper unit of taxation should be the individual or the family.[49]

In 1913, Congress created a system in which the individual would be the taxable unit.[50] Under this framework, the "net income of every individual" was subject to taxation.[51] The Treasury Department had less than one month to promulgate regulations and declared that married couples were to be treated as units.[52] According to the Treasury Department, the husband was to report the aggregate income of both husband and wife.[53] As a result of this declaration, some married couples that were dual-wage earners experienced a marriage penalty.[54] In 1914, regulations changed once again, as married

46. *See generally* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895).

47. U.S. CONST. amend. XVI.

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

49. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1399 (1975) (discussing the evolution of the income tax in the years 1913 to 1948).

50. McMahon, *supra* note 48, at 723.

51. *Id.* (internal quotation marks omitted).

52. *Id.*

53. *Id.* at 724.

54. *Id.* at 723-24. In order to understand how the marriage penalty worked at this time, note that the individual exemption was $3000 and the

women were allowed to file their income tax returns separately from their husbands.[55] Very few women, however, elected to do so. Less than 7000 separate returns were filed from married women that year, which represented little more than two percent of the total tax returns received from married persons, and this included tax returns from married women who were not able to file legally with their husbands since they were not living in the same household.[56] Shortly after this pronouncement, the Treasury Department declared that husbands and wives were to file separately, at least for purposes of the surtax.[57] The right of married couples to file jointly was first recognized in 1918, but for many the only advantage for doing so was convenience.[58] The tax system remained biased in favor of the individual, and applied the same rate schedule regardless of whether the return was individual or joint.[59]

This initial debate concerning the proper taxable unit was as much about the relative roles of men and women as it was

allowable exemption for those who were married was $4000. A husband and wife who each earned $2500 would suffer from the marriage penalty, as their combined income would be $5000. Had they not married, however, neither of them would be subject to taxation. *Id.*

55. McMahon, *supra* note 48, at 724.

56. *Id.* at 724 & n.27.

57. *Id.* at 724. It is important to keep in mind that, for purposes of this discussion, the wealthy paid a disproportionate share of the income taxes, and most Americans paid no income taxes at all. *Id.* at 725. The income tax exemptions, which were $3000 for individuals and $4000 for married couples, allowed most middle income Americans to escape income taxation. Joseph J. Thorndike, *Reforming the Internal Revenue Service: A Comparative History*, 53 ADMIN. L. REV. 717, 740 (2001). A surtax, or an additional tax upon an income tax, was also imposed, which could range from one percent to six percent of income. *Id.* The first bracket of surtax was imposed upon $20,000 of annual income, and the highest bracket in which the surtax would be imposed occurred when annual income was $500,000 or more. *Id.*

58. Bittker, *supra* note 49, at 1400.

59. *Id*. One instance in which the filing of a joint return was not economically disadvantageous occurred when a married couple had a very large amount of charitable contributions. The amount that a taxpayer may deduct for a charitable contribution is based on adjusted gross income. By pooling their aggregate income in filing a joint return, a married couple would be able to raise their adjusted gross income, and thus take a higher charitable contribution deduction. This circumstance, however, did not likely represent the majority of those filing their income taxes at this time. *Id.* at n.20.

about economic utility, if not more.[60] It was not entirely clear whether or not women should be treated as persons under the Sixteenth Amendment,[61] and one congressman remained concerned over the effect the Married Women's Property Acts would have on the constitutionality of the joint income tax return.[62] According to Alice Klessler-Harris, this controversy was not simply over taxes, and incorporated considerations of state versus federal rights, justice and fairness, and the rights of property owners and citizens.[63] At center stage in this debate, however, was the personhood of women.[64]

When the Treasury initially declared, in 1913, that married persons were to be the economic unit, it did so by depicting the male breadwinner image of the family.[65] According to the Treasury Department, the husband was to report aggregate income, because he was "the head and legal representative of the household and general custodian of its income."[66] A significant number of women at this time, however, had fought arduously for their property rights and wanted to control their property both actually and symbolically.[67] Many men who were married to women who owned property also did not want to report it as their own.[68] Caught in the middle of this debate, the Treasury continued to promote the image of male breadwinner families, but framed its position on "ability to pay."[69] At this time, the Treasury was attempting to defend both itself and the income tax as a whole, which was unpopular.[70] As a defense mechanism, the Treasury

60. Alice Kessler-Harris, *"A Principle of Law But Not of Justice": Men, Women, and Income Taxes in the United States 1913-1948,* 6 S. CAL. REV. L. & WOMEN'S STUD. 331, 333-34 (1997).

61. *Id.*

62. McMahon, *supra* note 48, at 723. Congressman Cordell Hull was concerned, early on, that the joint income tax would conflict with the separate interests in property rights that the Married Women's Property Acts created. *Id.*

63. Kessler-Harris, *supra* note 60, at 333-34.

64. *Id.*

65. McMahon, *supra* note 48, at 723.

66. *Id.* (internal quotation marks omitted).

67. Kessler-Harris, *supra* note 60, at 334-35.

68. *Id.*

69. *Id.*

70. *Id.* at 335.

evoked images of equity and male breadwinner families in an attempt to legitimize the income tax.[71] Eventually, however, the Treasury began to argue for family taxation, which was the result of its original commitment to taxing individuals based on their ability to pay.[72] Inherent in the logic that taxation should be based on ability to pay was the notion that women who earned income were taxpaying persons who should have to pay their fair share of taxes, even if it meant thrusting their family income into a higher tax bracket.[73] Thus, although the rhetoric of the Treasury evoked an image of women as non-persons, the reality was that women were claiming their own income and getting treated as persons in that respect.[74]

In the early years of income taxation, however, very few paid taxes and those who did were among the wealthiest.[75] Not surprisingly, there was a strong incentive for husbands to devise ways to assign income to their wives in order to reduce their tax burden in the progressive system.[76] The Treasury was concerned that such efforts might ultimately undermine the progressive tax system altogether.[77] A variety of methods were utilized for assignment purposes, and women who lacked earned income often found themselves in partnerships with

71. *Id.*

72. *Id.*

73. Klesser-Harris, *supra* note 60, at 334-35.

74. *Id.* at 336.

75. *Id.* at 335. Taxation was heavily weighted in favor of taxing the wealthiest. All but a minority were exempted from taxation altogether. There was even an additional surcharge added in 1920 that placed an additional tax for those on the higher end of the income brackets. *Id. See also* McMahon, *supra* note 48, at 725. Although the number of individuals who paid income taxes grew from two percent to fifteen percent from 1913 to 1918, respectively, in 1918 the wealthiest one percent of Americans accounted for approximately eighty percent of all revenue raised. *Id.*

76. Kessler-Harris, *supra* note 60, at 335-36. Assume, fictitiously, that the tax rate for incomes $100,000 and above is fifty percent and any amount under $20,000 is subject to a ten percent rate, and the husband earned $100,000 while the wife had no earned income. Ignoring for a moment any other particular deductions or exemptions they may have available to them, the husband would be taxed $50,000 if he declared his entire income on his own tax return. If he can assign some of that income to his wife, however, it may reduce his overall tax liability. If he were able to assign $10,000 to her, this would reduce his tax liability from $50,000 to $40,000, and she would pay only $2000 in income tax, reducing their overall burden by $8000.

77. *Id.*

their husbands or with a large number of trusts.[78] The history in this area is fraught with colorful attempts by wealthy men to lower their tax liability.[79] In one instance, a man was reported to have set up 197 trusts in his wife's name.[80]

Eventually, married people were treated very differently based on the type of income they reported on their tax return and the state in which they resided. In *Lucas v. Earl,* Mr. and Mrs. Earl attempted to assign one half of Mr. Earl's earned income to Mrs. Earl via private contract.[81] The Supreme Court held, however, that this type of anticipatory arrangement could undermine the system of taxation, and no contract "however skilfully [sic] devised" could be used to lower the tax burdens of individuals.[82] The end result was that couples who earned income-producing property could lessen their tax burden by shifting property from one spouse to another, while those who had earned income were unable to do so, even with a contract that was valid under state law.[83]

A similar dichotomy formed between the treatment of married persons in common law versus community property states.[84] In *Poe v. Seaborn*, the Supreme Court held that it was

78. *Id.* The trust was a particularly crafty way of assigning income, since it helped husbands to avoid the loss of control that would come with fully assigning the income to their wives. McMahon, *supra* note 48, at 726. In contrast, the partnership was only really useful for married persons with businesses. *Id.*

79. McMahon, *supra* note 48, at 725-32 (describing techniques used to lower tax liability).

80. *Id.* at 731. At one point, this issue received such great attention that some of the public started to blame these individuals for the Great Depression. *Id.*

81. Lucas v. Earl, 281 U.S. 111, 113-14 (1930).

82. *Id.* at 115.

83. Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 11-12 (1980). Under *Lucas*, it became "virtually impossible" for the typical wage-earning husband to assign any income. Such assignment was permitted for the unearned income of income-generating property, however, because the "fruit" which came from the "tree" was to be taxed to whomever received the "fruit." Thus, the "tree" could be assigned and the "fruit" taxed to the donee. Bittker, *supra* note 49, at 1401.

84. Marisa Nelson, *The IRS Moves To Income Tax Equality For Same-Sex Couples Despite DOMA*, 45 U.S.F. L. REV. 1145, 1164 (2011).

> Community property, as opposed to separate property,

permissible for married couples residing in community property states to split their income for taxation purposes.[85] *Lucas* and *Poe*, taken together, caused married persons to be treated quite arbitrarily for taxation purposes. Spouses were treated differently not only based on what state they resided in, but on whether or not they reported earned or unearned income.[86] Under *Lucas*, earned income could not be assigned while unearned income could be split to avoid tax liability, and under *Poe*, those in community property states could split their income while those in common law states could not.[87] The issue of income assignment became even more salient in the 1940s, when the maximum marginal tax rates rose to over ninety percent and the temptation to assign income was greater than ever.[88]

Congress eventually passed the Revenue Act of 1948 in order to resolve this dilemma.[89] The Act essentially extended *Poe* to all fifty states, allowing married couples to split their income, without requiring states to adopt the community property system.[90] This helped to immediately provide a sense of national uniformity, creating the same effect as if the states had all adopted community property regimes.[91] Thus, under the Revenue Act of 1948, married couples were permissibly able to split their income as if they were in a community property state or achieved the result that was attempted in

> means that property acquired during a marriage is considered under state law to be owned jointly by both spouses. From the moment one spouse earns a paycheck, that paycheck is community property, and is considered as belonging one-half to the spouse who earned it and one-half to the other spouse.

Id.

85. Poe v. Seaborn, 282 U.S. 101, 117-18 (1930).

86. Gann, *supra* note 83, at 15.

87. *Id.* at 11, 15. Note that when income was split for community property purposes under *Poe*, it was done so regardless of whether the income was earned or unearned. Bittker, *supra* note 49, at 1404-05.

88. Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259, 259 (1988).

89. Gann, *supra* note 83, at 18.

90. *Id.*

91. Bittker, *supra* note 49, at 1412-13.

Lucas v. Earl.[92] The basic premise of income splitting is this: a married couple aggregates all of their income and deductions on a single joint return, and their tax liability is "what a single person would pay on one-half their consolidated taxable income."[93] According to Carolyn Jones, however, "[t]he choice of the income-splitting joint return was neither obvious nor inevitable."[94] For one, it was a very expensive decision, since it offered a vast opportunity for married couples to reduce their overall tax liability.[95] It had the advantage, however, of administrative ease and the supposed advantage of preserving "traditional gender roles and power relationships."[96] This Act provided the framework for the taxation of married persons today.

III. A History of the Joint Bankruptcy Petition

Unlike the joint income tax, the inception of the joint bankruptcy petition was a much less contested matter.[97] Generally speaking, however, bankruptcy law has had a much more contentious history. The bankruptcy clause, which permitted Congress to enact bankruptcy legislation, was added to the Constitution with little debate.[98] Congress was unable to adopt lasting and stable bankruptcy legislation, however, until the year 1898.[99] Prior to the 1898 Act, debate ensued over

92. *See id.* at 1412 (suggesting that had Congress not enacted the Revenue Act of 1948, the result may have well been a universal adoption of community property among the states).

93. *Id.* at 1412-13.

94. Jones, *supra* note 88, at 296.

95. *Id.*

96. *Id.*

97. *See* S. REP. NO. 95-989, at 32 (1978); A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 FORDHAM L. REV. 69, 91 (1998) [hereinafter Dickerson, *Family Values*] (noting the "scant legislative history" regarding the passage of § 302).

98. *See* U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress to "establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States").

99. DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 23 (2001). According to David A. Skeel, Jr., American bankruptcy history can essentially be divided into three main eras. *Id.* at 5.

whether or not to have voluntary bankruptcy, both voluntary and involuntary bankruptcy, or none at all.[100]

Section 302, which codified the joint bankruptcy petition, was not added to the Bankruptcy Code until 1978, when the Code underwent a period of significant revitalization.[101] The late arrival of the joint petition in bankruptcy is due in large part to the effect of the doctrine of coverture on married women.[102] Upon the act of marriage, a husband assumed any debts that his wife may have had, and any that she would incur in the future.[103] Thus, even if a woman operated a business and incurred each dollar of debt on her own, her husband would presumably be the sole debtor, since he owned the business and its assets and was legally responsible for the debts of his wife.[104] Prior to the nineteenth century, this meant not only

The first era ended when Congress adopted stable bankruptcy legislation in 1898. *Id.* at 5. The second era began during the Great Depression and during the advent of the New Deal, when many were calling for reform to the 1898 act. *Id.* at 4-5. Although reforms to the 1898 legislation were not as far-reaching as some would have preferred, the more modest reforms that did take hold solidified and expanded bankruptcy practice in America. *Id.* at 5. Many at this time wanted American bankruptcy law to become more administrative, much like the English system. Had this taken hold, it may have involved the creation of a government agency. *Id.* at 4. Eventually, however, there would be yet another call to reform.

100. SKEEL, *supra* note 99, at 46. The bankruptcy debate was also shaped by geographical region, with Northeastern Republicans in favor of bankruptcy, while Southern and Western Democrats were more hostile to the idea. *Id.* Essentially, the debate placed those with agrarian interests and those who favored states' rights against those who favored a more national economy and viewed bankruptcy as a solution to economic distress. *Id.* at 23. It was not until the rise of commercial organizations and the bankruptcy bar, along with a period of Republican political control, that stable bankruptcy legislation was passed. *Id.* at 46.

101. 11 U.S.C. § 302 (2012); SKEEL, *supra* note 99, at 5.

102. *See supra* notes 33-36 and accompanying text (discussing the role of the doctrine of coverture in America). Although the doctrine of coverture experienced gradual erosion throughout American history, its vestiges lasted into the 1970s. *Id.*

103. Karen Pearlston, *Married Women Bankrupts in the Age of Coverture*, 34 LAW & SOC. INQUIRY 265, 271-72 (2009).

104. *Id.* The question of how to reconcile the doctrine of coverture with married women and property stretches back to medieval times. *Id.* at 270. During the medieval era, an exception to the doctrine of coverture was created for the feme sole trader, a married woman who operated a business and was treated in certain respects as a single woman. *Id.* In order to be bankrupt at the time, one had to be a trader and debtor. *Id.* at 271-72. Thus,

that wives' property would be held by their husbands in fee simple upon marriage, but that property originally theirs prior to the marriage could be seized by creditors in order to satisfy the debts of their husbands.[105] Tenancy by the entirety laws, however, functioned to protect household assets.[106] Such laws were designed to help shield the household assets from seizure, and to decrease the likelihood that a husband would drive his family into poverty by incurring significant amounts of debt.[107] The nature of entirety property helped to protect women's interests as well, since the husband could not "alienate or encumber it unilaterally."[108]

Eventually, the Married Women's Property Acts would give American women more control over their personal property.[109] Although conventional storytelling dictates that such acts ended barriers that blocked women's ownership of property and began to recognize the right to equality, the reality is that the earliest acts had more to do with bankruptcy than the liberation of women.[110] At times, Married Women's

a legal question arose as to how to treat the feme sole trader, who was a married woman covered by the doctrine of coverture, yet for all relevant purposes was also trader and debtor. *Id.* Although this problem illustrates a legal predicament that took place prior to the founding of America, it serves as an ideal illustration of the legal problems caused by the confluence of the doctrine of coverture, married women, and debts that only they incurred.

105. Joan C. Williams, *Married Women and Property*, 1 VA. J. SOC. POL'Y & L. 383, 385 (1994). *See also* Marie T. Reilly, *In Good Times and in Debt: The Evolution of Marital Agency and the Meaning of Marriage,* 87 NEB. L. REV. 373, 376 (2008) ("Without legal capacity or property of their own, married women were hardly worth creditors' attention").

106. Benjamin C. Ackerly, *Tenants by the Entirety Property and the Bankruptcy Reform Act*, 21 WM. & MARY L. REV. 701, 702 (1980). Tenancy by the entirety is a form of "concurrent ownership" in which the four unities of a joint tenancy ("time, title, interest, and possession") plus marriage must occur. *Id.* Characteristics of tenancy by the entirety property include the inability of such property to be subject to judicial partition, the inability of one spouse to dispose of entirety property without the consent of the other spouse, the inability of one spouse to subject entirety property to liability for payment of debt, and the right of survivorship. *Id.* at 702-03.

107. A. Mechele Dickerson, *To Love, Honor, and (Oh!) Pay: Should Spouses Be Forced to Pay Each Other's Debts?* 78 B.U. L. REV. 961, 972 (1998) [hereinafter Dickerson, *Love, Honor, and (Oh!) Pay*].

108. Reilly, *supra* note 105, at 379.

109. Williams, *supra* note 105, at 389.

110. *Id.*

Property Acts were passed concurrently with other debt relief statutes, and had more to do with shielding property from creditors than they did with equality.[111] In the first half of the nineteenth century, the passage of these acts also coincided with economic distress.[112] In the post-civil war period, women were given some control over wages in these acts, although it meant little to most women who did not work outside the home.[113] There were also notable caveats in some of these laws, such as giving the married woman the right to retain title to her property, but not to exercise control or dominion over it.[114]

Under the 1898 bankruptcy act, if only one spouse entered bankruptcy, entirety property could be shielded from the proceeding provided that state recognized entirety property as exempt when one spouse filed.[115] Interestingly enough, if both spouses were to file for bankruptcy, the proceedings would be consolidated and three estates were created—the husband's, the wife's, and the joint estate consisting of aggregate entirety property.[116] This result was influenced by the fact that entirety property is premised on the legal fiction that the husband and wife merge upon being wed.[117] Most women, however, were not able to so file well into the beginning of the twentieth century, because common law and/or state law prevented them from

111. *Id.*

112. Reilly, *supra* note 105, at 381.

113. *Id.* at 383. Note, however, that women were not given the right to control their own wages in the state of Georgia until 1943. Williams, *supra* note 105, at 389.

114. Reilly, *supra* note 105, at 383-84. The issue of control in entirety estates posed interesting legal questions in community property jurisdictions. *Id.* at 389. It seemed, at first, that either husband or wife would be able to incur a debt individually or "as an agent for the marital community." *Id.* Initially, the husband was given full control and dominion over community property. By the beginning of the twentieth century, however, the husband's right to unilaterally control such property was, for the most part, greatly restricted. *Id.* Once this happened, it appeared that community property was owned by not one, but two. *Id.* at 391.

115. Ackerly, *supra* note 106, at 705.

116. *Id.* at 705-06.

117. *Id.* at 702; Dickerson, *Love, Honor, and (Oh!) Pay*, *supra* note 107, at 971. In order for a creditor to reach entirety property, for instance, a judgment would have to be obtained against both the bankrupt and the bankrupt's spouse. Ackerly, *supra* note 106, at 706.

owning their own property or incurring debts.[118] Married women, however, were considered "persons" under the Bankruptcy Code, as evidenced by an addition in 1938, which specified that women were "persons" eligible to file for bankruptcy.[119]

In 1978, § 302 was added to the Bankruptcy Code, which codified the joint bankruptcy petition.[120] Section 302 was added as part of a larger overhaul of the Code, which occurred in large part due to a skyrocketing number of bankruptcies that most suspected coincided with the rise of consumer credit.[121] The language of § 302(a) is simple, providing that a debtor may file a single petition with his or her "spouse."[122] Section 302(b) adds merely that the court will decide the extent of consolidation in a joint case.[123] The legislative history is also quite sparse, but indicates that the joint bankruptcy petition was codified due to the fact that spouses are presumed to be "jointly liable on their debts" and to "jointly hold most of their property" in the "consumer debtor context."[124] It was also intended that the joint petition would "facilitate consolidation," and also to promote administrative efficiency by having a single proceeding and a single fee.[125] In addition, the legislative history specifically emphasizes that the consent of both spouses

118. *In re* Knobel, 167 B.R. 436, 439 (Bankr. W.D. Tex. 1994).
119. *Id.* at 439 & n.6.
120. *See* 11 U.S.C. § 302 (2012); S. REP. NO. 95-989, at 32 (1978).
121. SKEEL, *supra* note 99, at 136.
122. 11 U.S.C. § 302(a).

> A joint case under a chapter of this title is commenced by filing with the bankruptcy court of a single petition under such chapter by an individual that may be a debtor under such chapter and such individual's spouse. The commencement of a joint case under a chapter of this title constitutes an order for relief under such chapter.

Id.

123. *Id.* at § 302(b) "After the commencement of a joint case, the court shall determine the extent, if any, to which the debtor's estates shall be consolidated." *Id.*
124. S. REP. NO. 95-989, at 32 (1978).
125. *Id.*

is necessary to file a joint bankruptcy petition.[126] Section 302(b) is designed specifically for "ease of administration," and permits the court to consolidate the estates of the two petitioning debtors.[127] The decision to consolidate is based on how many of the debts are jointly incurred, how many assets are jointly owned, and potentially other factors as a court may deem necessary.[128] Ultimately, the inclusion of joint cases in the Bankruptcy Code was an administrative decision to alleviate the burden placed both debtors and the courts.[129]

In one sense, § 302 was a hallmark of progress, a signal that women had a separate legal identity and that the vestiges of coverture which kept women from owning their own property were losing their grip.[130] According to the court in *In re Knobel*, the "[p]rovision for joint filings under the Bankruptcy Code acknowledges the changed times."[131] The court was quick to point out that despite the presence of joint filing, a joint petition is filed by two individuals, not one.[132] The court regarded this as significant because it recognized the legal identity of both husband and wife, and did not "return us to days past."[133] Section 302 is certainly not without its critics, however. According to Robert B. Chapman, bankruptcy courts are very quick to aggregate the income and expenses of married couples filing jointly, and they routinely consolidate without due regard to precedent and economic criteria.[134] In

126. *Id.*

127. *Id.*

128. *Id.*

129. Dickerson, *Love, Honor, and (Oh!) Pay*, *supra* note 107, at 975-76; Dickerson, *Family Values*, *supra* note 97, at 90-91 ("Congress awards this right to facilitate case administration, not to promote marriage or to encourage spouses to support each other.").

130. *In re* Knobel, 167 B.R. 436, 439-40 (Bankr. W.D. Tex. 1994).

131. *Id.* at 440.

132. *Id.*

133. *Id.* Note that the court here is likely making reference to the effects of the doctrine of coverture and not the Bankruptcy Code itself, since it was *possible* for both spouses to file, but other state laws regarding property and the doctrine of coverture usually prevented it or made it unnecessary. This point is underscored by the fact that in 1938, women were specifically enumerated as individuals who could file for bankruptcy under the Bankruptcy Code. *See supra* notes 118-19 and accompanying text.

134. Robert B. Chapman, *Coverture and Cooperation: The Firm, the Market, and the Substantive Consolidation of Married Debtors*, 17 BANKR.

doing so, he argues, the bankruptcy courts are once again treating husband and wife as a single economic and legal unit that is reminiscent of the nineteenth century.[135]

Perhaps the greatest criticism of joint filing, however, is that it permits spouses to file jointly to the exclusion of those who are not spouses. Although the Bankruptcy Code does not define who constitutes a spouse, reference is made to "husband" and "wife" in both the legislative history of § 302 and within the Federal Rules of Bankruptcy Procedure in reference to consolidation.[136] Following the recent Supreme Court decision in *United States v. Windsor*, which held § 3 of the Defense of Marriage Act ("DOMA") unconstitutional, the United States Trustees Program adopted the position that such terms will be interpreted to apply to same-sex married couples as well.[137] Nonetheless, it is not difficult to see why the sole

DEV. J. 105, 219 (2000).

135. *Id.*

136. *See* 11 U.S.C. § 302 (2012). Section 302 permits "spouses" to file joint bankruptcy petitions. *Id.* The words "husband" and "wife" are notably absent from this section. *See also* FED. R. BANKR. P. 1015(a) (permitting courts to consolidate the estates of "husband and wife."); S. REP. NO. 95-989, at 32 (1978). For a more complete discussion of consolidation, *see infra* notes 221-30 and accompanying text.

137. 133 S. Ct. at 2696; *Consumer Information*, The United States Dep't of Justice, http://www.justice.gov/ust/eo/public_affairs/consumer_info/ (last visited April 14, 2014). Section 3 of DOMA, which was held unconstitutional in *Windsor*, amended the Dictionary Act to provide that marriage was between one man and one woman for federal purposes. *Windsor*, 133 S.Ct. at 2683. Section 2 of DOMA, which permitted the states to refuse to recognize same-sex marriages that had been performed in other states, was not challenged. *Id.* Following this decision, the Attorney General issued a memorandum to all employees in the Department of Justice in which he stated that, "It is the Department's policy, to the extent federal law permits, to recognize lawful same-sex marriages as broadly as possible, and to recognize all marriages valid in the jurisdiction where the marriage was celebrated." Memorandum from the Office of the Attorney General to All Department Employees (Feb. 10, 2014), *available at* http://www.justice.gov/iso/opa/resources/920142101425731425 5.pdf. The Department of Justice was instructed by President Obama to work with other federal agencies in order to ensure compliance with the *Windsor* decision. *Id.* Following extensive review, components of the Department of Justice issued guidance regarding compliance with *Windsor*. *Id.* Among these were the United States Trustee Program, which instructed personnel "to apply the Bankruptcy Code and Bankruptcy Rules to same-sex married couples in the same manner as they are applied to opposite-sex married couples, and to interpret references to marital status in the Code and Rules to cover

criteria for joint filing in § 302 – being a spouse – seems irrelevant in light of the objectives of the Bankruptcy Code. Bankruptcy in itself is said to have two goals: to give debtors who file for bankruptcy a "fresh start" and to insure maximum debt repayment to a debtor's creditors.[138] The joint petition, in contrast, is supposed to relieve the burden on both debtors and the courts by streamlining the process for those who (supposedly) have a significant number of joint assets.[139]

IV. The Benefits (or lack thereof) of Filing as One

A. *The Implications of Filing a Joint Income Tax Return*

Under our current tax regime, marriage can be either a blessing or a burden. This is largely due to a dichotomy in which some couples receive what is known as a marriage bonus or a marriage penalty upon marriage.[140] Essentially, couples receive a marriage bonus when their overall income tax liability is lower following their marriage than the sum of what they would have paid in taxes if they were both unmarried.[141] A penalty results when a married couples' tax liability increases as the result of marriage.[142] This difference in the tax liability of married couples cannot be attributed to one specific Internal Revenue Code provision, but rather results from the intersection of different provisions of the Code, which act to create a marriage incentive for some but not for others.[143]

individuals lawfully married under any jurisdiction with the legal authority to sanction marriages." *Id.*

138. Dickerson, *Love, Honor, and (Oh!) Pay*, *supra* note 107, at 965-66 (also noting that the promotion of marriage is not surprising in light of the promotion of marriage in other areas, including tax policy).

139. *Id.* at 975-76; Dickerson, *Family Values*, *supra* note 97, at 90-91.

140. Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, *in* TAXING AMERICA 45 (Karen B. Brown & Mary Louise Fellows, eds. 1996).

141. *Id.*

142. *Id.*

143. Amy C. Christian, *Legislative Approaches to Marriage Penalty Relief: The Unintended Effects of Change on the Married Couple's Choice of Filing Status*, 16 N.Y.L. SCH. J. HUM. RTS. 303, 303-04 (1999) [hereinafter Christian, *Legislative Approaches*].

The marriage penalty or the marriage bonus occurs when a couple marries and must pay income tax for the first time since their marriage. Although the American income tax system is often described as treating the individual as the unit of taxation, the scheme set forth by Congress evidences an intent to treat the family as the taxable unit.[144] Thus, once a couple is married, the legal fiction of the marital unit takes effect for purposes of income taxation, and treats married couples as if they have pooled their income regardless of whether or not they actually have.[145] Under the regime set forth by Congress in 1948, this means that when a married couple files jointly, their incomes are to be aggregated and split, which results in a tax liability that is the same as if each spouse had earned half of the aggregated income.[146] This essentially shifts income from the higher earning to the lower earning spouse.[147]

Depending on the relative income of the married couple who files jointly, income splitting will contribute significantly to producing either a marriage penalty or a marriage bonus. Those who receive the greatest advantage in this regime are couples with the greatest disparity in their relative income, including marriages in which one partner earns no income at all.[148] When spouses' relative incomes differ greatly, the aggregation and subsequent splitting of their incomes prior to the application of joint income tax rates may push the higher-earning spouse into a lower income tax bracket, which may reduce overall tax liability.[149] Thus, the tax benefits of joint

144. Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 611 (2010).

145. Lily Kahng, *Fiction in Tax*, *in* TAXING AMERICA 28 (Karen B. Brown & Mary Louise Fellows eds., 1996).

146. Bittker, *supra* note 49, at 1412-13.

147. Christian, *Legislative Approaches*, *supra* note 143, at 303-04.

148. Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U.L. REV. 721, 749 (2012). There is also evidence to suggest that, generally speaking, the burden of the marriage penalty is more likely to fall upon a minority household than it is for a nonminority household. For more on this subject, *see* Brown, *supra* note 140, at 45-57 (describing how the marriage penalty affects black versus white families).

149. Amy C. Christian, *Joint Versus Separate Filing: Joint Return Tax Rates and Federal Complicity in Directing Economic Resources From Women to Men*, 6 S. CAL. REV. L. & WOMEN'S STUD. 443, 448 (1997) [hereinafter

filing are the greatest when one spouse earns significantly more than the other, allowing a larger portion of income to be shifted.[150] Dual-earner couples who are both within similar income brackets, in contrast, are at risk of either receiving little to no benefit or experiencing a marriage penalty.[151] As the relative incomes of spouses grow closer or approach being equal, there is less of an incentive to file jointly.[152] Married couples that have near-equal incomes are likely to see little benefit when their incomes are aggregated and split, since it far less likely that the income of the higher-earning spouse would fall into a lower tax bracket following this process.[153] Spouses who earn equal incomes will see no benefit from the income splitting regime.[154] Married taxpayers have never been required to file joint returns, and married couples do have the option to file separately.[155] This does not always cure the marriage penalty, however, because married persons filing separately must use a certain rate schedule that likewise has unfavorable tax rates.[156] In addition, married persons are ineligible to file as a head of household on their income tax, which caused marriage penalties for dual-earner spouses with

Christian, *Complicity*].

150. *Id.* at 447.

151. Widiss, *supra* note 148, at 749. As a simple example, imagine that *Husband X* earns $100,000 per year and *Wife X* earns no income. Fictitiously assuming that there are no other deductions or exemptions, the couple will be taxed as if they each earned $50,000. Under the same circumstances, if *Husband Y* earns $60,000 and *Wife Y* earns $40,000, they will also be taxed as if they each earned $50,000. This scenario, however, presumably puts *Husband X* into a much lower tax bracket than *Husband Y*, and reduces *Couple X's* overall tax liability. Yet, if *Husband Z* and *Wife Z* each earned $50,000, neither of them would experience a decrease in tax rate as the result of their split income, and certainly no tax benefit.

152. Christian, *Legislative Approaches*, *supra* note 143, at 308-09.

153. Christian, *Complicity*, *supra* note 149, at 447.

154. *Id.*

155. Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Material Unit the American Income Tax*, 11 THEORETICAL INQ. L. 631, 645 (2010).

156. James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409, 1415-16 (2010). *Compare* 26 U.S.C. § 1(a) (2012) (rates for married individuals filing joint returns and surviving spouses), *with* 26 U.S.C. § 1(d) (rates for married individuals filing joint returns).

a child as early as 1951.[157]

A marriage penalty can also be caused by other provisions of the Code, however, such as the Earned Income Tax Credit ("EITC"). The EITC is available to each taxpayer whether or not they file individual or jointly.[158] The phase-out amounts for a joint income tax return, however, are only slightly higher than the amount given to a single filer.[159] Thus, if a single parent begins a relationship with a new partner, and they receive little to no benefit from having their incomes aggregated and split, there is a good chance that it will be financially advantageous for them to not marry.[160] This particular source of the marriage penalty falls disproportionately on the working classes, for whom the EITC was enacted to benefit.[161]

Criticisms of the current joint filing tax regime are vast and well-documented. Section 6013(a) of the Internal Revenue Code specifies that it is only a husband and wife who may file a joint return, though such language applies to same-sex married couples as well.[162] Income tax scholars have noted that our

157. Puckett, *supra* note 156, at 1415. *See also* 26 U.S.C. § 1(b) (tax rates for head of household); 26 U.S.C. § 2(b) (requirements for head of household status, among them being unmarried and maintaining a household as a principal place of abode for more than half of the taxable year for a qualifying individual, which includes a parent or a child). *See also* Boyter v. Comm'r, 668 F.2d 1382, 1383-84 (4th Cir. 1981) (holding that sham transaction doctrine may be applicable to married taxpayers who divorced in order to avoid marriage penalty).

158. Christian, *Legislative Approaches*, *supra* note 143, at 314-15.

159. Pamela Gershuny, *The Combined Impact of PRWORA, FMLA, IRC, FRD, DPPA, and BAPCPA on Single Mothers and Their Children*, 18 WM. & MARY J. WOMEN & L. 475, 503 & n.188 (2012); 26 U.S.C. § 32(b)(2)(A), (B) (earned income tax credit).

160. Gershuny, *supra* note 159, at 503.

161. Frederick J. Bradshaw, IV, *The Earned Income Tax Credit and the Marriage Penalty: New Proposals in Light of the Economic Growth and Tax Relief Reconciliation Act of 2001*, 54 TAX LAW. 701, 709 (2001). The EITC was originally enacted in 1975 in order to offset the burden on the working class for paying the Medicare and Social Security payroll taxes. Since the credit is based on earned income, it was viewed as an incentive to work at a time when welfare reform was becoming a concern. Congress paid special attention, however, to providing aid to those working families with dependent children. *Id.*

162. *See* 26 U.S.C. § 6013(a). Note that for purposes of this discussion, references to "husband" and "wife" are applicable to same-sex couples. The

current system, which fictitiously treats a married couple as a unit for purposes of taxation, exacerbates the marginalization of women in the workforce.[163] Women are more likely than men to be secondary earners, and the splitting of aggregated income causes "the first dollar earned by a secondary worker" to be viewed as effectively taxed "at the marginal rate of the primary worker."[164] Essentially, this psychological effect results from the fact that when incomes are aggregated and split, the tax liability of the higher-income spouse is likely to be reduced while for the lower-income spouse, the tax liability is likely to be increased.[165] Indeed, when income splitting took effect in 1948, it was considered attractive in part because it would reinforce traditional gender roles.[166] Income splitting allowed for the allocation of tax benefits between husband and wife without compromising the wife's supposed duties to her household with the concerns of business.[167]

Income splitting also perpetuates traditional gender roles by virtue of the manner in which benefits are allocated. As mentioned earlier, wives are more likely to be secondary earners within their marriages.[168] When a wife is the primary earner in a marriage, however, there is typically less of a difference in relative income than when the husband is the primary earner.[169] Thus, when a wife is the primary earner in their dual-earner marriage, the wife is less likely to receive

IRS recently held that due to the *Windsor* decision and some additional considerations, it would now be interpreting gender-specific terms such as "husband" or "wife" in a gender-neutral manner that would include same-sex spouses. I.R.S. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. The IRS has also held that it will recognize all legally performed same-sex marriages regardless of whether or not a same-sex couple who was legally married is domiciled in a state that recognizes same-sex marriage. I.R.S. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. Even in certain instances, however, being married may not be enough. Note, for example, that if one partner is a nonresident alien, husband and wife will not be permitted to file jointly. 26 U.S.C. § 6013(a)(1).

163. Kahng, *supra* note 145, at 38-39.

164. *Id.* at 39.

165. Christian, *Complicity*, *supra* note 149, at 448.

166. Jones, *supra* note 88, at 296.

167. *Id.*

168. Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109, 131-32 (2011).

169. *Id.*

significant benefits from income splitting than if their husband was the primary earner.[170] In addition, income splitting causes a systemic bias in which tax liability is reduced the most when one spouse, often the husband, earns much more.[171]

By becoming a single taxpaying unit, spouses also consent to be jointly and severally liable for each other's tax liability upon the filing of a joint income tax.[172] Several arguments have been advanced in favor of joint and several liability, including that it is a "price" paid for the benefits of a joint tax return.[173] It has also been thought of as administrative necessity, and as a mechanism for preventing the unjust enrichment of a non-delinquent spouse whose partner has understated his or her taxes.[174] It has the potential, however, to shift liability to a non-earning spouse.[175] Married couples with the greatest disparity in their relative income are those with the greatest incentive to file jointly, and those who file jointly will be subjected to joint and several liability in the event of delinquency.[176] Joint and several liability is significantly less fair when the spouses incomes differ greatly, since delinquency on the part of the higher-earning spouse, who is more likely to be the husband, will result in liability being placed on the lower-earning spouse, who is more likely to be the wife.[177] According to Amy Christian, this places a wife in a more fragile position, since in the event of delinquency, she will be less able to absorb the cost.[178] Not surprisingly, evidence exists that deficiencies are collected more from wives with delinquent husbands than husbands with delinquent wives.[179]

170. *Id.*
171. Christian, *Legislative Approaches*, *supra* note 143, at 313.
172. Amy C. Christian, *Joint and Several Liability and the Joint Return: Its Implications for Women*, 66 U. CIN. L. REV. 535, 540-50 (1998) [hereinafter Christian, *Joint and Several Liability*].
173. *Id.* at 545.
174. *Id.* at 545-46.
175. *Id.*
176. *Id.* at 605.
177. *Id.*
178. Christian, *Joint and Several Liability*, *supra* note 172, at 605.
179. *Id.* at 536.

B. *The Implications of Filing a Joint Bankruptcy Petition*

The typical consumer bankruptcy today is filed as a Chapter 7 liquidation or a Chapter 13 repayment.[180] In a Chapter 7 case, a debtor receives a discharge of his or her debts in exchange for turning over all non-exempt assets for sale.[181] The discharge takes place after the petition has filed and the time to object to discharge has passed.[182] In contrast, a debtor in a Chapter 13 repayment enters into a three or five year plan in which the debtor agrees to payments that will satisfy priority claims and compensate creditors for the amounts that they would have otherwise been able to receive in a Chapter 7 liquidation.[183] The discharge in a Chapter 13 case, however, does not take place until the completion of the plan.[184] One of the purposes of the 1978 revisions was to encourage debtors to choose a Chapter 13 repayment instead of a Chapter 7 liquidation in order to provide compensation to creditors.[185] Perhaps the most attractive aspect of a Chapter 13 repayment is that a debtor gets to retain his or her property and assets.[186]

180. *See* AM. BANKR. INST., *Annual Non-Business Filings by Chapter (07-11), available at* http://www.abiworld.org/AM/AMTemplate.cfm?Section=Home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=65197 (This table depicts the number of non-business filings in each state and territory for the years 2007 to 2011 for Chapters 7, 11, and 13. Notice that the number of Chapter 7 and Chapter 13 filings are significantly greater than those filed under Chapter 11). It is important to keep in mind, however, that it can be difficult to determine when bankruptcies are "strictly business" or "strictly consumer" since "consumers" may actually be discharging business debts, especially if they own small businesses. Robert M. Lawless, *A Few Recent Developments in the Bankruptcies of Small Businesses and Their Owners*, 29 No. 1 BANKR. L. LETTER 1 (2009).

181. Susan L. DeJarnatt, *Once Is Not Enough: Preserving Consumers' Rights to Bankruptcy Protection*, 74 IND. L.J. 455, 459 (1999).

182. Robert J. Bein, *Subjectivity, Good Faith, and the Expanded Chapter 13 Discharge*, 70 MO. L. REV. 655, 659 (2005) (citing 11 U.S.C. § 707(a) (2012)).

183. DeJarnatt, *supra* note 181, at 459.

184. Bein, *supra* note 182, at 659 (citing 11 U.S.C. § 1329(a)).

185. DeJarnatt, *supra* note 181, at 458-59.

186. James Winston Kim, *Saving Our Future: Why Voluntary Contributions to Retirement Accounts are Reasonable Expenses*, 26 EMORY BANKR. DEV. J. 341, 351 (2010) (discussing Chapter 13) (citing 11 U.S.C. § 1322). For information on how Chapter 13 bankruptcies affect home

Non-business debtors are permitted to file a Chapter 11 reorganization,[187] but to do so is much more expensive.[188] They may have to file in Chapter 11, however, if the debts incurred exceed the limits set forth under Chapter 13.[189]

In 2005, a series of amendments to the Bankruptcy Code were enacted under the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA").[190] Under the BAPCPA, a case may be dismissed or converted with the consent of the debtor into a Chapter 11 or Chapter 13 case if found to be "an abuse of the provisions of this chapter."[191] A presumption of abuse is found whenever the debtor cannot pass the rigid and formulaic means test in § 707(b)(2).[192] The means test is long and convoluted, but essentially requires that the above-median income debtor reduce certain allowed expenses by his or her monthly income in order to see how much "disposable income" remains.[193] The below median-income debtor does not suffer from this presumption of abuse and does not have to be subjected to the means test.[194] Regardless of whether or not

mortgage foreclosures, *see generally* Susan E. Hauser, *Cutting the Gordian Knot: The Case for Allowing Modification of Home Mortgages in Bankruptcy*, 5 J. BUS. & TECH. L. 207 (2010).

187. Toibb v. Radloff, 501 U.S. 157, 165-66 (1991) (holding that an individual debtor is not precluded from filing under Chapter 11).

188. Bruce A. Markell, *The Sub Rosa Subchapter: Individual Debtors in Chapter 11 After BAPCPA*, 2007 U. ILL. L. REV. 67, 79 (2007).

189. *Id.*; 11 U.S.C. § 109(e) (2012) (setting forth applicable debt limitations).

190. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

191. 11 U.S.C. §707(b)(1) (2012).

192. § 707(b)(2); Mark A. Neal & Sandra Mannochio, *Means Testing: The Heart of the BAPCPA*, 40 MD. B. J. 26, 27 (2007). Although the formula set forth in § 707(b)(2) is quite mechanical, there is some indication that the formula may be relaxing. In *Hamilton*, for example, the Supreme Court held that the petitioner, who had received a "one-time buyout" from a former employer, did not have to include this amount when calculating her "projected disposable income" under the means-testing analysis. Hamilton v. Lanning, 560 U.S. 505, 511, 524 (2010). Had this amount been included, it would have caused the amount of her average monthly income to artificially inflate despite meeting the mechanical requirements of the formula. *Id.* at 511-12.

193. Neal & Mannochio, *supra* note 192, at 27.

194. David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 307 (2007).

debtors are above or below median income status, all are subjected to the definition of "current monthly income" found in § 101(10A) when determining disposable income, which defines monthly income as income from nearly any source to the debtor or the debtor's spouse.[195]

Despite any additional hardships placed on above-median income couples under the BAPCPA, couples will generally benefit from jointly petitioning for bankruptcy if they so choose. Although there are many advantages to filing jointly, it is unlikely that one jointly filing couple would be able to benefit from all of the possible advantages.[196] There are some advantages, however, that all couples should be able to benefit from. For one, jointly filing spouses only need to pay one single filing fee.[197] In addition, the joint petition helps spouses save on the more significant cost of having to pay additional legal fees.[198] Any ability to save money during the bankruptcy process is of great benefit to debtors who have limited income to spend on the costs associated with bankruptcy.[199] These savings are particularly significant in recent years, since the cost of filing for bankruptcy has skyrocketed upwards, largely in part to the additional costs associated with the BAPCPA.[200] The BAPCPA imposed additional requirements on those filing for bankruptcy, which has made the process of filing for bankruptcy more involved, and the fees associated with it more expensive.[201] In addition, the joint bankruptcy petition has the

195. 11 U.S.C. § 101(10A) (2012); Carlson, *supra* note 194, at 301. For more information on the means testing analysis, *see infra* notes 331-32 and accompanying text.

196. Dickerson, *Family Values*, *supra* note 97, at 89-90.

197. Chapman, *supra* note 134, at 136. Currently, the filing fee for a Chapter 7 liquidation is $306.00 while the cost of a Chapter 13 repayment is $281.00. These costs are the same whether or not one files an individual or joint case with the court. *See* Filing Fees List, U.S. BANKR. COURT: S.D.N.Y, http://www.nysb.uscourts.gov/sites/default/files/pdf/filingFees2012.pdf (last modified Nov. 21, 2012) (pursuant to 28 U.S.C. § 1930 (2012)).

198. Dickerson, *Love, Honor, and (Oh!) Pay*, *supra* note 107, at 975-76.

199. Dickerson, *Family Values*, *supra* note 97, at 91.

200. *See* Blake Ellis, *Too Broke to Go Bankrupt*, CNN MONEY (May 7, 2012, 6:55 AM), http://money.cnn.com/2012/05/07/pf/bankruptcy-costs/index.htm.

201. *Id. See also* Christine Dugas, *Tax Refunds Being Used to Pay for Bankruptcy Filings*, USA TODAY,

advantage of convenience for a married couple. If one spouse is capable of providing all relevant financial information to the court, the court will often excuse the other spouse from attending proceedings.[202] This provides an additional financial benefit to joint debtors since it translates into less time lost from work.[203]

For married couples who opt to file jointly and meet eligibility requirements, filing a joint bankruptcy petition is a right.[204] No other relationship, except for marriage, gives rise to the right to file a joint bankruptcy petition.[205] For a Chapter 13 case, only one spouse needs to be eligible under § 109(e), which states that an individual have "regular income" and provides for the maximum debt ceiling.[206] Even if spouses do not elect to file a joint petition, however, and only one spouse files for bankruptcy, there are still additional benefits. For one, the debts of one spouse are not imputed to the other, which means that one spouse can file bankruptcy for incurred debts and the other non-filing spouse does not have any liability for the debt and can even be protected from debt collection activities.[207] A bankrupt spouse may also deduct reasonable amounts necessary to support their non-bankrupt spouse when calculating their allowable exemption amount under § 522(d)(1).[208] Section 522(d)(1) allows a debtor to deduct amounts necessary to support dependents, and according to § 522(a), a "dependent" includes a spouse, "whether or not actually dependent."[209]

http://usatoday30.usatoday.com/money/perfi/taxes/story/2012-04-12/tax-refund-filing-for-bankruptcy/54227664/1 (last updated Apr. 13, 2012). The average cost of filing for bankruptcy jumped from $921 in 2005 to $1477 in 2007. *Id.* Evidence exists that individuals are using their tax refunds to help pay for this cost. *Id.* The irony, of course, is that the BAPCPA was originally enacted in order to curb alleged abuse of the bankruptcy system, but it raised the cost of filing for bankruptcy significantly, making it so those with more wealth could most afford it. *Id.*

202. Dickerson, *Family Values*, supra note 97, at 91.

203. *Id.*

204. *Id.* at 90.

205. Chapman, *supra* note 134, at 137.

206. 11 U.S.C. § 109(e) (2012); Chapman, *supra* note 134, at 135-36.

207. Dickerson, *Love, Honor, and (Oh!) Pay*, *supra* note 107, at 963-64.

208. 11 U.S.C. § 522(d)(1) (2012).

209. § 522(a), (d)(1).

Married debtors may also have additional advantages if they live in a state that still recognizes tenancy by the entireties. Although entirety laws have existed in forty states, some states have opted to do away with entirety laws or else restrict them in some way, such as by requiring the expression of intent to form a tenancy by the entirety as opposed to having such an estate form automatically.[210] Entirety laws were once enacted for shielding the family assets from squandering husbands when coverture was still a strong doctrine.[211] Even today, however, with the doctrine of coverture significantly eroded, entirety laws can prove a strong force for keeping assets intact. Section 522(b)(1)(B) recognizes entirety property as exempt as to the extent of non-bankruptcy law.[212] In a majority of states that recognize entirety property, for instance, a creditor must have a claim against both spouses in order to seize entirety assets.[213] Furthermore, in order to seize non-exempt entirety property (such as a home) and sell it without the consent of a co-owner and non-debtor spouse, the trustee must show that: "(1) the property cannot be easily partitioned; (2) selling only the estate's interest would yield significantly less than selling the property free of the non-debtor spouse's interest; and (3) the benefit (to the debtor's bankruptcy estate) of selling the home outweighs the harm to the non-debtor spouse."[214] Trustees are often not able to seize and sell a home due to the third requirement, since it will certainly cause significant detriment to take the home of a co-owning non-debtor spouse, especially if the spouse does not work and is a

210. Dickerson, *Family Values, supra* note 97, at 94 n.138.

211. *See supra* notes 102-08 and accompanying text.

212. 11 U.S.C. § 522(b)(1)(B) (also recognizing property held in joint tenancy as potentially exempt as well).

213. Dickerson, *Family Values*, *supra* note 97, at 95.

214. *Id.* at 96. *See also* 11 U.S.C. § 363 (it is also required that the property is not "used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power"). Section 363 requires going through these steps for any property interest with a co-owner, but the literature in this area largely focuses on the effect of § 363 upon entirety property. *See* Dickerson, *Family Values*, *supra* note 97, at 96; Dickerson, *Love, Honor, and (Oh!) Pay*, *supra* note 107, at 980-82; Tiffany R. Harper, *Gelding the Lily: How the Bankruptcy Code's Promotion of Marriage Leaves It Impotent*, 28 EMORY BANKR. DEV. J. 31, 36-37 (2011).

homemaker.[215]

Although for the most part joint bankruptcy petitions are treated similarly to individual petitions, they are treated differently for purposes of joint administration and consolidation.[216] Rule 1015(b) of the Federal Rules of Bankruptcy Procedure authorizes the court to order a joint administration of the estates when a husband and wife file for bankruptcy.[217] Joint administration is a "procedural tool" which permits the court to consolidate by combining notices to creditors, using a single docket, or the "joint handling of other purely administrative matters" in cases where the interested parties significantly overlap.[218] Interestingly enough, the tool of joint administration is not limited to cases of husband and wife, but may also be used in partnerships or affiliated corporations.[219] When used in cases of husband and wife, however, joint administration requires that spouses elect the same exemptions within a reasonable time set by the court, or else the court will deem the spouses to have elected the same exemptions under § 522(b)(1).[220]

In addition, filing jointly allows for the facilitation of consolidation of estates where spouses have jointly incurred their debts and property.[221] Consolidation does not happen automatically, but rather is facilitated by § 302(b).[222] Once a married couple files a joint petition with the bankruptcy court, under § 302(b), "the court shall determine the extent, if any, to which the debtors' estates shall be consolidated."[223] Consolidation is "an extraordinary form of [bankruptcy] relief that generally eliminates debtors' otherwise separate identities

215. Dickerson, *Family Values*, *supra* note 97, at 96.

216. 11 U.S.C. § 302(b); FED. R. BANKR. P. 1015(b); Chapman, *supra* note 134, at 141 (noting that for the most part, joint cases are treated much the same as individual cases).

217. FED. R. BANKR. P. 1015(b). Such references to "husband" and "wife" apply to same-sex married couples as well. *See supra* note 137.

218. Chapman, *supra* note 134, at 140-41 (internal quotation marks omitted).

219. FED. R. BANKR. P. 1015(e).

220. 11 U.S.C. § 522(b); FED. R. BANKR. P. 1015(e).

221. Chapman, *supra* note 134, at 137-38.

222. 11 U.S.C. § 302(b) (2012); Chapman, *supra* note 134, at 137-38.

223. 11 U.S.C. § 302(b).

for purposes of their bankruptcies and permits recovery of debts from enterprises rather than entities."[224] Consolidation is a form of relief that was originally used in the corporate bankruptcy context, and can be thought of as akin to piercing the corporate veil.[225] Thus, although consolidation is extremely important when considering the joint bankruptcy petition, it is not limited only to the joint bankruptcy context.[226]

Consolidation can be a drastic remedy depending on the assets and liabilities of each spouse involved. Not all spouses who file a joint bankruptcy petition will have incurred debts in equal proportions, and may have different ratios of assets to liabilities.[227] For example, a husband may be determined to be unable to pay back his debts following consolidation, due to his debt becoming pooled with his wife's liabilities.[228] Assets also become essentially redistributed between the partners following consolidation, and it has the potential to deprive each spouse of enforceable interests held in individually titled assets such as earnings.[229] Although the determination to consolidate is a matter of the court's discretion and the Bankruptcy Code facilitates consolidation as opposed to mandating it, some districts provide for automatic consolidation while others do so as a matter of routine.[230]

V. The Relevancy of Our Current System and the Case for Change

A. *The Changing Demographics of the American Household*

Culturally speaking, it does seem that our treatment of married versus unmarried persons for joint filing purposes is quite out of touch with the relational demographics of American society. Marriage rates have been on a steady

224. Chapman, *supra* note 134, at 142-43.

225. *Id.* at 143-44.

226. *Id.* at 144. *See also* FED. R. BANKR. P. 1015(a) (authorizing consolidation of multiple petitions arising from an individual debtor).

227. Chapman, *supra* note 134, at 146-47.

228. *Id.* at 147-48.

229. *Id.* at 146-47.

230. *Id.* at 148-51.

decline, while cohabitation rates have been on the rise.[231] According to the Pew Research Center, "[t]he recent decline in the number of Americans getting married shows no signs of reversing."[232] This is not to say that Americans do not value marriage or do not have marriage as a goal. According to one survey, approximately six in ten Americans wish to get married at some point in their lives.[233] Furthermore, when prompted on the reasons for marriage, and overwhelming majority of Americans cited love as their main motivating factor while less than one third cited financial stability.[234] This "romantic ideal," however, is not resulting in more marriages.[235] Only fifty-one percent of American adults were married in the year 2011, which represents "an all-time low."[236] In the year 1960, that same number would have been seventy-two percent.[237] A more accurate view of this decline occurs, however, once one examines not only the percentage of those who are married, but the percentage of those Americans who were never married. Although seventy-one percent of Americans were married in the year 1960, only fifteen percent were never married at all.[238] In 2010, twenty-eight percent of Americans were never married, and the number of those who were divorced climbed from five percent in the year 1960 to fourteen percent in the

231. Harper, *supra* note 214, at 39-42.

232. Richard Fry, *No Reversal in Decline of Marriage*, PEW RES.: SOC. & DEMOGRAPHIC TRENDS (Nov. 20, 2012), http://www.pewsocialtrends.org/2012/11/20/no-reversal-in-decline-of-marriage/ [hereinafter Fry, *Decline of Marriage*].

233. D'Vera Cohn, *Love and Marriage*, PEW RES.: SOC. & DEMOGRAPHIC TRENDS (Feb. 13, 2013), http://www.pewsocialtrends.org/2013/02/13/love-and-marriage/ [hereinafter Cohn, *Love and Marriage*].

234. *Id.* Ninety-three percent of married individuals and eighty-four percent of unmarried individuals view love as an important reason to get married, while only thirty percent of married individuals and thirty-one percent of unmarried individuals believe that financial stability is an important reason to get married. *Id.*

235. *Id.*

236. *Id.*

237. D'Vera Cohn ET AL., *New Marriages Down 5% From 2009 to 2010: Barely Half of U.S. Adults are Married – A Record Low*, PEW RES.: SOC. & DEMOGRAPHIC TRENDS 1, 1 (Dec. 14, 2011), *available at* http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf [hereinafter Cohn, *New Marriages Down*].

238. *Id.*

year 2010.[239]

A number of factors may be contributing to this decline. Since the 1950s, there had generally been a gap in the marriage rates between those who had a college education and those who did not, with the college educated marrying at a rate slightly higher than their non-college educated counterparts.[240] This trend, however, has been reversing, and while marriage rates among men seem to be correlated still with their relative education levels, women are just as likely to marry regardless of whether or not they have obtained a college degree.[241] Even after taking education into account, married adults still earn more than their unmarried counterparts, with married couples lacking a college education earning thirty-four percent more than their similarly situated unmarried counterparts in the year 2008.[242] Those without a college education, however, are slightly more likely to see their marriages end in divorce.[243] Overall, however, divorce plays less of a role than it used to in the decline of marriage rates, as the numbers of divorce have stabilized during the past two decades.[244] Although some point to the recent economic recession as a cause of decline, efforts to link the continuing decline in marriage rates to the recession have proved problematic, as it has been difficult to show that the recession has caused marriage rates to decline, as opposed

239. *Id*. The difference between these two statistics is due to the change in widowed and divorced or separated adults. In 1960, five percent of American adults were divorced and separated, and this grew to fourteen percent in the year 2010. Approximately nine percent of adults were widowed in the year 1960, however, and this shrunk to six percent in the year 2010. *Id.*

240. Richard Fry, *The Reversal of the College Marriage Gap*, PEW RES.: SOC. & DEMOGRAPHIC TRENDS (Oct. 7, 2010), http://www.pewsocialtrends.org/2010/10/07/the-reversal-of-the-college-marriage-gap/ [hereinafter Fry, *Marriage Gap*].

241. *Id*. This is significant since women used to be less likely to marry if they obtained an education. College educated men, although delaying marriage, are just as likely to get married as those who have not yet obtained an education. *Id.*

242. *Id.*

243. *Id.* "[I]n 2008, 2.9% of all married adults ages 35-39 who lacked a college diploma saw their first marriage end in divorce in the prior year, compared with just 1.6% of a comparably aged group that had a college education." *Id.*

244. Cohn, *New Marriages Down*, *supra* note 237, at 3.

to a mere correlation.[245]

Other factors, however, may have a role here. The overall age at which one gets married has been rising.[246] Evidence also supports a racial gap in marriage rates, with Caucasians experiencing much higher rates of marriage than their African American counterparts.[247] Public attitudes towards marriage, however, have significantly changed. Approximately thirty-nine percent of Americans believe that marriage is becoming obsolete, a figure which is up approximately eleven percent since the 1970s.[248] Among those aged eighteen to twenty-nine, however, that figure becomes approximately forty-four percent.[249] Although many hold this belief, it does not necessarily correlate with their own personal wishes of whether or not they want to marry themselves.[250] Due to this conflict in research concerning declining marriage rates, the Pew Research Center has determined that it is difficult to determine whether or not young Americans "are abandoning marriage or merely delaying it."[251]

Alongside the decline in marriage rates, however, is the rise in nontraditional family structures. Generally speaking, the American public no longer sees marriage as necessary to the formation of a family.[252] In 2010, approximately half or

245. Cohn, *Love and Marriage*, *supra* note 233.
246. Cohn, *New Marriages Down*, *supra* note 237, at 2.
247. *Id.* at 8.
248. *Id.* at 10.
249. *Id.* at 11.
250. *Id.*
251. *Id.* at 2.
252. PEW RES. CTR., *The Decline of Marriage and Rise of New Families*, PEW RES.: SOC. & DEMOGRAPHIC TRENDS i, ii (Nov. 18, 2010), *available at* http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf

> Fully 86% say a single parent and child constitute a family; nearly as many (80%) say an unmarried couple living together with a child is a family; and 63% say a gay or lesbian couple raising a child is a family. The presence of children clearly matters in these definitions. If a cohabiting couple has no children, a majority of the public says they are not a family. Marriage matters, too. If a childless couple is married, 88% consider them to be a family.

more Americans stated that "there is no difference between being married or single in the ease of having a fulfilling sex life, being financially secure, finding happiness, getting ahead in a career or having social status."[253] Rates of cohabitation have doubled since the 1990s, and the proportion of adults who will cohabitate at some point in their lives have similarly grown.[254] Seventeen states and the District of Columbia have also legalized gay marriage, with another three states offering some form of civil union or domestic partnerships.[255] Other, perhaps less discussed, "nontraditional" families are also forming. In the wake of the Great Recession, multigenerational households experienced a new revitalization, as individuals experiencing economic hardship moved in with their relatives.[256] In the year 2009, there were approximately fifty-one million Americans living in multigenerational households, an increase from forty-two million in the year 2000, and thirty-two million in 1940.[257] Approximately three in ten young adults aged twenty-five to thirty-four now comprise the "Boomerang Generation," having moved back in with their parents due to a

Id.

253. Cohn, *Love and Marriage*, *supra* note 233.

254. Richard Fry & D'Vera Cohn, *Living Together: The Economics of Cohabitation*, PEW RES.: SOC. & DEMOGRAPHIC TRENDS 1, 1 (Jun. 27, 2011), *available at* http://www.pewsocialtrends.org/files/2011/06/pew-social-trends-cohabitation-06-2011.pdf.

255. *States*, Freedom to Marry, http://www.freedomtomarry.org/states/ (last visited April 14, 2014). As of April 2014; Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Illinois, Iowa, Minnesota, New Mexico, California, Washington, Hawaii, and the District of Columbia have legalized gay marriage. *Id.* Colorado has civil unions for same-sex partnerships. *In Your State: Marriage and Relationships*, Lambda Legal, http://www.lambdalegal.org/states-regions (last visited April 14, 2014) (providing interactive map of state legal protections for LGBT people and their families). Oregon and Nevada have domestic partnerships. *Id.* Wisconsin also recognizes domestic partnerships, but they are very restrictive in regard to the domestic partnerships and civil unions of other states. *Id.*

256. Rakesh Kochhar & D'Vera Cohn, *Fighting Poverty in a Bad Economy, Americans Move in With Relatives*, PEW RES.: SOC. & DEMOGRAPHIC TRENDS (Oct. 3, 2011), http://www.pewsocialtrends.org/2011/10/03/fighting-poverty-in-a-bad-economy-americans-move-in-with-relatives/.

257. *Id.*

poor economy.[258] Due to increased longevity, approximately one in seven adults also now provide support for both an aging parent and a child.[259] Now, over four in ten American adults also have a "step" relative included in their family.[260]

The histories of the joint income tax and the joint bankruptcy petition, however, demonstrate that the promotion of marriage is tangential to the joint filing regime, if related at all.[261] The income splitting regime was undoubtedly influenced by a preference for traditional gender roles,[262] and the debate over the joint income tax was intertwined with a much larger debate over the roles of husbands and wives.[263] The decision to effect an income splitting regime in 1948, however, was also heavily influenced by a desire to have uniform laws among the states[264] and to place an end to the rather creative devices that husbands employed in an attempt to assign income to their wives to lower their tax liability.[265] The decision to add the joint petition to a newly revitalized Bankruptcy Code, however, was a matter of little debate at the time of its enactment.[266] The scant legislative history demonstrates that its enactment was the result of a combination of the presumption that

258. Kim Parker, *The Boomerang Generation: Feeling OK About Living With Mom and Dad*, PEW RES.: SOC. & DEMOGRAPHIC TRENDS (Mar. 15, 2012), http://www.pewsocialtrends.org/2012/03/15/the-boomerang-generation/.

259. Kim Parker & Eileen Patten, *The Sandwich Generation: Rising Financial Burdens for Middle Aged Americans*, PEW RES.: SOC. & DEMOGRAPHIC TRENDS (Jan. 30, 2013), http://www.pewsocialtrends.org/2013/01/30/the-sandwich-generation/. Adults caught in the middle of this generational phenomenon are now aptly named "the Sandwich Generation." *Id.*

260. PEW RES. CTR., *A Portrait of Stepfamilies*, PEW RES.: SOC. & DEMOGRAPHIC TRENDS (Jan. 13, 2011), http://www.pewsocialtrends.org/2011/01/13/a-portrait-of-stepfamilies/.

261. *See supra* Parts II and III.

262. Jones, *supra* note 88, at 296.

263. *See* Kessler-Harris, *supra* note 60, at 333-36.

264. Gann, *supra* note 83, at 18. According to McMahon & Zelenak, a desire for national uniformity was actually the primary motivation for the joint taxing regime enacted by Congress in 1948. Martin A. McMahon, Jr. & Lawrence A. Zelenak, ¶ *44.02 Filing Status – Separate, Joint, and Head of Household Returns*, *in* FED. INC. TAX'N OF INDIV. ¶ 44.02 (2d ed. 2012).

265. *See* McMahon, *supra* note 48, at 731.

266. Dickerson, *Family Values*, *supra* note 97, at 91 (noting the "scant legislative history" regarding the passage of § 302).

husbands and wives pooled their incomes and resources, and the desire to ease the financial burden on the courts and debtors by facilitating the administration of cases.[267]

Both the decrease in marriage rates and the rise of nontraditional family structures result in fewer individuals being able to take advantage of the financial benefits accorded to spouses under the current tax and bankruptcy regimes.[268] Therefore, it is imperative that the bankruptcy and tax systems are re-evaluated in light of their objectives, not simply to make them less antiquated, but to modernize them so that they may be more efficient and useful. The objectives of the joint bankruptcy regime are simple. Congress enacted § 302 with the intent that the joint bankruptcy petition relieve the burden placed on debtors, the courts, and to facilitate case administration of spouses (due to the presumption that they each owned joint assets).[269] This makes sense, especially in light of the fact that the goals of the bankruptcy system as a whole are to provide debtors with "a 'fresh start' and ensure that all similarly situated creditors receive maximum debt repayment."[270] As mentioned earlier, however, the joint income tax history is fraught with debate that involved both concern for national uniformity and debate over the relative roles of husbands and wives.[271] Neither of these objectives are particularly relevant today given the presence of dual-earner couples, the rise of nontraditional family structures, and the "nationalization" of the joint income tax in the year 1948.[272] Although the joint income tax was not explicitly founded on the presumption that married couples who file joint tax returns pool their resources, the presumption that married couples pool their resources and thus should be permitted to file a joint tax return is considered one of the "principal after-the-fact justification[s]" for permitting the continuation of the joint

267. *Id.*; S. REP. NO. 95-989, at 32 (1978).

268. *See supra* notes 231-60 and accompanying text.

269. S. REP. NO. 95-989, at 32 (1978).

270. Dickerson, *Love, Honor, and (Oh!) Pay*, *supra* note 107, at 965.

271. Gann, *supra* note 83, at 18; Jones, *supra* note 88, at 296; McMahon & Zelenak, *supra* note 264, at ¶ 44.02[2].

272. *See supra* notes 231-60 and accompanying text; Gann, *supra* note 83, at 18.

income tax.[273] The joint income tax, however, did provide a greater benefit to Americans when it was first enacted than it does today, due to the fact that more Americans lived in traditional family structures that were more likely to be composed of a dependent wife and working husband than marriages today.[274] Thus, this Comment proposes that a modern and efficient system of joint income taxation provide the greatest benefit to those in interdependent relationships.

The goal of this Comment is to articulate a unit which would satisfy the policy objectives mentioned above yet still accommodate nontraditional family structures. In the end, two alternatives present themselves as remedies to a marriage-based filing system. The preferential treatment of the married could be completely eradicated by making the individual the sole unit of taxation and abolishing the joint bankruptcy petition. Alternatively, the unit could be based on an economic non-marital determination that would allow those who are in interdependent yet nontraditional dyadic relationships to participate in the joint filing system. Both would minimize the discrimination that occurs among the married versus the unmarried, yet both also have their own unique benefits and negative implications. Ultimately, however, this Comment will demonstrate that adoption of a strictly individual or modified individual system in the United States would be less feasible and would likely result in significant inequities to those in nontraditional relationships without significant overhaul, while a system which is based off of the relative economic interdependence of citizens will achieve the most equitable result in the most feasible manner.

273. Infanti, *supra* note 144, at 614.

274. In 1975, approximately forty-seven percent of women with children under the age of eighteen participated in the labor force, and in the year 2008, this number rose to seventy-one percent. *Labor Force Participation Rates Among Mothers*, U.S. DEP'T OF LAB.: BUREAU OF LAB. STATS. (May 7, 2010), http://www.bls.gov/opub/ted/2010/ted_20100507.htm. Dual-earner families comprised fifty-eight percent of married couples in 2007, compared with only forty-seven percent of married couples in 1967. *Women in the Labor Force: A Databook*, U.S. DEP'T OF LAB.: BUREAU OF LAB. STATS. 1, 2, 76 tbl. 23 (Sept. 2009), *available* at http://www.bls.gov/cps/wlf-databook-2009.pdf. In 2007, male breadwinner families in which only the husband worked comprised eighteen percent of married couples, while in 1967, this figure was thirty-six percent. *Id.*

B. *The Individual as the Sole Economic Unit*

The first practical alternative to according preferential treatment to married couples would be to have a strictly individual system in which the individual is the sole economic unit.[275] Each individual would file an individual tax return and each individual that filed for bankruptcy would do so alone. The main advantage to this system, obviously, is a very basic sense of equity – no difference in treatment is to be accorded based on marital status alone, and the preferential treatment of married persons no longer operates to the exclusion of others.[276] Equity, however, can be a fluid concept, and a strictly individual system which does not at least recognize the interdependent relationships that exist in society can actually be just as inequitable, if not more, than a system which only recognizes one interdependent relationship.[277]

The notion that a strictly individual system will inevitably cause great inequity is especially apparent after examining the work of Anthony Infanti and his analysis of the Canadian Tax System.[278] Infanti does argue for an individual system, but acknowledges that an individual filing system is "only a starting point for fashioning a tax system that decentralizes family."[279] Thus, an individual filing system that produces equitable results, according to Infanti, must take into consideration not only the individual, but the economic relationships the individual enters into.[280] The advantages of this system, according to Infanti, are the decentralization of family, and recognition of interdependent relationships that

275. Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1508-09 (1997).

276. *Id.* (noting that abolition of the joint return, however, may not resolve the class, race, and gender biases that cause some commentators to want to abolish the joint return in favor of an individual filing system in the first instance). *See also* Infanti, *supra* note 144, at 621-22 (noting that many commentators advocate for the imposition of an individual filing system yet give little attention to its design).

277. LAW COMM'N OF CAN., *supra* note 1, at 36.

278. *See generally* Infanti, *supra* note 144.

279. *Id.* at 621.

280. *Id.* at 639.

are based on actual taxpayer behavior.[281] A system that is completely individual and does not give recognition to the actual relationships that individuals form runs the risk of producing significant inequities. Such a system would assume that all Americans are "atomistic individuals" and would "serve only to impede the development of the economic dimension of personal relationships."[282] It would also be significantly biased in that it would favor those who are the most individualistic and least connected to others financially.[283] Infanti likewise recognizes that since taxation is transactional—concerning itself with the "economic aspects of transactions between individuals"—it makes sense to organize a system around the "economic dimension[s]" of the transactions that individuals enter into.[284] Such recognition, according to Infanti, will ensure that the tax system does not impede the development of interpersonal relationships.[285] A similar argument can easily be made in the bankruptcy context, since bankruptcy courts regularly have to recognize economic aspects of relationships when determining dependency,[286] and § 302 was enacted in part on an assumption of the pooling of resources between spouses.[287]

It is clear from Infanti's analysis that in order to avoid the inequities that would arise from a completely individualized system, some form of recognition must be given to relationships.[288] The Canadian Income Tax Act ("ITA") requires each taxpayer to file an individual income tax return under a progressive rate schedule.[289] This system, however, was not always universally accepted, and indeed there has been significant debate in Canada over whether or not to adopt a

281. *Id.* at 609.

282. *Id.* at 609-10 n.14.

283. *Id.*

284. Infanti, *supra* note 144, at 609 n.13.

285. *Id.*

286. 11 U.S.C. § 522(a), (d)(1) (2012); Erin K. Healy, *It Depends: Prioritizing Function Over Form to Evaluate a Debtor's Dependency Relationships in Consumer Bankruptcy*, 22 EMORY BANKR. DEV. J. 185, 186 (2005).

287. 11 U.S.C. § 302; S. REP. NO. 95-989, at 32 (1978).

288. Infanti, *supra* note 144, at 609.

289. *Id.* at 623.

joint filing system.[290] Nonetheless, the Canadian tax system cannot be fairly characterized as strictly individual, and resembles more of an individual system with significant modifications.[291] Although Canadian citizens file individual tax returns, they must still indicate their marital status.[292] Yet Canada is also many steps ahead of America insofar as recognizing nontraditional family structures, which includes both gay marriage and cohabiting relationships (otherwise known as "common-law partner[s]").[293] It is important to note, however, that Canada also has the most restrictive laws regulating the assignment of income, which helps to prevent the income splitting that has been so controversial in America.[294] Even with such restrictive laws against assignment of income, Canada has still suffered from a different form of "marriage" or "family" penalty, due to various phase-outs that occur when one indicates that they are married or common-law partners on their tax returns.[295] When the Law Commission of Canada published its recommendations for various legal reforms in 2001, it thus recommended that those reforming the law keep in mind not only the objectives of the law in particular, but the relationships that exists and how they can best comport with such legal reforms.[296]

It appears that a Canadian modified individual tax regime is more equitable than the current American tax regime in the sense that an individual is not defined by his or her marital status and has benefits allocated accordingly. It is likewise clear, however, that much of this equity derives not from the Canadian system of taxation per se, but from the fact that Canada is more accommodating of nontraditional family structures than the United States. In a vein reminiscent of the United States, Canadian citizens must also still designate some

290. *Id.*
291. *Id.* at 625.
292. *Id.* at 624.
293. *Id.*
294. Infanti, *supra* note 144, at 630. Note, however, that there are certain exceptions allowing assignment of income between partners, even in Canada. *See id.* at 633.
295. *See id.* at 625.
296. *Id.* at 639-40.

sort of "status" on their tax returns, whether in the form of marriage or other form of conjugal relationship, and are still at risk of suffering a penalty from such a designation.[297] These factors suggest that a Canadian-style system of taxation would likely need a significant overhaul in order to effectively transfer to the United States in a manner that would not produce or mimic the inequity currently placed on those living in nontraditional family structures.

Thus, a Canadian-style system of taxation would likely suffer from an inherent lack of practicality and complexity in the American context. Infanti is quick to point out that an adoption of an individual tax system in the United States is not "politically unrealistic" and points to the effective transition of Sweden from a joint to an individual system as an example of its possibility.[298] Surely, such a transition is possible in the United States. Yet the United States suffers from two conditions that decrease the feasibility of a modified individual system, or at least one that is sufficiently equitable. The first is that among other industrial democracies, the United States is unusual in that it is comparatively marked by a lack of social services to its citizens, relying on private individuals to form their own safety net.[299] The second is that the family is expected to provide these services, but "family" is often defined in heteronormative terms.[300] When benefits are distributed, they are often distributed through the marital unit.[301] This necessarily forms a converse relationship between the allocation of benefits and societal progress in the form of recognition of nontraditional family structures. Were the United States to change to an individual system, the general sense of inequity that results from allocating benefits on the basis of marital status would likely retain its same character

297. *Id.* at 624-25.

298. *Id.* at 621.

299. Martha A. Fineman, *Why Marriage?*, *in* JUST MARRIAGE 46, 47 (Mary Lyndon Shanley ed., 2004).

300. *Id.* at 47-49.

301. *Id.* at 47-48. "Unlike other industrial democracies, in which the state assures some floor of social services to each citizen, in America individual needs are managed by the family unit." *Id.* at 47. As mentioned earlier, marriage affords citizens over eleven hundred rights and privileges. BRAKE, *supra* note 20, at 12.

unless a significant overhaul were to occur within the tax laws to ensure that those in nontraditional relationships received recognition. Yet if the United States retained the joint character of its system and allowed those other than married couples to receive financial benefits typically allocated only to those who are married, this would serve to directly encourage progress in the form of the recognition of nontraditional family structures. Furthermore, such an action would also ensure that those in dependent relationships received benefits directly and be recognized *as if* they were a marital unit. In contrast, the adoption of a strictly individual system, or a modified individual system, is unlikely to promote the objective of allocating the greatest benefit to those in nontraditional yet interdependent relationships.

In the bankruptcy context, adoption of an individual system would not succeed in furthering the objectives underlying the enactment of § 302. The creation of an individual bankruptcy system would have the same advantage of a strictly individual unit of taxation, namely that married and non-married persons would be treated alike. Such a system would also be simple to implement given that the only step necessary to take would be a complete repeal of § 302, but it would not serve to further any of the goals underlying its enactment. For one, a reversion to individual proceedings would place great administrative burden on the bankruptcy courts, and on debtors who would be forced to pay more than one filing fee and pay twice the cost in legal fees.[302] Debtors would also incur the inconvenience that comes with having two court proceedings instead of one.[303] Such a system would also be administratively impracticable, since debtors who share a significant amount of assets would be forced into two proceedings.[304] Under the current regime set forth by § 302, however, significant inequity occurs when the benefits of joint petitioning are allocated according to marital status.[305] It is possible, however, to not only increase the efficiency and

302. *See* S. REP. NO. 95-989, at 32 (1978).
303. *Id.*
304. *Id.*
305. 11 U.S.C. § 302 (2012).

fairness of the Bankruptcy Code, but also to do so while simultaneously achieving the same result within the Internal Revenue Code.

C. *A Unit Based on Presumed Economic Interdependence*

The alternative to both a complete or partial abandonment of a joint regime and a regime which expresses preference for the heteronormative traditional marriage is a regime which allocates benefits based on a unit of presumed economic interdependence. This proposed regime will further the legal objectives of the tax and bankruptcy laws and provide the greatest probability of equity within the American context. It will also provide a useful and efficient unit that will be freely transferable between the tax and bankruptcy systems, thus furthering both legal homogeny and efficiency. Furthermore, such a system will help to provide a step in freeing the American legal regime from a system which provides numerous benefits to those who are married to the exclusion of those who are living in nontraditional interdependent relationships.

There are signs that both the IRS and the bankruptcy courts are ready to recognize other interdependent couplings, particularly in the areas of same-sex marriage and cohabitation. In one letter, the IRS indicated that an Illinois opposite-sex couple that had obtained a civil union would not be precluded from filing jointly so long as Illinois treated them as husband and wife.[306] The IRS has also provided in a private letter ruling that although registered domestic partners in California must file as single individuals, they also must report half of their earned income and property on their tax return.[307]

306. Letter from Pamela Wilson Fuller, Senior Technician Reviewer, IRS, to Robert Shair, Senior Tax Advisor, H&R Block (Aug. 30, 2011), *available at* http://www.proskauer.com/files/uploads/Documents/IRS-Letter-2011-on-Civil-Unions-in-Illinois.pdf.

307. I.R.S. Priv. Ltr. Rul. 201021048 (May 28, 2010). A private letter ruling is issued by the IRS in response to a taxpayer's question, and the IRS writes a response based only on the particular factual situation provided by the taxpayer. Nelson, *supra* note 84, at 1163. A private letter ruling is not binding as precedent, and is binding on the IRS only if the taxpayer fully articulated and described a transaction, and followed through with the transaction as it was described to the IRS. *Id.* Although private letter rulings

In doing so, the IRS recognized California's extension of community property to registered domestic partners, which permits the splitting of property.[308] Similarly, when § 3 of the DOMA was still in force, one California bankruptcy court permitted a same-sex couple who otherwise qualified to jointly file their petition for a Chapter 13 plan.[309] In 1981, one bankruptcy court denied a request for consolidation on behalf of two cohabiting debtors who filed Chapter 13, but nonetheless still permitted joint administration of their bankrupt estates.[310] Most recently, the IRS held that it would recognize legally performed same-sex marriages for taxation purposes, regardless of whether the same-sex couple currently resides in a state that allows same-sex couples to marry.[311] In order to accomplish similar effects consistently, however, the law must be expanded.

First, this proposed unit shall be called the "unit of presumed economic interdependence." As articulated by Infanti, the word "interdependence" is preferable to the word "dependence."[312] Although the word "dependence" is commonly used, the word connotes a "parasitic" relationship, when a given "dependent" relationship may more realistically be one of "give and take."[313] This is certainly the case in relationships such as parent-child (as the child grows to eventually care for the elderly parent), or in the case of spouses who may contribute various types of labor and support throughout the duration of their marriage.[314]

This Comment next proposes that the Internal Revenue

are not binding, may not be used as precedent, and do not have to be applied to other similarly situated taxpayers, private letter rulings can offer a glimpse as to how the IRS feels about a particular issue. *Id.*

308. I.R.S. Priv. Ltr. Rul. 201021048 (May 28, 2010).

309. *See generally In re* Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011). Same-sex couples are now permitted to file joint bankruptcy petitions, and gendered language within the Bankruptcy Code or Federal Rules of Bankruptcy Procedure is interpreted to apply to same-sex couples. *See supra* note 137.

310. *In re* Coles, 14 B.R. 5 (Bankr. E.D. Pa. 1981).

311. I.R.S. Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

312. Infanti, *supra* note 144, at 608 n.12.

313. *Id.*

314. *Id.*

Service articulate and define relationships of interdependence to be explicitly adopted by Congress in the Bankruptcy Code. To do so would be an extension, rather than an addition, of existing law. The IRS already allows individuals to take deductions for their "dependents," and has codified the qualifications for dependency in § 152 of the Internal Revenue Code.[315] These dependency deductions, as currently stated, provide an inefficient basis for a unit of presumed economic interdependence insofar as they fail to reflect current societal conditions. With few exceptions, these definitions generally require that one be a "qualifying child" or "qualifying relative" in order to qualify for "dependency."[316] In order to be a qualifying child, one must be "the child of the taxpayer or a descendent of such child,"[317] or "a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative."[318] A qualifying child must also meet the requisite age requirements of being eighteen years of age or younger, or if a student, twenty-four years of age or younger.[319] Section 152(d), which describes the requisite relationships which permit classification as a qualifying relative, is much more extensive and provides in pertinent part that a qualifying relative is one who "bears a relationship to the taxpayer described in this paragraph if the individual is any of the following with respect to the taxpayer:"

> **(A)** A child or a descendant of a child.
> **(B)** A brother, sister, stepbrother, or stepsister.
> **(C)** The father or mother, or an ancestor of either.
> **(D)** A stepfather or stepmother.

315. 26 U.S.C. § 152 (2012).

316. *Id.*

317. *Id.* at § 152(c)(2)(A).

318. *Id.* at § 152(c)(2)(B). A qualifying child must also have resided at the same principal place of residence as the taxpayer for at least one half of the taxable year, have met age requirements, have not provided over one half of his or her own support, and must not have filed a joint return with a spouse. *Id.* at § 152(c)(1)(B)-(E). Adopted children are recognized as dependents under § 152 provided that all other requirements are met. *Id.* at § 152 (b)(3)(B).

319. 26 U.S.C. § 152(c)(3).

> **(E)** A son or daughter of a brother or sister of the taxpayer.
> **(F)** A brother or sister of the father or mother of the taxpayer.
> **(G)** A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.
> **(H)** An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.[320]

With some revisions, § 152 would provide a sufficient basis on which to base a unit of presumed economic interdependence for joint filing purposes. The necessary revision, in this instance, would be to add an additional subdivision to § 152 titled "Application for Joint Filing Purposes." This section would then need to affirm that the dependent relationships mentioned in § 152 are to be used to determine a unit of presumed economic interdependence for joint filing purposes under the Internal Revenue Code. Since a strict application of § 152 would be insufficient for joint filing purposes insofar as it fails to recognize relationships between individuals who are not related by means of blood, adoption, or marriage, and likewise includes minor children, some qualifying provisions would then need to be added.[321]

In order to provide recognition for those who are not related by blood, adoption, or marriage, this section should specify that in addition to those relationships articulated in §

320. *Id.* at § 152(d)(2)(A)-(H). A qualifying relative must also have gross income that is less than the amount for a personal exemption, must provide over one half-of his or her support, and cannot be a qualifying child. *Id.* at § 152(d)(1)(B)-(D); 26 U.S.C. 151(d) (deductions for personal exemptions).

321. *See generally* 26 U.S.C. § 152(d)(2)(A)-(H) (depicting blood and marital relations); *id.* at § 152(b)(3)(B) (recognizing adoption); *id.* at § 152 (b)(2) (recognizing married persons insofar as providing that their marital status and act of filing a joint return with their partner will preclude determination as a dependent).

152, the additional interdependent unit of "cohabiting partnership" is to be recognized, without regard to whether or not the relationship is one based on conjugal relations. For purposes of establishing a cohabiting partnership, the Internal Revenue Code would be able to borrow the concept behind the property requirement in the definition of "qualifying child," and provide that a cohabiting partnership is established when the taxpayers share a principal place of abode for at least half of the taxable year.[322] In addition, this new subdivision of § 152 would need to provide that for joint filing purposes, individuals must be aged eighteen and older. This would avoid a situation in which an adult files a joint income tax return with a minor.[323] Finally, this section would simply need to provide that interdependent units are released from the fixed levels of financial support required in § 152 to establish the dependency of a relative.[324] Any provision that provides that one individual provide a certain amount of support for one another is characteristic of a dependent relationship, as opposed to a relationship of presumed economic interdependence. Section 152 would also need to release interdependent units from any restrictions on personal exemptions that would otherwise limit them from qualifying as a qualifying relative.[325]

In order for these rules to apply in the bankruptcy context, Congress would simply need to amend the Bankruptcy Code to explicitly authorize and require the use of § 152 for joint petitioning purposes in § 302(a), and likewise amend the Federal Rules of Bankruptcy Procedure to permit the facilitation of consolidation for joint petitioners as permitted by

322. *See id.* at § 152(c)(1)(B).

323. It is not difficult to fathom how, without this provision, an abuse of the system of taxation may ensue, especially if one were to try and obtain tax benefits by filing with an infant. In that case, there would be no "interdependent relationship," since the relationship between an infant and an adult such as a parent is one of dependency, not interdependency.

324. *See* 26 U.S.C. § 152 (d)(1)(C) (requiring that a taxpayer provide "over one-half of the individual's support for the calendar year in which such taxable year begins" in order to qualify as a qualifying relative).

325. *See id.* at § 152(d)(1)(B) (requiring that individuals comport with the requirements of § 151(d) in order to qualify as a qualifying relative); *id.* at § 151(d)(2) (disallowing personal exemptions for certain dependents).

§ 152.[326] As Erin Healy notes, the definitions of dependency articulated in § 152 have already been utilized by the bankruptcy courts in some limited contexts.[327] When calculating income and disposable income, the Bankruptcy Code permits debtors to support "dependents," but does not provide a complete definition of which individuals constitute "dependents."[328] Bankruptcy courts have had varying reactions to this definitional predicament. At least one court refused to deny a debtor a request for granting dependency status to a qualifying dependent because Congress had not explicitly codified § 152 of the Internal Revenue Code into the Bankruptcy Code.[329] Other judges, however, have readily utilized the IRS's definition of dependency in § 152 for determining dependency status in bankruptcy in the absence of a duty of legal support between debtor and "dependent."[330]

Section 152 is not the only instance, however, of bankruptcy courts "borrowing" concepts and law from the IRS. As a result of the 2005 Amendments to the Bankruptcy Code under the BAPCPA, debtors are required under § 707(b)(2)(A)(ii)(I) to use the National and Local Standards set forth by the IRS for purposes of determining their disposable income for a means test analysis.[331] The use of these standards

326. *See* 11 U.S.C. § 302 (2012); FED. R. BANKR. P. 1015(a). For purposes of clarification, it should be noted that any of the proposed changes to the Internal Revenue Code or the Bankruptcy Code operate as an extension of the law as it already applies to married couples. Thus, any provisions which already apply to married couples and permit them to file a joint tax return or jointly petition the bankruptcy courts would remain. The proposed revisions in this Comment are intended to provide those in nontraditional dyadic living arrangements with the rights and privileges currently provided to married couples under the tax and bankruptcy laws.

327. Healy, *supra* note 286, at 207-08.

328. *Id.* at 205.

329. *Id.* at 207-08.

330. *Id.*

331. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2012). *See also Collection Financial Standards*, I.R.S., http://www.irs.gov/Individuals/Collection-Financial-Standards (last updated Sept. 3, 2013). This website describes when National versus Local Standards are used when determining the allowable expenditure amounts for various areas of a personal or family budget, such as food and transportation. *Id.* According to the IRS, the National and Local Standards are "intended for use in calculating repayment of delinquent taxes." *Id.*

for a means testing analysis is admittedly questionable. The original purpose of these standards was to collect unpaid taxes from delinquent taxpayers who may otherwise be facing time spent in jail.[332] The wisdom of using the National and Local Standards in the bankruptcy context is beyond the scope of this Comment, but the use of this data does demonstrate that the Internal Revenue Code and the Bankruptcy Code are in some ways inextricably connected, and that data from the IRS has the potential to be efficiently shared, even if not in the case of means testing.

Next, once two individuals elect for a joint filing under either the Internal Revenue Code or the Bankruptcy Code, there should be a rebuttable presumption that they are a unit of presumed economic interdependence. When two individuals in a qualifying relationship file a joint tax return or a joint bankruptcy petition, they will do so under the presumption that they will have jointly pooled their assets. For joint filing purposes, this would function much in the same way that the marital unit does now, and the presumption of economic interdependence would be rebutted in cases where individuals fraudulently misrepresent their relationship. Stated more simply, individuals who file jointly, much like marital couples, will not have to prove that they jointly own a certain number of assets, but if questioned they may have to prove that they have the stated relationship that they claim. The reason for potentially requiring objective proof of a relationship is perhaps the most obvious. Given that conjugal, blood, or adoptive relations will not necessarily play a role in determining whether or not one may have a unit of presumed economic interdependence, which would be the case in a non-conjugal cohabiting partnership, this will ensure that individuals have the stated relationship that they claim. It will thus likewise prevent those without qualifying relationships, such as complete strangers, from taking advantage of the benefits of the tax and bankruptcy systems.

To potentially require proof of interdependency as measured by a specified number of joint assets, however, has the potential to hamper the objectives of the bankruptcy and

332. Healy, *supra* note 286, at 202.

tax systems by having a negative impact on judicial economy and making the objective of ease of case administration impracticable. A. Mechele Dickerson provides an example of a proposal which would include the requirement of potentially proving such dependency.[333] Dickerson suggests that § 101, the "definitional" section of the Bankruptcy Code, be amended to include a definition of economic unit and that § 302 be amended to reflect that change.[334] This proposal is similar to the one proposed here, since although limited to the bankruptcy context, it provides for an economic as opposed to a marital unit. Under Dickerson's proposal, however, an individual may be forced to prove their economic interdependency.[335] She suggests that to prove this dependency, one must look to the standards of other courts; as an example, she provides a multifactor test utilized by the New York Court of Appeals that requires a sufficient number of inextricably linked joint assets.[336] This, however, does not adequately support the goal of administrative ease, and could lead to an overwhelming burden on the court system if excessively challenged.

Additionally, the unit based on presumed economic interdependence that is articulated in this Comment operates as an extension on the current marital unit for bankruptcy and tax purposes by simply expanding joint filing to relationships that do not neatly fit into the hetero-normative norm. Under the current regime, married couples are presumed to have pooled their assets when they file jointly for tax and bankruptcy purposes.[337] Neither the Internal Revenue Code nor the Bankruptcy Code, however, requires married couples to demonstrate that they have jointly pooled their assets as a prerequisite to joint filing.[338] In fact, the Bankruptcy Code does

333. Dickerson, *Family Values*, *supra* note 97, at 106.

334. *Id.*

335. *Id.*

336. *Id.*

337. S. REP. NO. 95-989, at 32 (1978). While the presumption of pooling is explicit in the bankruptcy context, it takes the form of an after the fact justification in the tax context. Infanti, *supra* note 144, at 614.

338. *See* 11 U.S.C. § 302(a) (2012) (permitting spouses to petition for bankruptcy jointly); 26 U.S.C. § 6013(a) (2012) (permitting husband and wife to file a joint income tax return).

not require asset pooling in spite of a legislative history that indicates that pooling of assets was one of the reasons for creating the joint bankruptcy petition.[339] Section 522(a), for example, provides that a debtor's spouse may be considered a dependent without regard to actual dependency.[340] Likewise, the authorization of consolidation under § 302(b) in cases of jointly owned assets seems to contemplate the consideration that individuals in a "dependent" relationship may not be completely dependent in the financial sense.[341] Thus, the proposed unit of presumed economic interdependence will operate on a presumption that those in qualifying interdependent relationships pool their resources, but will ultimately serve to further the goals of vast economic benefit to taxpayers, facilitate ease of case administration, and further both judicial and administrative economy.

This system, however, does have one limitation—each individual shall be limited to filing within one economic unit consisting of two persons. As Erez Aloni has stated, "the legal system in the United States is bound up so closely with, and organized so thoroughly around, the concept of couples that it is very difficult to disaggregate this concept from that of the conferral of many rights and benefits."[342] According to Aloni, were the United States to recognize multiple partnerships at this time, it would bring the same types of problems with distribution of benefits as it does with the polyamorous community.[343] It is not impossible that such a system may be adopted sometime in the future, but it is not a future that realistically speaking, will happen soon.[344] Thus, much like the research of Aloni, this proposal is based off of practical necessity and "realpolitik."[345]

Since one citizen may only have one chosen partner to establish a unit of presumed economic interdependence with,

339. S. REP. NO. 95-989, at 32 (1978).

340. 11 U.S.C. § 522(a).

341. Chapman, *supra* note 134, at 137-38.

342. Aloni, *supra* note 19, at 612.

343. *Id*. *But see* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010).

344. Aloni, *supra* note 19, at 612.

345. *Id.*

this system will likely not change the function of the tax and bankruptcy laws for those who are already living in traditional heteronormative marriages. It will, however, open up these laws to those in nontraditional living arrangements, and for whom certain provisions of the bankruptcy and tax codes were previously inaccessible. Allowing those with nontraditional economically interdependent relationships to file jointly on the same paperwork and forms used by married couples for tax and bankruptcy purposes will have the additional benefits of serving to legitimize these nontraditional relationships in the eyes of the law and also begin the more gradual process of allocating financial benefits based on something other than marital status.

VI. Conclusion

As it remains now under the law, the single determinative factor regarding whether or not two individuals may file jointly for tax and bankruptcy purposes is their marital status.[346] Although both bankruptcy and tax law share this same determinative factor for joint filing purposes, they each arrived at this same result in different ways. History demonstrates that the joint income tax was not only the result of a contentious and long-lasting debate concerning the proper roles of men and women, but also the result of a desire for national uniformity of the tax laws, a legitimate means of assigning income to lower tax liability, and desire among some to preserve traditional gender roles.[347] The joint bankruptcy petition, in contrast, was a sign that the vestiges of the long-reaching arm of the doctrine of coverture were continuing to erode.[348] Married women were owning property and incurring

346. 11 U.S.C. § 302(a) (2012); 26 U.S.C. § 6013(a) (2012); I.R.S. Rev. Rul. 2013-17, 2013-38 I.R.B. 201. *But see supra* notes 306-10 and accompanying text (describing some exceptions to this rule).

347. Gann, *supra* note 83, at 18; Jones, *supra* note 88, at 261, 276; Kessler-Harris, *supra* note 60, 333-36; McMahon, *supra* note 48, at 731.

348. *Compare* Pearlston, *supra* note 103, at 271-72 (describing the assumption of past and future debt by a husband under the doctrine of coverture), *with In re* Knobel 167 B.R. at 439-40 (describing how by 1979 most of the obstacles that kept women from filing for bankruptcy had largely been removed, and the new Code which permitted joint filing reflected this

debts, and some of them would file for bankruptcy. Based on the assumption that married persons jointly incurred debts and assets, Congress permitted married couples to petition the courts for bankruptcy together.[349]

Joint filing is certainly better for some married couples than others. Due to the effect of income splitting and the inability of married couples to take advantage of the same tax rates as unmarried individuals, some married couples will experience a penalty and others will experience a bonus.[350] In bankruptcy, married couples who file jointly will benefit from only having one filing fee to pay and from only having to hire one attorney.[351] They may also miss less time from work with permission from the court to have one spouse appear as opposed to both.[352] If their case is consolidated, however, and they have not chosen their exemptions, their exemptions may be chosen for them.[353]

The joint income tax with the income splitting regime still applicable today became part of the law of taxation in 1948.[354] The joint bankruptcy petition was added to the Bankruptcy Code in 1978.[355] As these laws have remained in effect, the demographics of the American household have changed. Marriage rates have been on a steady decline.[356] Rates of cohabitation have been on the rise.[357] Many adults find that they are part of the Sandwich Generation, in which they support both an elderly parent and a child.[358] Many adult children now find they are in the Boomerang Generation, and once again living with their parents.[359] Economic recession may

change).

349. S. REP. NO. 95-989, at 32 (1978).

350. *See supra* notes 140-61 and accompanying text (discussing the marriage bonus versus the marriage penalty).

351. S. REP. NO. 95-989, at 32 (1978); Dickerson, *Love, Honor, and (Oh!) Pay*, *supra* note 107, at 975-76.

352. Dickerson, *Family Values*, *supra* note 97, at 91.

353. 11 U.S.C. § 522(b) (2012); FED. R. BANKR. P. 1015(e).

354. Jones, *supra* note 88, at 260.

355. S. REP. NO. 95-989, at 32 (1978).

356. Fry, *Decline of Marriage*, *supra* note 232.

357. *Id.*

358. Parker & Patten, *supra* note 259.

359. Parker, *supra* note 258.

have been the cause behind the rise in multigenerational households.[360] Many states now recognize gay marriage, and others provide civil unions.[361] Households with traditional male breadwinner family structures are on a decline.[362]

As demographic changes occurred within American households, the joint filing regime which permitted married couples to file jointly became more antiquated and less relevant. As the households with traditional male breadwinner families declined and dual wage earner families rose in number, income splitting benefitted fewer families than it used to.[363] The joint bankruptcy petition, upon which enactment was predicated on ease of case administration and the presumption that married persons should file together due to the pooling of resources, seemed to lose touch with its original objectives.[364]

A unit that is not based on marital status, however, will allow the bankruptcy and tax systems to reflect the changes that have occurred within American society. If § 152 of the Internal Revenue Code were expanded to include other qualifying relationships of presumed economic interdependence and adopted by the Bankruptcy Code, this would allow individuals to file jointly with one another based on their presumed economic interdependence as opposed to marital status. In bankruptcy, this would have the advantage of facilitating ease of case administration, lessening the burden on the courts, and offering potential advantages to those who are presumed to have pooled their resources. In tax, this would potentially allocate benefits to those who have strong economic ties yet do not qualify as married. In this sense, the laws regarding joint filing would be more efficient. This simple expansion of the law would also further serve the principle of equality, as individuals would no longer be treated solely on the basis of their marital status for joint filing purposes, but on the basis of their economic relationship. Thus, by adopting a unit of presumed economic interdependence for joint filing

360. Kochhar & Cohn, *supra* note 256.

361. *See supra* note 255 (describing current legal status of gay marriage among the states).

362. *See supra* note 274.

363. *Id.*

364. S. REP. NO. 95-989, at 32 (1978).

purposes, the original objectives of the laws would be better served, equality under the law and efficiency of the law would be duly promoted, and the bankruptcy and tax laws would more adequately reflect the relational definitions and demographic realities of American life.