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Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax

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The United States, unlike most developed countries, continues to use the marital couple as the taxable unit for its income tax. This continued use of the marital unit — like its original establishment — rests on cultural preferences. This Article suggests that the roles of marriage, religion and taxation in America are essential factors in America's retention of the marital unit. Part I examines the distinctive contribution marriage — especially the traditional single-earner breadwinner marriage — makes to the political life of the country. Part II explores the similar role of religion. Part III describes some congressional efforts over the past two decades to aid, ostensibly, married couples through the income tax. Part IV concludes that although these actions have not been the most effective or efficient means of helping married couples, they nevertheless serve an important expressive purpose. Tax has been the arena for many political issues since the founding of the nation. Consequently, congressional actions and rhetoric regarding the income tax's "marriage penalty" reinforce the marital unit/joint return and reaffirm — even if only symbolically — a national commitment to marriage as instrumental to American democracy.

INTRODUCTION

Unlike the majority of developed countries, the United States uses the marital couple as the taxable unit for the income tax. Some countries

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never used it; others have abandoned it.¹ The United States, in contrast, not only continues to use it, but has even increased its commitment to the married couple. Congress has expressed this dedication both literally and figuratively. It has actually helped some — but not all — married couples by increasing the standard deduction and widening the lower tax brackets for joint returns. Symbolically, it has supported the marital unit through extensive pro-marriage, pro-family rhetoric. Both methods favor single-earner married couples over dual-earner ones, even though the former are now a minority and already receive a marriage bonus.

The most common explanation for the persistence of the marital unit in American taxation is history. Once a principle or practice is established, deviation from it becomes difficult. Path dependency, however, is not all-powerful. Countries — including the United States — do diverge from historical contingencies — even in tax. In 1986, for example, the United States reversed a position established over seventy years ago by the first income tax act under the sixteenth amendment; it disallowed deductions for interest payments on personal debt. Other countries have changed their established definitions of a taxable unit. For example, in 1990 the United Kingdom abandoned its longstanding practice of taxing married couples as one and adopted separate taxation; Canada, on the other hand, retains separate taxation, but where marital status is relevant, now treats "common law partners" as married.

This Article suggests that the interconnected roles of marriage, religion and taxation in America are critical to the retention of the marital unit in its tax system. It focuses on the income tax, but a similar pattern exists for estate, gift, and social security taxes, which also use a marital unit. Part I examines the essential contribution the "traditional" single-earner breadwinner marriage makes to the political life of the country, Part II explores the similar role played by religion. Part III describes some congressional efforts over the past two decades to aid, ostensibly, married couples through the income tax. Part IV concludes that although these actions have not been the most effective or efficient means of helping

1 CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 59 (1997) (reporting that ten OECD countries switched to separate taxation between 1970 and 1990; none went from separate to joint). *See* OECD, TAX POLICY STUDIES, PUB'N NO. 12, TAXING WORKING FAMILIES: A DISTRIBUTIONAL ANALYSIS 37, 39 tbl.1.2.3 (2005). Some countries provide for separate taxation of employment income, but require that investment income be split. Many countries have extended the beneficial treatment of married couples to include same sex and/or heterosexual unmarried couples.

married couples, they nevertheless serve an important expressive purpose. Tax has been the arena for many political issues since the founding of the nation. Consequently, congressional actions and rhetoric regarding the income tax's "marriage penalty" reinforce the marital unit/joint return² and reaffirm — even if only symbolically — a national commitment to marriage as instrumental to American democracy.

I. MARRIAGE IN AMERICA

Although marriage is a basic institution throughout the world, its configuration differs over time and place. What Americans call a "traditional" marriage — a consensual, monogamous, single-earner marriage between a man and a woman — has only existed in North America and Western Europe since the eighteenth century and has been declining rapidly over the past several decades. As men and women in the Western industrialized world increasingly cohabit, produce and raise children outside of marriage, social and legal acceptance of alternative family structures has accordingly risen. In the United States, both the number of non-marital families and their acceptance has lagged behind other Western countries. Although many states in the United States extend some legal rights to non-marital partners (e.g., inheritance or hospital visitation rights), as do many businesses (e.g., health insurance), only a minority allow civil unions or same-sex marriages, although that number has recently been growing.³

At the federal level, government support of traditional marriage in the United States increased in the 1990s, as evidenced by the 1996 passage of both the Defense of Marriage Act (DOMA), which defined marriage for

2 Although the terms *joint return* and *marital unit* are not synonymous, this Article frequently uses them interchangeably because they are closely linked in the public's mind.

3 See, e.g., Henry Ordower, *Comparative Law Observations on Taxation of Same-Sex Couples*, 111 TAX NOTES 229 (2006); *Obama OKs Some Benefits for Employees' Same-Sex Partners*, CNN POL., June 17, 2009, available at <http://www.cnn.com/2009/POLITICS/06/16/obama.same.sex.benefits/>. For a current list of marriage laws in the various states see Nat'l Conference of State Legislatures (NCSL), Same Sex Marriage, Civil Unions and Domestic Partnerships, <http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx> (last visited June 9, 2009). As of June 9, 2009, six states permitted same-sex marriages: Massachusetts, Connecticut, Iowa, Maine, Vermont, New Hampshire, with California repealing by referendum a state Supreme Court decision allowing them.

federal purposes as the union between a man and a woman, and welfare reforms which promoted marriage.⁴ At the end of 2003, there were 1,138 federal laws using marital status as "a factor in determining or receiving benefits, rights, and privileges," a net increase of 89 provisions since DOMA's passage.⁵ Although this may change (President Obama has already extended limited domestic partner rights to federal workers), to date marital status affects numerous aspects of life, including crime, education, employment and veterans' benefits. It permeates the income tax, as well as other taxes such as estate, gift, and social security.

Although many countries support marriage — Germany even provides constitutional protection⁶ — the one-breadwinner, married-couple family holds special political and historical meaning in the United States. According to the nation's founders, a married couple was essential to the maintenance of the republic. A republic was the best form of government because it was the most virtuous in that it acted for the common good. The biggest threat to a republic was *corruption* caused by decreasing concern by both the governed and the governing for the common good and increasing concern for self-interest.⁷ The republican family, with the married couple at its heart, defended against this corruption by functioning as a "seedbed" of virtue. The wife/mother was particularly important because she taught her children the necessary morality and civic virtues and improved those characteristics in her husband.⁸ The "Manners of Women," as John Adams said, were

4 Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 and its reauthorization by Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

5 Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf>. *But see* Scott Wilson, *President Wades Into Gay Issues Order Gives Some Benefits to Partners of Federal Workers*, WASH. POST, June 18, 2009, at A1 (partners entitled to long-term health insurance, sick leave).

6 Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, art. 6 para. 1. *See* Maria Wersig, *Overcoming Joint Taxation: Case Study Germany* (May 2009) (unpublished manuscript), *available at* http://userpage.fu-berlin.de/~mwersig/Paper_Onati.pdf; Henry Ordower, *Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted*, 7 FLA. TAX REV. 259 (2006).

7 For a discussion of corruption, see, for example, GORDON S. WOOD, *CREATION OF THE AMERICAN REPUBLIC* 32-34 (1969).

8 Many of the excellent histories of the family note the role of the republican marriage and family. *See, e.g.*, KAY S. HYMOWITZ, *MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL AGE* 33-37 (2006);

the surest Criterion by which to determine whether a Republican Government is practicable in a Nation or not. The Jews, the Greeks, the Romans, the Swiss, the Dutch, all lost their public Spirit, their Republican Principles and habits, and their Republican Forms of Government, when they lost the Modesty and Domestic Virtues of their Women.⁹

A variety of family types have always existed in America. They range from unmarried couple-based families (heterosexual or homosexual) to polygamous ones and more complex ones that reflect America's strong communal strain.¹⁰ Nevertheless, despite the continued presence of all these types of families, the political connection between the married, single-breadwinner family and democracy remains predominant, even after the ideal of a republican government transformed into a representative democracy and the country industrialized.¹¹ This family-type remained the primary source for training and transmitting social and political values in a highly diverse and individualistic nation.¹² Thus, although no longer technically a *republican* family, the "traditional" family based on a heterosexual single-breadwinner married couple has retained the same societal functions.

At the turn of the twentieth century, Theodore Roosevelt reaffirmed the "vital" role the family plays in the nation, with the husband being the breadwinner and the woman "the helpmate, the housewife, and mother"

STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY, OR HOW LOVE CONQUERED MARRIAGE* (2005); NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 15-22* (2002); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* (2000); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985).

⁹ See COTT, *supra* note 8, at 20-21 (quoting John Adams).

¹⁰ See ROBERT P. SUTTON, *MODERN AMERICAN COMMUNITIES: A DICTIONARY* (2005). In the United States, polygamy was not confined to the Mormons. See, e.g., Yale Univ. Beinecke Rare Book & Manuscript Library, Oneida, <http://beinecke.library.yale.edu/utopia/uc10.html> (last visited June 9, 2009) (discussing "complex marriage"). Certain fundamental Mormon sects continue the practice.

¹¹ See, e.g., FRANK LAMBERT, *RELIGION IN AMERICAN POLITICS: A SHORT HISTORY* 45 (2008); LINDA K. KERBER, *WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA* (1980); Rosemarie Zagari, *Morals, Manners, and the Republican Mother*, 44 AM. Q. 192 (1992); Jan Lewis, *The Republican Wife: Virtue and Seduction in the Early Republic*, 44 WM. & MARY Q. 689, 700 (1987).

¹² See generally SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY (Mary Ann Glendon & David Blankenhorn eds., 1995).

into whose "keeping is committed the destiny of the generations to come after us."¹³ Numerous Supreme Court decisions elevated marriage to (near) fundamental right status and generally reaffirm the idea that the married family is the foundation of society.¹⁴ Today, despite (or because of) the proliferation of living arrangements, the heterosexual married couple remains central to the moral, social, economic and political life of the nation; Senator Hutchinson was just one of many conservatives who urged the enactment of DOMA, stating that the United States can survive many things, but "it cannot survive . . . the destruction of the family unit which forms the foundation of our society."¹⁵ Under this view, a family requires a married heterosexual couple, and the public consequences of this marriage are so important that the state must protect it against modern forces threatening its survival.¹⁶

This "traditional" family embodies the white middle/upper class family structure dominant in mid-nineteenth through mid-twentieth century America: a heterosexual marriage at its core and a single male breadwinner.¹⁷ It thus reinforced a gendered division of public (male) and private (female) spheres. Reflecting the dominance of European Americans in the country, it is also characteristically white. At its apogee in mid-twentieth century America, this family type was embedded in academic theories about families and in

13 Theodore Roosevelt, Speech Before the National Congress of Mothers (Mar. 13, 1905), available at <http://www.bartleby.com/268/10/29.html>.

14 See, e.g., C. Quince Hopkins, *The Supreme Court's Family Law Doctrine Revisited: Insights From Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL'Y 431 (2003-04).

15 142 CONG. REC. H7442 (daily ed. July 11, 1996) (statement of Hutchinson, quoting President Bush on the "enormous implications"); accord 142 CONG. REC. H7493 (daily ed. July 12, 1996) (statement of Weldon that marriage is "the foundation of Western civilization").

16 E.g., 104 CONG. REC. H7486 (daily ed. July 12, 1996) (Buyer stating that the nation is based on biblical principles which are threatened as marriage is under attack); see also BRADFORD WILCOX, SACRED VOWS, PUBLIC PURPOSES: RELIGION, THE MARRIAGE MOVEMENT AND MARRIAGE POLICY 3 (2002), available at <http://pewforum.org/publications/reports/marriagepolicy.pdf> (arguing that marriage is a "seedbed of virtues" that "often . . . radiate outward into civil society, furnishing married men and women with stronger habits of devotion to civic life than their unmarried peers"). But see Amir Pax-Fuchs, *Welfare to Work: Myth and Fact, Social Inclusion and Labour Exclusion*, 28 OXFORD J. LEGAL STUD. 797, 806 (2008) (arguing that the allegation that the lower poverty rate among married couples illustrates marriage's "innate superiority" is refuted by equivalent poverty rates between married and unmarried couples in countries with different government policies).

17 GROSSBERG, *supra* note 8, at 9-10.

popular culture, as in the classic television show — the Ozzie and Harriet Show. Although this family structure has waned both demographically and ideologically, it remains ideologically dominant in America. That is in contrast to many European countries; in Sweden, for example, the dual-breadwinner family has been the ideal for decades.¹⁸

In America, a middle-class, male breadwinner family served the need for a large, prosperous, educated population to both produce leaders and ensure a citizenry imbued with democratic values. It also represented the egalitarian nature of American political theory in which everyone has equal opportunity to strive and succeed. Moreover, in an increasingly industrialized, urbanized, and consumerist society, it reflected societal needs and aspirations, reaffirmed that the ideal society is one in which everyone is (or with effort could be) middle-class; recent surveys show that the vast majority of Americans identify themselves as middle-class.¹⁹

American history has reinforced the gendered, single-breadwinner aspect of this family. On the frontier, although the wife/mother provided real economic support, she also served important social functions. She was a civilizing force taming the wild frontiersman and teaching their children. She motivated the frontiersman to "conquer . . . the wilderness in order to make a place for his family, and the good worker is one who works hard to provide for his family."²⁰ Abolitionists and labor reformers also emphasized the provider role of the husband. They saw the ability to sell one's labor in order to provide for one's family as an important aspect of freedom.²¹ After emancipation, the Freedmen's Bureau, among others, promoted marriage as a way to turn ex-slaves into responsible citizens and industrious workers.²²

Throughout American history, the "traditional" family has served as a mechanism to unify a heterogeneous population.²³ Large numbers of people with different attitudes and habits (including living arrangements)

18 Charlott Nyman & Lasse Reinikainen, *Elusive Independence in a Context of Gender Equality in Sweden*, in MODERN COUPLES SHARING MONEY, SHARING LIFE 46, 47 (Janet Stocks, Capitolina Dias & Bjorn Hallerod eds., 2007).

19 BRIAN W. CASHELL, CONG. RESEARCH SERV., WHO ARE THE MIDDLE CLASS? 2-4 (2007), available at http://assets.opencrs.com/rpts/RS22627_20070320.pdf.

20 Jerry G. Pankhurst & Sharon K. Houseknecht, *The Family, Politics, and Religion in the 1980s: Fear of the New Individualism*, 4 J. FAM. ISSUES 5, 26 (1983).

21 AMY DRU STANLEY, FROM BONDAGE TO CONTRACT (1998).

22 See, e.g., COTT, *supra* note 8, at 84-104.

23 See, e.g., NATASHA ZARETSKY, NO DIRECTION HOME: THE AMERICAN FAMILY AND THE FEAR OF NATIONAL DECLINE, 1968-1980 (2007); GRETCHEN RITTER, THE CONSTITUTION AS SOCIAL DESIGN: GENDER AND CIVIC MEMBERSHIP IN THE AMERICAN CONSTITUTIONAL ORDER 67, 70-71(2006).

needed to be "Americanized": Native Americans (some of whom practiced polygamy), people living in lands recently acquired from Mexico, newly freed slaves, and wave after wave of immigrants of different races, religions, and ethnicities. The "traditional" family has helped forge a common identity and to assimilate outliers (whether foreign or native) to American habits, practices, and republican/democratic virtues.

The fate of polygamy in the United States illustrates the importance of this family to American democracy. In 1856 the Republican Party Platform called for the abolition in U.S. territories of "those twin relics of barbarism — Polygamy and Slavery."²⁴ Six years later, Abraham Lincoln signed the Morrill Anti-Bigamy Act of 1862 which banned polygamy in the territories, and made the act punishable by a fine and/or imprisonment.²⁵ The 1878 Supreme Court *Reynolds* decision upholding the ban on polygamy noted that marriage was both a "sacred obligation" and the bedrock of society, and stated that polygamy was undemocratic.²⁶ Four years later Congress reaffirmed the earlier act and denied polygamists the right to vote or hold office.²⁷ In essence, the need for a "traditional" family trumped the Mormons' freedom of religion claim. Although current same-sex marriage debates have caused some reexamination of the *Reynolds* decision, many still believe the case was rightly decided because polygamy is "inimical" to American democracy.²⁸ In the 1996 congressional debates over the definition of marriage, Senator Coats approvingly quoted the *Reynolds* Court's statement that heterosexual marriage is "the sure foundation of all that is stable and noble in our civilization."²⁹

Americans historically see causal links between the state of the family and the state of the nation. In the nineteenth century people linked the decline of the family (increased divorce and desertions) to the national stresses of sectionalism, industrialization, urbanization and immigration.

24 Republican Platform of 1856, http://www.ushistory.org/gop/convention_1856republicanplatform.htm (last visited Nov. 30, 2009).

25 The Morrill Anti-Bigamy Act of 1862, 12 Stat. 501.

26 *Reynolds v. U.S.*, 98 U.S. 145, 166-67 (1878).

27 Edmunds Act of 1882, 22 Stat. 30.

28 See, e.g., Adam J. MacLeod, *The Search for Moral Neutrality in Same-Sex Marriage Decisions*, 23 BYU J. PUB. L. 1 (2008); Kristen A. Berberick, Comment, *Marrying into Heaven: The Constitutionality of Polygamy Bans Under the Free Exercise Clause*, 44 WILLAMETTE L. REV. 105 (2007); Stanley Kurtz, *Polygamy Versus Democracy: You Can't Have Both*, 11 WKLY. STANDARD, June 5, 2006, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/012/266jhfgd.asp>.

29 142 CONG. REC. S4947 (daily ed. May 9, 1996) (without mentioning the case by name).

Bolstering the republican-type family, they believed, would ameliorate the democratic crisis because the family was a buffer against harsh economic and social realities.³⁰ During the Depression, New Deal policies and programs were frequently based (consciously or not) on gendered views of social and economic roles, which favored male (and white) breadwinner families.³¹ In the mid-twentieth century the middle-class breadwinner family again was centrally involved in a democratic crisis — the fight against communism. The traditional family exemplified the American way of life and the power of capitalism, by demonstrating that one worker could provide a decent standard of living for an entire family.³²

Today many people believe this traditional family is endangered. They see its weakened state (and that of supporting institutions) as "our culture's most serious long-term problem."³³ In 1980 the Republicans became the first major American political party to endorse a specific family type.³⁴ Reaffirming that "[the family] is the school of democracy," its National Platform supported the male breadwinner family, stating: "The importance of support for the mother and homemaker in maintaining the values of this country cannot be over-emphasized."³⁵ Consequently, it "insist[ed] that all domestic policies, from child care and schooling to Social Security and the tax code, must be formulated with the family in mind."³⁶

Republicans, however, are not the only supporters of traditional marriage and family-friendly policies. DOMA was enacted in 1996 under a Democratic administration. Similarly, although American welfare policy has long favored married women with children, a significant goal of the 1996 welfare reform — also enacted under a Democratic administration — was the promotion of marriage.³⁷ In its 1998 report, the bipartisan

30 GROSSBERG, *supra* note 8, at 10-12.

31 SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* (1998).

32 COTT, *supra* note 8, at 197; Dennis J. Ventry, Jr., For Richer, for Poorer: How Tax Policymakers Have Protected and Punished American Families, 1913-2006, at 248 (2007) (unpublished manuscript, on file with author).

33 MARY ANN GLENDON, *Introduction: Forgotten Questions*, in *SEEDBEDS OF VIRTUE*, *supra* note 12, at 1, 3.

34 Pankhurst & Houseknecht, *supra* note 20.

35 REPUBLICAN NAT'L CONVENTION, *REPUBLICAN PARTY PLATFORM OF 1980* (1980), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=25844>.

36 *Id.*

37 See sources cited in note 5, *supra*. On the interplay of family values, marriage promotion and welfare, see JOEL F. HANDLER & YEHESEKEL HASENFELD, *BLAME WELFARE, IGNORE POVERTY AND INEQUALITY* (2007); Judith E. Koons, *Motherhood*,

National Committee on Civic Renewal urged the nation to eliminate out-of-wedlock births and "commit" itself to "two-parent families "whenever possible" because "[f]amilies are crucial sites for shaping character and virtue," and "[o]ur civic condition cannot be strong if our families remain weak."³⁸ The report thus assumed without explicitly stating that families were not families unless there was a married man and woman. Moreover, both parties regularly support reducing marriage penalties in the tax law, although offering different solutions.

Despite the bipartisanship, Republicans express political support for marriage more strongly than Democrats in large part because of the religious right's strong position within the party. Religion customarily supports families and conservative religions generally support traditional (heterosexual, male breadwinner) families. Over the past several decades, the combination of religion (always a powerful force in America) and family has produced a political juggernaut, creating fertile ground for a conservative, "faith-based" family values politics with marriage at its core. Part II explains religion's central role in America.

II. RELIGION IN AMERICA

Both domestic and foreign observers have long noted America's religious exceptionalism, which reflects religion's social, political and cultural compatibility with the nation.³⁹ Religion, for example, balances equality, providing a sense of connection and social identity that counteracts the isolation of freedom and individualism,⁴⁰ as well as the actual physical isolation of frontier life. Religion, like the "traditional" family, serves important public functions in America, and Americans characteristically view both as "essential" to the nation's social and political life.⁴¹

Marriage, and Morality: The Pro-Marriage Moral Discourse of American Welfare Policy, 19 WIS. WOMEN'S L.J. 1 (2004).

38 NAT'L COMM'N ON CIVIC RENEWAL, A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT WEAKENS AMERICA AND WHAT WE CAN DO ABOUT IT 13 (1998).

39 LAMBERT, *supra* note 11, at 9 (discussing foreigners' astonishment at the religiousness of the United States); KENNETH D. WALD & ALLISON CALHOUN-BROWN, RELIGION AND POLITICS IN THE UNITED STATES 20-55 (2007) (listing four major factors: cultural compatibility, need for social identity, independence of religion from the state, and competitive religious environment).

40 II ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA bk. 1, ch. 5 (Henry Reeve Trans., 1863), available at http://xroads.virginia.edu/~HYPER/DETOC/ch1_05.htm.

41 LAMBERT, *supra* note 11, at 2 (quoting a 1779 sermon by Samuel Williams on the "essential nature of Christianity to the moral fabric of society"). The

American religious theories and practices helped establish fundamental political beliefs and practices, ranging from form of government to style of politics. Both evangelicalism's belief in personal redemption and Congregationalism's organizational structure, in which each church is independent with no higher governing body, promoted egalitarian, self-governing local government. American political campaigns use techniques perfected by religious evangelicals: mass meetings, parades, door-to-door soliciting, declarations of faith, and biblical references.⁴² Religion is even linked to the Revolution itself. Some scholars see a direct causation, while others merely believe evangelicalism helped achieve a more egalitarian revolution.⁴³ At the least, religion helped forge a national identity through mass fasting and praying, with many religious leaders urging support for the break with Britain.

Three aspects of Puritan theology, according to some scholars, suffuse American political and social beliefs: covenant theology, an emphasis on human depravity, and the concept of being a "chosen people."⁴⁴ Ever since the Mayflower Compact, Americans have applied the religious idea of a covenant between God and the individual to secular government. From the Declaration of Independence and the Constitution through modern politics, Americans stress the idea of consent of the governed and mutual rights and responsibilities. In 1992, for example, President Clinton called for a "New Covenant, a solemn agreement between the people and their government based not simply on what each of us can take but what all of us must give to our Nation."⁴⁵ Two years later, the Republican Party offered a Contract

Family Research Council states that marriage, religious "observance," and the "Judeo-Christian worldview [have] provided a sound basis for the flourishing of our national culture and our political system." Family Research Council, Religion and Culture, <http://www.frc.org/religion-culture> (last visited Nov. 30, 2009); accord PATRICK FAGAN, KIRK PATRICK & JONATHAN BUTCHER, A PORTRAIT OF FAMILY AND RELIGION IN AMERICA: KEY OUTCOMES FOR THE COMMON GOOD (2006), available at http://www.heritage.org/Research/family/Map_of_Religion.pdf (arguing that teenagers with intact families and religious attendance are least likely to have committed crimes).

42 WALD & CALHOUN-BROWN, *supra* note 39, at 42.

43 THOMAS S. KIDD, THE GREAT AWAKENING: THE ROOTS OF EVANGELICAL CHRISTIANITY IN COLONIAL AMERICA 288 & *passim* (2007).

44 WALD & CALHOUN-BROWN, *supra* note 39, at 43. Much of the following discussion is drawn from *id.* at 42-54.

45 Bill Clinton, Acceptance Speech to the Democratic National Convention (July 16, 1992), available at <http://www.4president.org/speeches/billclinton1992acceptance.htm>.

with America. More recently, the Network of Spiritual Progressives issued a Spiritual Covenant with America that among other things works to "create a society that promotes rather than undermines loving and caring relationships and families."⁴⁶

The Puritan belief in man's inherent depravity supports the American belief in a limited secular government. Given man's nature, government, in the words of Thomas Jefferson, is at best a "necessary evil." Consequently, the constitutional framers created formal structures — such as the checks and balances of the three branches of government — to contain officials' natural tendencies toward self aggrandizement, whether in the form of money or power. Given man's inherent predilections, it was therefore also essential that the republican family instill citizens with virtue so as to keep the republic pure.

The Puritan idea that God chose America to be a beacon on the hill courses through American history. Some believe this idea lies at the core of America's "civil" religion — with its generic appeal to God and its sanctified documents (e.g., Mayflower Compact, Declaration of Independence).⁴⁷ The 2008 Republican vice-presidential candidate Sarah Palin stated forthrightly that she and John McCain believed that "America is a nation of exceptionalism"; the Democratic candidates did as well.⁴⁸ Exceptionalism has influenced America's foreign policy from its "Manifest Destiny" westward expansion to wars to spread democracy and protect freedom against any threat, be it communism or a more recent "axis of evil."

Despite a constitutional separation of church and state, religion is an integral part of American politics and democracy. As President Reagan stated in 1984,

politics and morality are inseparable. . . . And as morality's foundation is religion, religion and politics are necessarily related. We need

⁴⁶ The Network of Spiritual Progressives, *A Spiritual Covenant with America*, <http://www.spiritualprogressives.org/article.php/covenant> (last visited Nov. 30, 2009). For the Republican Contract, see, *Republican Contract with America*, <http://www.house.gov/house/Contract/CONTRACT.html> (last visited Nov. 30, 2009).

⁴⁷ See, e.g., Robert N. Bellah, *Civil Religion in America*, 96 DAEDALUS 1 (1967).

⁴⁸ *Transcript: The Vice-Presidential Debate*, N.Y. TIMES, Oct. 2, 2008, available at <http://elections.nytimes.com/2008/president/debates/transcripts/vice-presidential-debate.html>; see also LAMBERT, *supra* note 11, at 17 (calling exceptionalism one of most "powerful and enduring myths"); Christopher Caldwell, *First Nation*, N.Y. TIMES MAG., Aug. 31, 2008, at 9 (arguing that both presidential candidates believe in exceptionalism).

religion as a guide. We need it because we are imperfect, and our government needs the church, because only those humble enough to admit they're sinners can bring to democracy the tolerance it requires in order to survive.⁴⁹

Religion, it is said, provides the "ballast . . . of deep commonality" that binds the pluralistic American country together.⁵⁰ Two-thirds of Americans believe the country is a "Christian nation" and religion is part of America's national identity.⁵¹ Religion is embedded in the fabric of American life. The Pledge of Allegiance asserts that the country is "one nation, under God," and the money proclaims, "In God we Trust." Congress opens with a daily prayer, including, occasionally, one for marriage and the patriarchal family:

Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh. (Genesis 2:24) Father in Heaven, we pray this morning for our families. Thou didst begin human history with marriage and the family, and history makes it clear that no civilization can survive the disintegration of the family.⁵²

Religion has played a powerful domestic role throughout American history. It has been a significant force in large issues (abolition, women's suffrage, prohibition, civil rights, the "culture wars"),⁵³ middling ones (taxation of the family), and small ones (should there be mail on Sunday).⁵⁴ Although various American religious traditions support differing views on family, the religious right's view has been the most politically influential in

49 Ronald Reagan, Remarks at a Dallas Ecumenical Prayer Breakfast (Aug. 23, 1984), available at <http://www.americanrhetoric.com/speeches/ronaldreaganecumenicalprayer.htm>.

50 Wilfred M. McClay, *The Soul of a Nation*, 155 PUB. INT. 4, 8 (2004).

51 PEW RESEARCH CTR., MANY AMERICANS UNEASY WITH MIX OF RELIGION AND POLITICS 5 (2006), available at <http://pewforum.org/publications/surveys/religion-politics-06.pdf>.

52 141 CONG. REC. S1557 (daily ed. Jan. 26, 1995) (Reverend Richard C. Halverson) This prayer was given ten times between 1988 and 2006.

53 E.g., Pew Forum on Religion and Public Life Home Page, <http://pewforum.org/religion-politics/> (last visited Aug. 13, 2008) (discussing religion's role in major issues of the day). On the culture wars, see Pat Buchanan, Address at 1992 Republican National Convention, Houston Texas (Aug. 17, 1992), available at <http://www.americanrhetoric.com/speeches/patrickbuchanan1992rnc.htm> ("[C]ulture [war is a] religious war . . . for the soul of America. It is as critical to the kind of nation we will one day be as was the Cold War itself.").

54 LAMBERT, *supra* note 11, at 59-63 (discussing religious opposition to Congress extending mail service to Sundays in 1810).

recent decades. Its emphasis on the sacred union between a married man and woman reinforces the "traditional" family, as does its belief that the wife — as her husband's helpmeet⁵⁵ — performs her most vital role by transmitting morals and virtues to the next generation. Over the past four decades, the Right's political involvement has been essential to the rise of the pro-family/pro-marriage movement in the United States.⁵⁶ It has influenced a variety of political decisions, ranging from stem cell research to welfare to taxation of the family.

Long a factor in presidential elections, religion, according to a recent study, is now more determinative of voting in America than age, gender, or income.⁵⁷ Possibly the decisive factor in the 2004 presidential election,⁵⁸ it was still significant in the 2008 election. Many saw Republican presidential nominee John McCain's vice-presidential choice of Sara Palin as a bid to shore up support from the religious right. As part of a conservative-organized campaign, ministers directly challenged laws prohibiting political action by tax-exempt organizations by endorsing candidates and specific positions on issues.⁵⁹ Both candidates participated in an evangelical religious forum, which questioned them on issues such as stem cell research, when life begins, and

55 *Genesis* 2:4-25 (woman created out of Adam's rib and eating the apple). *But see Genesis* 1:27 (on the sixth day, God created both man and woman in his image).

56 WILCOX, *supra* note 16, at 10-11 (arguing that at the national level the movement seems "motivated by civic goods like social order and fiscal probity, and by social goods like the welfare of children," but religion is "central" at the state and local levels). However, even at the national level, religion provides an important service — it is the source of leaders, and provides places to hold conferences, discuss problems, and so forth. *See* Pankhurst & Houseknecht, *supra* note 20, at 15-17. The movement is increasingly international. *See* DORIS BUSS & DIDI HERMAN, *GLOBALIZING FAMILY VALUES: THE CHRISTIAN RIGHT IN INTERNATIONAL POLITICS* (2003).

57 Daniel Bergner, *Can Leah Daughtry Bring Faith to the Party?*, N.Y. TIMES MAG., July 20, 2008, at 25, 26; JOHN C. GREEN, *THE FAITH FACTOR: HOW RELIGION INFLUENCES AMERICAN ELECTIONS* 16-17 (2007).

58 *See generally* GREEN, *supra* note 57; A MATTER OF FAITH: RELIGION IN THE 2004 PRESIDENTIAL ELECTION (David E. Campbell ed., 2007). Approximately 40 percent of Americans describe themselves as evangelical, born-again Christians, and five presidents from Jimmy Carter through George W. Bush, "either have been evangelicals or have closely aligned themselves with evangelical leaders." KIDD, *supra* note 43, at xiii. *See also* WALD & CALHOUN-BROWN, *supra* note 39, at 206-10 (arguing that the influence of evangelicalism/conservatism on politics goes back as far as the 1960s); PEW RESEARCH CTR., *supra* note 51.

59 Peter Slevin, *Some Clergy Flout Tax Law, Choose Political Sides*, BOSTON GLOBE, Sept. 29, 2008, at A10.

the definition of marriage. Both defined marriage as a union between a man and a woman.⁶⁰

To summarize, religion's special role in America, described in this Part, reinforces marriage and the family's prominent position in America. This prominence results from several factors. First, Americans are notoriously religious and most, if not all, religions recognize the benefits of marriage, even if they do not privilege traditional marriage. Second, conservative religions, which are politically powerful in the United States, stress the essential role traditional marriage plays in civilization and American society. Third, religion in the form of Puritan theology has been incorporated into American political thought and practice. Together these factors contribute to the persistence of the joint return. The next Part briefly examines some recent actions regarding marriage and joint returns.

III. THE MARITAL COUPLE AND TAX LAW: RECENT ACTIONS

Although U.S. taxpayers have never been required to file joint returns, the enactment of income splitting in 1948 essentially established the marital couple as the taxable unit because of the joint return's economic benefits. Since married taxpayers could combine their incomes and then split the total evenly between the two, they essentially had tax brackets that were twice as large as those which single taxpayers had. Under pressure from unmarried taxpayers, the Tax Reform Act of 1969 narrowed the tax brackets for married taxpayers, although they remained wider than those for single taxpayers. This created a "marriage penalty" for certain two-worker couples, since the piggybacking of one income on top of the other was not completely offset by widened brackets.⁶¹ Today the marital unit is deeply entrenched in the income

60 Katharine Q. Seelye & John M. Broder, *In Forum at Church, Rivals Meet Briefly and Part Sharply on Social Issues*, N.Y. TIMES, Aug. 17, 2008, at 3, available at <http://query.nytimes.com/gst/fullpage.html?res=9E01E3D6163CF934A2575BC0A96E9C8B63&scp=3&sq=.+> (last visited Nov. 30, 2009); Katharine Q. Seelye & John M. Broder, *U.S. Candidates Are Thrown into Relief at a Church Forum*, INT'L HERALD TRIB., Aug. 17, 2008, at 3, available at <http://www.iht.com/articles/2008/08/17/america/17forum.php>.

61 The benefit originally accrued to a (relatively) wealthy minority of taxpayers, but it helped more single-earner couples as median family income increased and the value of exemptions from tax decreased. Assume the tax brackets were 10 percent for the first \$10,000 of income and 20 percent for the second. Assume taxpayer A, who has \$20,000 taxable income, is married to B who has none. Without income splitting, A pays \$3000 of tax; B pays none. Under income splitting, each is deemed to have

tax system. Its effects are felt throughout the system, with numerous tax provisions affecting families — some positively, some negatively.⁶² Although approximately one-half of married couples suffer marriage "penalties,"⁶³ few Americans argue for abolishing the marital unit or extending its benefits either by broadening the definition of marriage or by extending marital benefits to cohabiting partners.

The promotion of marriage and the single-breadwinner family has always been a factor in American debates about the taxable unit. In the years leading to the 1948 enactment of income splitting, however, constitutional issues regarding state community property laws and political issues regarding tax cuts were more important.⁶⁴ To the extent the promotion of marriage was

half of the couple's combined income (\$10,000 each) and pays \$1000 tax. In effect, the couple's brackets are twice as large as an individual taxpayer's brackets.

As long as the married brackets are double the single brackets, a married couple will never pay more than if they were single (although the tax benefit of being married decreases if both work, and disappears if they have similar amounts of income). If the married brackets are more than — but not double — the single brackets, then some couples will receive a tax benefit from being married (e.g. a single earner couple), but others (e.g. dual earners with equal incomes) will suffer a marriage "penalty" and be forced to pay more in taxes as a married couple than if they were not married and paid taxes at the single's rate. This has been the case since 1969. See Leslie A. Whittington & James Alm, *Marriage Penalty*, in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 251 (Joseph J. Cordes, Robert D. Ebel & Jane G. Gravelle eds., 2d ed. 2005), available at <http://www.taxpolicycenter.org/taxtopics/encyclopedia/Marriage-Penalty.cfm>.

⁶² See, e.g., CONG. BUDGET OFFICE, *supra* note 1; Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008).

⁶³ Although the joint return is not mandatory, a married couple who file separately cannot use the same tax rates that single individuals use, but rather must split the married rate brackets the couple would use if filing jointly. As a consequence, most married couples will pay the same tax (as a couple) if they file separately or jointly. In certain situations, however, they will pay less if they file separately, as when, for example, one spouse has all the itemized deductions.

⁶⁴ Alice Kessler-Harris, "A Principle of Law but Not of Justice": Men, Women and Income Taxes in the U.S. 1913-1948, 6 S. CAL. REV. L. & WOMEN'S STUD. 331 (1997); Ventry, *supra* note 32, at 30-70. By the late 1920s, after some earlier vacillation, the Treasury determined that the individual generally was the proper unit. In 1930 the Supreme Court held that married couples could split their income only in community property states, because only in those states did the wife as a matter of state property law own one-half of the husband's income earned during the marriage. *Poe v. Seaborn*, 282 U.S. 101 (1930); *Lucas v. Earl*, 281 U.S. 111 (1930).

Throughout the 1930s and 1940s, various proposals for uniform treatment were made, including mandatory joint returns (without income splitting) which would tax community income to the spouse with management powers. Since this would increase tax liabilities for wealthy married couples, many opposed it on the grounds

considered, the joint return was frequently portrayed as penalizing marriage because joint returns (without income splitting) penalized married couples by taxing their combined income as if it were that of a single person. The income splitting adopted in 1948 reversed the situation. Consequently, post-1948 rhetoric about the taxable unit increasingly focused on joint returns as helping marriage and families. However, once the married brackets less than doubled the single brackets in 1969, some dual-earner married couples incurred a higher tax liability than they would as two single individuals. Over time the number of married couples suffering this "marriage penalty" grew as more became two-earner couples.

Beginning in the 1980s, the rhetoric about marriage and the taxable unit intensified when the religious and conservative right connected religion and family values to the issue of low taxation. The 1980 Republican platform stressed the importance of the "mother and homemaker" of the traditional single-breadwinner marital family, even while proposing partial relief from the marriage penalty for dual-earner couples.⁶⁵ The Economic Recovery Tax Act of 1981 provided for a 10 percent deduction for a second, lower-earning spouse (limited to \$3,000), but the provision was eliminated in 1986 when tax rates were dramatically reduced.⁶⁶ Nevertheless, both marriage bonuses and penalties remained, and penalties actually increased for certain taxpayers with the expansion of the Earned Income Tax Credit in 1993.

In the late 1990s, Congress once again considered helping married couples by decreasing the income tax's marriage penalty and promoting marriage. Increasingly, it focused on the tax brackets and the standard deduction in the joint return. Although these two provisions account for less than one-half of the penalties imposed by various tax provisions,⁶⁷ they are the most visible ones and affect the largest number of taxpayers. Consequently,

that it harmed marriage. Boris I. Bittker, *Taxation of the Family*, 27 STAN. L. REV. 1389, 1409-10 (1975). Finally, in 1948 Congress enacted voluntary income splitting for married couples filing a joint return. Unlike mandatory joint return proposals which could not gather enough votes to pass, the concept of splitting income was politically viable: the Treasury accepted it; middle- and upper-bracket taxpayers approved because it was their best chance of getting tax cuts past President Truman who had already vetoed previous tax bills. Stanley Surrey, *Taxation of the Family — the Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1104 (1948). Later Revenue acts reduced the benefits of income splitting, but did not change the basic rule.

⁶⁵ REPUBLICAN NAT'L CONVENTION, *supra* note 35.

⁶⁶ Economic Recovery Tax Act of 1981 (ERTA), Pub. L. No. 97-34, 95 Stat. 172 (I.R.C. § 221).

⁶⁷ *Easing the Family Tax Burden: Hearing on S. 107-170 Before the Comm. on Finance*, 107th Cong. 10 (2001) (Statement of Lawrence Zelenak).

for most taxpayers they represent the marriage penalty and served as the perfect emblem for the accompanying rhetoric, which asserted the essential role of the marital couple to American society. A 1998 Senate resolution, for example, stated: "Marriage is the foundation of the American society and the key institution preserving our values."⁶⁸ Broadening tax brackets and standard deductions would help all married couples, not just dual earners.

During the 2000 presidential election, George W. Bush campaigned for tax cuts in terms of family values (especially marriage), often describing the effects on particular middle-class families. This technique aimed to deflect criticism that the majority of his proposed tax cuts went to the wealthy.⁶⁹ His first tax proposal as President in February 2001 included a provision to reduce the marriage penalty on dual-earner couples similar to the 1981 provision, although it was a credit rather than a deduction.⁷⁰ Some congressional Republicans, however, argued for broader relief for all married couples, even though many Americans believed other tax issues were more important for families such as making college tuition deductible and increasing the child credit.⁷¹

Some people argued that the tax laws should actively benefit marriage. Tax laws, Congressman Blunt stated, should place a "premium" on marriages — provide a bonus to subsidize them — because "families and marriage is [sic] something that should be honored."⁷² Others said that the alleged marriage bonus was in reality a marriage penalty for single-earner couples which "penalized families just because one of the spouses chooses the hard work of the household over the role of breadwinner[.]"⁷³ They argued that

68 S. Con. Res. 86, 105th Cong. § 326 (1998).

69 Alison Mitchell, *Bush Returning Tax-Cut Plan to Center Stage*, N.Y. TIMES, Oct. 2, 2000, at 1, 23.

70 D. MARK WILSON & WILLIAM W. BEACH, THE ECONOMIC IMPACT OF PRESIDENT BUSH'S TAX RELIEF PLAN (Ctr. for Data Analysis, Report No. 01-01, 2001), <http://www.heritage.org/research/taxes/cda01-01.cfm> (reporting a 10 percent deduction for lower-earner spouse to a maximum of \$3000); JANE GRAVELLE, GOV'T & FIN. DIV., THE MARRIAGE TAX PENALTY: AN OVERVIEW OF THE ISSUES 2 (2000), available at http://assets.opencrs.com/rpts/RL30419_20001220.pdf; David E. Sanger, *Bush Tax Plan Sent to Congress*, N.Y. TIMES, Feb. 9, 2001, at A1 (not specifically mentioning the amount).

71 See, e.g., Stan Greenberg & James Carville, Democracy Corps, *Turning Point and Strategic Choices* 6 (June 20, 2001), http://www.greenbergresearch.com/articles/1924/3115_Turning_Point_and_Strategic_Choices.pdf (College tuition and child credit tax issues ranked higher than marriage penalty).

72 147 CONG. REC. H1300 (daily ed. Mar. 29, 2001).

73 146 CONG. REC. S2673 (daily ed. Apr. 13, 2000) (statement of Mack); *accord President's Tax Relief Proposals: Tax Proposals Affecting Individuals: Hearing*

the only way to eliminate the marriage penalty was to double the singles brackets, presumably to compensate the stay-at-home spouse — usually the wife — for her work at home. Since the stay-at-home spouse is not taxed on the imputed income from the domestic work (e.g. child care, cleaning, cooking), this solution compensates for a non-existent tax. Consequently, it increases the marriage bonus for single earner families, thereby accomplishing Representative Blunt's goal of putting a tax premium on marriage.

The Family Research Council, a Christian Right non-profit organization formed to promote marriage and the family, testified that the targeted dual-earner approach was worse than doing nothing because it penalized the *preferred* type of family, the one with a stay-at-home spouse.⁷⁴ Helping *all* married couples was imperative because the sacred institution of marriage was the heart of the family which, in turn, was the "foundation of civilization." Marriage, however, was endangered, as indicated by the rising numbers of out-of-wedlock births, cohabiting couples, and a tax code that penalized it. A tax code that promoted marriage would encourage cohabiting couples and unmarried mothers to wed.⁷⁵

Although this approach extended marriage bonuses without eliminating many marriage penalties, it prevailed. The Economic Growth and Tax Relief Reconciliation Act of 2001 temporarily broadened the lower brackets for joint returns and increased the standard deduction. Although later acts extended (or accelerated) these benefits, the 2001 debates represented the peak of congressional attention to the marriage penalty. The issue, however, has not disappeared from the tax policy agenda. The elimination of the marriage penalty is a frequently mentioned reason for making the 2001 tax cut permanent. Moreover, proposals to replace the progressive tax with a flat rate structure⁷⁶ also solve the marriage penalty in the same way as the 2001 reforms. By retaining the joint return and providing for one rate, single and dual-earner couples are treated the same; these proposals favor the traditional single-breadwinner family; imputed income from stay-at-home spouses, for example, remains untaxed while dual workers' necessary expenses (e.g. childcare) still are not fully deductible. Today the marital unit

on H.R. 107-6 Before the H. Comm. on Ways & Means, 107th Cong. 34 (2001) [hereinafter *Hearing*] (statement of Sen. Hutchinson on the necessary relief for married couples regardless of whether one *spouse* is at home).

⁷⁴ *Hearing*, *supra* note 73, at 36 (statement of Charles A. Donovan).

⁷⁵ *Id.* at 35.

⁷⁶ For a recent proposal, see Newt Gingrich & Peter Ferrara, *Let's Have a Real Middle-Class Tax Cut*, WALL ST. J., Nov. 20, 2008, available at <http://online.wsj.com/article/SB122714465532443171.html?mod=djemEditorialPage>.

and the joint return remain firmly established in the U.S. income tax system. Although some argue in favor of expanding it by broadening the definition of marriage to include same-sex couples, few argue for its abolition.

IV. CONCLUSION: THE EXPRESSIVE NATURE OF THE MARITAL UNIT/JOINT RETURN

The real and symbolic roles taxation has played in America throughout the country's history contribute to the persistence of the marital unit in its income tax laws (as well as estate, gift, and social security taxes). Since the nation's founding, tax has often been the arena for debates about the nature of America, so much so that it has been said that tax is a "lightning rod" for politics.⁷⁷ Consequently, it is unsurprising that concerns about marriage, religion, and the family would appear in the tax context. The real consequences of joint taxation cause higher or lower taxes than would occur in individual taxation. They also influence the behavior of some couples, such as whether to marry or whether a spouse should work. These real consequences both reveal and influence American attitudes. For example, the marriage "bonuses" and "penalties" caused by joint taxation reflect a preference for single-earner families.⁷⁸

Joint taxation's symbolic importance also produces real effects. Since most people do not understand the intricacies of tax, the rhetoric of tax may actually be as important (or more so) than its substance. Rhetoric is not empty. The choice of words and phrases is not accidental and has consequences. Politicians choose a particular rhetoric because people respond to it. It reflects people's attitudes and beliefs, even as it helps shape them. Thus, tax rhetoric about marriage and the family is not just symbolic, but has real meaning. It appeals to American values while it reinforces them.

77 See, e.g., DANIEL A. SMITH, *TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY* 21-23 (1998); Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 *BUFF. L. REV.* 819 (2002).

78 Peter Haan & Dolores Navarro, *Optimal Income Taxation of Married Couples: An Empirical Analysis of Joint and Individual Taxation* (Inst. for the Study of Labor, Discussion Paper No. 3819, 2008), available at <http://ssrn.com/abstract=1305803> (arguing that joint taxation is optimal only "when the government has a high taste for redistribution towards one-earner couples and a very low or even negative taste for redistribution towards couples in which both partners earn a similar amount of income").

Although many income tax provisions affect marriage and the family, the joint return — as representative of the taxable unit — is the most visible to the majority of taxpayers. It affects every taxpayer, affects numerous tax provisions, and its basic concept is not highly technical. As its name indicates, it strikes at the heart of marriage — its unity, its sharing. Congressional action in this area, therefore, is an effective means of showing symbolic support for marriage, families, and religion, which in turn supports marriage and families.

In the last several decades, both congressional and popular attention to marriage penalties in the income tax increased, even as traditional families and marriages declined. Many argued — often with great rhetorical flourish — for removing marriage penalties, not just on the grounds of fairness, but in order to protect marriage and society. Despite congressional sound and fury in debates and hearings, Congress has provided limited actual help for most families — including relief from the marriage penalty.⁷⁹ In fact, some commentators note that recent family tax legislation reinforces class, race, and gender biases, because high-income, white, single-earner families receive a disproportionate amount of the tax benefits in the form of lower taxes.⁸⁰ Certainly, Congress' widening of lower brackets for joint returns provided only limited assistance to working families suffering from stagnating (or declining) real wages, lack of jobs, rising healthcare costs, and other economic challenges. Moreover, non-tax assistance in the form of increased funding for education, housing, healthcare and childcare, etc. would support families more than the marriage penalty tax relief.

The tax relief enacted actually makes the enactment of such targeted relief more difficult because broadening tax brackets is very costly and inefficient. It not only gives money to those who suffer no marriage penalty, but it actually increases the tax advantage for married couples with a single earner, including some wealthier taxpayers who not only have seen their real incomes increase but also have greatly benefited from general tax cuts. Even the limited tax relief enacted does not eliminate the marriage tax penalty. Not only do some married couples still suffer a penalty under the Section 1 rate brackets, but many suffer from treatment under other sections. The Section 32, Earned Income Tax Credit, and the Section 21, credit for dependent care, for example, "penalize" married couples, while other — e.g., the 1998 amendment to IRA contributions Section 219(g) —

⁷⁹ *E.g.*, 147 CONG. REC. H1308 (daily ed. Mar. 29, 2001) (statement of Jones).

⁸⁰ *E.g.*, Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007).

help only some families. Doubling the standard deduction and widening the lower brackets are simply the largest, most visible sections with marriage penalties. Moreover, to the extent that widening the brackets decreased taxes on two married individuals compared to the taxes they would incur if single, the relief served the same function that the original 1948 income splitting did — providing tax reduction to a large number of wealthier, single-earner married couples.

The rhetoric surrounding the marriage penalty debates serves two functions. First, rhetoric often acts as the opiate of politics. It helps disguise the lack of real assistance to married couples and their families. Second, it provides moral support for embattled families, especially conservative and religious families who endorse single-breadwinner marriages. Beleaguered people often yearn for the stability of the (idealized) past, and in recent years many families, particularly families with white male workers, whose real wages especially have failed to grow,⁸¹ feel vulnerable. They desire real help, but real help is difficult and expensive. Rhetorical help is not just cheaper, but also can be more visible in a technical field such as taxation where many people do not even know whether their taxes have increased or decreased.⁸²

Rhetoric concerning the taxation of marriage resonates strongly with the American people. Throughout American history, important issues have played out in the tax arena. The very birth of the nation, the Shays' and Whiskey Rebellions of the early years of the republic, the nineteenth-century protectionist tariffs and today's tax revolts enacted through initiative and referenda were battles not just about tax, but about the nature of American government. The nature of family, marriage, and religion are also important issues in America and the tax debates about the marital unit are an important area in which they are expressed. Consequently, congressional actions and rhetoric regarding the marital unit and marriage penalty — even if primarily symbolic — reaffirm a national commitment to marriage as instrumental to American democracy and tacitly acknowledge a similar importance of religion (which supports marriage).

Sixty years ago, the United States Congress enacted income splitting, thereby establishing the couple as the taxable unit for married taxpayers. Although that action influenced future practices, path dependency alone cannot account for America's continuing fidelity to the marital unit. Tax

81 Jeff Madrick, *Time for a New Deal*, 55 N.Y. REV. BOOKS 65, 66 (2008).

82 A 2003 NPR/Kaiser poll revealed that half of the respondents did not know a tax cut had occurred in the past two years. See NPR/Kaiser Family Found./Kennedy Sch. of Gov't, *Americans' Views on Taxes* (Apr. 2003), <http://www.npr.org/news/specials/polls/taxes2003/>.

considerations of issues such as internal consistency of rules or ease of administration also cannot explain the constancy of the marital unit. Boris Bittker claimed, over a quarter of a century ago, that "society's assumptions about the role of marriage and the family"⁸³ were the most influential factor in choosing a taxable unit. This Article elaborates on his statement. In the United States the retention of the taxable unit reflects not just a single factor — marriage/family — but three: marriage/family, religion, and the symbolic nature of taxation. While each is important across societies, the exact nature of their roles is shaped by the specifics of that society's history, politics, and culture. In America the particularities of each have played instrumental and symbolic roles in forming and sustaining American democracy and identity. They affect numerous aspects of society, including the tax system. Until changing social and legal norms sufficiently alter this triumvirate's nature and power, the enduring roles of marriage, religion, and tax in America help explain why its tax system remains wedded to the joint return.

83 Bittker, *supra* note 64, at 1392.

