MAPPING THE FAMILIES OF THE INTERNAL REVENUE CODE

*Tessa R. Davis**

INTRODUCTION 181
I. THE PROBLEMS OF DISCRIMINATION AND ENFORCEMENT 187
  A. *Families and the Problems of Enforcement of and Discrimination in, the Code* 189
    1. The Problem of Enforcement 189
    2. The Problem of Discrimination 190
  B. *The Common Wisdom Regarding Family and the Code* 196
II. THE CODE'S TWO CONCEPTIONS OF FAMILY 199
  A. *A First Look at the Code's Two Conceptions of Families* 199
    1. Section 152's Broad Conception of the Family for Beneficial Provisions 201
    2. Section 267's Narrow Definition of the Family for Anti-Avoidance Provisions 204
  B. *Theorizing the Two Families of Tax: Lessons from Family Law* 207
    1. Status 208
    2. Contract 210
  C. *Applying the Status/Contract Framework to the Code* 211
    1. Contract: Section 152 Dependent Definition 212
    2. Status: Section 267(c) Definition of Family 213
  D. *The Inevitability of Family* 216
    1. A Final Lesson from Family Law 216
    2. Family by Another Name: The Error of Existing Proposals on the Family in Tax 217
III. MAKING PEACE WITH THE FAMILY: WHY WE SHOULD ABANDON ATTEMPTS TO RELY EXCLUSIVELY UPON A KINSHIP-FREE CONTRACT FAMILY AND THE ROAD AHEAD 220
  A. *Status, Contract, Tax Law, and Policy: The Road Ahead* 223
    1. A Tool for Enforcement: Family-as-Status 224

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2. Purveyor of Benefits and Reform: Family-as-Contract 229
B. *A Framework for Integrating Family-as-Contract and Family-as-Status* 231
1. Identify the Function—Identify the Family 231
2. Increasing Precision—Tailoring the Family 232
IV. APPLYING THE FRAMEWORK 232
A. *Reform of Anti-Abuse Provisions* 232
B. *Reform of Beneficial Provisions* 234
C. *Earned Income Tax Credit* 235
CONCLUSION 239

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The Tax Code contains not one, but two conceptions of family. Existing scholarship does not address this puzzle but instead takes one of two views on the family—either the family is a tool for avoiding taxes or it is a source of discrimination. Current scholars, motivated by the discrimination concern, reject the relevance of kinship to tax and argue for an increased focus on the individual. This Article takes a different approach. Utilizing the "status" and "contract" distinctions familiar to family law scholars, it explains the puzzle of the multiple families in the Code, identifying the two families of the Code and their respective functions. Specifically, this Article shows that when we convey benefits through the Code, we understand family as broad and contract based. On the other hand, when our goal is to root out or head off tax gaming and avoidance, we constrict our notion to that of the nuclear, status-based family. Current reform proposals undervalue the importance of family to the prevention of avoidance and evasion, make targeting beneficial provisions more difficult, and inhibit the challenging work of reforming the Code to be both administratively feasible and nondiscriminatory. Contrary to existing scholarship, this Article argues we should neither cut kinship from the Code nor rely exclusively upon the contract family. Instead, this Article creates a framework for modernizing the tax treatment of the family that combines the strengths of kinship theory and the status and contract families to maintain fairness and administrability and utilizes that framework to make preliminary reforms to existing law.

INTRODUCTION

> "One who fancies himself a tax expert should beware of venturing into the field of family income."[1]

TAX law has both the benefit and the burden of being inextricably tied up with the "family."[2] In the early years of the Code, scholars

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[1] Stanley S. Surrey, *Family Income and Federal Taxation*, 24 TAXES 980, 980 (1946).

[2] For examples of focus on the family, *see* Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1399 (1975) ("Turning from theory to practice, we find that the tension between the "individual" and "family unit" approaches to federal taxation has had a tortuous history since 1913, when the sixteenth amendment was ratified."); Nick Kasprak, *Fiscal Fact No. 352: Effects of Marriage on Tax Burden Vary Greatly with Income Level, Equality,*

saw the family as an enforcement problem—a likely site of avoidance or evasion.[3] Today scholars argue that focusing upon families as a unit of tax policy can lead to discrimination against individuals whose close bonds do not track conventional notions of the family.[4] Better, their critique runs, to focus the *individual* income tax on *individual* taxpayers, not on familial groups. Advocates of this line of critique argue for cutting a specific conception of family from the Code, namely, the kinship family—the family defined by blood, marriage, and adoption.

Many scholars currently writing on the family in tax propose one or both of the following changes. First, make the individual taxpayer central by allowing taxpayers to define their own "tax families."[5] Second,

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TAX FOUND. (Jan. 10, 2013), http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff352.pdf.

[3] The existence of a plethora of Code sections, including § 267, testifies to the tendency of family members to try to manipulate transactions to create tax benefits. For example, if A sells a piece of business property to his brother, B, a sale that creates a $20,000 loss, then Section 267 prevents A from taking a deduction for that loss. The disallowance is based on the assumption that while the sale may have the legal trappings of a bona fide transaction, by A selling to A's brother, A in fact maintains some degree of control over the property and has, therefore, not truly suffered an economic loss.

[4] Consider, for example, the joint return. The *Windsor* opinion, by ruling DOMA unconstitutional, opens the door to equal treatment of same-sex couples in the states that recognize same-sex marriage. Revenue Ruling 2013-17 extends that treatment to all married same-sex couples, regardless of domicile, by adopting a "state of celebration" rule. Discrimination continues, however, against unmarried couples throughout the United States due to the Code's recognition and disparate treatment of the legally married couple. United States v. Windsor, 133 S. Ct. 2675 (2013); Rev. Rul. 2013-17, 2013-38 I.R.B. 201. For further discussion and sources for technical guidance on the opinion, see *infra* Part I.A.2. For a discussion of how the tax code differentially treated unmarried and same sex couples pre-*Windsor*, *see, e.g.*, Patricia Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805 (2008); Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in the Joint Return World*, 61 HASTINGS L.J. 651 (2010); Nancy J. Knauer, *Heteronormativity and Tax Policy*, 101 W. VA. L. REV. 129 (1998); Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008); Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1 (2000).

[5] *See infra* Parts I.B & II.D. Scholars focused on the individual, failing to identify the presence and functions of both families (and the kinship categories each relies upon) to tax, contend that we should "[r]estore the individual" to the Code because the "tax law should not be the vehicle through which family definition issues are resolved"; that individualized, "separate taxation is more equitable" than the current system because the only bonds which matter to tax are economic ones, not relational titles; and that we must "decentralize the definition of family" within the Code. One such proposal advocates scrapping family as it exists within the Code in favor of the concept of "economically interde-

remove any necessary ties between kinship and relatedness in the tax conception of family. Looking outside of tax law to another area of law well versed in the complex relationship between families and the law—family law—shows that other areas of law have wrestled with these same problems, even attempted and then moved away from similar proposals, and provides guidance on the best solutions.[6]

Family law scholars think about families in two ways: family-as-contract and family-as-status.[7] The family-as-contract is a broad concep-

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pendent persons" ("EIPs"), giving the individual the freedom to define her own EIPs. Cutting kinship from the Code in this way "respects the autonomy and liberty of each individual to form the relationships that she wishes." This language and the concept it supports are paradigmatic, if particularly zealous, expressions of the family-as-contract view; zealous because even the existing family-as-contract conception within the Code is unsatisfactory to the extent it utilizes kinship categories. Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Filing in the United States*, 2010 UTAH L. REV. 605, 609, 648 (2010); Marjorie Kornhauser, *Love, Money and the IRS: Family, Income Sharing and the Joint Return*, 45 HASTINGS L.J. 63, 104, 109 (1993); James E. Maule, *Tax and Marriage: Unhitching the Horse and the Carriage*, 67 TAX NOTES 539, Apr. 24, 1995.

[6] Family law scholars too must wrestle with determining the balance between respecting individual autonomy in forging deep bonds with others and the threat that these bonds can pose to enforcement of the law. Despite this overlap, however, tax scholars have not looked to family law to solve perceived problems of family in the Code, an oversight that I believe is a missed opportunity as family law provides a ready lens through which to map the different conceptions of family within the Code. Bridget Crawford briefly discusses the potential insights for tax law of a combination of gender theory on connectedness and family law scholarship's recognition of the multiplicity of familial forms but does not pursue a deep analysis of the points of intersection of family and tax law, as does this Article. Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 U. PITT. TAX REV. 1, 36–48 (2005). Though not expressly family law, Ann Alstott has discussed the differences between the family for tax purposes and the family for direct welfare programs, noting the "narrow" definition of family within the tax realm. Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARVARD L. REV. 533, 571–78 (1995).

[7] For a discussion of the status/contract debate in family law scholarship, *see, e.g.*, Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess*, 102 COLUM. L. REV. 337 (2002) (providing an excellent discussion of the shift in viewing family as status to as contract and how the status perspective persists in the treatment of children under family law); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Public Distinction*, 36 HARV. C.R. C.L. L. REV. 79 (2001) (discussing a partnership model of marriage and the status and contract aspects of marriage); Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189 (2011) (providing a historical study of the development of family law) [hereinafter *What Is Family Law?*]; Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1 (2010) (recasting the sta-

tion that recognizes a wide range of personal relationships as familial, on the theory that this broad recognition respects individual autonomy. The family-as-status conception is narrow. It imposes upon the family a state-ordered conception that limits which relationships the state will recognize as familial. Why might the state limit its recognition of families to those that fit a particular mold? The leading opinion, *Maynard v. Hill*, makes clear that the family-as-status is a legal institution in which "the public is deeply interested" in so far as it impacts the public welfare.[8] Where individual autonomy undermines the public weal, however conceived, the State may impose a status conception of the family. For many years, family law scholars advocated a wholesale shift to a contract conception of family as the best way to remedy discrimination within the law. Yet recent scholarship has stepped off this path, recognizing that both a status and contract conception of family are essential to both the policy and administration of family law. Tax scholars should learn from this experience.

Scholars who argue that the individual should be central to the drafting and application of tax law elevate the contract family within tax.[9]

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tus/contract distinction as it applies to marriage into the concept of a marriage system) [hereinafter *Behind the Law of Marriage*]; Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004) (providing a historical overview of the development of family law, including the status/contract distinction, and potential avenues for reform); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) (challenging the dependence of the market/family/contract/status distinction and whether contract fuels equality); Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225 (1998) (arguing that marriage viewed as contract can retain a relational character); *infra* Part II.B.

[8] 125 U.S. 190, 210–11 (1888).

[9] *See, e.g.*, Anthony Infanti's conception of EIPS, discussed further in Parts I and II.D. Infanti, *supra* note 5. Each of these proposals, which rely upon individual filing as a critical part of the individualization process, make some accommodation for the impact of relationships on tax law—Infanti even uses the term "tax family" to describe the set of economically interdependent persons a taxpayer identifies for herself. A question then arises: if these scholars identify the need for tax law to account for relationships, are they truly arguing for removing the current family from the Code? The answer to that question, which I explore further in Part II, is yes. Infanti may use the term "tax family," but he and other scholars arguing in a similar vein expressly identify themselves as removing family, as we know it, from the Code. Where the Code relies upon family as, to use Infanti's language, "preconceived molds codified into the tax laws," an individualized tax system premised upon individual filing shatters those molds in favor of relying upon only relationships of economic interdependence. *Id.* at 619. These scholars contend that family, premised upon kinship bonds, is the wrong proxy for economic interdependence. *See, e.g.*, *id.* at 641 ("[T]he problem with the current related party antiabuse rules is that their drafters have counterfactually assumed that economic interdependence is either usually or always an attribute of certain noneconomic [familial] relationships."). As

But this call to cut family-as-kinship from the Code misses a crucial design feature of how the Code defines the family. There is neither one universal definition of family in the Code nor one role the family serves within tax law and policy.[10] In fact, the Code relies upon two definitions of family. One definition holds that the family is broad: It is an amalgamation of different kinship bonds (e.g., siblings, in-laws, and so on), and runs as far as to include persons unrelated by blood or law. The other definition of family is narrow: The family, according to some Code provisions, is the nuclear family.

This Article explains the puzzle of different families in the Code. It argues that we cannot and should not follow existing proposals to overhaul the Code's conception of family *because* of our concerns about discrimination and enforcement. To understand why the Code requires both status and contract conceptions of family and why kinship must remain in each, we must first answer the question: Why is there more than one family in the Code? This Article offers a functional explanation that begins with a simple, but powerful observation. When we convey *benefits*[11] through the Code, we treat family broadly in order to mitigate discrimination.[12] When we seek to *enforce* the Code, we treat family narrowly. Both of these families rely upon kinship categories in defining their boundaries. Recognizing this fact leads to two observations: not only does cutting the status concept of family from the Code run headlong

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such, tax law must "rectify [the] error" of relying upon family but cutting conceptions of family from the Code in favor tracking only relationships of "economic interdependence—the relational attribute that is most relevant to the application of the tax laws." *Id.* at 641. What the status/contract distinction of family shows us, however, is that this concept of economic interdependence, while "sanitized" or stripped of the language of kinship is kinship in new clothes; rather than cut family as we know it from the Code, individualist scholars simply advocate swapping a status family for a contract family as the principle family of tax.

[10] Notably, Australian scholar Miranda Stewart has explored the concept of two families in Australian tax law. For further discussion, see Miranda Stewart, *Domesticating Tax Reform: The Family in Australian Tax and Transfer Law*, 21 SYDNEY L. REV. 453 (1999).

[11] This Article will explore, among other ideas, the dependent exemption as a beneficial provision. Within the tax expenditure literature, this characterization would likely be contested because tax expenditure analysis characterizes personal and dependent exemptions as structural features of the Code, rather than departures from that structure. This Article adopts a slightly different view: The benefit/anti-abuse distinction is best understood, for the purposes of this Article, as the distinction between provisions with a clear social benefit versus those with no such discernable social value beyond supporting tax compliance by, for example, maintaining the tax base.

[12] I use the word mitigate deliberately. Though reforms such as the 1951 addition of the Head of Household filing status, as well as expansion of the § 152 conception of dependent, serve to encompass a broader array of familial forms, discrimination persists.

into the problem of enforcement of the Code, we also stand to make the conveyance of benefits, along with the administration of tax law and policy, more difficult if we cut kinship from the Code.

As family law instructs, the conflict between individual autonomy in the creation of families and the public welfare is inevitable. But rather than cut kinship from the Code, the better solution is to fit the conception of family to the function it serves within tax law and policy. When it comes to the family, the concern is the extent to which the law will recognize individual, autonomous choices about personal relationships. Where an individual's choices about her close bonds make her similarly situated to other individuals who get tax benefits, what should the law do? Adopting a broad, family-as-contract conception recognizes those choices and conveys benefits in light of them. By contrast, the problem of enforcement of the Code concerns individual autonomy and its capacity to undermine the public interest in taxation. In those circumstances, it is unsurprising to see the Code imposing a narrow status conception of the family.

This Article develops an alternative framework for resolving problems of the family, discrimination, and Code administration. In a nutshell, the framework holds that the family-as-contract conception is presumptively appropriate. That goes a long way to addressing problems of discrimination in the Code. But this presumption is overcome where the interests of enforcement—measured by decision costs[13] and the possibility of tax avoidance—require a narrower, status-based conception to prevent end-runs around the Code. To make this framework concrete, this Article tests it against existing law and then goes on to propose reforms to both improve the internal consistency of the Code as well as to support the goals of increased fairness and administrability.

My argument unfolds as follows. Part I summarizes the problems of discrimination in and enforcement of the Code and the conventional wisdom holding that we should universalize the contract family and cut kinship from the Code. Part II offers my descriptive claim that there are two families within the Code and that these families serve two functions: antidiscrimination and anti-avoidance. Parts III and IV explore the normative implications of this functional understanding of family within the Code, making preliminary proposals regarding strengthening the status-based conception of family to aid enforcement, expanding the influence of a contract-based conception of family throughout beneficial provisions, and establishing a framework for determining the proper conception of family for a given provision. The common thread throughout is that while knowing who your relatives are on April 15th is no easy task, we should embrace, not cut, the Code's two functional conceptions of the family and the kinship categories upon which they are premised.

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[13] Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 617–18 (2006) (defining "decision costs").

I. THE PROBLEMS OF DISCRIMINATION AND ENFORCEMENT

Within the law, family is both a private zone and focus of extensive regulation. In social consciousness, it is both an idealized entity—two parents and their children—and a complex, lived reality with a multiplicity of forms.[14] This complex reality means that the "family," as a concept, is hard to pin down. The difficulty lies both in delimiting where an autonomous individual ends and the family begins and in determining the relevance of those boundaries to law.[15]

The problem of defining the family within the Code is hardly new. With the recent U.S. Supreme Court decision in *United States v. Windsor*, debates over the fiscal cliff still in recent memory, and the passage of the American Taxpayer Relief Act of 2012, tax law and policy have been in the limelight. The family—both its place in tax and the impacts of tax policy upon it—is an integral part of media coverage and academic debate on tax reform.[16] Indeed, tax scholars have struggled with the

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[14] Popular news media has recently explored the ways in which individuals are navigating the complicated lived reality of family, highlighting the increasing numbers of couples choosing to remain unmarried, as well as individuals pursuing joint-parenthood without any romantic attachment. *See* Abby Ellin, *Making a Child, Minus the Couple*, N.Y. TIMES, Feb. 10, 2013, at ST1; Elizabeth Weil, *Unmarried Spouses Have a Way with Words*, N.Y. TIMES, Jan. 6, 2013, at ST1.

[15] Tax and family law are not unique in this regard. Marilyn Strathern, a leading anthropologist, identifies this tension as a fundamental aspect of Western culture: "So people already act out diverse ways of thinking about themselves: not just as isolates set apart or as members of collectives or groups but also as beings who value their connections to others, who—when things are going well that is—manage being at once autonomous and relational." MARILYN STRATHERN, KINSHIP, LAW AND THE UNEXPECTED: RELATIVES ARE ALWAYS A SURPRISE 26–27 (2005).

[16] Though much of the information provided by these sources is hardly new, the continued focus on taxes and the family indicates the depth of concerns over this issue. *See, e.g.*, Margaret Collins, *Higher Tax Rates on Top Earner Will Pinch Married Couples Faster than Individuals*, WASH. POST, Jan. 19, 2013, http://www.washingtonpost.com/business/higher-tax-rates-on-top-earners-will-pinch-married-couples-faster-than-individuals/2013/01/19/b2dab0be-60eb-11e2-9940-6fc488f3fecd_story.html; Kasprak, *supra* note 2. Popular media has explored the connections between the family and inequality. *See, e.g.*, Jason DeParle, *Two Classes, Divided by 'I Do,'* N.Y. TIMES, July 15, 2012, at A1 (discussing the impact of changing patterns in marriage correlating with economic class and level of education on inequality in the United States); Jason DeParle, *Economic Inequality and the Changing Family*, N.Y. TIMES: ECONOMIX, July 14, 2012, http://economix.blogs.nytimes.com/2012/07/14/economic-inequality-and-the-changing-family/?_r=0 ("An interesting pattern over the last four decades is that inequality has grown much faster for households with children than it has for households overall—an indication that changes in family structure (as opposed to wages ad employment alone) have increased inequality."); *see also* Peter Applebome, *A Doubly Trying Tax Season for Same-Sex Couples*, N.Y.

proper treatment and definition of the family within tax law since the inception of the modern income tax in 1913.

Examining this literature reveals two trends. First, scholars focus on two perceived problems of family and the Code: the problem of *enforcement* and the problem of *discrimination*. The problem of enforcement concerns the set of challenges family creates for administering the Code, including the potential for collusion in tax planning, income shifting, and transfers made solely for tax benefits.[17] The problem of discrimination is distinct. It concerns the potentially discriminatory effects created within the Code by recognizing and relying upon one conception of family and not another. Individuals may form deep bonds that they recognize as familial or that function as such, but which may fall outside the lines that the Code recognizes as defining families. This may result in horizontal equity concerns, with similarly situated individuals being treated differently. In short, it may result in discrimination in the provision of tax benefits or behavioral incentives that disadvantage certain groups.

By focusing on discrimination, contemporary scholars have largely let the problem of the family and enforcement fall by the wayside. Primarily concerned with the (very real) problem of discrimination, an influential group of scholars argues for a straightforward solution: cut the kinship family from the Code. The first (and often only) proposed means of doing so is to abolish the joint return. Understood as a bastion of the "traditional" family within the Code, the joint return seems ripe for excision—a change many scholars support[18]—and doing so marks a clear step toward making the individual central to, and diminishing the family within, the Code. The logic of these proposals is simple: Focusing on the individual ensures that no one or limited set of familial forms is enshrined within the Code. It also ensures that the discrimination on the basis of gender, sexuality, and marital status that such conceptions of family create will no longer be a part of tax law.[19] This emphasis on discrimination and abolishing the joint return is, however, a red herring. It both fails to account for the dual conceptions and functions of family in

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TIMES, Feb. 10, 2013, at BU8 (describing the unique challenges same-sex couples face during tax season); Lisa Arnold & Christina Campbell, *The High Price of Being Single in America*, ATLANTIC, Jan. 14, 2013, http://www.theatlantic.com/sexes/archive/2013/01/the-high-price-of-being-single-in-america/267043 (highlighting the disparate economic and tax effects of singledom and how common tax benefits and other economic benefits such as potentially reduced housings costs are accorded to marriage).

[17] Consider, for example, a transfer made to create a tax loss where the transferor still exerts control over the property transferred because of her relationship to the transferor and, as such, has not suffered a true economic loss.

[18] *See infra* Part I.B.

[19] Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. (forthcoming 2015) (discussing the implications of formal, legal definitions of identities, including familial bonds).

the Code and distracts from the work of truly reforming the Code to be more administrable, more precise in its characterization of economic groups, and less discriminatory.

This Part describes the problems of enforcement and discrimination and then sketches the conventional wisdom regarding both.

A. Families and the Problems of Enforcement of, and Discrimination in, the Code

The problems of enforcement and discrimination are enduring ones within tax policy. By as early as 1948, one commentator ventured that resolving the problem of family in the Code was "35 years overdue."[20] While the problems are perennial, the relative preeminence of each has shifted. Early scholarship was most concerned with the problem of enforcement. In contrast, contemporary scholarship focuses on the problem of discrimination. Though the work of identifying and rooting out the sources of discrimination within the Code is essential to advancing tax policy and equal treatment of individuals, the shift in focus has had two less salubrious effects. First, it has caused the tax academe to lose sight of the other function of the family, namely its role in combating avoidance and evasion. Second, and closely related, it has led to a call for universalizing the contract family and cutting kinship from the Code that I argue is error.

1. The Problem of Enforcement

Early scholarship focused upon the problem of enforcement, identifying the family as "a major instrument for income-tax avoidance."[21] The rationale was simple: within the family the "instruments of control are most readily available . . . [thus] tax avoidance schemes flower and die in great profusion in the field of the family transaction."[22] Stated differently, the intimacy of the family creates power dynamics and emotional ties that can lead to tax-base-eroding collusion.

In the years surrounding the 1948 adoption of income splitting via the joint return, scholarship on the family and tax avoidance reached a

[20] Note, *Proposals for Preventing Family Tax Avoidance*, 57 YALE L.J. 788, 804 (1948) [hereinafter *Preventing Tax Avoidance*].

[21] *Id.* at 788.

[22] Note, *The Tax-Reduction Motive Within the Family Unit*, 47 COLUM. L. REV. 665, 666 (1947) [hereinafter *Tax-Reduction Motive*]; *see also* Stanley Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1104 (1948) (writing in 1948, the year of the rise of income-splitting via the joint return, Stanley Surrey understood the family to present two challenges to application of the Code: "The present treatment of family income is vulnerable to indictment on at least two serious counts. It is a fertile breeding ground of costly, difficult and wasteful litigation. It is sadly lacking in tax equity, since it involves both geographical discrimination . . . and qualitative discrimination . . . .").

boiling point.[23] In order to resolve the geographic disparity between common law and community property states created by the *Poe* and *Lucas* cases, Congress expanded income splitting to all taxpayers via the Revenue Act of 1948.[24] While tax scholars noted the discrimination inherent in allowing married couples in community property states to split their income when couples in common law states were denied the same advantage, they were also concerned with reining in tax avoidance tactics open to families, of which income splitting was one.[25] Some argued that Congress had failed to consider the impact of marriage and family on tax when it enacted the Sixteenth Amendment and, as such, had allowed the family to "become a major instrument for income-tax avoidance."[26] Others focused on the role of tax attorneys in fueling family-tax avoidance.[27] Whether principal blame lay with Congress for leaving gaps in the Code or aggressive tax attorneys, scholars agreed that the family presented a significant challenge to the enforcement and integrity of the Code.

2. The Problem of Discrimination

The problem of discrimination requires a bit more unpacking.[28] Finding discrimination within the Code on the basis of gender, sexuality,

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[23] Roswell Magill, *The Federal Income Tax on the Family*, 20 TEX. L. REV. 150 (1941) (debating the validity of the joint return with an emphasis on the family as a mechanism of tax avoidance); Surrey, *supra* note 22, at 1104; *Preventing Tax Avoidance*, *supra* note 20, at 804; *Tax-Reduction Motive*, *supra* note 22, at 666.

[24] Bittker, *supra* note 2, at 1400–14.

[25] Surrey, *supra* note 1 (identifying the family as a primary cite of tax avoidance schemes and the geographic disparity created by Poe and Lucas); *Preventing Tax Avoidance*, *supra* note 20, at 788.

[26] *Preventing Tax Avoidance*, *supra* note 20, at 790 (Importantly, scholars identified recognition of the full-impact, economic and otherwise, of familial relationships as essential to shutting down families as avenues of tax avoidance—an idea reflected in the reliance upon family-as-status for anti-abuse rules, as discussed further in Parts I and II); *see, e.g.*, *Preventing Tax Avoidance*, *supra* note 20, at 804 ("Solution to this problem seems to lie only in a plan which recognizes the legal, economic and sociological implications of marriage in levying the federal income tax.").

[27] Surrey, *supra* note 1, at 980.

[28] A sampling of the most influential articles identifying the shift in scholarship toward focusing on discrimination includes: Knauer, *supra* note 4 (identifying the pervasiveness of provisions in which marital status is a factor and the impact of such provisions on the LGBT population); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993) (focusing on the gendered impact of the single-earner bias and select beneficial provisions such as the EITC); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1995–1996) (discussing the gendered impacts of the Code's failure to tax imputed income created by housework).

and marital status, contemporary scholars rally around different iterations of the same solution: cutting kinship from the Code and adopting an individual-centered system of taxation.[29] When the Code relies upon a conception of family, as it does for both beneficial and anti-abuse provisions, it decides which interpersonal bonds the law will recognize as familial.[30] This line drawing troubles contemporary scholars for two reasons. First, it results in a particular set of behavioral incentives by valuing some close relationships and not others. Second, it results in treating some similarly situated persons differently, leading to instances of both under- and over-inclusiveness as tax law intersects with the lived realities of family life.

Scholars' objections to the impacts of the under- or over-inclusiveness of family within the Code, as well as any resulting behavioral incentives, take different forms. Some are concerned with the marriage penalties and bonuses created by recognizing marital status through the joint return.[31] Others focus on the discriminatory impacts of the

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[29] Subsequent sections unpack the details of individual-centered proposals, but the following scholars all predict or advocate moving toward an individualized system by, at the very least, abolishing the joint return. *See, e.g.*, 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 (1997); Infanti, *supra* note 5; Kahng, *supra* note 4; Kornhauser, *supra* note 5; Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109 (2011); Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994).

[30] See Clarke, *supra* note 19 (discussing formal identities).

[31] Separate rate schedules for single and married individuals create the marriage penalty or bonus, known to tax policy students and scholars alike. More often than not, married couples filing jointly receive a bonus, meaning that their joint tax bill is less than the sum of their respective bills if each had filed separately. *Tax Topics: Marriage Penalty*, TAX POL'Y CENTER, http://www.taxpolicycenter.org/taxtopics/Marriage-Penalties.cfm (last visited Aug. 5, 2014) ("a couple pays less tax filing jointly than they would if they were not married and filed singly") [hereinafter *Marriage Penalties*]. For further information on the marriage penalty, its history and impact, *see* Zelenak, *supra* note 4, at 3 (highlighting the challenge to resolving disparate treatment of married couples vis-à-vis each other and singles inherent in our current system: "Be forewarned, however, that there really is no solution; there are only different ways of moving the problem around. The income tax treatment of marriage invites comparisons among three groups of taxpayers: one-earner married couples, two-earner married couples, and unmarried taxpayers. In a system with progressive marginal rates, any tax recognition of marriage will give rise to a plausible complaint by one of the groups that it is being treated unfairly compared to one of the other groups. Tax reform can relocate the complaints, but it cannot eliminate them.").

Occasionally, however, the separate rate schedules create a penalty, causing a married couple to pay a higher total tax than they would if both individuals

Code's heteronormative conception of marriage and family.[32] Still others focus on the gender implications of the single-earner bias inherent in current law.[33] Though its gender implications may shift as female

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had filed separately as singles. Marriage Penalties, *supra*. While competing policies are at play in evaluating the importance and impact of the marriage penalty/bonus, at its core is disagreement on the proper taxable unit, i.e., whether individuals should be taxed only as individuals or as members of units, such as the family. Conflicting desires for a marriage neutral income tax, couples neutrality, and progressivity all arise in the discussion of marriage penalties and bonuses. For a discussion of these warring neutralities, see Yair Listokin, *Taxation and Marriage: A Reappraisal*, 67 TAX L. REV. 185 (2014), Zelenak, *supra* note 4, at 3; Zelenak, *supra* note 29.

[32] Scholars also focus on the Code's adherence to a traditional model of family in the face of heterogeneity of contemporary families. Consensus instructs us that the current Code is built upon and "privilege[s] the so-called traditional, nuclear family over all other family arrangements," where the traditional family is understood as a single-earner husband or wife, his or her spouse and their children. Infanti, *supra* note 5, at 605. Though the head of household filing status encompasses some families outside this model, the Code has, until recently, failed to encompass same-sex couples and still fails to encompass unmarried couples, and other individuals living together and supporting each other. For example, no nontraditional families can utilize the potential decrease in tax liability available through the joint return. Adults are not the only individuals disadvantaged by the Code's emphasis on the traditional family, however. Patricia Cain argues that the heteronormative, marriage-centric focus of the Code places a particular burden on children in nontraditional families. Though the Code's traditional view of family burdens each of these nontraditional families to different degrees, the burdens are real and are a common discussion in the tax literature. Patricia Cain, *Dependency, Taxes and Alternative Families*, 5 J. GENDER, RACE & JUST. 267, 269–70 (2002).

[33] The single-earner bias is the result of the joint return and separate rate schedules. Suppose Susan marries Bob and the couple files jointly. Bob is an attorney who has $100,000 of taxable income. Assume five tax rates—15%, 20%, 25%, 30% and 35%—and Bob's income places the couple in the 30% rate. Susan does not work outside the home. Because Bob and Susan are married and file jointly, Bob's income gets the full benefit of lower marginal tax rates with some portion of his income being taxed at lower rates as Bob moves up the tax brackets. If Susan returns to work and begins to earn income, however, her income will be taxed at a 35% rate, as all income over $100,000 is taxed at the highest rate. Each dollar Susan earns is, therefore, worth less than Bob's as it is subject to the 35% rate at the outset. This phenomenon is the single-earner bias and it has historically come to bear most heavily on women. *See, e.g.*, Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2009–42 (discussing the single-earner bias and efficacy of common proposals to remedy gender discrimination in the Code). Edward McCaffery provides an excellent discussion of this bias. *See* McCaffery, *supra* note 28. Noting the gendered impact of the bias, McCaffery writes:

> There is no *a priori* reason to assume the wife should be the marginal earner . . . . But the current tax structure tends to push toward a "primary-secondary" delineation among work-

breadwinners head more American families, the bias itself persists and creates incentives that rightly trouble the tax academy.[34]

Unpacking the problems of under- and over-inclusiveness provides a ready handle with which to grasp the crux of existing proposals. According to contemporary scholarship, the Code's current conception of family is under-inclusive where it fails to incorporate changing familial forms. Because the Code's concept of family does not recognize "nontraditional"[35] families, it excludes a swath of self-identifying and functional families from being defined as such for tax purposes. Specifically, same-sex couples,[36] unmarried partners, and groups who in fact share resources

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> ing spouses, marginalizing the lesser-earning person. Here, as elsewhere, it is crucial to consider social context in evaluation tax laws—it is by failing to do so that ostensibly "neutral" ideology entrenches discriminatory patterns. . . .
>
> Historically, of course, wives have usually been the marginal earners. . . . The general lesson of the story is that married women are at the margins of the workforce—in terms of wages, power, and costs—and the tax laws contribute to this marginalization by putting the wife's income at the margins of the family's.

Id. at 993–95.

[34] Of course, incentives are only troubling to the degree that individuals respond to them. Some scholars question the extent to which individuals in fact respond to economic incentives in law that favor a particular familial structure or status. For responses to family caps in welfare law, *see generally* Melissa S. Kearney, *Is There an Effect of Incremental Welfare Benefits on Fertility Behavior: A Look at the Family Cap*, 39 J. HUM. RESOURCES 295, 318 (2004) ("This paper has found no systematic effect of the family cap on fertility rates."); Geoffrey L. Wallace, *The Effects of Family Caps on the Subsequent Fertility Decisions of Never-Married Mothers*, 26 J. POPULATION RES. 73, (2009) ("A necessary condition for family caps to be an effective policy tool is that welfare recipients respond to financial incentives in making decisions that affect fertility outcomes. Although there are numerous studies that examine the link between the generosity of AFDC benefits and subsequent childbearing decisions, a firm link between the two has not been established."); *id.* at 100 ("The most careful reading of the estimate presented is that there is no evidence that family caps influence the subsequent fertility decisions of unwed mothers."). *Cf.* Radha Jagannathan & Michael J. Camasso, *Family Cap and Nonmarital Fertility: The Conditioning of Policy Effects*, 65 J. MARRIAGE & FAM. 52, 68–69 (Feb. 2003) (finding that the family cap has a racialized effect on fertility).

[35] Kornhauser, *supra* note 5, at 66 ("The rapid rise in nontraditional living arrangements calls into question assumptions about patterns of sharing resources, as well as the concept of family itself.").

[36] Because the Supreme Court ruled Section 3 of the Defense of Marriage Act (DOMA), Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)) unconstitutional in United States v. Windsor, 133 S. Ct. 2675 (2013), same-sex couples in the rapidly increasing number of states that recognize same-sex marriage and D.C. no longer face the same discrimination. Rev. Rul. 2013-17, 2013-38 I.R.B. 201 then changed the

but no blood or legal ties resemble family units when the family is defined as a collective, economic unit.[37] By failing to recognize such pairs or groups as families for tax purposes, the Code's concept of family misses the mark.[38]

Windsor and the Service's subsequent Revenue Ruling 2013-17 changed the picture of under-inclusiveness, and both should change the discussion of family within the Code.[39] The decision itself invalidated § 3 of the Defense of Marriage Act (DOMA) and therein the bar to equalizing the treatment of same-sex and opposite-sex married couples within federal income taxation. The case itself only equalized treatment for same-sex couples in states that recognize same-sex marriage, however. Then came Rev. Rul. 2013-17, which extended equal federal tax treatment to all same-sex couples married in a state that recognizes same-sex marriage *regardless of where that couple is domiciled.* Even in light of *Windsor* and Rev. Rul. 2013-17's expansion of its impact, same-sex couples face continued complexity.[40] Couples residing in states that

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picture for all same-sex couples regardless of their domicile. Though I.R.C. § 6013 limits the joint return to a husband and wife, I.R.C. § 7701(p)(1)(3) incorporates 1 U.S.C. § 1, which removes the gendered nature of any terms ("words importing the masculine gender include the feminine as well"). *See also* Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 513–14 (2009) ("Although the rule is not clearly and completely stated in the Internal Revenue Code, or in the regulations, it is generally assumed that for tax purposes, a couple will be considered as married if they are legally married in the state of domicile."); Anthony Infanti, *The Moonscape of Tax Equality:* Windsor *and Beyond*, 108 NW. U.L. Rev. 1115 (2014). As of December 6, 2014, 35 states recognize the right of same sex couples to marry while many others have pro-same-sex marriage rulings awaiting further action. *States*, FREEDOM TO MARRY, http://www.freedomtomarry.org/states/ (last visited Jan. 31, 2015).

[37] *See* Kornhauser, *supra* note 5, at 66–70.

[38] The problem of under-inclusiveness is not confined to the individual income tax. For a discussion of the under-inclusiveness of the estate and gift tax regarding transfers between intimate partners, see Bridget Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer Taxation*, 6 FLA. TAX REV. 757 (2004).

[39] The Treasury continues to issue guidance, most recently issuing I.R.S. Notice 2014-19, *available at* http://www.irs.gov/pub/irs-drop/n-14-19.pdf. For commentary on this notice, see Patricia A. Cain & David Herzig, Op-Ed, *Notice 2014-19 and the Application of* Windsor *to Qualified Retirement Plans*, TAXPROF BLOG (Apr. 8, 2014), http://taxprof.typepad.com/taxprof_blog/2014/04/cain-herzig-.html.

[40] For guidance on the implementation of *Windsor* and Rev. Rul. 2013-17, see William D. Jewett et al., *Complying with IRS Guidance on Same-Sex Marriage*, 2013 TAX NOTES 1327; I.R.S Notice 2013-61, 2013-44 I.R.B., *available at* http://www.irs.gov/irb/2013-44_IRB/ar10.html; Benjamin Takis, *Same-Sex Marriage and ERISA in the* Windsor *Era*, BLOOMBERG L. (Sept. 10, 2013), http://www.bna.com/same-sex-marriage-and-erisa-in-the-windsor-era/; *Answers*

do not recognize same-sex marriage must reconcile differing treatment at the state tax level, particularly where state returns rely heavily upon the federal return.[41] At the federal level the "'place of celebration'"[42] rule articulated in Rev. Rul. 2013-17 and adopted by Medicare and Treasury is not yet uniform, with the Social Security Administration notably following a "'place of residence'" standard.[43] Nevertheless, the decision and the revenue ruling combine to expand the conception of family in a way that undercuts the Code's previous under-inclusiveness while maintaining the administrability advantage of tracking readily identifiable relationships.

Just as it fails to recognize all economic units as families, the Code is over-inclusive when it assumes all families are economic units. Scholars disagree on whether empirical data proves the assumption that families do, in fact, pool resources, but agree that the family is used as a proxy for a group functioning as a cohesive economic unit.[44] To the extent, however, that a couple does not act as an economic unit by, for example, maintaining separate accounts and not pooling income or other resources, the Code's current conception of family is over-inclusive; it

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to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law, IRS (Mar. 7, 2014), http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples. More informal responses to the decision and subsequent revenue ruling include, Patricia Cain, *The Less Obvious Tax Consequences from the Fall of DOMA*, TAXPROF BLOG (June 28, 2013), http://taxprof.typepad.com/taxprof_blog/2013/06/cain.html; David Herzig, *Blog Post*, TAXPROF BLOG (Aug. 30, 2013), http://taxprof.typepad.com/files/herzig-taxprof-op-ed-083013.pdf.

[41] Annie Lowrey, *Gay Marriages Get Recognition from the I.R.S.*, N.Y. TIMES (Aug. 29, 2013), http://www.nytimes.com/2013/08/30/us/politics/irs-to-recognize-all-gay-marriages-regardless-of-state.html; Richard Rubin, *Gay Married Couples' Filing Angst Now Triggered by States: Taxes*, BLOOMBERG NEWS (Sept. 13, 2013), http://www.businessweek.com/news/2013-09-13/gay-married-couples-filing-angst-now-triggered-by-states-taxes#p2.

[42] Place of celebration is the common parlance for the rule adopted in Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

[43] Lowrey, *supra* note 41.

[44] *See, e.g.*, Kornhauser, *supra* note 5 (using empirical data on resource pooling among families, Marjorie Kornhauser challenges the validity of the assumption that families are in fact economic units). Taking an opposing view, Lawrence Zelenak states that if the focus of determining the taxable unit is on determining who pools resources, "then requiring joint returns for married couples . . . is an easy-to-administer rule that gets it right most of the time." Zelenak, *supra* note 29, at 348–54. Though they take different stances on whether resource pooling occurs, exemplifying the consensus in the tax academy, Kornhauser and Zelenak agree that understanding married couples to be an economic unit underlies the joint return; *see also* Kornhauser, *supra* note 5, at 80 (Kornhauser identifies this idea as the "theoretical justification for the joint return"); Zelenak, *supra* note 29, at 343.

defines as family a marital unit that does not, in fact, act in accordance with the Code's assumptions.

The Code's conception of family *is* both over- and under-inclusive. This Article does not challenge that observation but rather the responses to it. Indeed, absent extensive and invasive, case-by-case analysis of each taxpayer's personal life, any formal definition of family will allow for some over- and under-inclusivity. Existing scholarship overcorrects for the inherent error of formal definitions, as Part I.B. details.

B. The Common Wisdom Regarding Family and the Code

According to the common wisdom regarding the problem of discrimination in the Code, the solution is simple: make the individual central by treating individuals as such whenever possible and, even where a conception of relatedness is necessary, cut kinship from that conception. In short, overhaul the family within the Code. By removing or reforming provisions that rely upon marriage and familial bonds to influence tax outcomes, we can keep tax out of the complicated business of family.[45]

This common wisdom has much to recommend it. Cutting family from the Code could make the individualized return easier by removing the difficult task of knowing who your family is on April 15th. The values of simplicity and notice are important ones within tax law and policy. Moreover, there is a strong libertarian objection to having the State involved in recognizing and valuing certain families and not others. Here, the same-sex marriage debate is instructive. Perhaps, as Richard Thaler and Cass Sunstein have argued,[46] the State should simply get out of defining marriage—and, say, defining the family—altogether.

Changing demographics of familial structure in the United States—from an increasing number of persons choosing to remain single,[47] to the changing composition of American households[48]—also play a role in the

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[45] The emphasis on individualization, though dominant, is not uniform. *See, e.g.*, Stephanie Hoffer, *Adopting the Family Taxable Unit*, 76 U. CIN. L. REV. 55 (2007). Hoffer notes that "[a]t its core, the Internal Revenue Code continues to apply to individuals, not families." *Id.* at 72. However, Hoffer argues in favor of adopting the family as the taxable unit to remedy "conceptual[] inconsisten[cies]" of the Code's alternate treatment of individuals as qua individuals and as members of family units. *Id.* at 78–83. *See also* Stephanie Hunter McMahon, *To Have and To Hold: What Does Love (of Money) Have to Do with Joint Tax Filing?*, 11 NEV. L.J. 718 (2011); Seto, *supra* note 4; Ayla A. Lari, *Sharing Alike: French Family Taxation as a Model for Reform*, 37 DUQ. L. REV. 207 (1999).

[46] Sunstein, Cass R. & Ricbard H. Thaler, *Privatizing Marriage*, 91 MONIST 377, 377–87 (2008).

[47] Kahng, *supra* note 4, at 674–75, 682.

[48] McCluskey, *supra* note 29 at 112 ("These inequities [inequities favoring the traditional family] have been heightened as demographic change has eroded the tax-favored breadwinner-homemaker marriage both as an ideal and as an empirical reality."); Zelenak, *supra* note 29, at 405 ("Whatever the merits of

push toward a more rigorously individualized Code.[49] If the Code currently favors an antiquated, traditional notion of family that either no longer exists or should no longer receive favor,[50] perhaps striking family from the Code is an avenue toward eradicating or undermining that family's dominance within the Code.[51] Some existing proposals are more limited, addressing only the taxable unit by arguing for individualizing filing by abolishing the joint return.[52] Whether advocating a reform of the taxable unit, or more sweeping changes, existing scholarship on the family and tax share three similar claims.[53] First, the Code advantages the traditional family over nontraditional familial forms, which results in discrimination on the basis of gender, sexuality, and/or marital status. Second, the Code should not be in the business of defining family, but

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joint returns may have been for mid-twentieth century America, the joint-return system fits poorly with American attitudes and living patterns at the close of the century.").

[49] Consider Martha McCluskey's characterization of her own article that advocates abolishing the joint return because of its class and gender biases; abolishing the joint return is part of a project to "clarify and develop existing arguments for an *individualized tax system*"—not simply an individualized filing system. McCluskey, *supra* note 29, at 115 (emphasis added).

[50] McCluskey, *supra* note 29, at 111 ("[T]he tax system privileges the traditional—and traditionally white, male, and heterosexual—family provider married to a homemaker."); Kahng, *supra* note 4, at 683 ("Through the powerful economic and signaling effects of the tax system, the choices of single people about how to live their lives—the relationships they form, the ways in which they find meaning and fulfillment in their lives—are deemed inferior to those of 'mainstream' couples. This sort of perpetuation of traditional social ordering through the tax system has been documented by tax scholars in other areas. The hope is that once revealed, the insidious effects of the tax system can be eradicated.") (citation omitted). One means of eradicating such insidious effects is, in Kahng's view, abolishing the joint return.

[51] *See, e.g.*, Kahng, *supra* note 4, at 683 (Abolishing the joint return is part of a broader goal of ending the "perpetuation of traditional social ordering through the tax system.").

[52] *See, e.g.*, Alstott, *supra* note 33 (questioning whether abolishing the joint return would advance feminist goals for the tax code as well as some scholars believe but remains open to its demise as part of a broader feminist project); Christian, *supra* note 29; Kahng, *supra* note 4, at 684; McCluskey, *supra* note 29. In a later article, Alstott argues more forcefully for abolishing the return. *See* Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695 (2013); Zelenak, *supra* note 29, at 342.

[53] For scholars arguing for complete overhaul, *see, e.g.*, Infanti, *supra* note 5, at 621–22; Kornhauser, *supra* note 5; Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413 (1996); Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*, 11 THEORETICAL INQUIRIES L. 631 (2010); Maule, *supra* note 5; Motro, *supra* note 29.

rather, only attempt to identify economic units without regard to any biological or legal ties.[54] Third, because the presence of family within the Code creates discrimination and because the Code should be concerned with economics, not the contours of intimate life, the Code should focus on individuals by removing or reforming provisions that rely upon traditional kinship bonds.

At the doctrinal level, the more sweeping of the proposed reforms rely upon abolishing the current joint filing system as a necessary but not sufficient step. Marjorie Kornhauser, whose widely cited article, *Love, Money, and the IRS: Family Income-Sharing, and the Joint Income Tax Return*, provided an early empirical critique of the joint return system, rejects joint filing in no uncertain terms[55]: "The joint return," she writes, quite simply "ought to be abolished."[56] Writing more recently, Anthony Infanti takes a similar stance, stating in order to "recognize and accommodate the multiplicity and complexity of family relationships and the webs of connections between individuals that actually exist in society," we should "abandon our extant joint filing regime."[57] Infanti continues, criticizing many scholars for stopping short of true reform.[58]

In such proposals, individual choice and autonomy are paramount. When law or policy requires tracking relatedness, the individual remains central. Rather than imposing a top-down, State-determined conception of family—one premised on kinship bonds—such scholars would allow a taxpayer to identify her own relatives. Kornhauser succinctly states:

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[54] As one scholar aptly stated in a mid-1990s Tax Notes piece: "[T]he tax law should not be the vehicle through which family definition issues are resolved." Maule, *supra* note 5 (citations omitted).

[55] For a sample of additional scholarship calling for abolishing the joint return and establishing an individualized approach to taxation, *see* Christian, *supra* note 29 (Christian views the joint return as a system of forced income transfers from women to men and, as such, is pro-abolishing the joint return); Kahng, *supra* note 4, at 684; Kornhauser, *supra* note 5, at 66–70; Zelenak, *supra* note 29, at 342 ("In this Article, I argue that American society at the end of the twentieth century would be better served by separate returns.").

[56] Kornhauser, *supra* note 5, at 108.

[57] Infanti, *supra* note 5, at 620.

[58] Infanti, *supra* note 5, at 621–22 ("An individual filing system is, however, only a starting point for fashioning a tax system that decentralizes family. The next step in the analysis is to consider the ways in which an individual filing system should take into account the economically interdependent connections and relationships that many of us have. Unfortunately, most U.S. commentators end their analyses with a call to abolish the joint federal income tax return and devote little attention to the appropriate design for an individual filing system. In the few cases where commentators have explored the implementation of an individual filing system, they have focused their attention almost exclusively on whether—and, if so, how—that system should continue to accommodate financial transactions between married different-sex spouses.") (citations omitted).

"[T]he income tax is a tax based on an individual's ability to pay, [thus] the tax unit logically should be the individual."[59] Excising the kinship family from the Code—"[s]tarting with the individual at the center"[60]—is seemingly the only means of identifying the one group with which tax should be concerned: the economic unit. And the only way to get at the real economics is to abandon our reliance upon traditional kinship bonds.[61]

II. THE CODE'S TWO CONCEPTIONS OF FAMILY

What is missing from this call to make the individual central to and cut kinship from the Code? This Part argues that we have not one, but two conceptions of family in the Code; that these conceptions serve different purposes; and that this fact means that family can't be cut from the Code. To illustrate this descriptive thesis, I begin by describing, at a doctrinal level, the two visions of family residing in 26 U.S.C. §§ 152 and 267. To understand these competing conceptions, I turn to family law's well-developed framework for describing the family within law. This framework describes family in two terms: family-as-contract and family-as-status. Both conceptions of the family are present in the Code. Thus, we must engage in systematic discussion of that fact, and its implications for how the Code functions, in order to address the problems of discrimination and enforcement that have led scholars to call for cutting kinship from the Code.

A. A First Look at the Code's Two Conceptions of Families

The word "family" appears three times on the 1913 Form 1040 Individual Tax Return and accompanying instructions.[62] Serving a limiting purpose, the concept was used to identify family expenses, such as rent for a family residence, as nondeductible personal expenses. While it played a policing role, being part of a family—specifically a married couple—gave rise to benefits as well. If a husband and wife lived together, the couple could claim a larger deduction ($4000 rather than $3000) than could a single person or married couple living separately.[63] This dual role of family—as tool for enforcement and for delivery of benefits—was a harbinger of policy to come. One hundred years later we find this dual role of the family writ large throughout the Code.

Across the entirety of the Code, many sections rely upon a conception of family for their operation. Tax-exempt organizations must root out family members as potential disqualified persons to avoid additional

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[59] Kornhauser, *supra* note 5, at 110.

[60] Infanti, *supra* note 5, at 607.

[61] *Id.*

[62] I.R.S. Form 1040 (1913), *available at* http://www.irs.gov/pub/irs-utl/1913.pdf.

[63] *Id.*

taxes and/or sanctions.[64] Within the corporate tax, § 318 relies upon a definition of family in order to attribute ownership of corporate stock.[65] Section 351 relies on a different definition of family as it attempts to determine whether an individual exercises control over a given corporation, a predicate for determining how to tax an exchange of property for stock in the corporation.[66] Section 108 tracks relatedness as it attempts to sort excludable income from cancellation of debt and, though it looks to § 267 for its conception of family, it alters it.[67] These sections are not only examples of the multitude of Code sections that evince the relevance of the family to tax, but also illustrate the competing visions of family within the Code.

In conception and frequently in execution, we have an individualized income tax. At the same time, we believe familial bonds may impact compliance (the history of § 267 and its predecessor, § 24, proves this belief).[68] So too do we believe that families frequently deserve economic support and state recognition, leading us to craft tax benefits directed at lessening overall familial tax burdens. These policing or beneficial provisions may be enforced or conveyed through individual or joint returns, but the family resides below the surface of many lines of those returns. Instituting an individual income tax, which accounts for the impact affective bonds have upon economic behaviors and capacities, requires mediating a tension between recognizing individual autonomy and enforcing the public interest in the Code. This tension underlies the intersection of the family and tax law and policy, and is one that has led to the disarray in law and scholarship on the family in tax.

Once we recognize that the family looms large in our tax system, the presence of competing visions and roles of family in tax gives rise to a set of questions. Is there a principled rationale that explains the competing notions of family within the Code or are they the result of ad hoc legislation? Should the family play dual roles within the Code—as a vehicle both for enforcement and the conveyance of benefits—or should the Code focus upon one and not the other? To answer these questions, we need a map of the definitions and functions of family within the Code.

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[64] I.R.C. § 4958(f)(4) (2012).

[65] I.R.C. § 318(a)(1) defines family to include an individual's spouse and her children, grandchildren, and parents. Notably absent are an individual's siblings, who qualify as family in many other Code sections. Section 704(e) of subchapter K—the partnership tax—mirrors § 318 in its exclusion of siblings from the definition of family.

[66] I.R.C. § 351(g)(3)(B) relies upon § 267, a section which will be explored in greater detail.

[67] I.R.C. § 108(e)(4)(B) (2012).

[68] *See* McWilliams v. Comm'r, 331 U.S. 694 (1947) (expressly identifying the purpose of § 24 as combating intrafamily abuse of the Code); Miller v. Comm'r, 75 T.C. 182 (Tax Ct. 1980).

To draw this map, I focus upon the two key players: § 152 and § 267. These sections represent a point of departure for the many other Code sections that rely upon a conception of family. Section 152 provides the "benefit family"; defining "dependents" for both the § 151 dependency exemption, as well as a number of other equally taxpayer-friendly sections. Alternately, § 267 provides the "enforcement family"; defining family for its own purpose as an anti-abuse provision, alongside many other sections that similarly target tax avoidance and gaming.

1. Section 152's Broad Conception of the Family for Beneficial Provisions

Personal exemptions matter. When a taxpayer begins preparing her return for a given year, she must, of course, calculate her taxable income. Taking one step back in that process, she first determines her adjusted gross income.[69] Then comes the personal exemption. Consider the following example: Susan, a relatively uncomplicated taxpayer, has gross income for 2014 of $50,000. The personal exemption reduces Susan's adjusted gross income by $3950 dollars,[70] creating a taxable income of $46,050 absent any other deductions or exemptions. If we make Susan single and without dependents, taxable income of $46,050 would place her in the 25% tax bracket, resulting in tax liability of $7368.[71] Without the personal exemption, her liability would have been almost $1000 higher at $8356. Assuming for ease that Susan continues to file as unmarried, rather than as a head of household,[72] if Susan has just one child, § 151 permits her to claim an additional exemption for that child as her dependent. The additional exemption would lower Susan's tax liability to $6381, over $1900 lower than her liability without any exemptions and almost $1000 dollars lower than her liability with only her own personal exemption. Representing almost 2% of Susan's annual income, nearly

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[69] Section 63 prescribes two methods of calculating taxable income: subsection (a) provides the computation for taxpayers who itemize their deductions while (b) provides the definition of taxable income for non-itemizers. Though the language of § 63(b) formally requires only non-itemizers to determine adjusted gross income (AGI), non-itemizers will also calculate AGI because of the operation of § 62 in conjunction with § 63(a). Section 62 provides a list of deductions or types of deductions taken in the process of whittling gross income to adjusted gross income. I.R.C. § 63 (2012).

[70] *Tax Guide 2014 for Individuals*, IRS (Dec. 24, 2014), http://www.irs.gov/pub/irs-pdf/p17.pdf.

[71] As calculated with the 2014 tax tables, Rebecca's tax liability calculation is as follows: $5,081.25 in tax + 25% of all income over $36,900 = 5,081.25 + .25(46,050 − 36,900) = 5,081.25 + .25(9150) = 5,081.25 + 2,287.50 = $7,368.75.

[72] Susan would file as head of household if she had a qualifying dependent. This example assumes she does not, however, to draw attention to the value of personal and dependent exemptions and, as such, isolates that change from the rate change that would occur simply by the shift to head of household status.

$1000 dollars is over half a month's average rent even in one of the highest-rent cities in the country,[73] two months of an average car payment[74] and two months of groceries following the USDA's low-cost expense food budget.[75] Quite simply, the personal exemption and additional dependent exemptions provide a significant benefit to many American families.[76]

Working in combination with § 151, § 152 identifies the individuals whom a taxpayer can claim as dependents for purposes of the dependency exemption. Section 152 defines a dependent not only for the purposes of § 151 but also for a number of other beneficial provisions that rely upon its conception of family. As such, § 152 is the gateway to an array of potential tax benefits, and it is a remarkably wide one.[77] Section 152 advances a broad notion of family,[78] grouping individuals into one of two classes of dependents: qualifying children and qualifying relatives.[79] A child qualifies as a dependent if she:

a) stands in a qualifying relationship to the taxpayer;[80]

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[73] Hayley Peterson, *D.C. Rents Are One of Nation's Highest*, WASH. EXAMINER (June 23, 2012, 12:00 AM) http://washingtonexaminer.com/d.c.-rents-are-one-of-nations-highest/article/2500447.

[74] Phil LeBeau, *Americans Borrowing Record Amount to Buy Cars*, CNBC (Mar. 4, 2014, 5:00 AM), http://www.cnbc.com/id/101461972#.

[75] Ctr. for Nutrition Pol'y & Promotion, *Official USDA Food Plans*, USDA (Jan. 2012), *available at* http://www.cnpp.usda.gov/USDAFoodPlansCostof Food.

[76] The American Taxpayer Relief Act reinstated a phase-out of the personal exemption for higher income taxpayers (e.g., a single taxpayer has to make more than $250,000 before the phase-out begins). The mechanics of that phase-out are not important for the focus of this Article. For a clear discussion of the impacts of the legislation and of the phase-out, see James Nunns & Jeffrey Rohaly, *Tax Provisions in the American Taxpayer Relief Act of 2012 (ATRA)*, TAX POL'Y CENTER (Jan. 9, 2013), http://www.taxpolicycenter.org/UploadedPDF/412730-Tax-Provisions-in-ATRA.pdf.

[77] *See infra* notes 119–24 and accompanying text.

[78] Critics may contend that I.R.C. § 152's breadth is an outgrowth of its focus on dependent relationships rather than expressly on defining family. While it is true that § 152 defines the term "dependent" and not "family" to argue that the sections does not provide a critical conception of family within the Code is to ignore the language of § 152 itself. First, to define dependent, § 152 relies almost exclusively upon commonly understood kinship bonds (brother, sister, uncle, aunt, etc). Section 152(d)(2)(H)'s grouping with these familiar categories does not disprove the dependent definition's relevance to defining family in the Code but rather signals an acceptance that those without blood or legal ties can live as family. Second, the section relies upon familiar attributes of family in defining a dependent such as shared residence and shared support.

[79] I.R.C. § 152(a)(1), (2) (2012).

[80] *Id.* § 152(c)(1)(A).

b) shares "the same principal abode" with the taxpayer for more than half a year;[81]

c) is younger than the taxpayer as well as is under nineteen (or twenty-four if a student);[82]

d) is dependent upon the taxpayer, meaning the child does not provide greater than half her own support;[83] and

e) has not filed a joint return with a spouse.[84]

A child shares a qualifying relationship if she is either "a child of the taxpayer or a descendant of such a child"[85] or is "a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative."[86] Thus, the picture of a typical dependent child is fairly intuitive: a child under nineteen who lives with her parents and provides no significant support of her own.

Yet § 152 does not stop at this fairly narrow conception of a dependent. Rather, through its definition of "qualifying relative," § 152 expands the concept of a dependent not only to broader classes of kin but even to include persons unrelated by blood or legal ties. A "qualifying relative" is one who:

a) shares a qualifying relationship with the taxpayer;[87]

b) earns less than exemption amount;[88]

c) receives more than half of his support from the taxpayer;[89] and

d) is not a child of the taxpayer for purposes of § 152.[90]

This expansion of dependent and, in turn, family, comes from the scope of relationships that satisfy the qualifying relative prong of § 152(d) that includes:

A) A child or a descendant of a child.

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[81] *Id.* § 152(c)(1)(B).

[82] *Id.* § 152(c)(1)(C), (3).

[83] *Id.* § 152(c)(1)(D).

[84] *Id.* § 152(c)(1)(E) (filing a joint return with her spouse will not disqualify an otherwise qualifying child if the return was filed only to claim a refund).

[85] *Id.* § 152(c)(2)(A).

[86] *Id.* § 152(c)(2)(B). Treasury Regulation § 1.152-2(c)(1) clarifies that adopted children are treated as biological children as follows: "For the purposes of determining the existence of any of the relationships specified in section 152(a) or (b)(1), a legally adopted child of an individual shall be treated as a child of such individual by blood."

[87] *Id.* § 152(d)(1)(A).

[88] *Id.* § 152(d)(1)(B).

[89] *Id.* § 152(d)(1)(C).

[90] *Id.* § 152(d)(1)(D).

B) A brother, sister, stepbrother, or stepsister.
C) The father or mother, or an ancestor of either.
D) A stepfather or stepmother.
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 a spouse] . . . who . . . has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.*[91]

The broad definition of a qualifying relative recognizes multiple familial forms. Aunts and uncles, in-laws, nieces and nephews, even individuals with no legal or genetic ties can be considered part of the taxpayer's family.

As seen in the example of Susan's varying tax liabilities, § 152 provides, via § 151, a significant tax benefit on its own. Its impact is even greater when one takes account of the numerous provisions that rely upon § 152 in conveying additional, policy-motivated tax benefits. The Joint Committee on Taxation Report on Tax Expenditures estimates that $291.6 billion in total revenue for the fiscal years 2014–18 will be foregone because of the child tax credit alone.[92] Another $59.9 billion is spent on the § 213 medical care deduction.[93] Both of these sections, which are simply two of many, rely upon § 152 as a point of departure in defining the persons who trigger eligibility for the benefits these sections confer.

2. Section 267's Narrow Definition of the Family for Anti-Avoidance Provisions

Where § 152 provides the gateway to many tax benefits, § 267 defines family for a different purpose: enforcement of the Code by preventing tax avoidance and evasion. Just as the purpose of the family § 267 advances differs from that of § 152, so to do its contours. Section 267 defines the boundaries of family as markedly narrower than does § 152. Governing the treatment of losses between related individuals, § 267 is a critical enforcement provision in its own right.[94] In addition to its func-

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[91] *Id.* § 152(d)(2)(A)–(H) (emphasis added).

[92] *Estimates of Federal Tax Expenditures for 2014–2018 (JCX-97-14)*, JOINT COMMITTEE ON TAX'N 30 (Aug. 5, 2014), https://www.jct.gov/publications.html?func=select&id=5.

[93] *Id.* at 31.

[94] Section 267 functions as an enforcement provision as it combats tax avoidance within the family unit. I.R.C. § 267 (2012). Consider the following

tion as an enforcement provision, § 267 provides an oft-cited definition of family used in many anti-abuse rules throughout the Code. In doing so, § 267 relies upon the nuclear family, in stark contrast with the broad family of § 152.

Section 267(a) provides the general force of the rule: "No deduction shall be allowed in respect of any loss from the sale or exchange of property, directly or indirectly, between [related] persons . . . ."[95] Subsection (b)(1) then goes on to identify "[m]embers of a family" as related persons. But it is (c)(4) that provides the crucial definition of family: an individual's family consists only of her "brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants."[96] The regulations tie up a few loose ends, limiting "ancestors" to parents and grandparents and "lineal descendants" to children and grandchildren, as well as clarifying that any adopted person who would qualify as related but for having been adopted shall qualify as related under § 267.[97] Recall that this narrow conception of family applies not only when § 267 is expressly implicated but also, in whole or large part, when other sections incorporate § 267 by reference. Thus, this narrow conception of family pervades the Code.

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example: A mother wants to lower her tax liability creating losses on the sale of Whiteacre but does not in fact want to give up control over Whiteacre. Mother holds Whiteacre as investment property. Assume the mother's basis in Whiteacre is equal to the price when she purchased Whiteacre, 100,000. Mother sells Whiteacre to her daughter for 75,000, creating a 25,000 loss (amount realized 75,000 – basis 100,000). Section 267 mandates that losses between related parties be considered manufactured and, therefore, denies the 25,000 loss to the mother.

[95] I.R.C. § 267(a)(1). As a loss limitation rule, § 267 expressly addresses the potential for abuse created by taxpayers realizing losses when most advantageous. Loss limitation rules, being the result of the realization requirement, may be grounded in a number of rationales, but § 267 rests upon the belief that losses on transactions between related parties are not true losses, as the taxpayer claiming the loss is assumed not to have truly given up control over the property whose sale or exchange created the loss. *See* Noel B. Cunningham & Deborah H. Schenk, *The Case for a Capital Gains Preference*, 48 TAX L. REV. 319, 323 (1993) ("The realization requirement has spawned loss limitation rules to prevent taxpayers from zeroing out income by realizing accrued losses while holding appreciated assets (often until death). Other loss limitations serve additional functions, but also move the tax system away from the norm.") (internal citations omitted).

[96] I.R.C § 267(c)(4) (2012). Section 267(b)(1) incorporates the definition of family found in (c)(4) for the purposes of the loss disallowance rule articulated in subsection (a)(1).

[97] Treas. Reg. § 1.267(c)-1(a)(4) (1960) (providing that "[i]n determining whether any of these relationships exist, full effect shall be given to a legal adoption. The term 'ancestors' includes parents and grandparents, and the term 'lineal descendants' includes children and grandchildren.").

Taking a moment to consider the titles and terminology of §§ 152 and 267, however, a potential criticism arises. Section 267, entitled "Losses, Expenses, and Interest with Respect to Transactions Between *Related* Taxpayers,"[98] expressly defines family as a subset of a broader category of related persons that includes entities such as corporations or trusts. On its face, § 152 does not directly define family in a similar way. Instead, § 152, entitled simply "Dependent Defined," does just that: define the term dependent. Though it uses common familial relationships to define both classes of dependent it creates—qualifying child and relative—unlike § 267, § 152 never expressly uses the term family. The question then arises whether § 152 can be understood as a conception of family within the Code alongside § 267. The answer is that it not only *can* be but that it *should* be.

The nuclear or immediate extended family provides the core of both provisions. While § 152 expands from that core and § 267 does not, § 152, like § 267, relies upon a conception of family even as it expands that conception. Within § 267 we find a mandatory conception of family as an economic unit; that is, in family law terms, family-as-status. Regardless of the reality of your interactions with your family, you are treated as a cohesive economic unit. Section 152 uses different terminology but is no less relevant to understanding the Code's multiple conceptions of family. Within § 152 we find family understood as a nexus of individual economic units; that is, family-as-contract.[99] Any aggregation that occurs is the result of agreements, explicit or implicit, among the members of the "family."[100]

Taken together, §§ 152 and 267 provide a foundational portrait of family within the Code. As we have seen, two distinct and competing

[98] I.R.C. § 267 (emphasis added).

[99] Viewing family as a nexus of individual economic units draws upon the concept of the family-household distinction common in anthropological literature. Anthropologists have long drawn attention to the separate but frequently overlapping nature of the household and the family.

[100] Household and family, though frequently synonymous, are in fact different entities. Kinship ties define families. In contrast, shared residence defines the household. To illustrate this point, few would challenge whether my brother is a member of my family simply because we live in different states. Nor does one's roommate become family by virtue of shared residence. Stated differently, though families frequently live together, they need not be considered family, nor does living together make a collection of individuals family. Anthropologists have long recognized and made this fundamental conceptual distinction. *See* Donald R. Bender, *A Refinement of the Concept of Household: Families, Co-residence, and Domestic Functions*, 69 AM. ANTHROPOLOGIST 493, 494 (1967) ("Once this relatively simple distinction between households and families is made, it seems perfectly obvious. Of course, families do not cease to exist when their members reside separately. Nor do persons who reside together necessarily form families."). On its face, I.R.C. § 152 seems to conflate family and household.

notions of family reside within the individual income tax: one that presumes cohesion from blood or marital ties and a second that allows individuals to depart from the core, nuclear family and construct their own families as economic units. Recognizing these two families as such does little, however, to tell us whether either or both accomplish the goals of tax law and policy. We now have a map of the two conceptions within the Code. But what does it tell us? To better understand the functions of these two conceptions of the family within the Code, the next section draws some lessons from family law, which has a well-developed framework for thinking about breadth in the State's definition of the family.

B. Theorizing the Two Families of Tax: Lessons from Family Law

Unlike tax law, which purports to treat the family as a mere proxy for an economic unit, family law[101] expressly considers the sociocultural nature of the family. In doing so, it has relied upon two separate concepts: the family-as-status and the family-as-contract.[102] Embedded within each of these perspectives are distinct ideas on the proper relationship between the State and individuals, the proper degree of choice permitted in intimate relationships, and the effects of intimate relationships on a person's autonomy.

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[101] Family law scholarship on the status/contract distinction discusses both marriage-as-status/contract and family-as-status/contract. I treat scholarship using either terminology as providing insight for both, but will use the terms family-as-status/contract. In doing so, I extrapolate some discussions, such as that of the Court in Maynard v. Hill, 125 U.S. 190 (1888), which are, on their face, only of marriage as status. However, because of the perceived inseparability of marriage and family, I believe this step is appropriate and enables a deeper discussion of the family-as-status/contract concepts. History and existing scholarship supports my position. Janet Halley makes explicit the link between viewing both marriage and family-as-status, writing that "marriage-as-status contains not only the husband and wife but the parent and the child." This is so because scholars advocating the marriage-as-status view so frequently understood marriage and family as inseparable. Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 43–44 (2011).

[102] As with most dichotomies, there are scholars who challenge whether the ideas of status and contract are, in fact, dichotomous. Inevitably, the distinction between status and contract can blur at the lines of more complicated cases, but the concepts of family as status and contract remain useful categories for analyzing two different approaches to the legal treatment of intimate life. For a discussion of the challenges to the status/contract dichotomy, *see, e.g.*, Halley, *Behind the Law of Marriage*, *supra* note 7, at 1 ("It is typical of our legal consciousness that we have transformed this polar opposition [status/contract] into a spectrum.").

1. Status

Maynard v. Hill—a canonical family law case—provides the paradigmatic expression of marriage as status.[103] Directly addressing the question of whether marriage is a relationship of contract or status, the Court wrote:

> It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, *it is something more than a mere contract*. . . . It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.[104]

The Court's opinion in *Maynard* can be distilled into a statement of three key features of the family-as-status view.

First, the Court articulated a fundamental link between marriage and family. Marriage is "an institution" in which the "public is deeply interested" because it is the "foundation of the family." Making explicit this link between marriage and family is important, particularly for demonstrating the impact of the family-as-status view on tax law. Marriage and family are presented as inseparable and each is essential to "civilization" itself and its "progress." In this way, family is an institution that is a matter of public concern.

Second, the Court's opinion in *Maynard* provides an example of the tension between defining family as status and recognizing individual autonomy. Defining family as status is about imposing law upon the family for the public welfare. The legal effect of the family-as-status perspective is best summarized as follows: "Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities."[105] By being in certain relationships, herein marriage, individuals enter into a relationship with the State that confers upon them certain rights and responsibilities—the legal effect. Stated differently, understanding mar-

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[103] 125 U.S. 190. Janet Halley offers a detailed history of the "genealogy" of family law, identifying *Maynard* as a key case in the marriage/family-as-status debate. Halley, *What Is Family Law?*, *supra* note 7, at 239 (writing of *Maynard*).

[104] *Maynard*, 125 U.S. at 210–11 (1888) (emphasis added).

[105] *Id.*

riage and familial relationships as ones of status, the State becomes a party to those relationships in a robust and direct way.[106]

A critically important result of the family-as-status view is that the State essentially denies individuals' capacity to contract on certain matters. Consider family law before the rise of prenuptial agreements, separation agreements, and no-fault divorce. Courts have not always respected such agreements nor permitted divorce without "cause,"[107] but rather exerted significant control over determining the terms of a separation and whether the grounds for divorce were present.[108] A couple could not, for example, simply "agree to divorce."[109] Instead, the State rigorously interceded, determining whether fault existed, investigating any attempt at agreements regarding division of property, and feeling free to set such agreements aside.[110] Viewing family-as-status became a means for opening the door to potentially significant monitoring and intervention by the State.

The State's regulatory role in a family-as-status world is one of advancing public policy surrounding familial relationships. In the name of doing so, the State retains the right to "prescribe the age at which parties may contract to marry, the procedures essential to constitute a valid marriage under state law, the duties and obligations created by marriage, and the effect of marriage on the parties' property and support rights and obligations."[111] Simply being married or being a child carries with it an array of legal consequences that individuals do not create through their own negotiations but rather have automatically conferred upon them by the State.

Third, and importantly, there is a tension within the *Maynard* opinion that begins to point the way towards an alternative conception of the State's role in defining the family. This alternative conception recognizes that the family is not just a legal, but also a cultural institution that involves individual decision making. Consider the following language from *Maynard*: "[Marriage] is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change."[112] Marriage is more than a "mere contract," yet it is a contract that takes its meaning not only from law, but also from culture.

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[106] JOHN D. GREGORY ET AL., UNDERSTANDING FAMILY LAW 31 (2d ed. 2001).

[107] *See* Scott & Scott, *supra* note 7, at 1234–36 ("The contractual paradigm is most evident in marital dissolution proceedings, specifically in the judicial response to the enforcement of separation and premarital agreements.").

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] GREGORY, *supra* note 106.

[112] Maynard v. Hill, 125 U.S. 190, 210–11 (1888).

In order to mute the problem that arises when the State seeks to value some individual decisions and not others, the family-as-status conception assumes that the State's preferred definition conforms to the cultural one; that is, kinship and the status family are intimately intertwined. This presumed cultural foundation rests upon the set of assumptions and particular understanding of the lived effects of certain classes of kinship. For example, the State may confer support requirements upon parents to care for their children and express those requirements through law. The cultural foundation aspect of family-as-status assumes that parents will work to support their children *by virtue of their status as children.* The very existence of a familial bond creates a generally predictable set of behaviors; for example, parents will support their children, or family members will act as a cohesive unit. Families, in this view, are not a mere amalgamation of individuals contracting with each other in unpredictable and autonomous ways but rather entities that exhibit certain unifying characteristics.

2. Contract

Family-as-contract stands in stark contrast to family-as-status in three key aspects: its characterization of 1) the relationship of the individual to the State, 2) the degree of individual choice permitted and encouraged, and 3) the impact of affective bonds on individual autonomy. The family-as-status view elevates the first of these three aspects, limiting individual choice, believing affective bonds circumscribe individual autonomy and casting the State in a robust regulatory role. The family-as-contract view instead elevates the second and third of these aspects, lessening the power of the State in favor of placing higher value on individual choice and allowing for greater individual autonomy. The individual is central.

Viewing family-as-contract weakens the relationship between individuals and the State. Where family-as-status brings the State into a close regulatory relationship with the family, the family-as-contract perspective recasts the State as the "neutral enforcer of the bargains of autonomous self-interested parties."[113] Returning to the example of prenuptial agreements, the increased prevalence and enforcement of such agreements is a clear and oft-cited example of the effects of understanding family-as-contract.[114] Rather than reinforcing the power of the State to define relationships, "[t]he law regulating premarital contracting increasingly reflects a straightforward contractual perspective, one in which couples are encouraged to reach an ex ante agreement about the terms of

[113] Scott & Scott, *supra* note 7, at 1228.

[114] *Id.* at 1235 ("The contractual paradigm is most evident in marital dissolution proceedings, specifically in the judicial response to the enforcement of separation and premarital agreements.").

their relationship and its dissolution."[115] When we understand family as an aggregation of contracts, individuals play the role once held by the State, determining the nature of their own relationships. The State then retreats from its more heavy-handed regulatory role.

Family-as-contract reflects a normative shift in the view of the relationship of an individual to her family. Rather than believing family to be the foundational unit of civilization—therein making the encouragement and maintenance of families a policy goal in itself—the family-as-contract perspective focuses its policy on the individual. Family may continue to be an idealized and revered institution, but the individual takes center stage. Treating the family as a collection of autonomous individuals "is part of a broader policy of maximizing the freedom of the individual to pursue personal ends in intimate relationships."[116] Supporting family may remain a goal, but it is no longer the sole policy concern. This emphasis on choice reflects the second departure from the cultural foundation of family-as-status: a greater sense of individual autonomy vis-à-vis one's intimate relations. Where family-as-status views the individual as part of a cohesive unit, unable to act or strongly curtailed from acting independent of that group, the family-as-contract viewpoint disagrees. An individual is an individual first and part of a unit second. In the family-as-status view, the very existence of familial bonds of blood or marriage limits an individual's ability to make choices independent of familial influence. In contrast, the family-as-contract view purports to exalt choice—choice of what relationships create family and the individual's free exercise of choice independent of her family members. Thus, the link between kinship and the contract family, while still strong, is weaker than that between kinship and the status family.

C. Applying the Status/Contract Framework to the Code

What lessons can this family law framework offer for tax scholarship? Up to this point, tax and family law have remained largely separate.[117] That division is a missed opportunity. Re-examining the two fam-

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[115] *Id.* at 1236.

[116] *Id.* at 1239. Anthropologists identify this particular brand of individualism as well. *See, e.g.*, STRATHERN, *supra* note 15, at 16–17.

[117] Though tax scholars discuss the overlap of these two areas of law on common issues, such as the proper treatment of alimony or child support, they have made no systematic attempt to bring family law theory on the family to tax law. Bridget Crawford briefly discusses the potential insights for tax law of a combination of gender theory on connectedness and family law scholarship's recognition of the multiplicity of familial forms, but does not pursue a deep analysis of the points of intersection of family and tax law, as will this Article. Crawford, *supra* note 6, at 36–48; *see also* James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409, 1425 (2010) ("In thinking about the tax treatment of mar-

ilies of tax—the extended family of § 152 and the nuclear family of § 267—reveals that those conceptions track those of family law.

Family law's contribution does not end at an improved taxonomy, however. Improved conceptualization of the two families of the Code goes part of the way in filling the gap in scholarship on the family and tax. Yet, the question remains as to whether tax law requires one, neither, or both families. Family law too has struggled with the question of whether to adopt family-as-status or whether status can and should exist alongside contract. Current family law scholarship recognizes that status does persist alongside contract and that both have important roles in the administration of family law and the advancement of its policy goals.[118] This lesson comes to bear on the question of the relevance of family to tax law. While current proposals would have us rely upon a contract family—severing kinship from the Code by abandoning the status family entirely and cutting kinship categories from even the contract family—examining the two families of the Code with the language and theory of the status/contract distinction provides a lesson that challenges this trend: kinship, the § 152 contract family, and the § 267 status family all serve important functions for tax law.

1. Contract: Section 152 Dependent Definition

Section 152 should be understood as a bastion of the family-as-contract view within the Code. Critically important for many other Code provisions, recall that § 152 provides a definition of who qualifies as a dependent.[119] The family-as-contract view elevates individual choice, with an emphasis on respecting an individual's right to structure her own family. By providing a broad definition of relative, § 152 enables a wide-range of individual choice in shaping who the taxpayer understands to be family. Considering examples of the impact of § 152 may help clarify this point. Section 213, which provides a deduction for qualifying medical expenses, utilizes § 152's broad definition of family.[120] So too does § 223 which allows a deduction for eligible contributions to a health sav-

riage, family law perspectives could be useful in ferreting out precisely why marriage retains such cultural salience in contemporary American society.").

[118] *See, e.g.*, Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319 (2012); Harry D. Krause & David D. Meyer, *What Family for the 21st Century?*, 50 AM. J. COMP. L. 101 (2002).

[119] Section 152's role in defining "child" for the purpose of multiple Code provisions increased in 2004 as the Working Families Tax Relief Act re-tooled I.R.C. § 152 to create the unified definitions of relative and child found in the Code today. Pub. L. No. 108–311, 118 Stat. 1166 (2004); *see also* SAMUEL A. DONALDSON & DONALD B. TOBIN, FEDERAL INCOME TAX: A CONTEMPORARY APPROACH 40 (2012).

[120] I.R.C. § 213 (2012).

ings account paid by or on behalf of an eligible individual.[121] A taxpayer who pays interest on a dependent's qualifying educational loans can deduct a limited amount of that interest thanks to § 221.[122] Even where a section incorporates § 152 with limitations, as does § 529, which provides an exemption for amounts paid to qualifying tuition programs,[123] the thrust of § 152 is still clear: the nuclear family is not the only familial form recognized in tax law. By expanding the concept of family, § 152 makes the benefits of multiple tax provisions available to a wider array of families therein recognizing and supporting an individual's capacity to structure her intimate life as she feels appropriate, to care for and count as family whom she desires.[124]

2. Status: Section 267(c) Definition of Family

Families should not be trusted. This is the assumption that underlies § 267 and the Code sections that rely upon it.[125] The logic underlying that assumption and evidence of it is found in two themes that emerge from the case law on related-party rules; themes that inform the proper understanding of the purpose and structure of § 267 as an anti-abuse rule. First, that the family is a proxy for a cohesive economic unit and second, that the family is the proper focus of anti-abuse provisions. Both of these themes rely upon a family-as-status view and § 267's narrow conception of family codifies that view.

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[121] *Id.* § 223(d)(2)(A) utilizes the § 152 definition of dependent in defining qualifying medical expenses as part of the definition of a health savings account.

[122] *Id.* § 221.

[123] I.R.C. § 529 excludes § 152(d)(2)(H), the effect of which is to exclude unrelated (by blood or law) individuals from qualifying as beneficiaries for the purposes of that provision.

[124] DONALDSON & TOBIN, *supra* note 119, at 753 (providing a tongue-in-cheek characterization of the benefits of many provisions that rely upon § 152 for its definition of dependent. The authors query: "Procreation: The Last Great Tax Shelter?"). The motivation of beneficial provisions may vary but each is a tax expenditure—a departure from the normative structure of the Code. Running counter to the general prohibition against the deduction of personal expenses found in I.R.C. § 262, sections such as § 213, are designed to accomplish multiple goals: "to encourage taxpayers to incur those expenses, to alleviate the tax burden on people who incur those expenses, or to make up for the over-taxation that might be related to those expenses." LAURIE L. MALMAN ET AL., THE INDIVIDUAL TAX BASE: CASES, PROBLEMS AND POLICIES IN FEDERAL TAXATION 236 (2d ed. 2010).

[125] Recognizing that assumptions underlie I.R.C. § 267's design is important and many textbooks do so, but few attempt to pin down those assumptions. *See, e.g.*, MALMAN ET AL., *supra* note 124, at 234 (exploring the basis of § 267's conception of related persons and entities in a student question section: "What assumptions underlie the restrictions in § 267? Are they valid? Is there an alternative approach to the potential abuse that § 267 addresses?").

Consider an early Supreme Court case addressing § 267's predecessor. In *McWilliams v. Commissioner*,[126] the Court interpreted the related-party rule to be an "absolute prohibition—not a presumption—against losses" on transactions between related parties.[127] The Court based the rationale for denying losses between related parties on the presumed fact that such parties "generally have a near identity of economic interest."[128] Thus, in *McWilliams* we find the Court's endorsement of a family-as-economic-unit view. Over thirty years later, the Fifth Circuit cited the same language in denying a family discord objection to the application of § 267.[129] A family relationship is, in the eyes of the courts, a consistent proxy for "shared economic interest." That assumption of shared economic interest gives rise to the sense that family is a site of tax avoidance.

McWilliams expressly identifies § 267 and its conception of family as an anti-abuse rule, making clear § 267's status as an explicit attempt to target tax avoidance. *McWilliams* again provides key language:

> We conclude that the purpose of § 24[b] was to put an end to the right of taxpayers to choose, by intra-family transfers . . . their own time for realizing tax losses on investments which, for most practical purposes, are continued uninterrupted.[130]

Other sections, such as § 465's at-risk loss limitation[131] or § 707's limitations on losses in controlled partnership transactions,[132] embrace this logic as they draft § 267's definition of family into the war on abuse of the Code.[133]

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[126] McWilliams v. Comm'r, 331 U.S. 694 (1947). *McWilliams* analyzed the predecessor to § 267, then § 24, but the opinion applies with full force to the current § 267.

[127] *Id.* at 699.

[128] *Id.*

[129] Metzger v. Comm'r, 693 F.2d 459, 471 (1982).

[130] *McWilliams*, 331 U.S. at 700.

[131] I.R.C. § 465 (2012).

[132] *Id.* § 707.

[133] Though not identifying I.R.C. § 267 as reflecting a family-as-status conception, Bittker identified the shared logic of § 267 and similar anti-abuse provisions. "As we have seen, this premise of 'a near-identity of economic interests' within the family underlies the numerous proposals for the aggregation of family income in computing the group's annual tax liability that have been advanced by tax theorists. But these proposals, unlike § 267, have invariably been confined to parents and minor children, excluding adult children and, a fortiori, more distant relatives, such as grandparents, grandchildren, and siblings. Moreover, no proposal for compulsory family income aggregation—not even between husband and wife—has ever been accepted by Congress. Yet the far more sweeping concept of family solidarity that is embodied in § 267 not only has survived without criticism, but has become the model for a plethora of other

The drafting and interpretation of § 267 rely upon the same assumption: families function as cohesive units. As such, they are natural targets for enforcement of the Code when we are concerned with the impacts of relationships on economic behavior. Rather than a collection of autonomous individuals who may engage with each other at arm's length, disagree, or pursue their own interests, § 267 treats family as a collective, something different than the aggregation of its individual members. Brothers and sisters, husbands and wives, parents and grandparents, children and grandchildren—the tax law presumes that the presence of these familial bonds overrides an individual's capacity to act independently. This understanding of the effects of familial bonds on a person's autonomy is an outgrowth of the cultural foundation of the family-as-status perspective found in family law and its corollary assumption that intimate relationships restrict individual autonomy in ways that matter for tax law and policy.[134]

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restrictions on intrafamily transactions involving property." Bittker, *supra* note 2, at 1458.

[134] The tension between understanding individuals as such, and as part of broader units, is clearly at play in both tax doctrine and existing scholarship. This tension can even play out within a single section, as it does in the I.R.C. § 1 "kiddie tax." The kiddie tax is a tax that differentiates between the earned and unearned income of a child, parsing the two out for separate treatment. Scholars have noted this seemingly inconsistent treatment of a child's earned and unearned income. Kornhauser, *supra* note 5, at 101. Viewing this inconsistency through the lens of the family law status/contract distinction, however, enables us to better understand its origin and persistence.

As a general rule, a child's income is taxed to the child as an independent taxpayer. I.R.C. § 73(a) (providing that "[a]mounts received in respect of the services of a child shall be included in his gross income and not in the gross income of the parent."). Treating the income-earning child as separate from her parents runs counter to the dependency-model of children found in the family-as-status view of the family. But in 1986, the picture shifted. In that year, Congress enacted the so-called kiddie tax of § 1(g). The tax differentiates between earned and unearned income and makes certain unearned income taxable at the parents' rate, rather than the child's. I.R.C. § 1(g); JAMES J. FREEDLAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION: CASES AND MATERIALS 967 (6th ed. 2011). With § 1(g), the child ceases to be a separate individual and is pulled back into the family unit, thus signaling a shift in the perception of the child and her relationship to her family. What explains this shift? In short, it is the need to curb abuse within the family.

Quite explicitly, the kiddie tax is an anti-abuse provision. Prior to the kiddie tax, parents could shift income to children in lower tax brackets and therein lower their tax liability. Concerned with such income shifting, Congress drafted § 1(g) to achieve the goal of "prevent[ing] [such] avoidance tactics [as] assignment of income to some minors." I.R.C. § 1(g); FREEDLAND ET AL, *supra*. When the Code faced the challenge of avoidance tactics, Congress once again turned to a family-as-status perspective, as it did in § 267. In the conflicting treatment of children as both autonomous and as subsumed within the family unit, we see

D. The Inevitability of Family

These two conceptions of the family—one broad, recognizing individual autonomy, and one narrow, limiting autonomy in the interests of public welfare—are inevitable features of the Code. They aim at different problems—one the problem of discrimination, the other the problem of enforcement—and thus serve different and essential functions. If we are concerned about both problems, the solution does not lie in cutting the status family and kinship from the Code; herein lies the error of existing proposals.

1. A Final Lesson from Family Law

The dominant wisdom within family law is that the law has shifted from a family-as-status to family-as-contract.[135] That suggests the possibility of utilizing only one conception of family. But this narrative does not reflect the existing structure of family law, nor is it a viable possibility for other areas of the law, such as tax.

For years, the dominant narrative within family law told the story of "how, in a generation, the law increasingly has come to deal with the family not as an organic unit bound by ties of relationship, but as a loose association of separate individuals";[136] a shift from status to contract. Sir Henry Maine provides an early and oft-cited articulation of this perceived shift in his 1861 work, *Ancient Law*: "Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. *The Individual is steadily substituted for the Family*, as the unit of which civil laws take account."[137]

Despite its dominance, however, Maine's narrative is increasingly challenged. Rather than a clear transition from status to contract, perceptions of family as both status and contract persist in current law.[138] Two examples of current law and policy that perpetuate the family-as-status view are "[f]amily law's consistent refusal to enforce interspousal con-

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not only the persistence of both the family-as-status and family-as-contract views, but also the correlation between the family-as-status view and laws aimed at preventing tax avoidance.

[135] *See, e.g.*, Hasday, *supra* note 7, at 834; Halley, *What Is Family Law?*, *supra* note 7, at 195–96.

[136] Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 687.

[137] SIR HENRY SUMNER MAINE, ANCIENT LAW 139–40 (Dorset Press 1986) (1861) (emphasis added).

[138] *See, e.g.*, Hasday, *supra* note 7, at 836 ("[T]he status-to-contract story overstates the changes that have occurred in family law over time. It obscures the substantial evidence that supports a counter-narrative that could be told about family law, but is not: the story of the persistence of status rules denying individual[']s choice about the structure of their relationships.").

tracts for domestic services"[139] and lawmakers' reticence to "redefine children" as autonomous members of the family unit.[140] Rather than understanding a person as a wholly autonomous individual who can structure her interpersonal relationships as she deems appropriate, the law steps in and limits her ability to contract or structures requirements for dependency and care. This State "interference" reflects the persistence of the family-as-status view in family law. The same dynamic is at work within tax law.

2. Family by Another Name: The Error of Existing Proposals on the Family in Tax

Though their rhetoric is often that of individualization and of cutting family from tax law, existing proposals simply trade one conception of family for another. None of the scholars advocating individual filing—or, as Infanti labels it, a "decentralizing" of family in the Code—wholly removes family from the Code.[141] Instead, such scholars overhaul the family in tax in two related but distinct ways: first, by cutting the status family from the Code entirely so the contract family dominates and second, by cutting kinship from the contract family that remains.[142] Yet, even if we were to adopt a kinship-free contract conception of family for tax, the language of family would merely be replaced by concepts such as economic unity or economic interdependence. The need to recognize relationships and their impact on tax administration would persist. Existing proposals, thus, reveal themselves as the exchange of one conception of the family—a narrow one the State defines without regard to individual choice—with another conception of the family—a broad one that views families as a collection of individuals who have chosen to enter into intimate relationships of mutual support.

Supporting and respecting individual autonomy by allowing individuals to structure their intimate lives as they choose is the laudable goal and dominant rhetoric of contemporary proposals: Abandoning family as currently conceived in the Code in favor of the concept of economically interdependent persons frees us from limited conceptions of the "tradi-

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[139] Hasday, *supra* note 7, at 839–40.

[140] Dolgin, *supra* note 7, at 348–51 ("Society did not, however, comparably reconstruct its understanding of children, and it still views them as depend[e]nt and vulnerable."); *id.* at 346.

[141] Infanti, *supra* note 5.

[142] Though closely aligned, the kinship family and the concept of family-as-status are not coextensive. Kinship terminology can persist in the family-as-contract view simply as a means of describing the nature of the relationship between two or more people (e.g. Jon and Rich are brothers). In contrast, when we understand family-as-status the kinship bond itself is more than a descriptor, as it implies a particular character of the relationship (e.g. because Jon and Rich are brothers they are emotionally bound and prone to have overlapping economic interests).

tional family" in favor of "recogniz[ing] and accommodat[ing] [a] multiplicity of familial relationships."[143] Abolishing the joint return "will remove a serious obstacle from [single persons'] path[s] forward to autonomy and self-realization."[144] Revising rules that hinge upon familial relationships to reflect the "new individualism" in intimate relationships will track the new reality in which "family relationships [are] very much [subject] to individual choice and revision."[145] This language, with its emphasis on, and respect for, individual autonomy in entering into and structuring intimate relationships should sound familiar: it expresses the family-as-contract view. Family as an entity is not cut from existing proposals but rather a particular type of family: the family-as-status. Were existing proposals to stop at this swap—the status family for the contract family—that alone would be enough to create concerns for the efficacy of anti-abuse provisions in the Code. However, scholars go one step further and argue for cutting all necessary ties between kinship and relatedness in tax law.

To understand the full potential impact of existing proposals, let us take a closer look at that of Anthony Infanti. As one of the most complete of its type, Infanti's proposal illustrates two key characteristics of existing arguments: a desire to recognize and respect individual choice and autonomy in intimate relationships and a set of reforms that attempt to remove not just family-as-status but also *family-as-kinship* from the Code in favor of tracing *economic unity*. Recall that Infanti argues for the abolishment of both the joint return and the Code's reliance upon traditional kinship categories in favor of a concept of "economically interdependent persons" (EIPs).[146] Beyond elevating autonomy by proposing a rigorously contract view of family, Infanti would give the individual great latitude in defining her economically interdependent relationships.[147] While, in Infanti's view, EIPs might overlap with kinship categories, the concept—the attempt to track economic unity—is not premised upon those categories. Kinship, in this view, has no necessary implications for defining relatedness in tax. Economic unity is now seemingly divorced from a dependence upon familial relationships.[148] To be sure, economic unity is nothing more than a sanitized version of family—that is a concept of family that does not rely upon traditional kinship terms for its boundaries. Importantly, however, Infanti does not challenge the need to track relatedness in tax law. In his and similar attempts to cut the status family and kinship terminology from the Code, we see

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[143] Infanti, *supra* note 5, at 609–10.

[144] Kahng, *supra* note 4, at 684.

[145] Alstott, *supra* note 52.

[146] Infanti, *supra* note 5, at 607 (writing that by "[s]tarting with the individual at the center, we are able to work outward, tracing the web of that individual's tax family").

[147] *Id.* at 608.

[148] *Id.* at 641.

that family reasserts its own significance to the Code. What upsets Infanti and scholars arguing for overhauling the family in tax is the assumption that the presence or absence of a kinship tie is relevant for determining economic unity.

If family defined by status and kinship is, in fact, a problem, what is the solution? Reflecting the classic family-as-contract view—where the individual has the freedom to structure her own intimate life—existing proposals exalt the belief that the individual, and not the government, should define her family.[149] Under Infanti's proposal, there are four separate avenues to being classified as EIPs: 1) electing nonrecognition treatment of a transfer outside ordinary trade or business,[150] 2) making a transfer(s) of cash over a threshold amount, 3) repayment of a below-market loan, or 4) fulfillment of a mandated or contracted support obligation above a certain level.[151].

With the nonrecognition election, Infanti's goal of elevating individual choice finds its clearest expression. The mechanics of the election are fairly straightforward. As a general rule, all transfers at other than fair market value are taxable events where the transferor will recognize any gain or loss (calculated as though the transferor received consideration equal to the fair market value of the property) and the transferee takes a fair market value basis in the property transferred.[152] Should a taxpayer wish to avoid this treatment, she need only make the nonrecognition election and doing so then triggers identification of the transferor and transferee as EIPs.[153] The taxpayers need not be related by blood or law, share a household, pool finances, or be in any type of support relationship—that is, the typical markers of family and dependency are gone. Whomever the taxpayer chooses as an EIP becomes such.

The nonrecognition election clearly elevates choice over the presumption of economic interdependency on the basis of "conjugal or familial relationships,"[154] but it does not deny the relevance of relatedness to tax law; relationships are still integral to administration of Infanti's proposal. By removing the familiar markers of familial bonds and enabling a wide range of taxpayer choice in constructing their own intimate

[149] *Id.* at 609–10 ("In other words, each taxpayer would get to choose her tax family—which might include a spouse, children, siblings, parents, cousins, friends, neighbors, or some combination of these or other people—instead of having a one-size-fits-all tax family imposed on her by the federal government. Put differently, the government would cease to be in the business of creating tax incentives for the formation of only a certain type of family and would instead begin to respect the autonomy and liberty of each individual to enter into whatever relationships are important to her.").

[150] *Id.* at 618.

[151] *Id.* at 641–59.

[152] *Id.* at 647.

[153] *Id.* at 647–48.

[154] *Id.* at 649.

networks, Infanti eradicates any reliance on the status concept of family and places a rigorous, kinship-free conception of family-as-contract in its place; but family remains.[155]

Contemporary scholars do not speak in the terms of contract and status. Instead, their proposals develop a sense of individualizing the Code by minimizing (if not undercutting entirely) the relevance of family to tax. If we cut kinship from the Code, as many scholars would have us do, have we not also cut family from the Code? The theories of status and contract make us answer that question in the negative. With the insights of status and contract, existing proposals are recast as still relying heavily upon family—just one of a different sort. If family pervades the reforms of even those most concerned with the potentially discriminatory impacts of family in the Code, how are we to proceed? If we are concerned with discrimination within the Code, perhaps the kinship-free contract family is the appropriate family for a modern income tax. In such a world, an individual is free to delimit her own family. That family may include her kin or may not. The individual and not the State will define family, meaning there should be no top-down discrimination at the intersection of the family and tax. Yet the real world impacts of cutting kinship and the status family from the Code are not quite so neat. The next Part proposes a framework for evaluating current and future law and makes initial proposals for reforms to the Code's conception of family that support both fairness and administrability.

III. MAKING PEACE WITH THE FAMILY: WHY WE SHOULD ABANDON ATTEMPTS TO RELY EXCLUSIVELY UPON A KINSHIP-FREE CONTRACT FAMILY AND THE ROAD AHEAD

Three observations support the continued role of kinship and the status and contract families within the Code. First, existing proposals to

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[155] Within existing scholarship, much has been made of the fact that the United States is an outlier in maintaining a joint filing system. Yet, even within those countries that have moved toward individual taxation, the need to track relatedness (and the pitfalls of not doing so or doing so poorly) remains. As Infanti discusses at length, the Canadian tax system, though purportedly individualized, has increasingly made accommodations for relatedness. *Id.* at 623–43 ("Even under Canada's system of individual filing, family responsibilities do creep into (and have increasingly crept into) the tax calculation."). Indeed, even as it attempts to determine better ways to track relatedness, the Canadian Law Commission expressly rejected the idea that individuals can always be permitted to identify their relations for tax purposes. *Id.* at 642–43. Stated differently, the Canadian Commission expressly rejected a wholesale shift to reliance upon a contract-based conception of family. Infanti disagrees with this rejection, as his proposal makes clear. In another potential model country, the United Kingdom, there is doubt as to the efficacy of an individualized system in combating avoidance and evasion. *See* Stephanie Hunter McMahon, *London Calling: Does the U.K's Experience with Individual Taxation Clash with the U.S.'s Expectations*, 55 ST. LOUIS U. L.J. 159 (2010).

make the individual central and cut kinship and the status family from the Code are in fact arguments to universalize a very particular notion of the contract family. As such, these arguments do not challenge the importance of tracking relatedness but do end in pulling the rug out from under a host of beneficial and anti-abuse provisions that rely upon a fair and administrable conception of family for their function. Replacing one family with another does not remove the family from the Code nor negate its relevance but instead simply obfuscates the discussion.

Second, proposals that attempt to excise family from the Code focus too much upon the problem of discrimination at the expense of the problem of enforcement. If we remove kinship and the status family from the Code, we lose a valuable tool for enforcing the Code, threatening revenue collection and fairness vis-à-vis taxpayers who do not or cannot game the system with their family members.

Third, cutting kinship from the contract family risks undermining the efficacy of beneficial provisions. The Code is complex and frequently difficult to navigate. If we ask individuals to define their own families, we risk individuals underutilizing benefits available to them out of uncertainty of whether they qualify for that benefit. Scholars may disagree on whether the tax system should be a tool for social policy, but the reality is that for now and for the foreseeable future, we use the tax system for more than revenue collection. Provisions targeted at subsidizing education, healthcare, and childcare are just a few examples of the benefits currently provided by the federal government through the medium of the individual income tax.

To argue that the family plays and should continue to play an important role in the enforcement of the Code and conveyance of tax benefits is not to accept the current limitations of our conceptions of family. Family life in the United States has changed and continues to do so,[156] a

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[156] Wendy Wang et al., *Breadwinner Moms: Mothers Are the Sole or Primary Provider in Four-in-Ten Households with Children; Public Conflicted About the Growing Trend*, PEW RES. CENTER 1 (May 29, 2013), http://www.pewsocialtrends.org/files/2013/05/Breadwinner_moms_final.pdf (finding that the composition of income earning within households is changing from previous decades: "A record 40% of all households with children under the age of 18 include mothers who are either the sole or primary source of income for the family, according to a new Pew Research Center analysis of data from the U.S. Census Bureau. The share was just 11% in 1960. These 'breadwinner moms' are made up of two very different groups: 5.1 million (37%) are married mothers who have a higher income than their husbands, and 8.6 million (63%) are single mothers."); *see also* Parker et. al, *The Decline of Marriage and Rise of New Families*, PEW RES. CENTER 1 (Nov. 18, 2010), http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf ("Over the past 50 years, a quiet revolution has taken place in this country. Decades of demographic, economic and social change have transformed the structure and composition of the American family. The pre-eminent family unit of the mid-20th century—mom, dad and the kids—no longer has the stage to itself. A variety of new ar-

fact of which scholars in both family and tax law are keenly aware.[157] Since 1970 the percentage of married adults declined from 72% to just 52% in 2008.[158] An increasing number of adults question whether marriage, as an institution, is obsolete—39% in 2010 as compared to only 28% of adults in 1978.[159] While gender equality within marriage is the ideal to a majority of Americans, marriage is increasingly unequal across socioeconomic classes with just 48% of individuals with a high school diploma or less education ever marrying, while 64% of college graduates will marry.[160] In 1960, that difference was only four percentage points—72% to 76%.[161] The concept of the traditional family has clearly weakened as unmarried, heterosexual couples, same-sex couples, and singles redefine family on their own terms. Nevertheless, despite these changes nearly 50% of Americans articulate a desire to marry[162] and 75% of Americans describe their family, regardless of its structure, as "the 'most important' element in their lives."[163] The family is hardly irrelevant, even if its boundaries are shifting.

For many scholars in both tax and family law, this flux in American family life is a call to action, as it should be.[164] While *Windsor* amelio-

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rangements have emerged, giving rise to a broader and evolving definition of what constitutes a family.").

[157] *See, e.g.*, Baker, *supra* note 118, at 320 (asserting that "there may [no longer] be a typical American family."); Infanti, *supra* note 5, at 607 (discussing demographic data on marriage, child bearing and familial structure).

[158] *The Decline of Marriage and Rise of New Families*, *supra* note 156, at 21.

[159] *Id.*

[160] *Id.* at 22–23.

[161] *Id.* at 23.

[162] *Id.*

[163] *Id.* at 41. Interestingly, despite the evolving conception of family, the family still seems to center around a finite set of blood or intimate ties in the public consciousness. Researchers found that

> [p]eople feel much more obligated to help out (with financial assistance or caregiving) a parent or a grown child than a stepparent or half sibling, but despite these differences, the sense of obligation flows more readily to each of the relatives on the list than it does to 'your best friend'—suggesting that even as family forms become more varied, family connections bind in ways that friendships do not.

Id. at 40.

[164] *See, e.g.*, Baker, *supra* note 118, at 324 ("Given these demographic changes, the academic call for more flexible, inclusive understanding of parenthood and familial partnership is not particularly surprising."); Infanti, *supra* note 5, at 605–06 ("To ameliorate this discrimination [the privileging of the traditional family in the income tax] recent contributions to the tax literature have proposed variants of a federal domestic partnership regime that would equalize the tax treatment of 1) married different-sex couples and 2) same-sex and unmarried couples . . . . [Such proposals] attempt only to widen the privi-

rates the Code's discrimination against same-sex couples, it does not eliminate it.[165] The potential discriminatory impacts of the Code are real and even the contract-based family of § 152 may be too narrow. Alternately, the distinctly narrow, status-based conception of family for enforcement purposes may accord unintended benefits to some families who by choice or by law do not qualify as such for tax purposes.[166] But our dissatisfaction with the current conceptions of family and their likely inadequacy in the face of changing demographics should not lead us to cut the status family, or all reliance upon kinship, from the Code. Not only are these two families—family-as-contract and family-as-status—quite simply too important to the enforcement of tax law and implementation of tax policy, but they are also inevitable and their reliance upon kinship categories necessary to their efficacy.[167]

A. Status, Contract, Tax Law, and Policy: The Road Ahead

Tax law and enforcement involve tradeoffs between administrability and accuracy.[168] Tracking the impact of intimate relationships upon the advancement of tax policy and the successful administration of the Code brings these two goals into direct and frequent contact. If, as academics and the general public agree, the family is in flux, perhaps the only path for tax law is to abandon traditional conceptions of family in favor of tracing lived realties. Doing so could increase the accuracy of application of the Code—if marriage no longer (if ever) indicates shared finances, we can scrap marriage as a relevant status for tax law in favor of tracking actual economic interdependence. If the same is true of other kinship ties, perhaps they too can fall by the wayside. Yet, doing so brings us headlong into the problem of enforcement. Without clear markers of relationships—blood ties, legal ties, however imperfect—how do we identify those relationships that matter for tax?

It is by embracing and relying upon both conceptions of family found within the Code—family-as-status and family-as-contract—and

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leged circle to include certain other relationships patterned after the traditional family norm.").

[165] *See* Infanti *supra* note 36.

[166] *See generally* Seto, *supra* note 4 (discussing the unintended benefits accorded gay couples when same-sex marriage is not accorded the same status as heterosexual marriage). The same logic applies for all unmarried couples and close but otherwise unrelated persons.

[167] This Article introduces avenues for reform consistent with the insights of the status/contract distinction. In a forthcoming Article, tentatively titled *Taxing the Modern Family*, I explore more detailed, section-level prescriptions for reform.

[168] The tension between administrabilty and accuracy in defining family is not the only tension the family creates for tax law and policy. For a discussion of marriage and the competing policy goals surrounding its place in the Code, see Yair Listokin, *supra* note 31.

maintaining their ties to kinship categories that we mediate the tension between a Code that is accurate (and less discriminatory), as well as administrable.

1. A Tool for Enforcement: Family-as-Status

Recall that early scholarship on the family and tax focused on the enforcement problem. As the focus of scholarship shifted to the discrimination problem, concern for the role family plays in tax avoidance or evasion seemed to fade. Most scholars writing in the area understood the benefits denied nontraditional families as the central issue, either ignoring or making only cursory mention of the role a conception of family plays in policing the Code. As such, most existing proposals to remedy discrimination in the Code fail to address or resolve the fall-out of cutting kinship and the status family from the Code: loss of the family as an important enforcement mechanism. Preventing tax avoidance or evasion by families requires a conception of family; specifically one grounded in the family-as-status view.[169]

Recall existing proposals' attempts to track relatedness. Infanti, for example, recognizes the anti-abuse role the family plays in the Code and attempts to use the concept of economically interdependent persons in place of family-as-kinship and status. In his proposal, individuals may elect for nonrecognition treatment of a transaction and thereby identify themselves as EIPs. Doing so not only garners nonrecognition treatment, but also flags those individuals as related for any anti-abuse provisions.[170] A taxpayer therefore has two options: choose nonrecognition treatment with the knowledge that doing so will trigger application of the Code's anti-abuse provisions or avoid anti-abuse rules by recognizing gain or loss on the transfer eligible for the election.[171] Infanti argues that the need for the transferor and transferee to share personal economic information upon being identified as EIPs provides sufficient disincentive to counter any thought of planning a nonrecognition transaction with a

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[169] In emphasizing the importance of the continued presence of a status-based conception of family in the Code, I align myself with a rising number of scholars once again focusing on the link between the family and tax avoidance. *See, e.g.*, Hoffer, *supra* note 45; McMahon, *supra* note 45, at 752 ("Instead of policing individual behavior, the government should think of married couples as a functional unit . . . . Although marriage is less the patriarchal hierarchy it was in 1948 . . . that does not negate the fact that focusing on couples as a unit remains the best standard for judging their relative economic worth compared to other taxpayers."); *See generally* McMahon, *supra* note 155 (cautioning that the shift to individual taxation may have unintended consequences).

[170] Infanti, *supra* note 5, at 649 (stating "election with respect to a transfer will trigger the application of attribution of ownership and other antiabuse rules that would turn on the existence of an economically interdependent relationship (rather than on the existence of certain conjugal or familial relationships.)").

[171] *Id.*

relative stranger.[172] By relying upon taxpayers to self-identify as related, however, Infanti gives sophisticated taxpayers a powerful tool. The taxpayer need only calculate the value of avoiding triggering anti-abuse provisions as compared to the cost of recognizing gain or loss on a given transfer(s). If the tax benefit of the latter is greater than the cost of the former, the rational taxpayer will not make the election and thereby maintain the opportunity for potentially significant tax avoidance.[173] Though Infanti advances one of the most comprehensive overhauls of family in the Code, not only expanding access to tax benefits but also combating abuse, his proposal does not overcome the challenges to enforcement that abandoning a status conception of family and kinship create. Maintaining a kinship-based concept of family-as-status at the core of anti-abuse provisions, however, keeps the door to such abuse closed thereby supporting revenue collection and the overarching fairness of the tax system.

Recall that § 267 creates a narrow, status conception of family for anti-abuse provisions. When the goal of a provision is to prevent families from strategically creating tax benefits with clever but economically hollow transactions, the vision of family is limited to the immediate extended family—parents, grandparents, children, grandchildren, siblings, and a spouse. This conception may be both over-inclusive—a taxpayer may not be on speaking terms with her brother much less colluding with him in tax planning—and under-inclusive—it fails to capture unmarried couples (hetero- or homosexual), unrelated but intimate relations, as well as relatives outside its scope. Yet despite some shortcomings in accuracy, relying on a status-based family supports both the efficacy and administration of the Code.[174]

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[172] *Id.* ("The application of these attribution and antiabuse rules would necessarily require both the taxpayer and the transferee of the property to share information regarding their business and investment holdings—information that many taxpayers will be loathe to share with anyone other than someone with whom they share a close, economically interdependent relationship.").

[173] Infanti briefly details a proposed solution to this potential avenue of abuse that involves breaking the transaction (for which the taxpayers choose not to elect nonrecognition status so as to avoid classification as EIPs) modeled after I.R.C. § 7872's treatment of below-market loans. The crux of the proposals is that by breaking a transaction in which there is built-in loss or de minimis gain into its constituent parts, EIPs who try to avoid that classification can be caught by deeming the transfer by the transferor into a transfer of cash by the transferor to the transferee, thereby (potentially) triggering one of the other avenues to EIP status. Such a procedure requires the already resource-strapped IRS accurately identify such transactions and audit when necessary and, as such, is an inadequate response to the potential avenues created for gaming when taxpayers are allowed to identify their own related persons. Infanti, *supra* note 5, at 656–58.

[174] *See, e.g.*, Baker, *supra* note 118.

Though the family is changing, the narrow, status-based conception of family still provides a reliable proxy for determining relationships that limit individual autonomy—that is, the set of relationships in which individuals tend not to act at arm's length and in which control and influence may be unbalanced. Kinship theory supports this notion, as does recent sociological work on public perception of the family. Indeed, following its shift to individual taxation, the United Kingdom has increasingly struggled with managing tax avoidance within the family.[175] Section 267 and its predecessor, § 24, effectively quashed an easy family tax-planning tool: strategic timing and manufacturing of losses. The effectiveness of family-as-status as the enforcement family stems from its resonance with American conceptions of family.

Anthropologists describe American kinship as "biogenetic."[176] While relationships of blood are, of course, not the only relationships that make someone a relative, Americans place particular importance on *blood* or *genetic* ties. Blood relationships are perceived of as immutable,[177] in contrast to the severability of legal relationships. Spouses, as paradigmatic relatives *in law*, may cease to be upon divorce. The relationship, while potentially significant and life long, is one "by law or custom, [the product of a] code of conduct, [or culturally structured] pattern of behavior."[178] The concept of blood relatives has expanded to include relationships that track those created by blood even if genetics aren't, in fact, shared—step-siblings, adopted children, and the like carry the same sense of immutability of blood relationships rather than the severability of relationships *in law*. Nevertheless, though the concept of blood relatives has expanded, the distinction between blood and legal relatives remains a strong one in American life.

Recent sociological studies documenting the increasing diversity of American familial life echo kinship scholarship. Friends may be the family you choose but that *choice* makes all the difference. Ethnographic work finds that "what distinguishes friends from relatives . . . is that you are born with your relatives but you can pick your friends."[179] That element of choice lends friendship relationships, no matter how close or

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[175] McMahon, *supra* note 45, at 206–17.

[176] DAVID SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 23 (1968).

[177] *Id.* at 24 ("The relationship between parent and child, or between siblings, may be such that the two never see each other, never mention each other's name, never communicate in any way, each acting as if unaware of the other's existence. But to those directly concerned, as to all others who know the facts, the two remain parent and child or sibling to each other. Nothing can really terminate or change the biological relationship that exists between them, and so they remain blood relatives. It is this which makes them parent and child or sibling to each other in American culture.").

[178] *Id.* at 27.

[179] *Id.* at 53.

"family-like," an even greater degree of severability than the marital relationship and even more so than blood ties. As "you pick [friends], by the same token they can be dropped at will and without obligation."[180] A recent Pew Center research project on the family and its role in American life confirms the primacy of distinction between your family and the family you choose:

> [P]eople feel much more obligated to help out . . . a parent or a grown child than a stepparent or half sibling. But despite these differences the sense of obligation flows more readily to each of the relatives on the list than it does to "your best friend"—suggesting that even as family forms may be more varied, family connections bind in ways that friendships do not.[181]

Our families may be changing and in another fifty years the status-based conception of family may hold less sway in American culture, but for current law, it still provides a reliable proxy for relationships that limit individual choice and autonomy in ways that come to bear upon tax.

Many scholars writing on related-party provisions take as given the validity of the cultural construct of blood ties. Writing recently on the need to reform related-party rules of the transfer tax in line with the income tax, Jay Soled and Mitchell Gans articulate the common view:

> Why are related parties willing to go to virtually any length to assist the taxpayer? There are three answers to this question: loyalty, control and financial gain. First, some related parties have a close blood relationship with the taxpayer (e.g., a child or grandchild); and as such, they are likely to be predisposed to adhere to the taxpayer's wishes. . . .
>
> . . . [T]he *related-party* definition should be expansive. The term *related party* should include any party who is apt to be loyal to the taxpayer, over whom the taxpayer can exercise control, or with whom the taxpayer shares a common financial destiny. Loyalty often stems from having common ancestry. Therefore, any *related-party* definition should include members of the taxpayer's family, including all of the taxpayer's [descendants], ancestors, and siblings. Relative to the taxpayer, individu-

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[180] *Id.*

[181] *The Decline of Marriage and Rise of New Families*, *supra* note 156, at 40.

> als within this family group are inclined to be faithful and reliable.[182]

Recognizing that family relationships may limit individual autonomy, why should we not then cast the net wider and bring the family-as-contract view we find in § 152 to anti-abuse provisions? Doing so could support revenue collection, as it would sweep a broader array of relationships into the category of "related" or "family" for the many anti-abuse provisions throughout the Code. Further, if a taxpayer feels a sufficient tie to another that she is willing to make outlays in support of that person that give rise to tax benefits (e.g. tuition payments), that tie may be the exact type of bond with which anti-abuse provisions are concerned. If that were the case, then mapping the contract family of benefits onto the concept of family for anti-abuse would seem to only increase the accuracy of the Code. But here again the goal of accuracy runs head long into the goal of administrability.

Under current law the anti-abuse rules regarding relatedness operate as absolute presumptions. Courts have considered the issue and rejected the position that such rules should be rebuttable on the basis of administrability and privacy.[183] If administrability compels an absolute presumption, we must be judicious in drawing the boundaries of family too broadly. It may be reasonable to assume my brother commands greater influence over me than does my second cousin. Nevertheless, while the current status-based conception of family may, even while narrow in scope, be over-inclusive,[184] casting a wider net would only seem to exacerbate that problem; an intuition which kinship theory and sociological data support.

Though adopting a contract-based conception of family for anti-abuse provisions is inappropriate, the anti-abuse family may still require reform. As it currently exists, § 267 and the provisions that rely upon it fail to encompass a major class of relationships that track our notions of kinship ties that limit autonomy: unmarried couples. *Windsor* itself can be read as an affirmation of the continuing relevance of the status family and an example of reform that can balance a desire to combat discrimination and need to maintain administrability. By finding § 3 of DOMA unconstitutional, the *Windsor* opinion enables same-sex couples that choose to marry to qualify as spouses and thereby trigger all relevant anti-abuse provisions. Stated differently, *Windsor* enables us to expand the status family to encompass same-sex marriage (and therein combat discrimination), while maintaining the ease of administration that arises

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[182] Mitchell M. Gans & Jay A Soled, *Related Parties and the Need to Bridge the Gap Between the Income Tax and Transfer Systems Enforceable*, 62 ALA. L. REV. 405, 430 (2011).

[183] *See, e.g.*, Miller v. Comm'r, 75 T.C. 182 (1980) (rejecting a family discord exception to related-party rules).

[184] *See, e.g.*, *id.*

from relying upon readily identifiable markers of relatedness: kinship ties. Yet, the problem of unmarried couples, be they hetero- or homosexual, remains. The solution to this problem lies in devising a means of identifying couples who are spouses but do not qualify as such under current law. I explore the details of such reform in a subsequent article on the proper balance of rules and standards in the Code and its provisions relating to family. For the purposes of this Article, however, it is most important to note that adopting an overbroad contract-based notion of family and/or abandoning the family-as-kinship altogether is the wrong reform.

2. Purveyor of Benefits and Reform: Family-as-Contract

While the broad contract-based family of § 152 is inappropriate for anti-abuse provisions, it is the ideal family for provisions whose policy aim is to benefit taxpayers. If § 152 tracked § 267, the Code would dramatically circumscribe the scope of families that could utilize not only §152, but also the provisions that rely upon it for their conception of family. In a time when families readily depart from the traditional model of a mother, father, and two children, using a status-based conception of family would only exacerbate the discriminatory impacts of the Code by limiting benefits to the "traditional" family. To the extent that § 152 departs from that model, which it does significantly, potentially recognizing as family individuals unrelated by blood or law, it already ensures that beneficial tax provisions are available to a broader array of families.

Consider the example of the head of household filing status. Three years after implementing the joint filing income-splitting regime, Congress created the head of household filing status. The filing status was a response to criticisms not unlike those of scholars today: families that did not fit the mother, father, and two children mold deserved similar financial assistance to that accorded married couples via income splitting.[185] Restated in the language of status and contract, a status-based conception of family resulted in discrimination and Congress responded in 1951 with a broader, contract-based solution: "Acknowledging merit in this complaint, in 1951 Congress prescribed a special head of household ('HOH') rate schedule for an unmarried person maintaining his home as the principal place of abode for a dependent or for a child (or other descendent) even if not a dependent."[186] Congress tweaked the head of household status further in subsequent years, but the key point is

[185] Bittker, *supra* note 2, at 1417 (Though the impetus for income splitting was to resolve geographic disparity, "[o]nce enacted, however, income splitting for married couples came to be seen as a tax allowance for family responsibilities. So viewed, it was assailed as unfair by taxpayers with similar family responsibilities, such as unmarried persons with dependent children or parents, who argued that their taxpaying capacity was no greater than that of a married couple with the same amount of income.").

[186] *Id.*

that by broadening the Code's conception of family—by giving breathing room for the exercise of individual autonomy in intimate life—the Code became more accurate and less discriminatory in application.

Where the tie between the status family and kinship is clear—kinship relationships are the very ties that trigger status-based treatment under law—perhaps the tie between kinship and the contract family is more easily severable. Contemporary scholars would have us make that cut, yet kinship theory, sociological studies, and interests of fairness and administrability compel the opposite. The contract family of § 152 relies upon kinship categories even as it broadens the conception of family. In doing so, it advances fairness—by expanding the notion of family to encompass more diverse familial forms—while maintaining administrability—utilizing a core of readily identifiable indicators of relatedness. For the multitude of taxpayers for whom kinship ties are indicators of supportive, economically intertwined relationships, the kinship-based contract family reduces complexity.

Consider the example of § 102(c). Section 102(c) prevents individuals from treating property received from an employer as a gift, and therein requires inclusion of the value of the gift in income. Proposed Regulation Section 1.102-1(c) creates a third order exception to inclusion, however, when the employee is the "natural object[ ]" of the employer's "bounty." Should we be surprised if a taxpayer is not sufficiently confident that her conception of the natural objects of her bounty is in line with that of the IRS and instead plays it safe by passing on a potential benefit? The Earned Income Tax Credit provides another ready example of the resultant increase in complexity from abandoning kinship. Compliance with the credit is difficult, and a common source of error is the application of the qualifying child language itself.[187] In current form, § 32 itself and its IRS forms utilize familiar kinship terms to define relationships that satisfy the qualifying child definition.[188] If we accept current proposals, which remove the readily identifiable markers of relatedness—kinship categories—from even the contract-family of tax, we risk eligible individuals misunderstanding their own eligibility for policy-motivated benefits.

Assume our friendly taxpayer, Susan, has a nephew whom she cares for after his parents pass away. Looking to the language of § 152 itself, Susan will easily recognize that her nephew stands in a qualifying relationship to her and she will not miss out on the benefit of § 152. Can the same be said if relatedness had no necessary tie to kinship? Where the government has decided to forego revenue in the interest of social policy, fairness compels that the government support access to such benefits for

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[187] *Handling the Most Common Errors*, EITC & OTHER REFUNDABLE CREDITS, http://www.eitc.irs.gov/Tax-Preparer-Toolkit/toolsandtips/mostcommonerrors (last visited Feb. 1, 2015).

[188] *See, e.g.*, *EITC Eligibility Checklist for Tax Year 2014*, IRS, http://www.irs.gov/pub/irs-pdf/p3524.pdf (last visited Feb. 1, 2015).

all those eligible. Keeping kinship in the contract family maintains its accuracy and administrability without compromising its role in combating discrimination. Those whose families do not fully track kinship categories can look to the extent to which § 152 pulls persons unrelated by blood or law into its conception of family. As such, the contract family can be a tool against discrimination, even as we continue the work of tailoring that family to the modern family.

B. A Framework for Integrating Family-as-Contract and Family-as-Status

Recognizing the roles both conceptions of family play—a status family for enforcement and a contract family for conveying benefits and combating discrimination—and the need for kinship in both—how can we deploy this functional insight to improve existing tax law? Going forward, law and policy makers can use the status/anti-abuse, contract/benefit framework to guide the decision of which relationships are relevant for a given provision and avoid such inconsistencies, therein making the Code more administrable and fair.

A multi-step framework provides a means of determining the proper family for a given Code provision. Encompassing a wider array of familial forms—combating discrimination in and improving the accuracy of the Code—suggests a broad, contract-based conception is presumptively appropriate. Yet the Code cannot elevate choice and autonomy at all costs. Where interests of fairness or administrability predominate, the broad, family-as-contract presumption must yield to the more appropriate status-based conception of family. The framework articulated below provides a set of questions, asked in a prescribed order, to determine which family of the Code is best suited to the task at hand.

1. Identify the Function—Identify the Family

The first inquiry when reforming an existing, or drafting a new, provision should be: is the primary goal of the provision to provide a taxpayer benefit or to police against tax avoidance and evasion? Where the primary goal of a provision is to provide a policy-motivated benefit, a broad-conception of family is presumptively appropriate. But where the principle goal of a provision is enforcement, that presumption may fail, suggesting instead a status-based conception of family to be a better fit. Whether the provision is beneficial or anti-abuse,[189] lawmakers will have

[189] Of course, a beneficial provision may have enforcement/anti-abuse aspects. For example, to claim a dependent exemption, a taxpayer must provide the dependent's social security number. This enforcement aspect does not undermine the core beneficial nature of the provision, however. Section 152, like the many beneficial provisions that rely upon it, provides a discernable social benefit outside of any anti-abuse mechanism imbedded within it—it reduces a taxpayer's annual liability based upon the number of others she supports. In

a ready conception of the appropriate family grounded in the purpose of the provision by looking to the conceptions of family in §§ 152 and 267.

2. Increasing Precision—Tailoring the Family

The second inquiry asks if the goals of the provision, or other tax policy concerns—interests of fairness or administrability—compel a departure from the family-as-status or contract family already within the Code. Stated differently, does the interest of respecting individual autonomy dominate or must individual autonomy yield to State concerns of administrability and fairness? The most common answer to this second inquiry will be that the interests of administrability compel use of the status-conception of family. By providing a rubric for drafting tax law, the status/contract distinction may lead to better-conceived and tailored law when close relationships may impact a taxpayer's behavior or economic situation.

IV. APPLYING THE FRAMEWORK

To give a sense of the practical impact of this framework, this Part explores several applications and offers early, limited reforms. First, it considers at a fairly high level of generality how the framework can guide reform of anti-abuse provisions to deal with the problem of enforcement. Second, it considers how the framework applies to reform of beneficiary provisions to deal with the problem of discrimination. Third, it explores at a granular level the framework as applied to the Earned Income Tax Credit.

A. Reform of Anti-Abuse Provisions

At first blush, applying the framework to anti-abuse provisions might seem to suggest that the family for anti-abuse should be expanded to match that of contract. If I am close enough to my uncle to support him for purposes of beneficial provisions, should he not then be considered family for anti-abuse provisions? This is, however, the wrong intuition because of the wisdom of making anti-abuse rules absolute presumptions, as discussed above. Additional potential avenues to reform the anti-abuse family may exist,[190] but working within the context of existing law requires maintaining a narrower conception of family for anti-abuse provisions.

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contrast, a section like I.R.C. § 267 provides no discernable social benefit—it does not offset education, health care, child, or dependent care expenses and the like—but merely provides a means of accurately determining an individual's annual income.

[190] A subsequent piece, tentatively titled *Taxing the Modern Family*, will explore potential reforms to increase the accuracy of anti-abuse provisions while maintaining the administrability of such provisions.

Family law scholarship supports this view. Family law has, in its progression toward greater inclusion and equality, shifted toward a contract-based conception in many aspects. Nevertheless, recent scholarship emphasizes the importance of a judicious combination of status and contract. Administrability requires "some reliance on restricted legal definitions of family . . . for any meaningful system of family obligation to operate."[191] Rather than a retrenchment of traditional mores, the continued reliance upon status is a means of ensuring a workable and fair system of law.[192]

Consider again the following inconsistency: § 318, a corporate tax attribution rule, excludes siblings in its definition of family while § 351, a provision in part concerned with control in a corporation, incorporates § 267's conception of family wholesale.[193] In short, your brother is family for § 351 but not for § 318. Both provisions attempt to track a taxpayer's interest in a corporation, the presence or absence of which is critical for determining the tax treatment of a given transaction. The specifics of both provisions are less important than the fact that they both are concerned with enforcement.[194] Despite similarity of purpose, however, the two sections use different definitions of family. As enforcement provisions, both should rely upon the status-based conception of family. Yet § 318 claws back at that conception.

Moving onto the second question of our framework, can administrability or fairness concerns compel departure from the status-based family? Administrability cannot explain the inconsistency—quite simply, if we can account for my brother in § 351, we can do so for § 318. And fairness? Fairness concerns may explain § 318's narrowing of the status-conception of family. Lawmakers may have doubted whether the sibling relationship presented a substantive challenge to autonomy with which tax should be concerned. Yet that concern has no more purchase in § 318 than it does in § 351 or § 267. It cannot compel narrowing the existing status-based conception and creating inconsistency. Such inconsistency in the definition of family within the context of provisions with similar goals, beyond seeming illogical, adds unnecessary complexity to an already complex Code. If we presume sibling relationships are close enough to limit individual autonomy for one anti-abuse provision, why should they not remain so for another similar provision? Reforming anti-abuse provisions to track the § 267 status-based conception of family is a

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[191] Baker, *supra* note 118, at 321.

[192] *See, e.g.*, *id.*; Krause & Meyer, *supra* note 118.

[193] I.R.C. §§ 318, 351 (2012).

[194] Some may argue that § 351 has a discernable social benefit—enabling efficient entry into the corporate form. While the value of favoring the corporate form is up for debate the non-preferred stock subsection of § 351—the subsection here discussed—is an enforcement provision, ensuring that the taxpayer receiving stock for property in fact retains a controlling interest in the corporation.

simple change to make the Code more internally consistent and effective.

B. Reform of Beneficial Provisions

Applying the proposed framework to beneficiary provisions points toward a simple reform to lessen discrimination within the Code: § 152 should be revised to encompass a broader set of kinship relationships. The framework establishes that when the primary purpose of a provision is to convey a policy-motivated benefit, the broad contract family of § 152 is presumptively appropriate. The second question of the proposed framework asks if fairness or administrability compel a departure—either an expansion or contraction—from that family. Within the context of beneficial provisions, both fairness and administrability suggest that an even broader conception of family is appropriate.

While § 152's conception of family is broad, particularly when measured against that of § 267, it does not expressly include a common familial group: cousins. By adding a provision allowing first cousins to qualify as relatives for § 152, the Code could accommodate a broader array of familial forms without sacrificing administrability of the Code. Indeed, there is some precedent within the Code for expanding benefits to first cousins as § 529, the exemption for qualified tuition plans, considers first cousins qualifying relatives for the purposes of that section.[195] As it currently reads, § 152(d)(2)(F) pulls a taxpayer's aunt and uncle in as qualifying relatives: "A brother or sister of the father or mother of the taxpayer." Revising § 152(d)(2)(F) to read as follows: "A brother or sister of the father or mother of the taxpayer, *and their descendants*" would bring cousins into the tax family fold and therein expand the range of supportive and economically intertwined relationships that tax law recognizes.

Second, beneficial provisions that currently claw-back § 152's broad conception of family should be revised to be more rigorously contract-based. Consider again § 529. Subsection (e)(2) modifies the dependent definition so as to exclude persons unrelated by blood or law.[196] Thus, while it moved beyond § 152's parameters, it also narrowed them. If § 529 instead incorporated § 152 in whole, the section would then be available to a wider array of families, therein better respecting individual choice and reducing existing discrimination. Lawmakers may balk at allowing persons unrelated by blood or law to qualify as related for the full array of beneficial provisions out of concern for abuse or revenue loss. If common enforcement tools are used—for example, requiring the taxpayer to file the dependent's social security number to substantiate the relationship—there is no obvious enforcement reason to exclude the § 152(d)(2)(H) unrelated persons from classification as dependents for the

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[195] I.R.C. § 529(e)(2)(D) (2012).
[196] *Id.* § 529(e)(2).

full set of beneficial provisions that rely upon § 152 for their conception of family. As for concerns over lost revenue that arise from making a benefit available to a broader set of taxpayers, such concerns should be raised *at the time of drafting the provision.* No one set of taxpayers—if they are engaged in the type of spending and behavior that Congress decided to subsidize by foregoing tax revenue—should be denied that benefit simply because their relationship does not fit a particular model of family.

The proposed reforms—further broadening § 152 and cutting any "claw-back" of § 152 by provisions that utilize its conception of family—are simply a point of departure. Recognizing the role the contract-based family plays in conveying benefits and combating discrimination may, upon further consideration, lead to proposals for a Code that relies even more heavily upon conceptions of family.[197] The key point for this Article is that scholars must recognize the role that a broad, contract-based conception currently plays within the Code.

C. Earned Income Tax Credit

As a third test case for this framework, consider: § 32, the Earned Income Tax Credit ("EITC") and the alternating treatment of a married couple as a cohesive unit or as a set of two individuals. Scholars note that the Code vacillates between treating married couples as one unit or as the sum of two separate taxpayers.[198] A married couple takes double the standard deduction of an individual. Yet, when that same married couple calculates capital gain for the year, the Code limits their losses to the same amount as that of a single individual: $3000. In the former scenario, the Code treats the couple as simply two separate individuals, each with their own standard deduction. Yet, in the § 1211 capital loss limitation world, the Code does things differently. The couple does not receive a $6000 loss limitation, but is instead treated as one unit, albeit of different composition, but equal to the individual taxpayer. At first blush, this alternating treatment seems inconsistent, but reconsider the treatment through the lens of status/contract. The standard deduction is a benefit. It reduces the taxpayer's liability by providing an income base taxed at a 0% rate.[199] The capital loss limitation, however, is an anti-abuse provision. By limiting losses a taxpayer can claim in a given year, it mitigates against taxpayers strategically timing losses to offset gains. Once again, we find that when the Code conveys benefits it views familial bonds as

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[197] Lari, *supra* note 45.

[198] Kornhauser, *supra* note 5, at 100.

[199] Whether or not the standard deduction is properly understood as a structural feature of the Code or as tax expenditure is, for the purposes of this paper, not determinative of whether the deduction is a beneficial or anti-abuse provision. The end result of the deduction is to provide for a base level of subsistence income (albeit inadequate) by taxing a limited amount of income at 0%. As such, this Article understands the deduction as a beneficial provision.

those of contract—for the standard deduction we see the married couple as two individuals, joined by choice and law, but who maintain their separate identities. When avoidance and enforcement are the primary concerns, however, the status conception of family dominates, the separate individuals of the married couple merge into only one unit. This tension plays out in a multitude of Code sections, including the EITC.

Under current law, § 32 is muddled in its treatment of the married couple. It neither falls neatly into the status nor contract treatment. Taking § 32 through the proposed framework discussed earlier reveals this inconsistency and points to a simple reform.

First, *is the primary goal of the provision to provide a taxpayer benefit or to police against tax avoidance and evasion?* The EITC is, quite expressly, a beneficial provision. Its goal is to support working, low-income taxpayers by providing a refundable tax credit. For 2014, a family with three or more children with qualifying earned and investment income levels may receive as much as $6143 after filing their annual tax return.[200] As the taxpayer's earned income increases above a statutorily set phaseout amount, the credit is phased out to ensure the EITC assists its target group: low-income families. While the credit amount depends upon multiple factors, including earned and investment income and family size,[201] the mechanics of qualifying for the EITC are not important for the focus of this Article. What is important to note is that § 32 is a beneficial provision.

Because the EITC is a beneficial provision, the assumption should be that it would rely upon a contract-based conception of family. Yet examining the treatment of married couples and the phaseout amount reveals that current law departs from a contract-based conception of family. The phaseout amount for an individual with one child is $17,830.[202] The same amount for a married couple filing jointly is $23,260, a difference of $5430. Thus, current law creates a marriage penalty.[203] Two sin-

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[200] *EITC Income Limits, Maximum Credit Amounts and Tax Law Updates*, IRS, http://www.irs.gov/Individuals/EITC-Income-Limits,-Maximum-Credit--Amounts-and-Tax-Law-Updates (last visited Dec. 6, 2014).

[201] I.R.C. § 32 (2012). Section 32 provides the details of the phase out and phase in rates, limitation on investment income, definition of qualifying child and earned income necessary to determine the credit amount. For those interested in seeing the effects of family size and earned income on the amount of credit for which an individual is eligible, IRS Publication 596 provides detailed information on the credit and determining eligibility. *Earned Income Credit*, IRS (Dec. 18, 2014), http://www.irs.gov/pub/irs-pdf/p596.pdf.

[202] Rev. Proc. 2013-35, *available at* http://www.irs.gov/pub/irs-drop/rp-13-35.pdf.

[203] Indeed § 32 acknowledges and itself partially mitigates the marriage penalty in § 32(b)(3)(B). I.R.C. § 32 (2012). For a discussion of the marriage penalty in the EITC, *see, e.g.*, Dorothy A. Brown, *The Tax Treatment of Children: Separate but Unequal*, 54 EMORY L.J. 755, 769, 806–07 (2005); Jonathan B. Forman, *Earned Income Tax Credit*, TAX POL'Y CENTER, http://www.tax

gle persons with one child each could, as singles, make $17,830 each ($35,660 total) and still receive the full $3305 credit (a total credit of $6610). That same couple, if married, could receive a maximum credit of $5460 (because the credit increases with the number of children up to three), but the credit would begin to phaseout at an annual income of $23,260. Not only then does the couple get a maximum credit over $1000 dollars less than when they were single, their phaseout begins at a lower combined earned income. In past years, married couples faced the exact same phaseout amount as did an individual, creating an even more dramatic penalty than does current law. Though the increased, but not doubled, phaseout amount is the result of years of piecemeal changes to combat that penalty,[204] the penalty persists as long as the phaseout amount for married couples is less than double that of singles.

A contract-based EITC would resemble the standard deduction: treating a married couple as a set of two separate individuals by giving each their own phaseout amount. If we doubled the phaseout for a married couple, as we do for the standard deduction, how would § 32 change? For 2014, a married couple with one child will see a reduction in their credit beginning at earned income of $23,260 and lose their EITC entirely when they earn at or above $43,941. Doubling their phaseout amount—treating § 32 as a true contract/beneficial provision—to $35,660 ($17,830 x 2) would increase the income at which the phaseout begins to $35,660, thereby allowing the couple to earn an addition $12,400 of income before they begin losing the credit.[205]

Having established that § 32 is a beneficial provision and, as such, that it should track the contract-based conception of family utilized by similar provisions, we must go to the second inquiry of the proposed framework: *do the interests of fairness or administrability compel a departure from the family-as-status or contract family already within the Code?* Or, stated differently, *does the interest of respecting individual autonomy dominate or must individual autonomy yield to State concerns of administrability and fairness?*

The easier question to answer is the one of administrability. Tax law could allow married couples to have a doubled phaseout amount just as easily as it currently allows a marriage penalty compromise of a limited increase in the phaseout amount.[206] The real concern for the EITC that

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policycenter.org/taxtopics/encyclopedia/EITC.cfm (last visited Feb. 1, 2015); Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995).

[204] I.R.C. § 32(b)(3)(B) (2012).

[205] The same couple would lose their EITC entirely at a combined earned income of $56,342.10.

[206] Indexed for inflation. While a person may try to fraudulently claim the EITC, the EITC, unlike the I.R.C. § 1211 capital loss limitation, is not an enforcement provision and, as such, does not require a narrower conception of family.

could counsel in favor of limiting the State's view of individual autonomy in favor of adopting a more status-based view is fairness. Doubling the phaseout for a married couple remedies the marriage penalty but would create a singles penalty.[207] Returning to our example above, where a married couple could earn $35,660 annually before their credit would begin to decrease, a single person at that same income would be within $3000 of losing her EITC entirely. Is it fair for a married couple to be able to earn $12,400 more than they currently can before beginning to lose their EITC? To earn $17,830 more than a single person (a doubled phaseout world)? $5430 more (current law)? How does marriage affect that family's position? Singlehood? These are questions without easy answers and the current law strikes a balance between a marriage and singles penalty.

Scholars can (and do) debate whether a partially resolved marriage penalty is worse or better than a singles penalty in the EITC. The current compromise of a partial mitigation of the marriage penalty suggests what the scholarship reflects: that concerns of *fairness* led lawmakers to depart from a rigid contract-based conception of family within the EITC in favor of a mixed status/contract-conception. A married couple is neither merely one unit—they are no longer limited to the same phaseout amount as an individual—nor is that couple a set of wholly separate individuals each warranting their own phaseout amount. While I would argue in favor of § 32 utilizing a more rigorous contract conception of family—with a doubled phaseout and an expansion of the qualifying child definition to encompass cousins in accordance with my earlier proposal to expand § 152—the more important point for this Article is that by mapping and applying the status/contract distinction in tax law, we

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[207] For another example of the mechanics of the EITC and the effect of marriage, see Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the Minimum Wage*, 57 TAX L. REV. 301 (2004):

> To illustrate the possibilities, assume the phase-out (at the rate of 20%) of the $4,000 maximum credit is to begin at the $12,000 income level in the case of an unmarried parent. If the phase-out also begins at $12,000 for a married couple, the result will be significant phase-out-created marriage penalties. For example, if a parent with $12,000 income and two children married a person with $12,000 income and no children, the EITC would decrease from $4,000 to $1,600. The same parent would not face a marriage penalty if, instead, the phase-out threshold for a married couple were set at $24,000—twice the phase-out threshold for a single parent. The problem with this approach is that it creates large singles penalties. A married couple with $24,000 income is not subject to the phase-out tax, but a single parent earning $24,000 is burdened by a phase-out tax of $2,400.

Id. at 341–42 (citations omitted). Zelenak makes his own proposal for reforming the EITC, which addresses more than marriage penalty.

gain a powerful descriptive insight and normative framework. By taking existing law or future provisions through that proposed framework, we can ensure that our decisions regarding the conception of family utilized for a given provision are deliberate and the result of informed policy decisions rather than the result of inattention or ad hoc legislation.

CONCLUSION

Family is prevalent in both the Code and tax scholarship, but we have not mapped the ways in which the Code defines the family. This Article fills that gap, using family law's framework for defining the family to map the Code's complexity in terms of the two key families of tax: the broad, contract-based family of § 152 and the narrow, status-based family of § 267. Bringing together family law and tax does more, however, than simply better conceptualize the family in tax. It also helps us think about solutions to the problems of discrimination and enforcement. A common call is for cutting the status family and kinship from the Code. But understanding the status/contract distinction and its reflection in the Code undermines these arguments in three ways: First, it shows how such proposals undervalue the importance of family to the prevention of avoidance and evasion. Second, it clarifies the role of family in targeting beneficial provisions and how removing kinship from the Code would make that task more difficult, opening the door to taxpayer error that results in underutilization of those benefits. Third, re-reading tax with the insights of the status/contract distinction underscores that the challenge of tax law and policy is not to force family out of the Code but to devise tax laws that draw upon both conceptions to arrive at creative solutions to the problems of discrimination and enforcement. As the American family continues to change, kinship, the family-as-contract, and the family-as-status will serve important and different functions within the Code. The proposed framework utilizes both of those families and their ties to kinship categories to guide reforms and drafting of future provisions to craft a Code that is internally consistent, administrable, and fair.

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