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American Patriarchy/American Taxation: A Comment on Marjorie Kornhauser's Wedded to the Joint Return

A Comment on: "Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax" by Marjorie E. Kornhauser.

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American Patriarchy/American Taxation: A Comment on Marjorie Kornhauser's *Wedded to the Joint Return*

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In 1948, the U.S. Congress amended the Internal Revenue Code to permit married couples nationwide to split their taxable incomes by filing a joint return. Since the adoption of the income-splitting joint return, the American federal income tax system has continued to consider the nuclear family and married couples as the appropriate taxable unit. While the precise tax treatment of the joint return filed by married couples has changed over time, the American law of taxing a married couple as one economic unit has remained remarkably resilient.¹ By contrast, other industrialized nations have long used, or have recently adopted, an individual tax filing system, whereby each individual, regardless of marital status, is taxed on his or her own earnings. The United States' enduring commitment to taxing the joint income of married couples, particularly in the context of a seemingly global convergence toward individual taxation, thus raises a fascinating comparative-historical puzzle: what explains the stubborn persistence of the marital tax unit and the joint return in the United States?

In her article, *Wedded to the Joint Return*, Marjorie Kornhauser seeks

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1 For more on the history of the income-splitting joint return, see generally, Carolyn C. Jones, *Split Incomes and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1988); Stephanie Hunter McMahon, *To Save State Residents: States' Use of Community Property for Federal Tax Reduction, 1939-1947*, 27 LAW & HIST. REV. 585 (2009); Dennis J. Ventry, Jr. *Saving Seaborn: Ownership Not Marriage as the Basis of Family Taxation*, 86 IND. L. J. (forthcoming 2010).

to solve this puzzle by investigating "the interconnected roles of marriage, religion, and taxation in America."² Unsatisfied with conventional accounts, which rely on historical and institutional inertia, administrative convenience, or the internal logic and consistency of tax rules to explain the durability of the marital tax unit in the United States, Kornhauser turns instead to a more contextual, nuanced, and perhaps even deeper-seated rationale: the American cultural commitment to the traditional, male-dominated, single-earner family. By briefly chronicling the historical role of marriage and religion in American public life and documenting more recent tax law changes related to the marital unit, Kornhauser contends that the real and symbolic aspects of political debates and tax law changes illustrate and reproduce the continued American preference for marriage and the traditional, patriarchal family.

Though tax scholars have long identified the gender bias within American tax law,³ Kornhauser's central contribution is to underscore the important role that religion has played — both historically and in more recent times — in reinforcing traditional gender roles within American society and, by extension, within U.S. tax law. In the process of making this claim, Kornhauser implicitly suggests that American tax law is comparatively unique. Though the article does not focus in detail on the issue of American tax exceptionalism, and thus perhaps misses an opportunity to clarify why the U.S. has remained wedded to the joint return, the analysis of historical forces and current political debates acutely shows how tax law both reflects and reinforces assumptions about gender and the family that are historically ingrained within a dense social, cultural, and political matrix.

As Kornhauser duly notes, she is not the first scholar to explore the social and cultural beliefs that undergird the American preference for the joint return.⁴ Yet, while previous studies have acknowledged the salience of marriage and the conventional nuclear family to American tax law,⁵

2 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, 632 (2010).

3 See, e.g., Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, TEX. L. REV. 59 (1980); EDWARD J. MCCAFFERY, *TAXING WOMEN* (1997).

4 Indeed, nearly two decades ago, Kornhauser herself explored some of the economic assumptions that undergird the concept of using the joint return/married couples as the appropriate taxable unit. Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993).

5 See, e.g., Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L.

Kornhauser goes a step further by asking why traditional notions of marriage and the family remain so prominent in American public life, especially at a time when familial arrangements seem to be in such flux. The answer, she posits, is twofold. First, the American allegiance to marriage and the nuclear family cannot be understood without reference to religion. Second, tax law and policy have not only acted as a mirror reflecting prevailing social attitudes toward the family/marriage; they have also been the motor that has actively shaped the social meaning of family/marriage. Thus, in Kornhauser's narrative, the material and symbolic aspects of tax law — what she refers to as tax law's "expressive nature" — are the connective tissue linking politically conservative religion with traditional notions of marriage and the family.

From the Puritan theology of the colonial period to the evangelical Protestantism of today's religious Right, religious conviction, Kornhauser maintains, has been "an integral part of American politics and democracy."⁶ Certain aspects of the American religious tradition, in turn, have exalted a particular vision of the family, even though the notion of marriage and family has changed throughout American history. Adhering to an idealized, and often ahistorical, view of the past, evangelical activists in recent years have been leading an effort to promote marriage and the traditional, patriarchal family through a variety of public policies, including tax law. Religious and political rhetoric about preserving "family values" and "traditional Western culture," in the face of postindustrial social changes, has had a significant impact on American public policy. As Kornhauser explains, the religious Right's

emphasis on the sacred union between a married man and woman reinforces the "traditional" family, as does its belief that the wife — as her husband's helpmate — performs her most vital role by transmitting morals and virtues to the next generation. Over the past four decades the Right's political involvement has been essential to the rise of the pro-family/pro-marriage movement in the United States.⁷

The social and political movement to promote "family values" has not been limited to mere campaign slogans or promises. Recent tax reforms aimed at reducing the "marriage penalty" for dual-earner married couples, Kornhauser reminds us, have left intact "marriage bonuses" for the vast majority of single-earner married couples, as well as those couples that

REV. 1389 (1975); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994).

⁶ Kornhauser, *supra* note 2, at 642.

⁷ *Id.* at 644.

approximate the single-earner norm. Tax law, it appears, has been an integral part of the culture wars.

But tax law does not only reveal politically conservative religious preferences; tax rules like other parts of law are truly imbricated with society. Whereas other legal scholars have depicted taxation as merely reflecting social attitudes about the role of marriage and family in society, Kornhauser skillfully focuses on the constitutive aspect of tax law — its ability to shape social perceptions and attitudes. If religion "reinforces marriage and the family's prominent position in America,"⁸ it is tax law that helps solidify the link between religion and the single, male breadwinner conception of the family. In her concluding remarks about "the expressive nature of the marital unit/joint return," Kornhauser summarizes her argument about the real and symbolic aspects of taxation. The real or material consequences may appear obvious; they are the ultimate tax hikes or cuts that come with different taxable units — with joint versus individual taxation. The symbolic implications, though more abstract, are nonetheless significant. And they entail the way rhetoric molds social beliefs. "Rhetoric is not empty," writes Kornhauser. "The choice of words and phrases is not accidental and has consequences. Politicians choose a particular rhetoric because people respond to it. It reflects people's attitudes and beliefs, even as it helps shape them."⁹

Rhetoric, for Kornhauser, also does much more.¹⁰ As "the opiate of politics,"¹¹ it serves as a palliative distraction for economically beleaguered families. When lawmakers tout the benefits of reducing marriage penalties, they are able to dodge difficult questions about their lack of direct support for arguably more pressing concerns like education, housing, and healthcare. The visibility of marriage-penalty relief, moreover, provides working-class couples, who have had to endure the stagnation of real wages over time, with some limited comfort that comports with the stability of an idealized past represented by traditional gender roles within the family.¹² To be sure, there

⁸ *Id.* at 645.

⁹ *Id.* at 650.

¹⁰ Rhetorical analysis has been a consistent theme in Kornhauser's well-known scholarship. See, e.g., Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465 (1987).

¹¹ Kornhauser, *supra* note 2, at 652.

¹² Historical economic sociologists have recently made similar claims about the way that religion has fostered the turn to "market fundamentalism" and a privileging of tax cuts. Margaret R. Somers & Fred Block, *From Poverty to Perversity: Ideas, Markets, and Institutions: Over 200 Years of Welfare Debate*, 70 AM. SOC. REV. 260, 260-62 (2005).

are many other factors that help explain the connection between theological conservatism and the American preoccupation with the traditional patriarchal family, but, as Kornhauser shows, taxation is certainly a critical component linking these two historically-contingent forces.

While Kornhauser makes a persuasive case for the salience of religion to the enduring American fixation with taxing married couples, lurking beneath her explicit thesis is a more subtle claim about just how uniquely American this preoccupation really is. At the outset of her article, Kornhauser mentions that the United Kingdom and Canada rely on separate taxation, but rather than directly explore how these two countries, which share a great deal of cultural similarities with the United States, have come to embrace individual taxation, Kornhauser focuses instead on the historical roots of American marriage and religion. By probing deeper into the comparative aspects of her research question, Kornhauser could have clarified the exceptional nature of the American obsession with the traditional married family and the joint return. It is likely that, by examining the comparative similarities and differences between the American experience with the taxable unit and the Canadian and British ones, a great deal might be learned about how powerful the religious Right has really been in the United States in the past several decades. In addition, since the U.K. has only recently adopted individual taxation, analyzing the British movement for individual taxation may provide some lessons for American reformers.¹³

Kornhauser is, no doubt, correct in identifying the religious Right as supporting the marital unit and the joint return, as part of its efforts in the American culture wars. But one wonders about the historically-contingent origins and the long-term durability of the evangelical support for the traditional family. Throughout her article, Kornhauser adroitly notes that the religious Right's support for the marital unit and the traditional family has intensified, despite the recently changing composition of many American families and despite the historical fluctuations in the American concept of the family. Yet, this paradox remains unresolved in the article. And this leads to several additional questions about the role of religion in explaining the stubborn persistence of the marital unit and the joint return. Why, for instance, was the religious Right's vision of the patriarchal marital unit ascendant in the last several decades? Why didn't the liberal, egalitarian wing of American religion — the segment that supported the civil rights movement

13 Stephanie Hunter McMahon, *London Calling: Does the U.K.'s Experience with Individual Filing Clash with U.S. Expectations?*, 55 ST. LOUIS U. L.J. (forthcoming 2010).

and other significant social reforms — challenge such anachronistic notions of the family? How have evangelical activists been able to use the growing American diversity in family arrangements to call for a return to a more traditional family structure?

The shifting American religious landscape also raises other questions. With more and more Americans changing religious affiliation, and with younger Americans self-identifying today as "unaffiliated with any particular faith,"¹⁴ will religion continue to play a prominent role in American politics and public policy? Has the political power of the religious Right, in other words, been exhausted? And consequently, will Americans continue to be wedded to the joint return?

Providing detailed answers to these questions is certainly beyond the scope of Kornhauser's already informative and provocative article. Yet, at a time when the definition of marriage, if not its sanctity, is under reconsideration, *Wedded to the Joint Return* reminds us of the important role that tax law and policy play in reflecting and reproducing some of the most entrenched aspects of American culture. Not everyone will agree with the causal weight that Kornhauser ascribes to religion in her article, but few will be able to doubt that tax law and policy have been complicit in bolstering the historical patriarchy underpinning the American commitment to the marital unit and the joint return.

14 Neela Banerjee, *A Fluid Religious Life Is Seen Among Americans*, N.Y. TIMES, Feb. 26, 2008, at A12, A12. The original Pew Forum report from the U.S. Religious Landscape Survey can be found at Pew Forum, U.S. Religious Landscape Survey (Feb. 2008), <http://religions.pewforum.org/reports>.