

INEQUITABLE ADMINISTRATION: DOCUMENTING FAMILY FOR TAX PURPOSES

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Abstract

Family can bring us joy, and it can bring us grief. It can also bring us tax benefits and tax detriments. Often, as a means of ensuring compliance with Internal Revenue Code provisions that turn on a family relationship, taxpayers are required to document their relationship with a family member. Most visibly, taxpayers are denied an additional personal exemption for a child or other dependent unless they furnish the individual's name, Social Security number, and relationship to the taxpayer.

In this article, I undertake the first systematic examination of these documentation requirements. Given the privileging of the "traditional" family throughout the Code, one might expect to see that same privileging mirrored in the administrative structure that underpins the Code's family tax provisions. Indeed, on their very face, the information-reporting rules that apply to jointly owned income-producing property do just that.

Once the inquiry is expanded to cover other family tax provisions, however, it quickly becomes clear that the administrative structure underpinning the family tax provisions has also been strongly influenced by endemic privilegings along a variety of other axes of subordination—from class to race to gender to sexual orientation. To address and remedy these defects in the administrative structure underpinning the family

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tax provisions, this article advocates an approach to documenting family for tax purposes that does not invidiously discriminate among taxpayers.

INTRODUCTION

Family is important to each of us—no matter whether it is the family that we are born into, the family that we choose, or the family that chooses us. Family also plays an important role in determining the size of our tax bills. For instance, having a child may render a taxpayer eligible for the child tax credit, an additional personal exemption, and tax relief for childcare costs incurred to enable her to be gainfully employed.¹ In addition to these benefits, the expenses of adopting a child may be creditable against the taxpayer's tax bill.² Taking in a family member or friend might also permit the taxpayer to claim an additional personal exemption and to deduct medical or other expenses paid on that person's behalf.³ Where the ownership of an interest in a corporation or partnership is relevant to determining tax liability, the taxpayer's ownership is often aggregated with that of her family members—sometimes to the taxpayer's benefit and at other times to her detriment.⁴ Similarly, families are sometimes treated as a larger economic unit for tax purposes, with the individual members presumed to be indifferent to the allocation of legal ownership of assets among them.⁵ Moreover, the decision to remain single or to couple

¹ I.R.C. §§ 21, 24, 129, 151 (LEXIS through July 2010 amendments).

² *Id.* § 36C.

³ *Id.* §§ 151, 152(d), 213; see also *infra* Part II for a discussion of the many tax provisions that provide benefits to a taxpayer with respect to her dependents.

⁴ I.R.C. §§ 267, 318; see Anthony C. Infanti, *Bringing Sexual Orientation and Gender Identity into the Tax Classroom*, 59 J. LEGAL EDUC. 3, 13 (2009) (explaining this point with examples).

⁵ I.R.C. §§ 1(g), 1361(c)(1).

(whether within or without marriage) opens a veritable Pandora's box of tax consequences.⁶

When taking family into account for all of these purposes, the Internal Revenue Code (Code) clearly privileges the so-called traditional family over all others. Lesbian and gay families fit uncomfortably, if at all, into the normative structure of the Code.⁷ Married women who work outside the home may be penalized for this decision.⁸ And other nontraditional

⁶ See, e.g., Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787 (1997) (explaining the impact of the tax incentives relating to marriage upon African-American different-sex couples); Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004) (discussing the tax issues faced by same-sex couples and unmarried different-sex couples); Lily Kahng, *Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Tax Liability*, 49 VILL. L. REV. 261 (2004) (discussing the lack of a coherent rationale for the joint and several liability that accompanies the filing of a joint return); Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651 (2010) [hereinafter Kahng, *Loneliest Number*] (discussing the lack of a coherent rationale for the joint and several liability that accompanies the filing of a joint return and also discussing tax issues faced by single taxpayers); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1992) (discussing the impact of the tax laws on decisions to marry, to have a one- or two-carer household, and to work full or part time); Mylinh Uy, Note, *Tax and Race: The Impact on Asian Americans*, 11 ASIAN L.J. 117 (2004) (explaining the impact of the tax incentives relating to marriage upon Asian-American different-sex couples).

⁷ See, e.g., Anthony C. Infanti, *Dismembering Families*, in CHALLENGING GENDER INEQUALITY IN TAX POLICY MAKING: COMPARATIVE PERSPECTIVES (Kim Brooks et al., eds., 2011) (explaining how the medical expense deduction in I.R.C. § 213 constructs, corporealizes, and dismembers families); Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998) (explaining how marital status is pervasive in the tax laws and how the provisions relating to the taxation of the family are prescriptive in nature); see also *infra* note 118.

⁸ See McCaffery, *supra* note 6, at 988–1013.

families⁹ often fall through the cracks.¹⁰ For example, in *Leonard v. Commissioner*, the Tax Court held that a taxpayer who supported a disabled friend and the friend's grandchildren—all of whom lived with her—was eligible to claim an additional personal exemption for each of the children but was ineligible to claim the child-care credit, the child tax credit, the additional child tax credit, or the earned income credit because those same children were not “qualifying” children.¹¹

In this Article, I break new ground by undertaking the first systematic examination of the administrative structure that underpins the Code's family tax provisions.¹² In this examination, I focus on the presence or absence of requirements to identify and document a taxpayer's family members. Though, as a working hypothesis, one might expect these identification and documentation requirements simply to mirror the Code's

⁹ For descriptions of family arrangements that do—or might—depart from the “traditional” nuclear family norm, see Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 U. LOUISVILLE J. FAM. L. 691 (1996–1997); Angela Mac Kupenda, *Two Parents Are Better than None: Whether Two Single, African American Adults—Who Are Not in a Traditional Marriage or Romantic or Sexual Relationship with Each Other—Should Be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703 (1996–1997).

¹⁰ See generally Wendy C. Gerzog, *Families for Tax Purposes: What About the Steps?*, 42 U. MICH. J.L. REFORM 805 (2009) (describing the inconsistent treatment of stepfamily as family members for federal income and transfer tax purposes).

¹¹ *Leonard v. Comm’r*, T.C. Summ. Op. 2008-141 (T.C. 2008).

¹² For the sake of maintaining a sharper focus and to keep the length of this article manageable, I have confined my discussion to the income tax. Nonetheless, it is worth noting that a variety of estate tax provisions also take family into account. See, e.g., I.R.C. §§ 2036(b)(2), 2057(c) (LEXIS through July 2010 amendments). The risk of audit for an estate tax return is, however, much higher than for an individual income tax return, which arguably makes alternative compliance measures (e.g., the identification and documentation requirements that are the subject of this Article) less important. On average, the risk of audit for an estate tax return in fiscal year 2008 was about 8%, while that same risk was only 1% for an individual income tax return. I.R.S. PUB. NO. 55B, INTERNAL REVENUE SERV., DEP’T OF TREASURY, DATA BOOK, 2008, at 23 tbl.9a (2009). This eightfold increase in the risk of audit more than doubled—indeed, in fiscal year 2008, it skyrocketed to nearly 20%—where large estates (i.e., those with a gross estate of at least \$5 million) were concerned. *Id.*

ubiquitous privileging of the “traditional” family,¹³ the picture is actually rendered far more complex by the influence of privilegings along a number of interconnected axes of subordination.

Such an intricate web of interconnected subordination is precisely what we would expect to see when the dominant group in society obtains and maintains its status as such at least in part through control of the flow of ideas—what Antonio Gramsci referred to as “hegemony.” As Douglas Litowitz has noted, “Gramsci’s work on hegemony provides a useful starting point for legal scholars who understand that domination is often subtle, invisible, and consensual.”¹⁴ Though I have provided a fuller description of Gramsci’s conceptualization of hegemony elsewhere,¹⁵ this short recapitulation of the concept nicely highlights its relevance here:

By hegemony Gramsci meant the permeation throughout civil society—including a whole range of structures and activities like trade unions, schools, the churches, and the family—of an entire system of values, attitudes, beliefs, morality, etc. that is in one way or another supportive of the established order and the class interests that dominate it. Hegemony in this sense might be defined as an “organizing principle”, or world-view (or combination of such world-views), that is diffused by agencies of ideological control and socialization into every area of daily life. To the extent that this prevailing consciousness is internalized by the broad masses, it becomes

¹³ See Lily Kahng, *Investment Income Withholding in the United States and Germany*, 10 FLA. TAX REV. 315, 316–27 (2010) [hereinafter Kahng, *Investment Income Withholding*] (describing how the privileging of income from capital over income from labor in the rate structure and tax base is mirrored in enforcement provisions).

¹⁴ Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 519.

¹⁵ Anthony C. Infanti, *Tax Equity*, 55 BUFF. L. REV. 1191, 1242–49 (2008).

part of "common sense"; as all ruling elites seek to perpetuate their power, wealth, and status, they necessarily attempt to popularize their own philosophy, culture, morality, etc. and render them unchallengeable, part of the natural order of things.¹⁶

It should come as no surprise, then, that the interconnecting lines of subordination in the administrative structure underpinning the family tax provisions are not the result of deliberate action by Congress or the Internal Revenue Service (IRS). They are instead the product of "endemic" privileges—that is, privileges that have become so normal, so ingrained in our nature, such a part of our "world-view" that they manifest themselves without conscious thought.

Our unearthing of the endemic privileges embedded in the identification and documentation requirements in the Code's family tax provisions will proceed in three parts. In Part I, we begin our analysis with an examination of the information-reporting requirements that attach to jointly owned income-producing property. This examination reveals the expected influence of the privileging of heterosexuality and different-sex marriage upon the administrative structure underpinning the family tax provisions in the Code. It also begins to complicate the expected picture by demonstrating how this privileging of the "traditional" family concomitantly reinforces privileges along other axes of subordination.

The next two parts of the article work in tandem, as their import only truly emerges when we juxtapose them and compare and contrast the provisions discussed in each of them. In Part II, we will examine the deductions, credits, and exclusions that are provided (or, conversely, denied) to a taxpayer with respect to her family members. From the taxpayer's perspective, these are perhaps the most salient family tax provisions in the Code. From any perspective, they are also the provisions that do the most to convey a sense of randomness in the administrative structure underpinning the family tax provisions and lend support for the notion that the privileges embedded in that administrative

¹⁶ CARL BOGGS, *GRAMSCI'S MARXISM* 39 (1976).

structure are a manifestation of Gramscian hegemony. Nonetheless, these provisions, like the information-reporting rules described in Part I, clearly establish a baseline of identification and documentation of family members.

In Part III, we will examine the rules that attribute ownership of property between family members—from the conventional rules attributing the ownership of stock among family members, to business and investment incentives that disregard transactions among family members either to prevent abuse or to facilitate the delivery of tax incentives, to the “kiddie” tax that prevents parents from assigning investment income to their minor children, and so on. The dearth of identification and documentation requirements in the numerous and varied provisions covered in Part III stands in stark contrast to the general baseline of identification and documentation that we will have encountered in Part II (and, for that matter, even in Part I) of this Article.

In this contrast, we will detect the influence of endemic privilegings along a number of axes of subordination. It will become clear that the wealthy are subjected to less stringent reporting requirements than low- or middle-income taxpayers when it comes to identifying and documenting family members. We will explore how this class-based privileging implicates and intersects privilegings along other axes of subordination, including race, ethnicity, gender, sexual orientation, and marital status.

Throughout the Article, it will become apparent that, even though Congress and the IRS have not taken a deliberative approach when imposing identification and documentation requirements, endemic privilegings along multiple axes of subordination have subtly influenced the decision whether or not to employ identification and documentation requirements as a tool for enforcing the Code’s family tax provisions. To redress this unconscious discrimination, the concluding section of this article will advocate a more uniform and deliberative approach to documenting family for tax purposes—and one that does not invidiously discriminate among taxpayers. I suggest that the baseline of requiring identification and documentation of family members be applied to all of the Code’s family tax provisions in

the name of increasing both tax compliance and the evenhanded enforcement of the tax laws. In keeping with these twin goals, exceptions from the identification and documentation requirements should be carved out only where there are valid, articulable, and nondiscriminatory reasons for departing from the common baseline of reporting family relationships.

I. Information-Reporting Rules

In this Part, we begin our examination of the identification and documentation requirements in the Code's family tax provisions by looking at the information-reporting rules that apply to jointly held income-producing property. More particularly, we will consider the Form 1099 information-reporting requirements that apply to jointly owned interest, dividend, and royalty payments. These information-reporting requirements are designed to "provide[] a strong incentive to taxpayers to include payments in their personal tax returns and thus avoid noncompliance issues with the IRS. Payments not reportable on Forms 1099 tend to be ignored by taxpayers and thus escape taxation."¹⁷

As we will see, these information-reporting rules have two distinctly different faces. The public face of these rules is embodied in the IRS's general instructions for the various iterations of the Form 1099. These instructions paint a very neat (and very heteronormative) picture of the information-reporting requirements. The private face of these rules—the one encountered by those who go behind the IRS's published instructions to look at the underlying sections of the Code and Treasury regulations—is not nearly so neat. An examination of the Code and Treasury regulations reveals dissonances both between the coverage of the different information-reporting provisions as well as contradictions between the Code and Treasury regulations, on one hand, and the IRS's general instructions for the Form 1099, on the other. These dissonances will help to highlight the expected privileging of the "traditional" family in the administrative structure underpinning the Code's family tax provisions as well as begin to reveal how

¹⁷ Carol A. Kassem, *Information Reporting to U.S. Persons*, Tax Mgmt. Portfolio (BNA) No. 643, at A-1 (2011).

that privileging at the same time connects with and reinforces privilegings along other axes of subordination.

A. The Public Face of the Information-Reporting Rules

Certain payments of interest, dividends, and royalties are required to be reported to taxpayers—with a copy of the report furnished to the IRS—on Form 1099-INT, Form 1099-DIV, and Form 1099-MISC, respectively. These information-reporting rules are designed to increase taxpayer compliance in reporting these items of income.¹⁸ Yet, they raise interesting questions for those who jointly receive payments of these items of income.¹⁹

Anyone who holds a bank account jointly with a spouse, domestic partner, family member, or friend knows that the bank completes and submits only one Form 1099-INT with respect to each account, using the taxpayer identification number of just one account holder.²⁰ But how can the account holder who receives the Form 1099-INT be sure that the IRS does not attempt to tax her on more interest (or, for that matter, dividend or royalty) income than she is actually entitled to?

¹⁸ See *infra* note 96.

¹⁹ I have chosen to focus on these three information-reporting requirements because of this Article's focus on documenting family. Other information-reporting requirements generally apply only to persons engaged in a trade or business and only with respect to transactions occurring in the course of that trade or business. See, e.g., I.R.C. §§ 6041, 6045 (LEXIS through July 2010 amendments). Any resulting reporting would, therefore, principally stem from a business (and not a family) relationship.

²⁰ I.R.S. GENERAL INSTRUCTIONS FOR CERTAIN INFORMATION RETURNS 8 (2009) [hereinafter GENERAL INSTRUCTIONS]:

If payments have been made to more than one recipient or the account is in more than one name, show on the first name line the name of the recipient whose TIN is first shown on the return. You *may* show the names of any other individual recipients in the area below the first line, *if desired*.

(emphasis added).

The solution to this problem is found in the general instructions for Form 1099, which explain the reporting obligations that apply to the joint account holder who receives the Form 1099. These instructions adopt a default position that requires taxpayers to identify and document the sharing of jointly owned interest, dividend, and royalty income:

Generally, if you receive a Form 1099 for amounts that actually belong to another person, you are considered a nominee recipient. You must file a Form 1099 with the IRS (the same type of Form 1099 you received) for each of the other owners showing the amounts allocable to each. You must also furnish a Form 1099 to each of the other owners. File the new Form 1099 with Form 1096 with the Internal Revenue Service Center for your area. On each new Form 1099, list yourself as the "payer" and the other owner as the "recipient." On Form 1096, list yourself as the "filer." *A husband or wife is not required to file a nominee return to show amounts owned by the other.*²¹

This imposes a burden on the joint owner who receives the Form 1099 (the first joint owner) to then complete another Form 1099 for the other joint owner (the second joint owner). The first joint owner must provide the Form 1099 to the second joint owner and submit a copy to the IRS along with the transmittal Form 1096. But the first joint owner cannot simply download an additional Form 1099 and a Form 1096 from the IRS's web site, complete them, and furnish them to the second joint owner and the IRS. Rather, the forms must be ordered from the IRS, received by regular mail, and then completed and furnished to

²¹ *Id.* at 2 (emphasis added).

the second joint owner and the IRS.²² When the first joint owner does not learn of this reporting obligation until late in the filing season, the possibility of failing to timely file (and of incurring penalties) is significant.²³

In addition, the first joint owner is required to backup withhold at a flat rate of 28% (and pay any withheld tax over to the IRS) if the second joint owner does not furnish the first joint owner with a Form W-9 that (1) includes the second joint owner's taxpayer identification number, (2) certifies under penalties of perjury that this taxpayer identification number is correct, and (3) further certifies that the second joint owner is not subject to withholding due to notified payee underreporting.²⁴ The first joint owner must then retain the relevant records and forms "so long as the contents thereof may become material in the administration of any internal revenue law."²⁵

²² Most federal tax forms are available for downloading from <http://www.irs.gov>. A search for Form 1099-DIV, Form 1099-INT, Form 1099-MISC, and Form 1096 reveals that only an information copy is available on the IRS's web site. In each case, a cover page appears before this information copy of the form that advises the taxpayer that the form must be ordered from the IRS and received by mail. The cover page further warns that submitting a downloaded copy of the form may result in the imposition of a penalty.

²³ The Form 1099 is required to be furnished to the second joint owner by January 31 of the year following the calendar year with respect to which information is being reported, even though that is the same deadline for the actual payer of interest, dividends, or royalties to furnish the initial Form 1099 to the first joint account owner. I.R.C. §§ 6042(c) (flush language), 6049(c)(2), 6050N(b) (flush language). The copy of Form 1099 and the transmittal Form 1096 must be furnished to the IRS by February 28 of the year following the calendar year with respect to which information is being reported. Treas. Reg. §§ 1.6042-2(c) (as amended in 2000), 1.6049-4(g)(1) (as amended in 2006); see GENERAL INSTRUCTIONS, *supra* note 20, at 4. For the applicable penalty for failure to timely file an information return, see I.R.C. § 6721. This penalty may be waived upon a showing of reasonable cause. *Id.* § 6724.

²⁴ I.R.C. §§ 3406(a)(1)(A), 6302; Treas. Reg. §§ 31.3406(a)-1 (1995), -2(a) (as amended in 2002), 31.3406(b)(2)-1(a)(1) (1995), -4(a) (1995), 31.3406(b)(3)-4(a) (1995), 31.3406(d)-1(a), (b)(3) (1995), 31.3406(d)-2 (1995), 31.3406(h)-2(f)(3) (as amended in 2002), 31.3406-3 (as amended in 2000), 31.6302-4 (1993).

²⁵ Treas. Reg. § 1.6001-1(c) (as amended in 1990); see generally *id.* § 1.6001-1(a).

Interestingly, as the italicized final sentence of the block quote above indicates, these additional reporting and withholding burdens are not imposed on married different-sex couples. Why are married different-sex couples singled out for relief from these burdens? A natural response to this question might be that imposing the information-reporting and backup-withholding requirements is unnecessary when the spouses file a joint return, because all of the interest (or dividends or royalties) will be reported on the return that the spouses file together. But the exception in the instructions is not confined to married couples filing jointly. By its terms, it applies equally to married couples filing separately—who will be filing not one, but two returns. In that situation, why isn't the spouse who receives the Form 1099 treated like every other joint owner and required to report to the IRS the share of the income that belongs to (and should be taxed to) another taxpayer? The fact that married different-sex spouses who file separately must provide each other's names and Social Security numbers on their tax returns is not a sufficient answer to this question.²⁶ The taxpayer's spouse is not the only person who might jointly hold title to interest-, dividend-, or royalty-producing property with the taxpayer. The number of married different-sex taxpayers choosing to file separate returns is comparatively low but, with more than 2.7 million such returns filed in 2008, far from insignificant.²⁷ Why not impose the same reporting burden on them as is imposed on others, rather than shifting the burden onto the IRS only for this one particular, "special" group?

The general instructions thus provide support for the working hypothesis articulated in the introduction to this Article.

²⁶ I.R.S. FORM 1040: U.S. INDIVIDUAL INCOME TAX RETURN, at 1 (2009).

²⁷ In 2008, there were 2,717,037 returns filed under the married filing separately status and 53,655,844 returns filed under the married filing jointly status. I.R.S. PUB. NO. 1304, STATISTICS OF INCOME—2008, INDIVIDUAL INCOME TAX RETURNS 40 tbl.1.3 (2010). Though married filing separately returns are comparatively smaller in number, it is still quite an administrative task for the IRS to ensure that, together, all 2.7 million of these returns report a total amount of income equal to that reported to the IRS by third parties as interest, dividends, and royalties separately under the names of each of these spouses. And, it is worth noting that more than 2.7 million taxpayers may actually be involved here, as one of the spouses filing separately may fall under the threshold for filing a return.

The administrative structure underpinning the reporting of jointly owned interest, dividend, and royalty income evidences a clear privileging of the "traditional" family. Without any apparent justification, the IRS has carved out an exception for all married different-sex spouses from an identification and documentation requirement intended to increase compliance. Yet, the evidence of this privileging becomes even clearer once we look behind the public face of these information-reporting rules and scrutinize the Treasury regulations underlying them.

B. The Private Face of the Information-Reporting Rules

The regulations governing information reporting with respect to interest, dividends, and royalties are not entirely consistent with the picture painted by the general instructions for Form 1099. Only the interest-reporting regulations are consistent with those instructions. The royalty-reporting regulations may be interpreted to embrace a similar consistency with the instructions; however, the dividend-reporting regulations are clearly *inconsistent* with the instructions—but are far less burdensome on taxpayers.

1. Section 6049: Interest Reporting

The information-reporting rules regarding interest payments do appear to correspond with the description in the general instructions for Form 1099. Section 6049 requires those who pay \$10 or more in interest, those who receive and disburse payments of \$10 or more of interest as a nominee, as well as those who act as middlemen to file an information return.²⁸ The regulations confirm the obligation of those acting as middlemen to report interest payments.²⁹ For this purpose, the regulations provide:

A person shall be considered to be a middleman as to any portion of an interest payment made to such person which portion is

²⁸ I.R.C. § 6049(a), (d)(4).

²⁹ Treas. Reg. § 1.6049-4(a)(1), -4(a)(2)(ii), -4(b)(3)(i) (as amended in 2006).

actually owned by another person, whether or not the other person's name is also shown on the information return filed with respect to such interest payment, except that a husband or wife will not be considered as acting in the capacity of a middleman with respect to his or her spouse.³⁰

This broad definition of "middleman" comports with the general instructions for Form 1099.

2. Section 6050N: Royalty Reporting

Arguably, the rules regarding the reporting of royalty payments also correspond with that description. Like the interest-reporting rules, § 6050N requires those who pay \$10 or more in royalties as well as those who receive and disburse payments of \$10 or more of royalties as a nominee to file an information return.³¹ However, in contrast to § 6049, no mention is made of middlemen in the text of § 6050N. Nevertheless, the regulations under § 6050N, though rather sparse, do incorporate by reference the definition of "payor" from the interest-reporting regulations.³² That definition, in turn, specifically references and incorporates the definition of "middleman" in the interest-reporting regulations quoted above. Though the placement of this incorporation by reference in the royalty regulations seems to be aimed specifically at an exemption from reporting for certain foreign-related items, it does apply to "this section," which would seem to mean the entirety of Treasury Regulation § 1.6050N-1 and not just the exemption for certain foreign-related items. Accordingly, it is possible to read the regulations under § 6050N as likewise comporting with the general instructions for Form 1099.

3. Section 6042: Dividend Reporting

³⁰ *Id.* § 1.6049-4(f)(4)(i).

³¹ I.R.C. § 6050N(a).

³² Treas. Reg. § 1.6050N-1(c)(2)(i) (as amended in 1999) (incorporating the definition of "payor" from Treas. Reg. § 1.6049-4(a) by reference).

However, the rules regarding the reporting of dividend payments cannot be read so charitably. Like the interest and royalty reporting rules, § 6042 requires those who pay \$10 or more in dividends as well as those who receive and disburse payments of \$10 or more of dividends as a nominee to file an information return.³³ And, as was the case with § 6050N and in contrast to § 6049, no mention is made of middlemen in the text of § 6042. The regulations under § 6042 do seem to fill this gap in the definition of “nominee”:

For purposes of this section, a person who receives a dividend shall be considered to have received it as a nominee if he is not the actual owner of such dividend and if he was required under § 1.6109-1 to furnish his identifying number to the payer of the dividend (or would have been so required if the total of such dividends for the year had been \$10 or more), and such number was (or would have been) required to be included on an information return filed by the payer with respect to the dividend.³⁴

This regulation goes on, however, to depart significantly from the scope of the definition of “middleman” in the regulations under § 6049 and, concomitantly, from the scope of nominee/middleman reporting mandated by the general instructions for Form 1099:

[A] person shall not be considered to be a nominee as to any portion of a dividend which is actually owned by another person whose name is also shown on the information return filed by the payer or nominee with respect to such dividend. Thus, in the case of stock jointly owned by a husband and wife, the husband will not be considered as receiving any portion of a dividend on that stock as a

³³ I.R.C. § 6042(a).

³⁴ Treas. Reg. § 1.6042-2(a)(2) (as amended in 2000).

nominee for his wife if his wife's name is included on the information return filed by the payer with respect to the dividend.³⁵

Though this regulation uses a married couple to illustrate this exception, the exception, by its own terms, applies to *any* joint owners of stock whose names both appear on the Form 1099-DIV issued by the payer of the dividend.³⁶ Yet, despite this broadly worded exception in the regulations under § 6042, the general instructions for Form 1099 do not appear to absolve the recipient of a Form 1099-DIV from having to furnish a Form 1099 to a joint owner (with a copy to the IRS transmitted with Form 1096), unless the stock happens to be jointly held by a husband and wife.

The regulations under §§ 6042, 6049, and 6050N thus paint a far less neat and coordinated picture than do the general instructions for Form 1099. Through the general instructions for Form 1099, the IRS has deliberately created a uniform rule for nominee/middleman reporting where none exists in the corresponding regulations. Simplification through harmonization may be a laudable goal; however, one cannot help but observe that the blanket exception for husbands and wives in the general instructions for Form 1099 is completely unmoored from the text of the statute. Sections 6042, 6049, and 6050N all speak generally of nominees or middlemen—none of these sections makes specific mention of spouses, married couples, husbands, or wives.³⁷ The relevant legislative history provides no support

³⁵ *Id.*; see *Rosenbaum v. Comm'r*, 63 T.C.M. (CCH) 3033 (1992) (exception unavailable because wife's name was not included on Form 1099 provided to husband).

³⁶ It is worth noting that this same exception existed under § 6049 prior to the amendment of Treasury Regulations § 1.6049-4 in 1997. Compare T.D. 8734, 1997-2 C.B. 109 (amending Treas. Reg. § 1.6049-4(f)(4)(i)), with T.D. 7881, 1983-1 C.B. 316 (initially promulgating that same regulation). No reason was given in the preamble to either the proposed or final regulations for this change. See T.D. 8734, 1997-2 C.B. 109; Information Reporting and Backup Withholding, 1988-1 C.B. 892 (proposed January 1988) (to be codified at 26 C.F.R. pts. 1, 31, and 35a).

³⁷ *Cf.* I.R.C. §§ 6042, 6049, 6050N.

for an exception for spouses either.³⁸ Furthermore, as discussed earlier, there is no obvious rationale for the IRS's unexplained choice to narrow this exception to cover only different-sex married couples.³⁹

C. Endemic Privilegings

In the past, all of the relevant regulations had embraced the dividend-reporting regulations' broad exception to information reporting, which absolves the recipient of the Form 1099 from reporting so long as the payer also identifies the other joint owner(s) on that form.⁴⁰ Then, for no apparent reason and with no explanation,⁴¹ the federal government narrowed this exception from information reporting for interest (and, derivatively, royalty) payments so that it now covers only married different-sex couples. It also issued instructions explaining the relevant tax forms that disregard the relevant regulations and narrow the exception from information reporting for dividends so that it, too, covers only different-sex spouses. No matter how inexplicable these changes may be, one thing can be said of them—they did not come about by chance, but through purposeful (though, it appears, not deliberate) action. Without any publicly explained rationale for them, these changes may seem unthinking; however, they bear the mark of having been influenced by the endemic privileging of marriage. They seem to serve no purpose other than to further entrench the

³⁸ See H.R. REP. NO. 99-841, at 11-788 to -789 (1986) (Conf. Rep.), reprinted in 1986 U.S.C.C.A.N. 4075, 4876-77; H.R. REP. NO. 97-760, at 562-63 (1982) (Conf. Rep.), reprinted in 1982 U.S.C.C.A.N. 1190, 1334-35; H.R. REP. NO. 87-2508, at 41-42 (1962) (Conf. Rep.), reprinted in 1962 U.S.C.C.A.N. 3732, 3762-63; S. REP. NO. 87-1881, at 118-23 (1962), reprinted in 1962 U.S.C.C.A.N. 3297, 3424-30.

³⁹ See *supra* text accompanying note 26 as well as the remainder of that paragraph.

⁴⁰ See *supra* note 36.

⁴¹ Neither the preamble to the proposed nor the final regulations discusses the reason for this change. See *supra* note 36.

privileged position that marriage occupies in our federal tax laws.⁴²

To understand this point, let us first consider the effects of, and then a readily available alternative to, the general instructions' nominee/middleman reporting rules. If taxpayers are aware of these rules, they find themselves saddled with onerous compliance and recordkeeping burdens, not to mention potential penalties if they happen to learn of the rules too late in the filing season.⁴³ And if the initial payer included the names of all of the joint owners on the initial Form 1099, these burdens will have been imposed for naught—the information reported by the taxpayer on the additional Form 1099 will merely duplicate information that the IRS already has—and the IRS will find itself bombarded with more information than it should reasonably have to process. But if the misinformation circulating on the Internet about reporting interest from joint bank accounts is any indication,⁴⁴ taxpayers are more likely to be unaware of these rules. In that case, they will either overpay their taxes—that is, if the first joint owner reports and pays tax on all of the interest income, even the portion that belongs to the second joint owner⁴⁵—or risk an audit because the income reported on their tax returns does not match the information reported to the IRS on Form 1099.

⁴² See *supra* note 7 and *infra* note 305 and accompanying text.

⁴³ See *supra* text accompanying notes 22–25.

⁴⁴ See *If a Bank Account Is Owned by 2 Unmarried Adults, How Does the IRS Decide Who Pays Taxes on Interest Income?*, YAHOO! ANSWERS, <http://answers.yahoo.com/question/index?qid=20071216053619AA3rl25> (last visited Sept. 30, 2011).

⁴⁵ Correlatively, the second joint owner's taxable income will be underreported by a like amount. If the first joint owner's overpayment of taxes were somehow characterized as a payment of taxes on behalf of the second joint owner, this overpayment would itself have independent tax consequences. See, e.g., I.R.C. § 2511(a) (LEXIS through July 2010 amendments) (the gift tax applies to indirect transfers of property by gift); *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716, 729–30 (1929) (payment of another's taxes constitutes additional income to the person whose taxes were paid, to be characterized based on the circumstances surrounding the payment); Rev. Rul. 81-110, 1981-1 C.B. 479 ("The gratuitous payment of an individual's indebtedness is a gift to the individual rather than a gift to the individual's creditor.").

A more efficient alternative to the potentially costly and burdensome approach of the general instructions would be to apply a modified version of the broad exception that ostensibly exists in the dividend-reporting rules to *all* joint owners and absolve them from filing Forms 1099 and 1096 without regard to their marital status or relationship to each other. To ensure compliance in the reporting of interest, dividend, and royalty income, the IRS could require (rather than merely permit) the payer to include (1) each owner's name and taxpayer identification number on the Form 1099 and (2) each owner's ownership percentage (as reported to the payer at the time the account was opened or the property was purchased or licensed). Remarkably, in lieu of embracing such a simple and straightforward rule, which is both more efficient and more neutral with regard to the formation of personal relationships,⁴⁶ the IRS has opted for a rule that singles out "traditional" marriage for special treatment and, as explained below, exacerbates subordination along lines of class, race, ethnicity, gender, sexual orientation, and marital status.

Most obviously, the general instructions' spousal exception from nominee/middleman reporting contributes to the bizarre web of incentives and disincentives that can influence different-sex couples when they decide whether to marry, whether to have the secondary earner in the couple enter the workforce, and whether to have the secondary earner work part or full time. Professor Edward McCaffery identifies five principal factors in the tax laws that influence these decisions:

- (1) the aggregation of spousal tax rates under the income tax [i.e., the "marriage penalty"];
- (2) the disaggregation of spousal rates, with an asymmetric allocation of benefits, under the social security system;
- (3) the failure to tax imputed income from self-supplied labor;
- (4) the present treatment of mixed business-

⁴⁶ See generally Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Filing in the United States*, 2010 UTAH L. REV. 605 (advocating the abolition of the joint federal income tax return in favor of an individual filing regime that would recognize *all* of a taxpayer's interdependent economic relationships and not only those patterned after the so-called traditional family with the different-sex married couple at its core).

personal expenses, particularly child care; and
(5) the treatment of fringe benefits.⁴⁷

Of course, the nominee/middleman reporting rules play only a supporting role in creating this web of incentives and disincentives. Nevertheless, being spared an information-reporting burden that constitutes little more than a trap for the unwary either adds to the benefits or reduces the detriments of marriage from a tax perspective.

Professor McCaffery explains that this complex web of incentives and disincentives has a disproportionately negative impact on women as well as effects that vary along class lines:

Perhaps even more importantly, the situation of upper-income families—indeed, the whole range of treatment by class—introduces highly unfortunate discontinuities. Among the lower classes, the tax laws discourage formal family structures. This might retard economic improvement to the middle class. At the middle income levels, the laws encourage women to work full time or stay at home. Either such women fail to develop valuable job market skills, or they find themselves pushing against the upper income levels. But as soon as they do, they face even greater incentives to stay home. Secondary earners in general, and married mothers in particular, are thus pushed in different directions as they cross income levels. The whole pattern is reflected in a social structure that finds poor women alone, middle class women in a bind, and upper class women disempowered.⁴⁸

There is also a racial dimension to the web of tax incentives and disincentives associated with the privileging of marriage in our tax laws. Professor Dorothy Brown has explained that Professor

⁴⁷ See McCaffery, *supra* note 6, at 988.

⁴⁸ *Id.* at 1029.

McCaffery's analysis may be more relevant to white different-sex couples than it is to African-American different-sex couples. She points out that the African-American experience might differ because African-American different-sex couples are (1) more likely than white couples to experience a marriage penalty (and a resulting disincentive to marry) because their incomes are more likely to be equal and (2) more likely to have the man (rather than the woman) be the secondary earner in the couple.⁴⁹ Mylinh Uy has expanded on Professor Brown's analysis by explaining how the experience of Asian-American different-sex couples may be closer to that of African-American different-sex couples than to it is to white different-sex couples.⁵⁰

From the perspective of same-sex couples, the nominee/middleman reporting rules are simply another facet of the overt and covert discrimination that is perpetrated against them throughout the Code.⁵¹ Because the federal Defense of Marriage Act requires the IRS to treat all same-sex couples as tax "singles,"⁵² same-sex couples are ineligible for the spousal exception from nominee/middleman reporting—even if they are treated as married (and, therefore, as spouses) under the laws of their state of residence. From a marital status perspective, individuals who are uncoupled (and, therefore, truly single)—whether they happen to be gay or straight, living alone or acting as head of a household—find themselves in this same

⁴⁹ Brown, *supra* note 6, at 791–97.

⁵⁰ Uy, *supra* note 6, at 138.

⁵¹ See Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 TAX LAW. 407, 423–36 (2008) (describing the overt and covert discrimination against same-sex couples in the tax laws); see also *supra* note 7.

⁵² 1 U.S.C. § 7 (LEXIS through July 2010 amendments). See *infra* note 118 for discussion of a recent federal district court decision finding this portion of the Defense of Marriage Act unconstitutional as it applies to several Massachusetts same-sex couples as well as President Obama's recent decision to cease defending the Defense of Marriage Act in court.

predicament if they share ownership of income-producing property with another.⁵³

To round out these many intersections, consider that, even though information reporting is a relatively effective means of ensuring compliance, a withholding tax on investment income would be an even more effective compliance tool.⁵⁴ Despite other countries' successful imposition of withholding taxes on investment income,⁵⁵ for more than sixty years the financial services industry has managed to foil repeated attempts to impose a withholding tax on investment income in the United States.⁵⁶ Professor Lily Kahng asserts that the federal government's use of a more stringent tax enforcement measure (i.e., a withholding tax) against those with income from wages and a less stringent enforcement measure (i.e., information reporting) against those with investment income is inherently unfair and magnifies the preferences accorded to investment income under the Code.⁵⁷

This inequality in enforcement has a clear impact along class lines. For taxable years 2007 and 2008, approximately 97% of all returns filed by individuals reported an adjusted gross income of less than \$200,000.⁵⁸ In both years, these returns

⁵³ See generally Kahng, *Loneliest Number*, *supra* note 6 (describing the predicament of single taxpayers).

⁵⁴ See Charles P. Rettig, *Nonfilers Beware: Who's That Knocking at Your Door?*, J. TAX PRAC. PROC., Oct.–Nov. 2006, at 15, 15 (indicating that the rate of misreporting for amounts subject to withholding is only 1.2% while the rate of misreporting for amounts subject only to third-party information reporting is 4.5%).

⁵⁵ Kahng, *Investment Income Withholding*, *supra* note 13, at 324.

⁵⁶ *Id.* at 324–27.

⁵⁷ *Id.* at 338–39.

⁵⁸ I.R.S. PUB. NO. 1304, *supra* note 27, at 16 tbl.B; Justin Bryan, *Individual Income Tax Returns, 2007*, STAT. INCOME BULL., Fall 2009, at 5, 22 tbl.1.

reported 80% of total salaries and wages.⁵⁹ The remaining 3% of returns—for individuals with adjusted gross incomes of at least \$200,000—reported the other 20% of total salaries and wages but a far higher share of total taxable interest (47% in 2007 and 42% in 2008), total tax-exempt interest (66% in 2007 and 57% in 2008), total ordinary dividends (60% in 2007 and 57% in 2008), total qualified dividends (65% in 2007 and 61% in 2008), and total net royalty income (62% in 2007 and 66% in 2008).⁶⁰ Thus, the privileging of so-called traditional marriage in the information-reporting rules is built upon the foundation of a class-based privileging that imposes a less effective and less intrusive method of enforcement on items of income that are disproportionately associated with the wealthiest of taxpayers. This class-based privileging can have its own disparate impacts along lines of race, ethnicity, gender, sexual orientation, and marital status due to, among other things, wage discrimination

⁵⁹ I.R.S. PUB. NO. 1304, *supra* note 27, at 42 tbl.1.4; Bryan, *supra* note 58, at 22 tbl.1.

⁶⁰ I.R.S. PUB. NO. 1304, *supra* note 27, at 42 tbl.1.4; Bryan, *supra* note 58, at 22 tbl.1. Notably, from 2007 to 2008, the amounts reported in most of these categories of income decreased, in some cases significantly. I.R.S. PUB. NO. 1304, *supra* note 27, at 2 tbl.A.

It is also worth noting that these figures are consistent with data reported in the Federal Reserve Board's Survey of Consumer Finances. In the report for 2007, 84.8% of the families in the top decile of income were savers, while only 56.5% of families overall saved. Brian K. Bucks et al., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, FED. RES. BULL., Feb. 2009, at A1, A5 tbl.1. Moreover, 7.8% of the income of families in the top decile came from interest and dividends, compared with 1.9% for families in the 75–89.9 percentile of income and no more than 0.7% for families below that income level. *Id.* at A7 tbl.2. In contrast, wages comprised nearly 80% of the income of families below the 75th percentile, but only 46% of the income of families in the top decile. *Id.*

on these bases that detrimentally affects the ability to accumulate wealth.⁶¹

In the next two parts of this Article, the complex, intertwined endemic privilegings along multiple axes of subordination that we have uncovered in the information-

⁶¹ MELVIN D. OLIVER THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 73 (1995) ("Theories of wealth accumulation and inequality specify earning power as the best predictor of wealth. An examination of wealth holding by income class provides a clear picture of the strong relationship between income inequality and wealth inequality."); see *id. passim*. (exploring the nature and causes of the significant wealth gap between African Americans and whites and explaining that income alone does not fully account for this gap); Carmen Diana Deere Cheryl R. Doss, *The Gender Asset Gap: What Do We Know and Why Does It Matter?*, 12 FEM. ECON. 1, 11 (2006) ("[I]n both datasets the median and mean [nonpension] assets of married couples are substantially greater than those of single household heads . . . , a difference greater than that accounted for by the simple fact that married couples have two adults who may contribute to wealth . . ."); *id.* at 35 ("The evidence provided above demonstrates that women systematically have less access to wealth."); Infanti, *supra* note 15, at 1227–39 (citing and discussing a number of studies on wage discrimination experienced by traditionally subordinated groups, but explaining that income is, at best, an incomplete proxy for discrimination and, at worst, a highly misleading one); Sunhwa Lee, *Racial and Ethnic Differences in Women's Retirement Security*, 30 J. WOMEN, POL. POL'Y 141, 148–49 (2009) (summarizing research on wealth inequality based on race and ethnicity); *id.* at 158–64 (exploring the sources of women's retirement income based on race, ethnicity, marital status, and living arrangements and, echoing the findings of research regarding wealth inequality, showing that minority women are far less likely than white women to have income from assets); Angela Lyons et al., *Gender and Marital Differences in Wealth and Investment Decisions*, 6 J. PERS. FIN. 57, 57–58 (2008) (indicating that women's wealth has historically been lower than men's wealth and that this continues to be the case today; in addition, the wealth of singles is lower than that of married couples, even after controlling for the presence of two earners in a married couple); Urvi Neelakantan Yunhee Chang, *Gender Differences in Wealth at Retirement*, 100 AM. ECON. REV. 362 (2010) (exploring whether gender differences in risk preferences can explain the gender-based wealth gap at retirement and concluding that, though there is a negative correlation between risk aversion and wealth accumulation, the correlation is not strong enough to explain the gap); Lucie Schmidt Purvi Sevak, *Gender, Marriage, and Asset Accumulation in the United States*, 12 FEM. ECON. 139, 156 (2006) (finding that, "even after controlling for differences in observable characteristics, including earnings, there are large wealth gaps by gender and marital status throughout the wealth distribution," but noting that these wealth gaps disappear in the younger cohort of households headed by those between twenty-five and thirty-nine years old—whether because this group is fundamentally different from the older generations, the wealth gap does not emerge until later in life, or some other reason).

reporting rules will become even further reified. First, we will consider the identification and documentation requirements in the deductions, exclusions, and credits that provide (or deny) tax benefits based on family status. Then, we will consider the dearth of identification and documentation requirements in the rules that attribute property ownership from one family member to another. When taken together, these rules will highlight other ways in which endemic privilegings permeate the administrative structure underpinning the family tax provisions in the Code.

II. Deductions, Credits, and Exclusions

A number of income tax provisions afford (or, conversely, deny) taxpayers benefits with respect to their family members. Many of the benefits take the form of a deduction or credit for income transferred to, or on behalf of, a family member. (Or, in the case of benefits denied with respect to family members, take the form of a deduction or credit for income transferred to, or on behalf of, an unrelated individual.) In other cases, a taxpayer can exclude the value of a benefit provided by her employer directly to a family member or can exclude other income that is used for the family member's benefit. To obtain the deduction, credit, or exclusion, the taxpayer is usually required—either explicitly or implicitly—to comply with identification or documentation requirements. For instance, in the case of family-based tax benefits, the taxpayer may be required to specifically identify the family member, provide the family member's taxpayer identification number, and/or describe her relationship with the family member as a prerequisite to claiming the benefit.

The baseline with respect to these deductions, credits, and exclusions is thus the same as that encountered in the information-reporting rules discussed in Part I, namely one of identification and documentation. The discussion in this Part of the baseline of identification and documentation is divided into two sections. The first section addresses the baseline of identification and documentation of relatives and other family members. The second section addresses the baseline of identification and documentation of spouses and former spouses.

A. Documenting Relatives and Other Family Members

1. Dependents and the Additional Personal Exemption

Perhaps the most far-reaching of the Code's requirements that a taxpayer identify and document her family members was enacted as part of the Tax Reform Act of 1986. In that Act, Congress established the requirement that a taxpayer must furnish each dependent's taxpayer identification number in order to be entitled to claim a deduction for an additional personal exemption with respect to the dependent.⁶² For this purpose, a "dependent" is currently defined to include certain of the taxpayer's children (including stepchildren, adopted children, and certain foster children) and their descendants, certain relatives (including in-laws, stepparents, and stepsiblings), and certain other household members who are neither related nor married to the taxpayer.⁶³ Initially, the documentation requirement only applied to dependents five years and older.⁶⁴ Congress gradually lowered this age limit and then eliminated it in 1994.⁶⁵ At present, a taxpayer is asked on the Form 1040 to identify each dependent by name, to supply each dependent's Social Security number, and to identify the relationship between her and the dependent.⁶⁶

This requirement to identify and document dependents was intended to curb potential tax abuses:

⁶² I.R.C. § 151(e) (LEXIS through July 2010 amendments).

⁶³ *Id.* § 152(c)(2), (d)(2), (f)(1).

⁶⁴ Tax Reform Act of 1986, Pub. L. No. 99-514, § 1524(a), 100 Stat. 2085, 2749 (codified at I.R.C. § 6109(c)).

⁶⁵ Uruguay Round Agreements Act, Pub. L. No. 103-465, § 742(b), 108 Stat. 4809, 5010 (1994) (amending I.R.C. § 6109(c) to eliminate the age threshold); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11112, 104 Stat. 1388, 1388-413 (amending I.R.C. § 6109(c) to lower the age threshold from two years of age to one); Family Support Act of 1988, Pub. L. No. 100-485, § 704, 102 Stat. 2343, 2427 (amending I.R.C. § 6109(c) to lower the age threshold from five to two years of age); *see also* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1615(a), 110 Stat. 1755, 1853 (moving the identification and documentation requirement from I.R.C. § 6109(c) to its current location in I.R.C. § 151(c)).

⁶⁶ FORM 1040, *supra* note 26, at l. 6(c).

Congress believed that it is important to ensure the validity of claims for dependents on tax returns. Some taxpayers claim dependents that the taxpayers are not entitled to claim. For example, following a divorce, both parents may continue to claim the children as dependents, even though only one of the parents is legally entitled to claim the children as dependents.

Congress chose to increase compliance in this area by requiring that a taxpayer include on the taxpayer's tax return the taxpayer identification number (TIN) of any dependent claimed on that tax return who is at least 5 years old.⁶⁷

This documentation requirement decreased the number of false and erroneous claims for additional personal exemptions with respect to dependents. When eliminating the age threshold that had applied to the documentation requirement, Congress noted that "[t]he requirement that TINs be provided with respect to each dependent claimed on a tax return has significantly reduced the improper claiming of dependents. Requiring that TINs be supplied regardless of the age of the dependent will further reduce the improper claiming of dependents."⁶⁸

Indeed, "[a]fter Congress enacted the requirement that dependents' Social Security numbers must be entered on a tax return, a couple of million dependents disappeared."⁶⁹ This is not an exaggeration. For taxable year 1986, individual taxpayers claimed more than 77 million exemptions for dependents.⁷⁰ For

⁶⁷ JOINT COMM. ON TAX'N, JCS-10-87, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 1286-87 (1987); see 132 CONG. REC. S7893-98 (daily ed. June 19, 1986).

⁶⁸ H.R. REP. NO. 103-826, pt. I (1994), at *172 (Westlaw).

⁶⁹ George Guttman, *Improper Refunds Sapping Billions*, 65 TAX NOTES 19 (1994).

⁷⁰ I.R.S. PUB. NO. 1304, INDIVIDUAL INCOME TAX RETURNS, 1986, at 68 tbl.2.3, col. 15 (1989).

taxable year 1987, the first year in which the new identification and documentation requirement was in effect,⁷¹ individual taxpayers claimed 71.8 million—that is, *more than 5 million fewer*—exemptions for dependents.⁷² Furthermore, in the eyes of the Tax Court, the reduction in improper claims of additional personal exemptions for dependents constituted a compelling government interest that justified the rejection of a taxpayer's First Amendment challenge to the identification and documentation requirement, which is currently codified at § 151(e).⁷³

2. Overlap with Other Tax Deductions and Credits for Dependents

Technically, this identification and documentation requirement applies only for purposes of claiming the additional personal exemption for a dependent. In practice, however, it is not nearly so constrained. The requirement's reach is far broader because the group of "dependents" with respect to whom a personal exemption can be claimed under § 151 largely overlaps—and, in some cases, is coextensive with—the group of "dependents" who give rise to (or are denied) tax benefits under other deduction and credit provisions in the Code.⁷⁴ In effect, § 151(e) establishes a baseline of identification and documentation of family members for all of these provisions by imposing a *de facto* identification and documentation requirement with respect to many, if not all, tax dependents.

Among the provisions that allow a deduction for expenses incurred with respect to a taxpayer's dependents are § 162 (health insurance coverage for self-employed individuals), § 213 (medical care), § 217 (moving expenses), § 220 (Archer medical

⁷¹ Tax Reform Act of 1986, Pub. L. No. 99-514, § 1524(c), 100 Stat. 2085, 2749.

⁷² I.R.S. PUB. NO. 1304, INDIVIDUAL INCOME TAX RETURNS, 1987, at 53 tbl.2.3, col. 5 (1990).

⁷³ *Miller v. Comm'r*, 114 T.C. 511 (2000).

⁷⁴ Section 151 incorporates by reference the definition of "dependent" found in § 152. I.R.C. § 151(c) (LEXIS through July 2010 amendments).

savings accounts), § 221 (educational loan interest), § 222 (qualified tuition and related expenses), and § 223 (health savings accounts).⁷⁵ Among the provisions that allow a credit for expenses incurred with respect to a taxpayer's dependents are § 21 (dependent care credit), § 24 (child tax credit), § 25A (American opportunity, hope, and lifetime learning credits), § 32 (earned income credit), and § 35 (health insurance credit).⁷⁶ As mentioned above, the overlap between the "dependents" covered by these deduction and credit provisions and the identification and documentation requirement imposed for purposes of the personal exemption varies.

These variations create the potential for gaps in coverage of the de facto identification and documentation requirement imposed by § 151(e). As we will see, these gaps are sometimes filled, at other times left unfilled, and at yet other times are overfilled. Far from negating the existence of a baseline of identification and documentation, these gaps highlight the existence of that baseline—after all, these gaps are identifiable only when a tax deduction or credit provision is compared to the baseline established in § 151(e). Legislative and administrative reaction (or, in many cases, failure to react) to these gaps—especially when taken together with the unexplained spousal exemption to the information-reporting rules described in Part I above—lends the administrative structure underpinning the family tax provisions a haphazard and uncoordinated feel. As we will further explore in Part III below, congressional and administrative heedlessness only provides further support for the notion that endemic privilegings along multiple axes of subordination—including class, race, ethnicity, gender, sexual orientation, and marital status—have subtly influenced decisions to include or omit identification and documentation requirements in connection with enforcement of the family tax provisions.

a. Examples of Overlaps in Coverage

⁷⁵ *Id.* §§ 162(f), 213(a), 217(b)(2), (g), 220(d)(2)(A), 221(d), 222(d)(1), 223(d)(2)(A).

⁷⁶ *Id.* §§ 21(b)(1), 24(c), 25A(f)(1), 32(c)(1)(A), (c)(3), 35(a), (d).

Now let us turn to some concrete examples that illustrate these overlaps and gaps in coverage of the de facto documentation requirement imposed by § 151(e). The American opportunity, hope, and lifetime learning credits and the tuition deduction use precisely the same definition of “dependent” as § 151, which means that any dependent whose expenses are creditable or deductible under these provisions is subject to the identification and documentation requirement in § 151(e).⁷⁷ Taxpayers are unlikely to claim the benefit of these educational incentives but fail to claim the additional personal exemption. The personal exemption is the most salient of all the benefits associated with dependents, as the number of a taxpayer’s exemptions is determined on line 6 of the Form 1040—immediately after checking one’s filing status and before entering the first item of income on the return.⁷⁸ In fact, the instructions to the Form 1040 admonish taxpayers that:

You must enter each dependent’s social security number (SSN). Be sure the name and SSN entered agree with the dependent’s social security card. Otherwise, at the time we process your return, we may disallow the exemption claimed for the dependent and *reduce or disallow any other tax benefits (such as the child tax credit) based on that dependent.*⁷⁹

Furthermore, Form 8863, which is used to claim the American opportunity, hope, and lifetime learning credits, and Form 8917, which is used to claim the tuition deduction, require the taxpayer to list the name and taxpayer identification number of the student with respect to whom the credit is claimed—and the

⁷⁷ *Id.* §§ 25A(f)(1)(A)(iii) (defining “qualified tuition and related expenses” as including those of a dependent, but only if an additional personal exemption can be claimed under § 151 with respect to the dependent), 222(d)(1) (incorporating by reference the definition of “qualified tuition and related expenses” found in § 25A(f)).

⁷⁸ FORM 1040, *supra* note 26, at l. 6(c).

⁷⁹ I.R.S. INSTRUCTIONS FOR FORM 1040, at 19–20 (2009) [hereinafter FORM 1040 INSTRUCTIONS] (emphasis added).

form specifically asks for the name and identification number "as shown on page 1 of your tax return."⁸⁰

In other cases, the definition of "dependent" employed for purposes of § 151 overlaps, but is not coextensive with, the definition of "dependent" used in other deduction and credit provisions in the Code. For example, § 213 allows a deduction for medical expenses incurred with respect to a taxpayer's "dependents." Though the group of dependents covered by § 213 includes those for whom a personal exemption can be claimed, it is expanded by statute to encompass certain individuals who fail to meet selected elements of the basic definition of "dependent" (viz., the cap on gross income and the no joint return requirement).⁸¹ This leaves a gap in identification and documentation of dependents because § 213 does not require the taxpayer to identify and document dependents with respect to whom a deduction is taken but to whom § 151(e) does not apply.⁸² This underdocumentation of dependents opens the door to potential taxpayer error and abuse of the medical expense deduction because the only check on the propriety of a claimed deduction will come in the highly unlikely event that the IRS audits the taxpayer.⁸³

In contrast, § 24 employs a more limited definition of dependent for purposes of the child tax credit. It lowers the age cap by allowing the child tax credit to be taken only with respect to a qualifying child under the age of seventeen, and it disallows the credit with respect to qualifying noncitizen children who are residents of Canada and Mexico.⁸⁴ Accordingly, even though all

⁸⁰ I.R.S. FORM 8863: EDUCATION CREDITS (AMERICAN OPPORTUNITY, HOPE, AND LIFETIME LEARNING CREDITS), at 1 pt. I, l. 1(a)–(b) (2009); *id.* at pt. II, l. 3(a)–(b); *id.* at pt. III, l. 5(a)–(b); I.R.S. FORM 8917: TUITION AND FEES DEDUCTION, at 1 l. 1(a)–(b) (2009).

⁸¹ I.R.C. § 213(a) (incorporating the definition of "dependent" in § 152, but without regard to paragraphs (b)(1), (b)(2), and (d)(1)(B) of that section).

⁸² See FORM 1040, *supra* note 26, at 1 l. 29 (no reporting requirements mentioned); FORM 1040 INSTRUCTIONS, *supra* note 79, at 30–31 (same).

⁸³ See *infra* note 134.

⁸⁴ I.R.C. § 24(a), (c).

dependents covered by § 24 are also covered by the identification and documentation requirement of § 151(e), not all dependents identified on the taxpayer's return as eligible for an additional personal exemption will support a claim for the child tax credit. This creates a potential gap in the opposite direction of § 213; that is, it gives rise to the possibility of misleading overdokumentation. This opens the door to potential errors and abuse in claims for the child tax credit. A taxpayer who does not carefully walk through the instructions in three different places⁸⁵ might mistakenly believe or assume that a child properly documented for purposes of claiming the additional personal exemption also qualifies for the child tax credit. Again, the only check on the propriety of a claimed deduction will come in the highly unlikely event that the IRS audits the taxpayer.⁸⁶

b. Gaps Filled, Unfilled, and Overfilled

This potential for under- and overdokumentation of dependents highlights the need for specific corrective measures that deter false or erroneous claims by taxpayers and foster compliance with the terms of the relevant Code provisions. Yet, a review of these provisions reveals a haphazard, uncoordinated approach to filling these potential gaps. On one hand, the independent identification and documentation requirements in the dependent care credit and the earned income credit ensure that the use of a concomitantly narrower and broader definition of "dependent" in these provisions will not give rise to either an under- or overdokumentation problem.⁸⁷ In addition, the IRS has itself taken steps to cure the possibility of overdokumentation with regard to the child tax credit by requiring taxpayers to check a box next to those dependents for whom the taxpayer may claim an additional personal exemption *and* who render the taxpayer eligible to claim the child tax credit.⁸⁸ On the other hand, § 24 contains an independent documentation requirement—even though that requirement is duplicative of the

⁸⁵ FORM 1040 INSTRUCTIONS, *supra* note 79, at 17, 42–44, 72.

⁸⁶ *See infra* note 134.

⁸⁷ I.R.C. §§ 21(e)(10), 32(c)(3)(D).

⁸⁸ FORM 1040, *supra* note 26, at l. 6(c)(4).

documentation requirement in § 151(e), which applies to each and every dependent for whom a child tax credit may be claimed.⁸⁹ The same is true of the American opportunity, hope, and lifetime learning credits and the tuition deduction, which, as described above, employ definitions of “dependent” that are coextensive with that employed by § 151(e), yet contain their own independent documentation requirements.⁹⁰ The other deduction and credit provisions employ definitions of “dependent” that depart from that employed in § 151, thereby creating potential gaps in the coverage of its *de facto* documentation requirement; however, none of those provisions contains an independent documentation requirement that would fill that gap.⁹¹

3. Overlap with Exclusions Relating to Dependents

a. Fringe Benefits

These same variations and gaps are found in Code provisions that afford exclusions from gross income. The Code provisions that allow a taxpayer to exclude from gross income fringe benefits provided to family members by an employer include § 101 (survivor benefits provided to family members of a public safety officer killed in the line of duty), §§ 105 and 106 (employer-provided medical care), § 117 (tuition benefits provided to the family members of an employee of an educational organization), § 119 (employer-provided meals and lodging), § 129 (employer-provided dependent care assistance programs), § 132 (no-additional-cost services, qualified employee discounts, and qualified moving expense

⁸⁹ I.R.C. § 24(c).

⁹⁰ *Id.* §§ 25A(g)(1), 222(d)(2); *see supra* note 80.

⁹¹ For a complete listing of the provisions discussed in this section with an indication of (1) whether they employ a definition of “dependent” that differs from that employed in § 151 and (2) whether they contain independent documentation requirements, *see infra* Table 1 following Part II.A.4.

reimbursements), and § 134 (military benefits).⁹² With the exception of §§ 119 and 134, which adopt definitions of “dependent” that are coextensive with that employed by § 151, there are gaps between the coverage of these exclusions and the identification and documentation requirement of § 151(e). Interestingly, however, recordkeeping requirements that apply to employers fill in *all* of these gaps in coverage and ensure the identification and documentation of *all* dependents eligible for these exclusions, regardless of whether the taxpayer can claim them as dependents for purposes of the personal exemption.

Employers who are required to deduct and withhold income tax from the wages of their employees must keep records regarding (1) the total remuneration paid to each employee and (2) the portion of this remuneration that constitutes wages subject to withholding.⁹³ Employers are further required to keep records regarding the reasons for any discrepancy between these two amounts.⁹⁴ In other words, it is up to the taxpayer’s employer to ask the taxpayer/employee to document her claim for an exclusion from gross income (and, in turn, exemption from withholding⁹⁵) and to retain the records supporting that claim. Through these recordkeeping requirements, the federal government has gone far beyond merely establishing a baseline of identification and documentation. By filling in all of the gaps in the *de facto* documentation requirement of § 151(e) as it applies to these exclusions, the federal government has

⁹² I.R.C. §§ 101(h), 105(b), 117(d), 119(a), 120, 129, 132(a)(1), (a)(2), (a)(6), (b), (c), (g), (h)(2)–(3), 134; Treas. Reg. § 1.106-1 (1960); *see also* Prop. Treas. Reg. § 1.106-1, 2007-2 C.B. 714; I.R.S. Notice 2010-38, 2010-20 I.R.B. 1; I.R.S. Notice 2004-79, 2004-49 I.R.B. 898.

⁹³ Treas. Reg. § 31.6001-5(a)(2), (3) (as amended in 1983).

⁹⁴ *Id.* § 31.6001-5(a)(5).

⁹⁵ *See* I.R.C. § 3401(a)(18)–(22) (excluding amounts falling within the exclusions under §§ 105, 106, 129, 132, and 134 from the definition of “wages” for withholding tax purposes); Treas. Reg. § 31.3401(a)-1(b)(9) (as amended in 2006) (excluding amounts falling within the exclusion under § 119 from the definition of “wages” for withholding tax purposes).

mandated identification and documentation as a prerequisite to obtaining tax-free fringe benefits for a taxpayer's dependents.⁹⁶

b. Other Exclusions

A few exclusions do not involve employer-provided benefits. For example, § 135 permits a taxpayer to exclude from gross income interest on U.S. savings bonds used to pay the higher education expenses of a dependent.⁹⁷ Even though this exclusion is restricted to dependents for whom a personal exemption may be claimed under § 151, the IRS nonetheless requires the taxpayer to identify the dependent whose educational expenses were paid with the redeemed U.S. savings bond.⁹⁸

Sections 529 and 530 provide additional incentives for education by according favorable tax treatment to qualified tuition programs (QTPs) and Coverdell educational savings accounts (Coverdell ESAs). Both QTPs and Coverdell ESAs benefit from tax-free growth of amounts contributed or saved (i.e., the earnings on contributions to the account are excluded from the gross income of the contributor and the beneficiary), and distributions from these accounts to designated beneficiaries are tax free so long as they do not exceed the beneficiary's

⁹⁶ The federal government has concomitantly shifted the responsibility for making initial assessments of eligibility for these exclusions to the taxpayer's employer. This same shift in the responsibility for policing compliance extends to taxable entertainment provided as a fringe benefit of an employment or independent contractor relationship. Fringe benefits that are not otherwise excluded from gross income are taxable to an employee or independent contractor, even if the benefits are provided to another (e.g., a family member of the employee). Treas. Reg. § 1.61-21(a)(4) (as amended in 1992). In the case of taxable entertainment, the deduction for providing such entertainment is conditioned on reporting the entertainment as income to the employee or independent contractor—and, in the case of certain employees and independent contractors, the amount of the deduction is limited to the amount reported as income to the employee or independent contractor. I.R.C. § 274(c)(2), (9); Treas. Reg. § 1.274-2(f)(2)(iii) (as amended in 1996); see I.R.S. Notice 2005-45, 2005-24 I.R.B. 1228 (explaining the operation of the limitation of the deduction to the amount reported as income to the employee or independent contractor).

⁹⁷ I.R.C. § 135(c)(2)(A)(iii).

⁹⁸ I.R.S. FORM 8815: EXCLUSION OF INTEREST FROM SERIES EE AND I U.S. SAVINGS BONDS ISSUED AFTER 1989, at 1 I. 1(a) (2009).

qualifying educational expenses.⁹⁹ A taxpayer who opens a Coverdell ESA or an account with a QTP is permitted to change the designated beneficiary to another member of the current beneficiary's family without adverse tax consequences.¹⁰⁰ Apparently relying on the trustees of Coverdell ESAs and the administrators of QTPs to police compliance with the requirement that the new beneficiary be a member of the existing beneficiary's family, little or no reporting of a change in beneficiary is required.¹⁰¹

In a different vein, § 139D allows taxpayers to exclude the value of "qualified Indian health care benefits," including certain health care benefits provided to the dependents of members of an Indian tribe. This provision was enacted in March 2010 as part of healthcare reform; it therefore remains to be seen whether the IRS will issue any notices, forms, or regulations that require identification or documentation of the taxpayer's dependents who qualify for this exclusion but fall outside of the de facto documentation requirement of § 151(e).¹⁰²

With their mix of duplicative documentation requirements, shifting of responsibility for policing compliance, and potential for underdocumentation, these provisions share the haphazard approach to identification and documentation of a taxpayer's dependents encountered in the deduction and credit provisions discussed in the previous two sections of this Part.

⁹⁹ I.R.C. §§ 529(c)(1), (c)(3), 530(a), (d)(1)–(2).

¹⁰⁰ *Id.* §§ 529(c)(3)(C), 530(d)(5)–(6). In the case of a Coverdell ESA, the member of the family must be under age 30, unless the member of the family qualifies as a special needs beneficiary. *Id.* § 530(b)(1) (flush language), (d)(5)–(6).

¹⁰¹ See I.R.S. INSTRUCTIONS FOR FORM 1099-Q, at 1, 2 (2009) (requiring no reporting for a change in beneficiary, but requiring reporting of the amount of a distribution in the case of a rollover to another program); I.R.S. PUB. NO. 970, TAX BENEFITS FOR EDUCATION 60–61, 70 (2009) (in the case of both a Coverdell ESA and a QTP, advising taxpayers not to report a qualifying rollover anywhere on the Form 1040 because it is nontaxable and further advising that a change in beneficiary to another member of the family has no income tax consequences at all).

¹⁰² I.R.C. § 139D(c)(5); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 9021(a), 124 Stat. 119, 873 (2010) (enacting I.R.C. § 139D).

4. Overlap with Tax Disallowances Relating to Dependents

In some cases, Code provisions disqualify payments to relatives from eligibility for a deduction or credit. For example, payments to a taxpayer's dependents and children under the age of nineteen are ineligible for the dependent care assistance credit and are likewise ineligible for the exclusion for employer-provided dependent care assistance programs.¹⁰³ A taxpayer claiming the dependent care assistance credit or the exclusion for an employer-provided dependent care assistance program must identify and document all persons who provide dependent care services for which a credit or exclusion is claimed, notwithstanding that those who are dependents would already have been documented on the first page of the return, as mandated by § 151(e).¹⁰⁴

Section 213(d)(11) renders amounts paid for long-term care services provided by a relative ineligible for deduction as medical expenses, unless the relative is a licensed professional. For this purpose, a "relative" is defined as "an individual bearing a relationship to the individual which is described in any of subparagraphs (A) through (G) of section 152(d)(2)."¹⁰⁵ In some cases, these relatives will be claimed as dependents on the return and in others they will not (e.g., because they fail to meet other prongs of the definition of "dependent" for purposes of §§ 151 and 152).¹⁰⁶ Nevertheless, § 213 does *not* require taxpayers to identify or document *any* of the individuals to whom payments for long-term care services are made.¹⁰⁷

Under § 170(g), a taxpayer may take a charitable contribution deduction for amounts paid to maintain an

¹⁰³ I.R.C. §§ 21(c)(6), 129(c).

¹⁰⁴ I.R.C. §§ 21(c)(9), 129(c)(9); I.R.S. FORM 2441: CHILD AND DEPENDENT CARE EXPENSES, at 1 pt. I (2009).

¹⁰⁵ I.R.C. § 213(d)(11)(B).

¹⁰⁶ *Id.* § 152(d)(1)(B)–(D).

¹⁰⁷ I.R.S. FORM 1040, SCHEDULE A: ITEMIZED DEDUCTIONS, at 1 ll. 1–4 (2009).

individual in her home in connection with that individual's participation in an educational program, so long as the individual is neither a dependent nor a relative of the taxpayer.¹⁰⁸ For this purpose, the definition of "dependent" is borrowed from § 152, but it is broadened by statute to include individuals who fail to meet selected elements of that definition (viz., the no joint return requirement and the gross income cap).¹⁰⁹ Again, a "relative" is defined as "an individual bearing a relationship to the individual which is described in any of subparagraphs (A) through (G) of section 152(d)(2)."¹¹⁰ Though taxpayers claiming a deduction under § 170(g) are required to submit a significant amount of information with their tax returns in support of the deduction, a statement regarding the taxpayer's relationship to the student is not required—nor, apparently, is even identification of the student explicitly required so that the student's name might be matched with the persons claimed as dependents on the front of the taxpayer's return.¹¹¹

Newly enacted § 45R permits certain small employers who provide health insurance coverage to their employees to claim a credit against their income tax.¹¹² Certain owners of the business, their family members, and some of their dependents are not taken into account as employees in calculating the amount of this credit.¹¹³ Though the IRS has provided taxpayers guidance on claiming the credit, it remains to be seen whether the IRS will require identification or documentation of the employer's relationship to employees with respect to whom the credit is claimed.¹¹⁴

¹⁰⁸ I.R.C. § 170(g).

¹⁰⁹ *Id.* § 170(g)(1).

¹¹⁰ *Id.* § 170(g)(3).

¹¹¹ Treas. Reg. § 1.170A-2(a)(4) (1972); I.R.S. PUB. NO. 526, CHARITABLE CONTRIBUTIONS 19-20 (2009).

¹¹² Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1421, 124 Stat. 119, 237 (2010) (codified at I.R.C. § 45R).

¹¹³ I.R.C. § 45R(c)(1).

¹¹⁴ I.R.S. Notice 2010-44, 2010-22 I.R.B. 717.

These provisions either overfill compliance gaps in the de facto documentation requirement of § 151(e) or leave them wholly unfilled, further contributing to the haphazard patchwork of identification and documentation requirements that apply to a taxpayer's dependents.

Before turning to a discussion of documenting spouses in the next section, it is worth pausing for a moment to peruse a tabular representation of the numerous provisions discussed so far in this Part. Table 1 summarizes this discussion by first listing each of the Code sections mentioned above. The next two columns in the table indicate whether the definition of "dependent" in those sections is the same as—or, conversely, varies from—the definition of "dependent" employed for purposes of the de facto documentation requirement in § 151(e). The final two columns in the table note whether the provision contains an independent documentation requirement that applies either to the taxpayer or to a third party dealing with the taxpayer, which either fills or overfills any gaps in coverage.

Table 1—Gaps Filled, Overfilled, and Underfilled in the Documentation of Dependents

Code Provision	Definition of “Dependent” Same as § 151(e)	Definition of “Dependent” Varies from § 151(e)	Independent Documentation Requirement (Taxpayer)	Independent Documentation Requirement (Third Party)
§ 21 (dependent care credit)		✓	✓	
§ 24 (child tax credit)		✓	✓	
§ 25A (American opportunity, hope, and lifetime learning credits)	✓		✓	
§ 32 (earned income credit)		✓	✓	
§ 35 (health insurance credit)		✓		
§ 45R (small employer health insurance credit)		✓		
§ 101 (survivor benefits)		✓		✓
§§ 105 and 106 (employer-provided medical care)		✓		✓
§ 117 (tuition benefits)		✓		✓
§ 119 (employer-provided meals and lodging)	✓			✓

Code Provision	Definition of "Dependent" Same as § 151(e)	Definition of "Dependent" Varies from § 151(e)	Independent Documentation Requirement (Taxpayer)	Independent Documentation Requirement (Third Party)
§ 129 (employer-provided dependent care assistance programs)		✓		✓
§ 132 (fringe benefits)		✓		✓
§ 134 (military benefits)	✓			✓
§ 135 (interest on U.S. savings bonds)	✓			✓
§ 139D (Indian healthcare benefits)		✓		
§ 162 (health insurance for self-employed)		✓		
§ 170 (charitable contributions)		✓		

Code Provision	Definition of "Dependent" Same as § 151(e)	Definition of "Dependent" Varies from § 151(e)	Independent Documentation Requirement (Taxpayer)	Independent Documentation Requirement (Third Party)
§ 213 (medical care)		✓		
§ 217 (moving expenses)		✓		
§ 220 (Archer medical savings accounts)		✓		
§ 221 (educational loan interest)		✓		
§ 222 (qualified tuition and related expenses)	✓		✓	
§ 223 (health savings accounts)		✓		
§ 529 (qualified tuition programs)		✓		✓
§ 530 (Coverdell educational savings accounts)		✓		✓

B. Documenting Spouses

3. Current Spouses

The Code provides married different-sex couples a choice between filing one joint return or two separate returns.¹¹⁵ If the couple files a joint return, then each spouse's name and Social Security number must be entered at the top of the return.¹¹⁶ If the spouses decide to file separate returns, they are required to identify and document their relationship by furnishing each other's names and Social Security numbers when they select "married filing separately" as their filing status.¹¹⁷ Thus, a taxpayer's marital relationship (at least as defined for federal tax

¹¹⁵ See I.R.C. § 6013.

¹¹⁶ FORM 1040, *supra* note 26, at 1.

¹¹⁷ *Id.* at 11.3.

purposes)¹¹⁸ is always identified and documented on his or her return.

Many, though not all, of the exclusions, deductions, and credits that are provided (or denied) to a taxpayer with respect to her dependents apply equally to the taxpayer's different-sex

¹¹⁸ I.R.C. § 6013(d); see also *id.* § 7703 (containing rules for determining marital status that apply to a number of Code provisions). Determining whether taxpayers are "married" for federal tax purposes can itself be a difficult and complex question.

The basic rule is that a couple is "married" for tax purposes if it is married for state law purposes on December 31 of that tax year. But a taxpayer may be married, although his spouse is dead, and unmarried although his spouse is alive. A married taxpayer is not married in the year his marriage is annulled but may or may not have been married in earlier years. A divorced couple is still married if the divorce decree is interlocutory and a separated couple is unmarried if "legally separated." But some couples separated by a court are not "legally separated" and are, therefore, married for income tax purposes. Other couples who are not separated but who have lived apart for the full year may be unmarried for some purposes and married for others.

Toni Robinson Mary Moers Wenig, *Marry in Haste, Repent at Tax Time: Marital Status as a Tax Determinant*, 8 VA. TAX REV. 773, 788-90 (1989) (footnotes omitted).

Moreover, the federal government currently denies recognition to same-sex marriages for federal tax purposes. 1 U.S.C. § 7 (LEXIS through July 2010 amendments). Because the parties to a same-sex marriage are excluded from the federal tax law definition of "spouse," they cannot claim the family tax deductions, credits, and exclusions described in the text above on the grounds of their marital status. Instead, the only way that same-sex couples can qualify for the application of these family tax provisions is for one same-sex spouse to qualify as the dependent of the other same-sex spouse under the terms of the relevant Code section. See, e.g., I.R.S. Priv. Ltr. Rul. 2003-39-001 (June 13, 2003) (describing the treatment of same-sex domestic partners for purposes of the employer-provided medical care exclusions in I.R.C. §§ 105 and 106).

spouse.¹¹⁹ Where these provisions do apply to different-sex spouses, they raise issues similar to the potential duplication and underdocumentation issues discussed above with respect to dependents. That is, where the different-sex spouses file a joint return, requiring further documentation of a spousal relationship results in duplicative documentation because both spouses are

This constitutes blatant discrimination on the basis of sexual orientation—discrimination that should, without question, be eradicated from our federal tax laws. *See generally* Infanti, *supra* note 51; *see also* Infanti, *supra* note 46 (proposing an individual filing regime that would rectify this discrimination on the basis of sexual orientation). Indeed, a federal district court has found that 1 U.S.C. § 7, insofar as it applies to the federal tax laws, violates the right to equal protection of the laws of several married same-sex couples from Massachusetts. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374, 376, 383, 387–97 (D. Mass. 2010). However, because this was not a facial challenge to the statute, it is unclear what the precise impact of this decision will be; in any event, the federal government has appealed this decision. Denise Lavoie, *US Appeals Mass. Rulings on Gay Marriage*, BOS. GLOBE, Oct. 13, 2010, at 7. Should the decision in *Gill* be upheld on appeal, its ultimate impact might turn, in part, on a separate federal district court decision that held California's Proposition 8, which prohibits same-sex couples from marrying in that state, unconstitutional as a violation of the Due Process and Equal Protection Clauses of the U.S. Constitution. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 991–1004 (N.D. Cal. 2010). The decision in *Perry* holds the promise of extending the right to marriage to same-sex couples across the country; however, the court's decision in *Perry* was appealed on the same day that it was issued. *Gay Marriage Appeal Filed*, PITT. POST-GAZETTE, Aug. 6, 2010, at A5.

President Obama's recent decision to cease defending the Defense of Marriage Act in court is another step in the right direction. *See* Charlie Savage Sheryl Gay Stolberg, *In Turnabout, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1. It is far from clear, however, what the practical, legal effect of this order will be, especially given that the executive branch is nonetheless to continue enforcing the federal prohibition against recognizing same-sex marriages. Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to John A. Boehner, Speaker of the U.S. House of Representatives (Feb. 23, 2011), available at <http://www.scribd.com/doc/49404879/Attorney-General-Holder-s-Letter-to-John-Boehner-on-DOMA-Appeal>. If anything, this move has only further muddied the waters surrounding the application of the federal tax laws to same-sex couples. Anthony C. Infanti, *Questions Raised by Obama Shift on DOMA*, FEMINIST LAW PROFESSORS (Feb. 23, 2011), <http://www.feministlawprofessors.com/2011/02/follow-obama-shift-doma/>.

¹¹⁹ Technically, spouses cannot qualify as dependents. I.R.C. § 152(c)(2)–(3), (d)(2). Accordingly, spouses must be separately enumerated if they are to be included within the ambit of these provisions.

parties to, and already identified on, the return.¹²⁰ Conversely, where different-sex spouses file separate returns, failure to require them to identify when they are claiming a tax allowance with respect to each other creates the possibility that the same tax benefit might be claimed by the spouses twice (i.e., once on each return).¹²¹ Yet, it is worth noting once again that these issues of under- and overdocumentation exist only because there is a baseline of identification and documentation of a spousal relationship on all tax returns.

4. Former Spouses

A unique aspect of the spousal relationship is the ability to sever that relationship and become former family members. Disentangling the ties between spouses often involves the payment of alimony and/or property settlements. Naturally, these payments have tax consequences and raise issues regarding the need to identify and document the former spousal relationship between the parties.

If former different-sex spouses so elect, alimony payments are deductible by the payer spouse and includible in the gross income of the payee spouse.¹²² In effect, this regime permits the former spouses to extend the income-splitting privilege afforded to different-sex married couples under the joint return beyond the end of the marital relationship.¹²³ Under § 215(c), a taxpayer may deduct alimony paid to a former spouse only if she provides

¹²⁰ See *supra* note 90 and accompanying text.

¹²¹ See, e.g., I.R.C. § 213(a) (permitting a taxpayer to deduct medical expenses paid with respect to her spouse); I.R.S. PUB. NO. 502, MEDICAL AND DENTAL EXPENSES 3 (2009) (indicating that a taxpayer can claim a deduction for her spouse's medical expenses even if they file separate returns); I.R.S. FORM 1040, SCHEDULE A, *supra* note 107, at 1 ll. 1-4 (requiring no reporting regarding the person with respect to whom the deducted medical expenses were incurred); I.R.S. INSTRUCTIONS FOR SCHEDULE A (FORM 1040), at A-2 (2009) (same).

¹²² I.R.C. §§ 71, 215.

¹²³ BORIS I. BITTKER LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 77.1.1 (2011), available at 1997 WL 439909.

the payee's Social Security number on her tax return.¹²⁴ Enacted in 1984, this identification and documentation requirement closed the way to a well-trodden avenue of tax abuse where the government would find itself whipsawed when "the payor would deduct payments as alimony under § 215, but the payee would not report the payments as income under § 71."¹²⁵

There is, however, no documentation requirement with respect to transfers of property between former different-sex spouses incident to a divorce (or, for that matter, between spouses who are still married to each other).¹²⁶ Under § 1041, the transferor spouse recognizes no gain or loss on the transfer of property, and the transferee spouse excludes the property from gross income as a gift and takes the property with a transferred basis.¹²⁷ Neither spouse is required to notify the IRS of the transfer; however, the transferor spouse is required to provide the transferee spouse with information necessary to determine the adjusted basis, holding period, and any investment credit recapture with respect to the transferred property.¹²⁸

C. Making Sense of Nonsense

The discussion in the preceding two sections of this Part clearly establishes a baseline of identification and documentation when it comes to affording (or denying) tax benefits based on marital or familial status. Yet, as highlighted in Table 1, Congress often creates different definitions of "family" (and even of the marital unit) for purposes of different

¹²⁴ I.R.C. § 215(c); Temp. Treas. Reg. § 1.215-1T (1984); I.R.S. PUB. NO. 504, DIVORCED OR SEPARATED INDIVIDUALS 13 (2009).

¹²⁵ Paul C. Feinberg Toni Robinson, *A Household Is Not a Home: "Not Members of the Same Household" in the Tax Treatment of Alimony Payments*, 6 VA. TAX REV. 377, 379 n.8 (1986).

¹²⁶ See I.R.S. PUB. NO. 504, *supra* note 124, at 19–21 (2009) (discussing property settlements and mentioning no reporting requirements other than those described *infra* text accompanying note 128).

¹²⁷ I.R.C. § 1041(a)–(b); see also *id.* § 102 (excluding gifts from gross income).

¹²⁸ Temp. Treas. Reg. § 1.1041-1T, QA (14) (as amended in 2003).

Code sections. In a regime where the federal government chooses a taxpayer's family for her, it may be appropriate to expand or contract the scope of "family" based on the precise policy to be achieved through a Code section.¹²⁹ But why would Congress choose to underpin these differing definitions of family (and of the marital unit) with a hodgepodge of explicit, de facto, and duplicative requirements that—when measured against a baseline of identification and documentation—leaves some compliance gaps filled, others unfilled, and yet others overfilled?

The only sense that can be made of this hodgepodge is that it makes no sense at all. For instance, why is Congress so concerned that taxpayers will claim an unwarranted additional personal exemption (\$3650 in 2009)¹³⁰ absent a documentation requirement, when it is apparently unfazed by the possibility that taxpayers will either exploit or fall into the gap between the expanded definition of dependent in § 221 and the documentation requirement in § 151(e) and falsely or erroneously claim a student loan interest deduction (a maximum of \$2500)¹³¹ with respect to a dependent?¹³² Why wouldn't Congress wish to close this and other gaps in the same way that it gradually filled in and then completely closed the gap in the documentation requirement in § 151(e)?

As mentioned earlier, between 1986 and 1994, Congress slowly lowered the age threshold for documenting dependents

¹²⁹ See Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1, 3–4 (2005) ("A uniform definition [of family] would make the law easier to apply, but it would result in systematic over-taxation or under-taxation. Instead the [estate tax] statutes should be revised to use unique terms that apply for limited purposes."). But see Infanti, *supra* note 46 (proposing an individual filing regime in which taxpayers would choose their own family for tax purposes).

¹³⁰ Rev. Proc. 2008-66, § 3.19, 2008-2 C.B. 1107.

¹³¹ I.R.C. § 221(b)(1).

¹³² Indeed, in terms of administering § 221, the legislative history accompanying the provision's enactment evinces concern only with third-party reporting by the lender to the borrower regarding the portion of interest payments that qualify for the deduction. H.R. REP. NO. 105-220, at 368 (1997).

and then eliminated it altogether.¹³³ By similarly closing the remaining gaps in the identification and documentation requirements for spouses and dependents, Congress would discourage taxpayers from taking false or careless positions with regard to other family tax provisions in the hope of winning the “audit lottery”¹³⁴ and escaping IRS scrutiny of those positions. After all, the National Taxpayer Advocate has observed that

[T]he IRS can relatively easily verify:

- The existence and age of the person associated with a Social Security number (SSN);
- The mother and often the father of the person associated with a SSN;
- The consistency of current year return data with prior year returns (including filing status); and
- The earnings and other income of the taxpayer as reported by a third party (including on Form W-2, Wage and Tax Statement, and other information returns).¹³⁵

This may not be all of the information necessary to determine the correctness of a position claimed with respect to a spouse or dependent, but it may be enough to deter noncompliance. In fact, the IRS requires more than a dependent’s name, Social Security number, and relationship to the taxpayer to determine the

¹³³ See *supra* note 65.

¹³⁴ See James S. Eustice, *Abusive Corporate Tax Shelters: Old “Brine” in New Bottles*, 55 TAX L. REV. 135, 161 (2002) (“The Service’s shockingly low audit coverage makes the audit lottery an irresistible attraction; it is not even a lottery, but rather a virtually sure thing.”). For fiscal year 2008, the IRS audited only 1% of individual income tax returns filed. I.R.S. PUB. NO. 55B, *supra* note 12, at 23 tbl.9a.

¹³⁵ 1 NAT’L TAXPAYER ADVOCATE, 2008 ANNUAL REPORT TO CONGRESS 365 (2008).

correctness of a claim for an additional personal exemption;¹³⁶ nevertheless, requiring even this information has led to a decrease in the number of false and erroneous claims for additional personal exemptions with respect to dependents.¹³⁷

The failure to similarly—and systematically—close the compliance gaps in the other family tax provisions discussed in this Part bespeaks a lack of congressional attention to issues of taxpayer compliance with the terms of those provisions. Put differently, the lack of attention to obvious compliance issues imparts a haphazard and uncoordinated feel to the administrative structure underpinning the family tax provisions. In the next Part of this Article, we will turn to the task of tracing the interconnecting lines of subordination that have embedded themselves within this administrative structure. Before undertaking that task, however, it is important to underscore that the hodgepodge of explicit, *de facto*, and duplicative identification and documentation requirements that we encountered in this Part does *not* appear to be the result of deliberate action on the part of Congress or the IRS. To the contrary, the haphazard and uncoordinated administrative structure underpinning the family tax provisions provides support for the notion that the interconnecting lines of subordination that we will trace in the next Part of this Article are the product of endemic privilegings—that is, privilegings that have become so normal, so ingrained in our nature, such a part of our “world-view” that they manifest themselves without the conscious thought of legislators or regulators.

III. Attribution Rules

To detect the interconnected lines of subordination that are embedded in the family tax provisions discussed in Part II, it will be necessary to compare and contrast those provisions with a different set of family tax provisions, namely the rules attributing ownership (or, occasionally, other relevant attributes) from one person to another for tax purposes. Tax consequences often turn on a taxpayer's ownership of property. For instance, if

¹³⁶ See I.R.C. § 152.

¹³⁷ See *supra* text accompanying notes 68–73.

a taxpayer disposes of property that she owns, the taxpayer will ordinarily be required to realize and recognize gain or loss on the transaction.¹³⁸ If that property is stock and the disposition is in the form of a redemption by the issuing corporation, whether the gain or loss will be characterized as a sale or exchange (with one set of tax consequences) or as a distribution taxable under § 301 (with a different set of tax consequences) will often depend upon the amount of stock in the corporation that the taxpayer continues to own after the disposition.¹³⁹ This is but one example of the myriad ways in which property ownership is relevant to determining the tax consequences of a financial arrangement or transaction.

On a social or cultural level, an individual may be indifferent as to whether she or someone else in her family is considered the legal owner of property. From a tax perspective, however, the individual may find that, without some special statutory accommodation, dispersing ownership of property within her family frustrates her ability to obtain an intended tax benefit or, alternatively, opens the door to potential abuse of the Code.¹⁴⁰ In an attempt to facilitate the delivery of tax benefits or to frustrate potential abuse, many Code provisions require taxpayers to take account of property owned by family members when determining the tax treatment of their own financial transactions or arrangements. For instance, in determining whether the redemption of corporate stock described in the previous paragraph will be treated as a sale or exchange or as a distribution taxable under § 301, the redeeming shareholder must, in most cases, not only take into account stock that she herself owns following the redemption, but also stock owned by members of her family (and certain entities, too).¹⁴¹

In this Part, I will first describe the identification and documentation requirements that attach to the § 267 and § 318 attribution rules, which are, by far, the most commonly

¹³⁸ I.R.C. § 1001(a), (c).

¹³⁹ *Id.* § 302.

¹⁴⁰ See *supra* note 4.

¹⁴¹ I.R.C. § 302(c).

encountered attribution rules in the Code. Then I will describe the small group of provisions that contain their own unique attribution rules. With the necessary background in place, I will turn in the final section of this Part to comparing and contrasting the identification and documentation requirements that apply to the attribution rules with those discussed in Part II (and, to a lesser extent, Part I) of this Article.

A. The § 267 and § 318 Attribution Rules

3. No Documentation Required

The primary Code sections that attribute ownership of property from one taxpayer to another are §§ 267 and 318. Each contains a set of attribution rules that treats an individual taxpayer as if she owned property that is actually owned by her family members or by certain entities. Neither of these provisions requires a taxpayer to identify or document family members to or from whom the ownership of property is attributed. In the vast majority of cases, the substantive Code provisions that incorporate these attribution rules by reference do not contain identification or documentation requirements either. Indeed, the following is a list of some *sixty* instances of provisions that incorporate the attribution rules of § 267 or § 318 by reference but impose no identification or documentation requirements regarding relationships that give rise to the constructive ownership of property:

- Sections 45A, 51, 1396, and 1400H (disallowing the Indian employment, work opportunity, empowerment zone, and renewal community employment credits for wages paid to related persons and certain owners of the business)¹⁴²

¹⁴² *Id.* §§ 45A(c)(5), 51(i)(1), 1396(d)(2), 1400H; see I.R.S. FORM 5584: WORK OPPORTUNITY CREDIT (2009) (requiring no reporting regarding the relationship between the taxpayer claiming the credit and the persons with respect to whom the credit is being claimed); I.R.S. FORM 8844: EMPOWERMENT ZONE AND RENEWAL COMMUNITY EMPLOYMENT CREDIT (2009) (same, and also not requiring reporting regarding the ownership of the business by individuals who are treated as qualified employees); I.R.S. FORM 8845: INDIAN EMPLOYMENT CREDIT (2009) (same).

- Section 45F (disallowing the employer-provided childcare credit in the case of facilities that discriminate in favor of highly compensated employees and facilities that do not enroll a sufficient number of employees' dependents if the facility is the principal trade or business of the employer)¹⁴³
- Sections 79, 105, 117, 125, 127, 129, 132, and 137 (restricting tax benefits in the case of discrimination

¹⁴³ I.R.C. § 45F(c)(2)(B); *see* I.R.S. FORM 8882: CREDIT FOR EMPLOYER-PROVIDED CHILDCARE FACILITIES AND SERVICES (2006) (requiring no reporting regarding the use of the childcare facility by highly compensated employees or by employees' dependents).

in favor of key or highly compensated employees, which include certain owners of the business)¹⁴⁴

¹⁴⁴ I.R.C. §§ 79(d), 117(d)(3), 105(h)(5), 125(b)(2), (j)(3)(D)(iii)–(iv), 127(b)(2), 129(d)(2), 132(j)(6), 137(c)(2); see I.R.S. PUB. NO. 15-B, EMPLOYER'S TAX GUIDE TO FRINGE BENEFITS 13 (2010) (describing the application of § 79 to key employees and making no mention of any reporting requirement other than including the value of group-term life insurance in the key employee's wages on the Form W-2); *id.* at 2–4 (similarly describing the application of § 125 but mentioning no reporting requirements); *id.* at 6–7 (similarly describing the application of § 105 but mentioning no reporting requirements); *id.* at 7–8 (similarly describing the application of § 137 but mentioning no reporting requirements other than on the Form W-2); *id.* at 8–9 (similarly describing the application of § 129 but mentioning no reporting requirements other than on the Form W-2); *id.* at 9–10 (similarly describing the application of § 127 but mentioning no reporting requirements); *id.* at 10, 17–18 (similarly describing the application of § 132 but mentioning no reporting requirements); I.R.S. Pub. No. 970, *supra* note 101, at 8 (similarly describing the application of § 117 and only mentioning the need to report any taxable amount as wages on Form W-2); see also *supra* notes 112–114 and accompanying text for a discussion of newly enacted § 45R.

Section 6039D would require employers to report the number of highly compensated employees covered by any plan under §§ 79, 105, 106, 125, 127, 129, or 137; however, this reporting requirement has been suspended until the IRS issues further guidance. I.R.S. Notice 2002-24, 2002-1 C.B. 785. It is also worth noting that, in contrast to the discussion of employment-related exclusions for benefits provided to dependents, see *supra* Part II.A.3.a, the employer in this situation cannot be said to be acting as a third party who can be counted on to verify compliance because the person to whom the attribution rules applies, as an owner of the business, is, in effect, also the employer. See generally Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695 (2007) (discussing when third parties can effectively be used to monitor and verify taxpayer compliance).

- Section 101(j) (stripping tax advantages typically associated with life insurance from certain employer-owned life insurance)¹⁴⁵
- Section 121 (denying an exclusion from gross income to the sale of a remainder interest in a principal residence to a related person)¹⁴⁶
- Section 167 (denying depreciation deductions upon a purchase of term and remainder interests in property by related persons)¹⁴⁷
- Section 170 (permitting a deduction equal to the full fair market value of qualified appreciated stock donated to a private nonoperating foundation, but only to contributions by the taxpayer and her family

¹⁴⁵ I.R.C. § 101(j)(2)(A), (B); *see id.* § 6039I (requiring no reporting regarding persons related to the owner of the contract or, aside from satisfaction of a notice and consent requirement, with regard to the exceptions from the application of § 101(j); rather, the taxpayer is directed to keep necessary records); I.R.S. FORM 8925: REPORT OF EMPLOYER-OWNED LIFE INSURANCE CONTRACTS (2010) (same); *see also* BITTKER LOKKEN, *supra* note 123, ¶ 12.2.2A, available at 1997 WL 439538 (explaining how employer-owned life insurance had been used as a tax shelter). Related persons are absolved from complying with the applicable reporting requirements, despite being included within the definition of “applicable policyholder” in the statute. I.R.S. Notice 2009-48, QA (17), 2009-1 C.B. 1085.

¹⁴⁶ I.R.C. § 121(d)(8). A taxpayer must ostensibly elect to exclude from gross income gain on the sale of a remainder interest in a principal residence. Treas. Reg. § 1.121-4(c)(2)(i) (as amended in 2002). However, the election requires no reporting or documentation. *Id.* § 1.121-4(c)(2)(iii) (“The taxpayer makes the election under this paragraph (c)(2) by filing a return for the taxable year of the sale or exchange that does not include the gain from the sale or exchange of the remainder interest in the taxpayer’s gross income.”).

¹⁴⁷ I.R.C. § 167(c); *see* H.R. REP. NO. 101-247, at 1361–62, *reprinted in* 1990 U.S.C.C.A.N. 1906, 2831–32 (describing the abuse that this provision is intended to curtail).

of no more than 10% of the stock in the corporation)¹⁴⁸

- Section 179 (rendering property purchased from a related person ineligible for expensing)¹⁴⁹
- Section 221 (denying the deduction for educational loan interest to loans from related persons)¹⁵⁰
- Section 263A (requiring farmers who elect to currently deduct otherwise capitalizable costs relating to plants with a preproductive period of more than two years—as well as anyone related to the farmer making this election—to use the alternative depreciation system of § 168(g)(2) with respect to property predominantly used in their

¹⁴⁸ I.R.C. § 170(c)(5); *see* I.R.S. FORM 8283: NONCASH CHARITABLE CONTRIBUTIONS, at 1 pt. 1 (2009); I.R.S. INSTRUCTIONS FOR FORM 8283, at 4 (2009) [hereinafter FORM 8283 INSTRUCTIONS] (on a donation of securities, requiring no disclosure of the percentage of stock of the corporation currently and previously donated by the taxpayer and members of her family; moreover, when entering the fair market value of property on Form 8283, a supporting statement is only required if § 170 requires a reduction in the fair market value of the property, which is not the case for qualified appreciated stock).

¹⁴⁹ I.R.C. § 179(d)(2); *see id.* § 179(c)(1) (flush language) (generally delegating to the Treasury Department the task of prescribing the requirements for making a § 179 election); Treas. Reg. § 1.179-5(a) (flush language) (as amended in 1995) (requiring only that taxpayers “maintain records which permit specific identification of each piece of section 179 property and reflect how and from whom such property was acquired and when such property was placed in service”); *see* I.R.S. FORM 4562: DEPRECIATION AND AMORTIZATION, at 1 pt. 1 (2009) (requiring no disclosure of how and from whom § 179 property was acquired).

¹⁵⁰ I.R.C. § 221(d)(1) (flush language); *see* FORM 1040, *supra* note 26, at 1 l. 33 (requiring no reporting regarding the relationship between the taxpayer and her creditor); FORM 1040 INSTRUCTIONS, *supra* note 79, at 34 (same).

farming businesses and placed in service while the election is in effect)¹⁵¹

- Sections 263A, 269A, 280H, 441, 444, 465, 469, and 775 (all defining, in one form or another, “personal service corporation”)¹⁵²
- Section 274 (excepting certain entertainment expenses primarily for the benefit of non–highly compensated employees from disallowance)¹⁵³
- Sections 280A and 163 (determining whether a residence is used for personal purposes)¹⁵⁴

¹⁵¹ I.R.C. § 263A(d)(3), (c)(2); *see* Treas. Reg. § 1.263A-4(d)(3)(i) (as amended in 2000) (permitting a taxpayer to make the election out of capitalization merely by filing a return applying the relevant tax rules); *see* I.R.S. INSTRUCTIONS FOR SCHEDULE F (FORM 1040), at F-4 (2009) [hereinafter SCHEDULE F INSTRUCTIONS] (requiring no reporting); *see also* Treas. Reg. § 1.263A-4(d)(5), ex. 2 (as amended in 2000) (illustrating the application of the alternative depreciation system to persons related to the farmer making an election out of the capitalization rules of § 263A).

¹⁵² I.R.C. §§ 263A(h)(3)(D), 269A(b)(2), (3), 280H(f)(5), 441(i)(2), 444(f), 465(c)(7)(B)(ii), 469(j)(2), 775(b)(2)(A); *see* I.R.S. FORM 1065-B: U.S. RETURN OF INCOME FOR ELECTING LARGE PARTNERSHIPS (2009) (requiring no reporting regarding ownership by personal service corporations); I.R.S. FORM 1120: U.S. CORPORATION INCOME TAX RETURN, at 1 item A, box 3 (2009) (merely requiring a corporation to check a box if it qualifies as a personal service corporation); I.R.S. FORM 1120, SCHEDULE H: SECTION 280H LIMITATIONS FOR A PERSONAL SERVICE CORPORATION (2009) (requiring no reporting regarding the ownership of a personal service corporation); I.R.S. FORM 6198: AT-RISK LIMITATIONS (2009) (same); I.R.S. FORM 8716: ELECTION TO HAVE A TAX YEAR OTHER THAN A REQUIRED TAX YEAR (2008) (same); I.R.S. FORM 8820: CORPORATE PASSIVE ACTIVITY LOSS AND CREDIT LIMITATIONS (2009) (same); I.R.S. PUB. NO. 538, ACCOUNTING PERIODS AND METHODS 21 (2008) (describing the rules of § 263A(h), but making no mention of any reporting requirements).

¹⁵³ I.R.C. § 274(c)(4); *see* Temp. Treas. Reg. § 1.274-5T(c)(7)(ii) (as amended in 2010) (waiving the strict substantiation requirements that normally apply to entertainment expenses).

¹⁵⁴ I.R.C. §§ 280A(d)(2), 163(h)(4)(A)(i)(II); *see* I.R.S. FORM 8829: EXPENSES FOR BUSINESS USE OF YOUR HOME (2009) (requiring no reporting regarding the personal use of the home).

- Sections 302 and 356 (determining the tax consequences of actual redemptions of corporate stock as well as the fictive redemptions that determine the tax characterization of gain recognized by a shareholder in conjunction with an otherwise tax-free corporate reorganization)¹⁵⁵
- Section 304 (governing redemptions through related corporations)¹⁵⁶
- Section 306 (dealing with preferred stock bailouts)¹⁵⁷

¹⁵⁵ I.R.C. §§ 302(c), 356(a)(2); *cf.* I.R.S. Priv. Ltr. Rul. 91-15-019 (Apr. 12, 1991) (permitting a redeeming corporation to discharge its obligation to report dividend payments under I.R.C. § 6042 by filing a Form 1099-B along with an explanatory statement, in lieu of a Form 1099-DIV, where the corporation has insufficient facts to determine whether a distribution in redemption of stock will be characterized as a dividend at the shareholder level); I.R.S. Priv. Ltr. Rul. 90-15-012 (Apr. 13, 1990) (same with respect to an amount that might be recharacterized as a dividend under § 356(a)(2)).

A taxpayer who wishes to waive application of the family attribution rules of § 318(a)(1) in order to qualify for a redemption as an exchange under § 302(b)(3) must file an agreement with the IRS. I.R.C. § 302(c)(2). This agreement requires no reporting of the relationships that trigger attribution under § 318. Treas. Reg. § 1.302-4 (as amended in 2007). All “significant” shareholders must also file a statement with their returns upon redemption of stock; however, this statement need only include the fair market value and basis of the stock redeemed and a description of the property given by the corporation in exchange for that stock. *Id.* § 1.302-2(b)(2). Similarly, all “significant” shareholders must file a statement with their returns for the year in which a reorganization exchange occurred; again, however, this statement need only include the names and employer identification numbers of the corporate parties to the reorganization, the date of the reorganization exchange, and the fair market value and basis of the target corporation stock exchanged by the shareholder in the reorganization. *Id.* § 1.368-3(b) (2007).

¹⁵⁶ I.R.C. § 304(b)(1), (b)(3)(B)(iii)(I), (c)(3); *see supra* note 155.

¹⁵⁷ I.R.C. § 306(b)(1), (c)(4); *see* FORM 1040, *supra* note 26, at 1 ll. 9, 21 (requiring no reporting regarding § 306 stock); I.R.S. FORM 1040, SCHEDULE B: INTEREST AND ORDINARY DIVIDENDS, at 1 pt. II (2009) (same); I.R.S. FORM 1040, SCHEDULE D: CAPITAL GAINS AND LOSSES (2009) (same); FORM 1040 INSTRUCTIONS, *supra* note 79, at 22–23, 29 (same).

- Section 336 (disallowing losses on certain distributions of property to related persons in complete liquidation of a corporation)¹⁵⁸
- Section 354 (excepting nonqualified preferred stock from treatment as boot in the recapitalization of a family-owned corporation)¹⁵⁹
- Section 355 (addressing corporate divisions)¹⁶⁰
- Section 382 (preventing the trafficking of corporate losses)¹⁶¹
- Section 447 (requiring large corporations and partnerships with a corporate partner that are in the

¹⁵⁸ I.R.C. § 336(d)(1); *see* I.R.S. FORM 966: CORPORATE DISSOLUTION OR LIQUIDATION (2007) (requiring reporting only of the fact of liquidation); *see also* I.R.C. § 6043(a) (imposing this reporting requirement); Treas. Reg. § 1.6043-1 (as amended in 1983) (same); *see id.* § 1.6043-2(a) (as amended in 2007) (requiring a liquidating corporation to report the amount of liquidating distributions to its shareholders on Form 1099); *id.* § 1.331-1(d) (as amended in 2007) (under certain circumstances, requiring “significant” shareholders of a liquidating corporation to file a statement with their tax returns that includes a description of the property received in exchange for their surrendered stock); I.R.S. FORM 1099-DIV: DIVIDENDS AND DISTRIBUTIONS, at boxes 8–9 (2009) (requiring a liquidating corporation to report the dollar amount of cash and noncash liquidating distributions to shareholders).

¹⁵⁹ I.R.C. § 354(a)(2)(C); *see* Treas. Reg. § 1.368-3(b) (2007) (requiring “significant” shareholders to file a statement with their returns for the year in which a reorganization exchange occurs, but requiring no reporting regarding the status of the recapitalized corporation as family owned).

¹⁶⁰ I.R.C. § 355(d)(7)–(8), (c)(4)(C), (g)(2)(B)(ii)(III), (g)(3); *see* Treas. Reg. § 1.355-5 (2007) (requiring only minimal reporting regarding corporate divisions described in § 355).

¹⁶¹ I.R.C. § 382(f)(3); Temp. Treas. Reg. § 1.382-2T(h) (as amended in 2007); *see* Treas. Reg. § 1.382-11(a) (2007); *see id.* § 1.382-2T(a)(2)(ii) (as amended in 2007) (requiring the loss corporation to file a statement with its tax return for any taxable year in which an owner shift occurred, but not requiring the loss corporation to disclose information regarding the ownership of the corporation).

business of farming to use the accrual method of accounting)¹⁶²

- Section 460 (excepting closely held pass-through entities from required use of the simplified look-back method when reporting income from long-term contracts on the percentage of completion method)¹⁶³
- Section 464 (providing a family-based exception to the limitation on cash-method taxpayers' deductions for prepaid farm supplies)¹⁶⁴
- Section 465 (determining amounts considered at risk and carving out an exception from the at-risk rules for certain corporate taxpayers)¹⁶⁵

¹⁶² I.R.C. § 447(c), (h); *see* Treas. Reg. § 1.446-1(c) (as amended in 2006) (only requiring consent for a change in method of accounting, not for the adoption of a method of accounting); I.R.S. INSTRUCTIONS FOR FORM 3115, at 1 (2009) (same); *see also* I.R.S. PUB. NO. 225, FARMER'S TAX GUIDE 6 (2009) (making no mention of any reporting requirements under § 447 and merely referring taxpayers to § 447 for more details on the exception for family corporations).

¹⁶³ I.R.C. § 460(b)(4); *see* I.R.S. FORM 8697: INTEREST COMPUTATION UNDER THE LOOK-BACK METHOD FOR COMPLETED LONG-TERM CONTRACTS (2002) (requiring the taxpayer to indicate whether it is a pass-through entity, but not requiring the information necessary to determine whether that pass-through entity is closely held).

¹⁶⁴ I.R.C. § 464(f)(3)(B)(iii); *see* SCHEDULE F INSTRUCTIONS, *supra* note 151, at F-4 (making no mention of any reporting requirements and referring taxpayers to I.R.S. Pub. No. 225, *supra* note 162, for further discussion of § 464).

¹⁶⁵ I.R.C. § 465(b), (c)(7); *see* FORM 6198, *supra* note 152 (requiring no reporting regarding the source of financing or qualification for the exception from the at-risk rules for qualified C corporations).

- Section 468B (prescribing the tax treatment of designated settlement funds)¹⁶⁶
- Section 469 (excepting dispositions of a taxpayer's entire interest in a passive activity in a fully taxable transaction to an unrelated person from the passive activity limitations and excepting rental real estate activities in which the taxpayer materially participates from the per se passive activity rule if the taxpayer is a real estate professional)¹⁶⁷
- Section 483 (providing a cap on the rate used for calculating unstated interest on certain sales of business or investment land between family members)¹⁶⁸

¹⁶⁶ I.R.C. § 468B(d)(3); *see* Treas. Reg. §§ 1.468B-3(c) (as amended in 2006) (respectively, applying the rules of Treas. Reg. § 1.468B-3 to designated settlement funds and requiring the transferor to a qualified settlement fund to provide a statement to the administrator of the fund documenting transfers to the fund; notably, however, the transferor is not required to furnish any information regarding whether any amount transferred consists of stock or indebtedness of the transferor or a related person or may be transferred back from the fund to the transferor or a related person, either of which would render the payment ineligible for treatment as a "qualified payment" for purposes of § 468B); I.R.S. FORM 1120-SF: U.S. INCOME TAX RETURN FOR SETTLEMENT FUNDS (UNDER SECTION 468B) (2007) (requiring no reporting that relates directly to the sundry "related person" prohibitions in § 468B).

¹⁶⁷ I.R.C. § 469(c)(7)(D)(ii), (g)(1); *see* I.R.S. FORM 8582: PASSIVE ACTIVITY LOSS LIMITATIONS (2009) (requiring no reporting regarding the identity of the purchaser of the taxpayer's interest in a passive activity or the taxpayer's ownership interest if an employee in a rental real estate business); I.R.S. INSTRUCTIONS FOR FORM 8582, at 2, 6-7 (2009) (same); I.R.S. FORM 8810: CORPORATE PASSIVE ACTIVITY LOSS AND CREDIT LIMITATIONS (2009) (requiring no reporting regarding the identity of the purchaser of the taxpayer's interest in a passive activity); I.R.S. INSTRUCTIONS FOR FORM 8810, at 5 (2009) (same).

¹⁶⁸ I.R.C. § 483(c); *see id.* §§ 483(g)(3), 1275(b) (excepting debt instruments received in exchange for the transfer of personal use property from the purview of § 483); *id.* § 6049(b)(2)(A) (excepting from information reporting interest on obligations issued by natural persons); I.R.S. FORM 1099-S: PROCEEDS FROM REAL ESTATE TRANSACTIONS (2009) (requiring no reporting of unstated interest).

- Section 613A (requiring the volume cap on percentage depletion for oil and gas wells available to independent producers and royalty owners to be split among family members and commonly controlled entities)¹⁶⁹
- Section 631 (disqualifying dispositions of coal or iron ore subject to a retained economic interest that are made to a related person from eligibility for inclusion in the § 1231 hotchpot)¹⁷⁰
- Section 988 (expanding the definition of § 1256 contracts for electing qualified funds and prescribing their tax treatment)¹⁷¹
- Section 1060 (authorizing the IRS to require reporting of employment contracts, covenants not to compete, royalty and lease agreements, or other similar arrangements entered into by a 10% owner of an entity—or a person related to the 10% owner

¹⁶⁹ I.R.C. § 613A(c)(8); *see* Treas. Reg. § 1.613A-6 (1977) (imposing limited recordkeeping requirements that do not touch on the sharing of the volume cap by commonly controlled entities and family members); I.R.S. PUB. NO. 535, BUSINESS EXPENSES 32–37 (2009) (making no mention of reporting requirements).

¹⁷⁰ I.R.C. § 631(c); *see* I.R.S. FORM 4797: SALES OF BUSINESS PROPERTY, at 1 pt. I, l. 2 (2009) (requiring no reporting regarding the purchaser's identity or relationship to the taxpayer); I.R.S. INSTRUCTIONS FOR FORM 4797, at 5 (2009) [hereinafter FORM 4797 INSTRUCTIONS] (same).

¹⁷¹ I.R.C. § 988(c)(1)(E); *see* Treas. Reg. § 1.988-1(a)(8)(iv) (as amended in 2001) (prescribing the requirements for making an election to be treated as a qualified fund, but requiring no information regarding the ownership of the partnership making the election).

—in connection with a transfer of an interest in the entity)¹⁷²

- Section 1202 (denying the exclusion of gain on the sale or exchange of qualified small business stock when the corporation has redeemed more than a de minimis amount of stock from the taxpayer or a related person or entered into an offsetting short position prior to the time when the requisite five-year holding period has been met)¹⁷³
- Section 1235 (extending long-term capital gain or loss treatment to certain transfers of patent rights to unrelated persons)¹⁷⁴
- Section 1237 (permitting certain subdivided real property to be treated as property not held primarily for sale to customers in the ordinary course of business—and, therefore, to potentially become eligible for long-term capital gain or loss treatment)¹⁷⁵

¹⁷² I.R.C. § 1060(c). Regulations have yet to be issued implementing this reporting requirement. Mark J. Silverman, *Purchase Price Allocation Rules: Sections 1060, 338 and 197*, in STRATEGIES FOR ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS RESTRUCTURINGS 2009, at 803, 830 (PLI Tax Law Estate Planning, Course Handbook Ser. No. 878, 2009); see I.R.S. FORM 8594: ASSET ACQUISITION STATEMENT UNDER SECTION 1060, at I l. 6 (2006) (making no mention of reporting regarding 10% owners or persons related to them).

¹⁷³ I.R.C. § 1202(c)(3), (j) (2010); see Treas. Reg. § 1.1202-2(a) (1997) (providing the de minimis exception to § 1202(c)(3)); I.R.S. INSTRUCTIONS FOR SCHEDULE D (FORM 1040), at D-5 (2009) [hereinafter SCHEDULE D INSTRUCTIONS] (setting forth the manner for reporting § 1202 gain).

¹⁷⁴ I.R.C. § 1235(d); see FORM 1040, SCHEDULE D, *supra* note 157 (requiring no special reporting regarding dispositions of patents, let alone reporting regarding transfers to related persons); SCHEDULE D INSTRUCTIONS, *supra* note 173 (same); FORM 4797, *supra* note 170 (same); FORM 4797 INSTRUCTIONS, *supra* note 170 (same).

¹⁷⁵ I.R.C. § 1237(a)(2)(A); see FORM 1040, SCHEDULE D, *supra* note 157 (requiring no reporting regarding subdivided real property); SCHEDULE D INSTRUCTIONS, *supra* note 173, at D-3 (same).

- Section 1239 (applying ordinary income treatment to gain on the sale or exchange of depreciable property between related persons)¹⁷⁶
- Section 1259 (deeming an appreciated financial position to have been sold when the taxpayer or a related person enters into an offsetting position)¹⁷⁷
- Section 1366 (permitting the IRS to make adjustments if an S corporation shareholder furnishes capital or services to the corporation and does not receive reasonable compensation therefor and the shareholder has family members who are also shareholders of the S corporation)¹⁷⁸
- Section 1372 (in many cases, preventing an S corporation shareholder from excluding fringe benefits from gross income because the S corporation is treated as a partnership and 2% shareholders of the S corporation are treated as partners for purposes of applying tax rules concerning fringe benefits)¹⁷⁹

¹⁷⁶ I.R.C. § 1239(b)-(c); see FORM 4797, *supra* note 170 (requiring no reporting regarding sales or exchanges of depreciable property between related persons); FORM 4797 INSTRUCTIONS, *supra* note 170 (same).

¹⁷⁷ I.R.C. § 1259(c)(4); see I.R.S. PUB. NO. 550, INVESTMENT INCOME AND EXPENSES 40 (2009) (making no mention of any special reporting requirements for constructive sales of appreciated financial positions); FORM 1040, SCHEDULE D, *supra* note 157 (same); SCHEDULE D INSTRUCTIONS, *supra* note 173, at D-3 (same).

¹⁷⁸ I.R.C. § 1366(c); see I.R.S. INSTRUCTIONS FOR FORM 1120-S, at 15 (2009) [hereinafter FORM 1120-S INSTRUCTIONS] (describing § 1366(c), but making no mention of any associated reporting requirements).

¹⁷⁹ I.R.C. § 1372(b); see JAMES S. EUSTICE JOEL D. KUNTZ, FEDERAL INCOME TAXATION OF S CORPORATIONS ¶ 11.04 (2009), available at 1999 WL 597165 (explaining these rules); see also I.R.S. FORM 1120-S: U.S. INCOME TAX RETURN FOR AN S CORPORATION (2009) (requiring no identification of 2% shareholders of the corporation); FORM 1120-S INSTRUCTIONS, *supra* note 178, at 15 (same).

- Section 1400B (rendering related-party transactions ineligible for the 0% capital gains rate applicable to DC zone assets)¹⁸⁰
- Section 1400C (rendering related-party transactions ineligible for the DC first-time homebuyer credit)¹⁸¹
- Section 4985 (imposing an excise tax on stock compensation of insiders in expatriated corporations)¹⁸²

4. Limited Documentation Required

A much smaller group of provisions incorporate the § 267 or § 318 attribution rules by reference and impose some limited reporting or documentation requirements. In this section, I describe these provisions and their associated reporting requirements. Notably, none of the provisions described below requires meaningful or significant reporting of the familial or other relationships that cause a taxpayer to be treated as constructively owning property.

Section 108(e)(4) prevents a taxpayer from avoiding discharge of indebtedness income by treating a related person's acquisition of a taxpayer's debt as the acquisition of the debt by the taxpayer herself. For purposes of determining which persons will be considered related to the taxpayer/debtor, § 108(e)(4) applies a modified version of the § 267 attribution rules.¹⁸³ The Treasury regulations require only limited reporting with regard to this antiabuse rule. The taxpayer/debtor must file a statement

¹⁸⁰ I.R.C. § 1400B(c)(5); see SCHEDULE D INSTRUCTIONS, *supra* note 173, at D-6 (requiring no reporting regarding the identity of the purchaser of the DC zone asset).

¹⁸¹ I.R.C. § 1400C(c)(2)(A); see I.R.S. FORM 8859: DISTRICT OF COLUMBIA FIRST-TIME HOMEBUYER CREDIT (2009) (requiring no reporting regarding the identity of the seller of the DC zone asset).

¹⁸² I.R.C. § 4985(a)(2); see FORM 1040 INSTRUCTIONS, *supra* note 79, at 46 (making no mention of any reporting requirements regarding related persons); I.R.S. PUB. NO. 525, TAXABLE AND NONTAXABLE INCOME 11 (2009) (same).

¹⁸³ I.R.C. § 108(c)(4)(A)–(B).

with her return explaining why the holder of her debt did not acquire that debt in anticipation of becoming related to the taxpayer/debtor if either (1) the debt constitutes 25% or more of the fair market value of the total gross assets of the "holder group" or (2) the holder acquires the debt six months or more but less than twenty-four months prior to the time the holder became related to the taxpayer/debtor.¹⁸⁴ Outside of these two circumstances, no specific reporting is required under § 108(e)(4).

Section 170(a)(3) postpones the deduction for a charitable contribution of a future interest in tangible property until such time as all intervening interests in the property have either expired or are held by persons other than the taxpayer or persons related to the taxpayer.¹⁸⁵ The IRS does require the taxpayer/donor of a partial interest in property to disclose the location where the property is kept as well as the identity of any person (other than the donee charitable organization) that has actual possession of the property.¹⁸⁶ There is, however, no requirement that the taxpayer/donor indicate whether the person with actual possession of the property is a related person or whether any persons who have an interest in the property (other than the charitable organization) are related to the taxpayer/donor.¹⁸⁷ Even in the case of property for which a charitable contribution deduction of more than \$5000 is claimed, neither the qualified appraisal that must be retained by the taxpayer/donor nor the qualified appraisal summary that must be provided to the IRS requires the disclosure of the relationship between the taxpayer/donor and others to whom an interest in the property has been reserved.¹⁸⁸

¹⁸⁴ Treas. Reg. § 1.108-2(c)(4) (1992).

¹⁸⁵ See Treas. Reg. § 1.170A-5(a)(1) (as amended in 1994).

¹⁸⁶ FORM 8283, *supra* note 148, at I § A, pt. II, ll. 2(d)-(c).

¹⁸⁷ *Id.*; FORM 8283 INSTRUCTIONS, *supra* note 148, at 4.

¹⁸⁸ Treas. Reg. § 1.170A-13(c)(3)(D)(2), -13(c)(4)(ii) (as amended in 1996); FORM 8283, *supra* note 148, at 2 § B.

Section 280F limits the ability of taxpayers to make the § 179 election to expense property and provides less generous depreciation rules with respect to “listed property” (e.g., passenger automobiles, entertainment property, computers, and cellular telephones) that is “not predominantly used in a qualified business use.”¹⁸⁹ For this purpose, neither leasing listed property to a 5% owner or a related person nor providing the use of listed property to a 5% owner or related person as compensation for personal services constitutes a “qualified business use.”¹⁹⁰ The determination of whether an individual is a 5% owner or a related person is accomplished through the application of attribution rules.¹⁹¹ Though the taxpayer is not required to identify and document 5% owners and related persons, taxpayers are required to report whether listed property is predominantly used in a qualified business use and to indicate whether they have evidence to support the claimed business use of the property.¹⁹²

Section 643(i) provides that if a foreign trust makes a loan of cash or marketable securities (or permits the use of other trust property) to a person related to a U.S. grantor or U.S. beneficiary of the trust, then the amount of the loan (or the fair market value of the use of the property) will be treated as a distribution to the related U.S. grantor or U.S. beneficiary of the foreign trust. Both the foreign trust and the U.S. grantor or U.S. beneficiary who is deemed to receive this constructive distribution from the trust must report the distribution to the IRS.¹⁹³ Nonetheless, neither the foreign trust nor the U.S.

¹⁸⁹ I.R.C. § 280F(b)(1), (d)(1).

¹⁹⁰ *Id.* § 280F(d)(6)(C)(i).

¹⁹¹ *Id.* § 280F(d)(6)(D).

¹⁹² FORM 4562, *supra* note 149, at 2 pt. V; *see* I.R.C. § 274(d)(4) (imposing substantiation requirements on deductions for listed property); Temp. Treas. Reg. § 1.274-5T(d)(2)–(3) (as amended in 2010) (providing the authority for requiring the disclosure of information on Form 4562).

¹⁹³ I.R.S. FORM 3520-A: ANNUAL INFORMATION RETURN OF FOREIGN TRUST WITH A U.S. OWNER, at 2 pt. II, l. 17 (2009); I.R.S. FORM 3520: ANNUAL RETURN TO REPORT TRANSACTIONS WITH FOREIGN TRUSTS AND RECEIPT OF CERTAIN FOREIGN GIFTS, at 4 pt. III, ll. 25–28 (2009).

grantor or U.S. beneficiary is required to identify the related person to whom the loan was made that triggered the constructive distribution.¹⁹⁴

Section 707(b)(1) disallows losses on sales or exchanges of property between (1) a partnership and a person who owns more than 50% of the capital or profits interests in the partnership and (2) commonly controlled partnerships (i.e., partnerships in which the same persons own more than 50% of the capital or profits interests). Section 707(b)(2) recharacterizes as ordinary income gain on the sale or exchange of property between these same two classes of persons where the property is not a capital asset in the hands of the transferee. For purposes of both of these provisions, ownership of the partnership's (or partnerships') capital and profits interests is determined using a modified version of the constructive ownership rules in § 267(c).¹⁹⁵ As part of its annual return, a partnership is required to identify and document individuals and entities that own 50% or more of its capital or profits interests (applying constructive ownership rules).¹⁹⁶ Nevertheless, no reporting is required regarding transactions between the partnership and controlling individuals and entities or between the partnership and other partnerships under common control.¹⁹⁷

Section 1033 permits a taxpayer whose property has been compulsorily or involuntarily converted into money (or into

¹⁹⁴ FORM 3520-A, *supra* note 193, at 2 pt. II, l. 17; FORM 3520, *supra* note 193, at 4 pt. III, ll. 25–28; *see* I.R.C. 6048(c) (providing the authority for these information-reporting requirements); I.R.S. Notice 97-34, § V.A., 1997-1 C.B. 422 (providing guidance on the reporting requirements under § 6048(c)).

¹⁹⁵ I.R.C. § 707(b)(3).

¹⁹⁶ I.R.S. FORM 1065, SCHEDULE B-I: INFORMATION ON PARTNERS OWNING 50% OR MORE OF THE PARTNERSHIP (2009).

¹⁹⁷ *Id.*; FORM 1040, SCHEDULE D, *supra* note 157; I.R.S. FORM 1065: U.S. RETURN OF PARTNERSHIP INCOME, at 4 sched. K (2009); I.R.S. FORM 1065, SCHEDULE D: CAPITAL GAINS AND LOSSES (2009); I.R.S. FORM 1065, SCHEDULE K-I: PARTNER'S SHARE OF INCOME DEDUCTIONS, CREDITS, ETC. (2009); FORM 4797, *supra* note 170; *see* I.R.S. INSTRUCTIONS FOR FORM 1065, at 37–40 (2009) [hereinafter FORM 1065 INSTRUCTIONS] (listing the items to be included in the catch-all category of line 20c on Schedule K, but not mentioning § 707(b) transactions).

property that is not similar to the converted property) to elect to postpone the recognition of gain, provided that the taxpayer purchases replacement property (or stock in a corporation that owns such property) within a specified time frame.¹⁹⁸ To prevent the taxpayer from "obtain[ing] significant (and possibly indefinite or permanent) tax deferral without any additional cash outlay to acquire new properties,"¹⁹⁹ § 1033(i) generally prohibits C corporations, certain partnerships with corporate partners, and other taxpayers with large gains from involuntary conversions from electing to postpone the recognition of gain if the taxpayer purchased the replacement property from a related person. No form is provided for making a § 1033 election; rather, the regulations provide:

All of the details in connection with an involuntary conversion of property at a gain (including those relating to the replacement of the converted property, or a decision not to replace, or the expiration of the period for replacement) shall be reported in the return for the taxable year or years in which any of such gain is realized.²⁰⁰

The regulations make no specific mention of any need to identify the person from whom the taxpayer acquired the replacement property. This is not surprising because these regulations were last amended prior to the enactment of § 1033(i).²⁰¹ What is surprising, however, is that the relevant publication explaining these rules to taxpayers was produced more than a decade after the enactment of § 1033(i) and explains the effect of § 1033(i), but still makes no mention of identifying the person from whom replacement property was acquired as a

¹⁹⁸ I.R.C. § 1033(a)(2).

¹⁹⁹ JOINT COMM. ON TAX'N, PUB. NO. JCS-12-96, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 104TH CONGRESS 10 (1996).

²⁰⁰ Treas. Reg. § 1.1033(a)-2(c)(2) (as amended in 1981); *see also* I.R.S. PUB. NO. 544, SALES AND OTHER DISPOSITIONS OF ASSETS 10 (2010).

²⁰¹ The regulations were last amended in 1981, *see supra* note 200, while § 1033(i) was not enacted until 1995. Act of Apr. 11, 1995, Pub. L. No. 104-7, § 3, 109 Stat. 93, 94.

necessary "detail" that should be addressed in the statement making the election to postpone gain.²⁰² Indeed, notwithstanding the categorical tone of the text quoted above, the regulations actually permit a taxpayer to make an effective election to postpone gain without providing *any* details regarding the involuntary conversion of her property at all.²⁰³

Section 5881 imposes a 50% excise tax on so-called greenmail payments. The tax applies to a corporation's direct or indirect acquisition of its stock from a shareholder who has held her stock for less than two years, provided that (1) the acquisition of the stock is not on terms available to all of the corporation's shareholders and (2) either the shareholder, someone acting in concert with the shareholder, or someone related to the shareholder or a person acting in concert with the shareholder made (or threatened to make) a public tender offer for the corporation's stock during the two-year period prior to the acquisition.²⁰⁴ The taxpayer reports the greenmail transaction and calculates the excise tax on Form 8725.²⁰⁵ This form requires absolutely no reporting about the identity of the person who made (or threatened to make) the public tender offer—whether it was the taxpayer herself, someone acting in concert with her, or a related person.²⁰⁶

In the international area, which is notoriously open to arbitrage of the differential taxation of U.S. and foreign persons,

²⁰² I.R.S. PUB. NO. 544, *supra* note 200, at 8–9, 10.

²⁰³

A failure to so include such gain in gross income in the regular manner shall be deemed to be an election by the taxpayer to have such gain recognized only to the extent provided in subparagraph (1) of this paragraph *even though the details in connection with the conversion are not reported in such return.*

Treas. Reg. § 1.1033(a)-2(c)(2) (as amended in 1981) (emphasis added).

²⁰⁴ I.R.C. § 5881(b) (LEXIS through July 2010 amendments).

²⁰⁵ I.R.S. FORM 8725: EXCISE TAX ON GREENMAIL (2008).

²⁰⁶ *Id.*

attribution of ownership rules play a key role in preventing abuse.²⁰⁷ Accordingly, for purposes of the Subpart F rules, a modified version of the § 318 attribution rules applies in determining (1) whether a foreign corporation qualifies as a “controlled foreign corporation,” (2) whether a taxpayer will be classified as a “U.S. shareholder” of that controlled foreign corporation, and (3) the amount of a U.S. shareholder’s income inclusion with respect to her stock in the controlled foreign corporation.²⁰⁸ The § 267 attribution rules apply in determining whether income from the factoring of a related person’s receivables will be recharacterized as interest income for purposes of both the Subpart F rules and the foreign tax credit limitation under § 904.²⁰⁹ In addition, the § 318 attribution rules apply to prevent taxpayers from circumventing the recognition of gain on an outbound § 351 exchange by instead contributing property to the capital of a foreign corporation.²¹⁰ Furthermore, both the § 267 and § 318 attribution rules apply in determining whether certain income from U.S.-owned foreign corporations should be recharacterized as arising from domestic sources for purposes of the foreign tax credit limitation under § 904.²¹¹

Nonetheless, §§ 6038 and 6046 require only limited information reporting by shareholders of foreign corporations regarding their ownership of those corporations.²¹² Section 6038 requires information reporting only by U.S. controlling shareholders (i.e., those who own more than 50% of the total combined voting power or total value of the foreign corporation

²⁰⁷ Given the unique administrative issues raised by taxing nonresident aliens and other foreign persons, I have confined my discussion here to the portions of the U.S. international tax regime that concern the foreign activities of U.S. persons. See 2 JOEL D. KUNTZ ROBERT J. PERONI, U.S. INTERNATIONAL TAXATION ¶ C2.01 (2005).

²⁰⁸ I.R.C. §§ 951(b), 954(d)(3), 956(c)(2), 957, 958(b).

²⁰⁹ *Id.* § 864(d).

²¹⁰ *Id.* § 367(c)(2).

²¹¹ *Id.* § 904(h).

²¹² *Id.* § 6038(a).

for an uninterrupted period of 30 days during the year),²¹³ and § 6046 requires information reporting only by those U.S. shareholders of a foreign corporation who experience a significant change in their stock ownership (i.e., an acquisition or disposition of stock that causes them to move across the threshold of 10% ownership or, for a shareholder already above that threshold, an acquisition of an additional 10% or greater block of stock in the foreign corporation).²¹⁴ This limited group of shareholders must report the name, address, and identifying number of all U.S. 10% shareholders of the foreign corporation along with information regarding the U.S. 10% shareholders' ownership of stock in the foreign corporation and share of corporate income subject to current inclusion under the controlled foreign corporation rules.²¹⁵ Even though §§ 6038 and 6046 both employ constructive ownership rules in determining which shareholders are subject to these reporting requirements²¹⁶ and, as mentioned above, attribution rules play an important role in the operation of the substantive controlled foreign corporation rules and the rules regarding outbound contributions to the capital of foreign corporations, no reporting is required with respect to constructive ownership of *any* U.S. shareholder of the foreign corporation. Reporting is required *only* with respect to U.S. shareholders who directly or indirectly own 10% or more (measured by vote or value) of the stock of the foreign corporation.²¹⁷

²¹³ *Id.* § 6038(a), (c)(2).

²¹⁴ *Id.* § 6046(a)(1)(B); see Treas. Reg. § 1.6046-1(c)(1) (as amended in 2008).

²¹⁵ Treas. Reg. §§ 1.6038-2(a)(2), (f)(9) (as amended in 2008), 1.6046-1(b)(14), (c)(3)(i) (as amended in 2008); I.R.S. FORM 5471: INFORMATION RETURN OF U.S. PERSONS WITH RESPECT TO CERTAIN FOREIGN CORPORATIONS, at 2 sched. B (2007).

²¹⁶ I.R.C. §§ 6038(c)(2), 6046(c).

²¹⁷ I.R.S. INSTRUCTIONS FOR FORM 5471, at 5 (2009) [hereinafter FORM 5471 INSTRUCTIONS]; see I.R.C. § 6046(c) (indicating that constructive ownership is to be taken into account only for purposes of § 6046(a)); Treas. Reg. §§ 1.6038-2(c) (flush language), (f)(9) (as amended in 2008) (indicating that constructive ownership rules apply only for purposes of determining whether the reporting threshold has been met); 1.6046-1(b)(14), (c)(3)(i) (as amended in 2008) (speaking in terms of "actual" and "record" owners).

Moreover, the reporting that does apply to transactions between a controlled foreign corporation and related persons²¹⁸—transactions that underpin a large part of a controlled foreign corporation's Subpart F income—is triggered only by the existence of a single controlling U.S. shareholder,²¹⁹ even though the class of related persons under § 954(d)(3) is not confined by geography and embraces entities under the common control of more than one person.²²⁰ Making the reporting gaps even larger, the form on which this reporting is done does not contain a separate entry for related person factoring income that is recharacterized as interest income for purposes of the Subpart F rules.²²¹ Furthermore, this reporting requirement is wholly insufficient with regard to policing the re-sourcing rules for certain income from U.S.-owned foreign corporations, as the definition of U.S.-owned foreign corporation in § 904(h)(6) is even broader than the definition of "controlled foreign corporation" in the Subpart F rules.²²²

5. Documentation Required

Only a handful of provisions incorporate the § 267 or § 318 attribution rules by reference and actually include an identification or documentation requirement. For instance, to obtain the (now expired) first-time homebuyer credit in § 36, a taxpayer must file Form 5405, which requires the taxpayer to

²¹⁸ I.R.S. FORM 5471, SCHEDULE M: TRANSACTIONS BETWEEN CONTROLLED FOREIGN CORPORATIONS AND SHAREHOLDERS OR OTHER RELATED PERSONS (2007).

²¹⁹ See FORM 5471 INSTRUCTIONS, *supra* note 217, at 2 (indicating that only category 4 filers are required to complete Schedule M).

²²⁰ Treas. Reg. § 1.954-1(f) (as amended in 2002).

²²¹ FORM 5471, SCHEDULE M, *supra* note 218.

²²² Compare I.R.C. § 904(h)(6), with *id.* § 957; see 1 KUNTZ PERONI, *supra* note 207, ¶ B4.16[17][b][ii]. The forms for claiming the foreign tax credit appear to do nothing to fill in this gap. See I.R.S. FORM 1116: FOREIGN TAX CREDIT (INDIVIDUAL, ESTATE, OR TRUST) (2009); I.R.S. FORM 1118: FOREIGN TAX CREDIT—CORPORATIONS (2009).

certify that her home was not purchased from a related person.²²³ The taxpayer is also required by statute to attach to her return a copy of the executed settlement statement relating to the purchase as a prerequisite to obtaining the credit.²²⁴ In addition, the installment sale rules of § 453 contain antiabuse rules targeted at potentially manipulative sales of property between related persons.²²⁵ A taxpayer reporting gain on the installment method must file Form 6252, which contains a section that specifically addresses related party installment sales. The first line of this section requires the taxpayer to identify the name, address, and taxpayer identification number of the related purchaser of the property.²²⁶ And § 1031(f) contains an antiabuse rule that is designed to prevent related persons from engaging in a like-kind exchange in order to shift the basis of properties prior to an anticipated sale.²²⁷ The IRS requires taxpayers to make relatively detailed reports regarding such related party exchanges, including documenting the identity of the related party to the exchange.²²⁸

B. Other Attribution Rules

²²³ I.R.C. § 36(c)(3), (5); Homebuyer Assistance and Improvement Act of 2010, Pub. L. No. 111-198, § 2, 124 Stat. 1356, 1356 (to be codified at I.R.C. § 36); (extending the application of the credit to home purchases completed before October 1, 2010); I.R.S. FORM 5405: FIRST-TIME HOMEBUYER CREDIT AND REPAYMENT OF THE CREDIT, at 1 pt. I, l. E (2009).

²²⁴ I.R.C. § 36(d)(4).

²²⁵ *Id.* § 453(c), (f)(1), (g), (h).

²²⁶ I.R.S. FORM 6252: INSTALLMENT SALE INCOME, at 1 pt. III, l. 27 (2009). The § 453(f)(1) definition of related person also applies in determining whether a sale of a residential lot by a dealer will qualify for installment sale reporting, while a different attribution rule applies in determining whether a sale of a time-share by a dealer will qualify for installment sale reporting. I.R.C. § 453(f)(2)(B). However, neither of these rules comes with any special reporting requirements akin to those that apply to related person sales. *See* I.R.S. PUB. NO. 537, INSTALLMENT SALES 2 (2009) (simply referring taxpayers to § 453(f) for further information and mentioning no reporting requirements).

²²⁷ *See* H.R. REP. NO. 101-247, at 1340 (1989), *reprinted in* 1989 U.S.C.A.N. 1906, 2810 (explaining the rationale behind the enactment of § 1031(f)).

²²⁸ I.R.S. FORM 8824: LIKE-KIND EXCHANGES, at 1 pt. II (2009).

Though §§ 267 and 318 are the most commonly encountered attribution rules in the Code, there are a few provisions with their own unique attribution rules. In this section, I briefly describe these attribution rules and their attendant identification and documentation requirements (if any). I first describe generally applicable attribution rules and then address rules that apply only to married different-sex couples. The identification and documentation requirements in these attribution rules share the same haphazard quality as the family tax provisions discussed in Part II of this Article.

3. General Attribution Rules

Section 541 imposes a personal holding company tax on the undistributed, generally passive income of corporations. As originally conceived, the personal holding company tax targeted corporations that functioned as incorporated pocketbooks, incorporated talents, or incorporated yachts or country estates to provide their shareholders a means of avoiding taxation at the (then higher) graduated rates that applied to individuals.²²⁹ To be classified as a personal holding company, a corporation must meet both an income test and an ownership test.²³⁰ The ownership test requires that more than 50% of the value of the corporation's stock must be held by five or fewer individuals.²³¹ For purposes of determining whether this ownership test has been satisfied, § 544 requires taxpayers to take into account its own special set of constructive ownership rules.²³² Given the central importance of the ownership requirement to

²²⁹ BORIS I. BITTKER, JAMES S. EUSTICE, *FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS* ¶ 7.20 (2009), available at 1999 WL 516532.

²³⁰ I.R.C. § 542(a).

²³¹ *Id.* § 542(a)(2).

²³² As they relate to family attribution, these constructive ownership rules also apply for purposes of determining whether a corporation qualifies for the exceptions from classification as a personal service corporation for certain lending or finance companies and for certain small business investment companies. *Id.* § 542(c)(6)-(7), (d). Naturally, a corporation that qualifies for these exceptions does not have to undertake the reporting described in the text below.

classification as a personal holding company, it should not be surprising that there is a section of the personal holding company tax return that requires the corporation to identify the name and address of each of the shareholders who comprise the requisite five or fewer individuals who own more than 50% of the value of its stock.²³³ Interestingly, this same stock ownership requirement is incorporated by reference in the at-risk rules of § 465 (including a modified version of the constructive ownership rules), and it there serves the important role of setting the outside parameters of the class of closely held corporations subject to those rules.²³⁴ Yet, there is no requirement that corporate taxpayers document which shareholders cause them to be subject to the at-risk rules.²³⁵ The same is true of the passive activity rules, which indirectly borrow the personal holding company stock ownership requirement by incorporating by reference the definition of closely held corporation from § 465.²³⁶

Section 1256 contains mark-to-market rules that require taxpayers to annually recognize as gain or loss any unrealized appreciation or depreciation in regulated futures, foreign currency, and certain other contracts.²³⁷ Hedging transactions are, however, excepted from this mark-to-market regime “to ensure that § 1256 does not impede valuable functions served by the commodity futures markets” to the agricultural and commercial sectors in reducing the risks associated with the sale of crops and the bulk purchase of items.²³⁸ Nevertheless, to prevent manipulation of the hedging exception by tax shelters,

²³³ I.R.S. FORM 1120, SCHEDULE PH: U.S. PERSONAL HOLDING COMPANY (PHC) TAX, at 2 pt. IV (2009).

²³⁴ I.R.C. § 465(a)(1)(B), (3).

²³⁵ See FORM 6198, *supra* note 152.

²³⁶ I.R.C. § 469(a)(2), (j)(1); Temp. Treas. Reg. § 1.469-1T(g)(2)(ii) (as amended in 2002); see FORM 8810, *supra* note 167 (requiring no reporting regarding the ownership of the corporation).

²³⁷ I.R.C. § 1256(a), (b).

²³⁸ *Id.* § 1256(c)(1); BITTKER LOKKEN, *supra* note 123, ¶ 57.2.2, available at 1997 WL 439779.

"syndicates" are made ineligible for the exception.²³⁹ For this purpose, a "syndicate" is defined as any entity other than a C corporation if "more than 35 percent of the losses of such entity during the taxable year are allocable to limited partners or limited entrepreneurs."²⁴⁰ Individuals who actively participate in the business and certain relatives of individuals who actively participate in the business are not classified as limited partners or limited entrepreneurs for this purpose.²⁴¹ Though recordkeeping requirements do apply to hedging transactions, these recordkeeping requirements do not include information relating either to an entity's qualification as a "syndicate" or to the application of the rule attributing one person's active participation in the business to certain of her relatives.²⁴²

To be eligible to elect treatment as a small business (i.e., "S") corporation, a domestic corporation is not permitted to have more than 100 shareholders.²⁴³ For purposes of this requirement, all members of a family are now treated as a *single* shareholder.²⁴⁴ Adding to the generosity of this provision, § 1361 has its own, rather broad definition of family. It includes (1) a husband and wife and (2) a common ancestor who is up to six generations removed from the youngest generation of shareholders who would be members of the family along with any lineal descendants (and spouses or former spouses of lineal descendants) of that common ancestor (without any generational

²³⁹ I.R.C. § 1256(c)(3)(A); see BITTKER LOKKEN, *supra* note 123, ¶ 57.2.2, available at 1997 WL 439779.

²⁴⁰ I.R.C. § 1256(c)(3)(B).

²⁴¹ *Id.* § 1256(c)(3)(C).

²⁴² Treas. Reg. § 1.1221-2(f) (as amended in 2007) (containing the identification and recordkeeping requirements for hedging transactions); *id.* § 1.1256(c)-1 (as amended in 2002) (incorporating the identification and recordkeeping requirements of Treas. Reg. § 1.1221-2(f) by reference and applying them to hedging transactions under § 1256(c)).

²⁴³ I.R.C. § 1361(b)(1)(A).

²⁴⁴ *Id.* § 1361(c)(1). Congress expanded this provision beyond only a husband and wife in 2004. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 231(a), 118 Stat. 1418, 1433.

limit).²⁴⁵ When filing an S election, the name and address of each consenting shareholder must be included with the election.²⁴⁶ If more than 100 shareholders are included on the list, a box must be checked to indicate that application of the family attribution rule of § 1361 brings the number of shareholders below the maximum of 100.²⁴⁷ However, no details are required concerning which shareholders are related to each other, the exact number of shareholders after application of the attribution rules, or how the attribution rules were applied.²⁴⁸

The so-called kiddie tax is essentially another form of attribution rule, as it is designed to prevent parents from assigning unearned income to their minor children in order to get a second (or third or fourth) bite at the lower brackets in the graduated rate schedule.²⁴⁹ The kiddie tax combats this abuse by effectively attributing the income back to the parent; in other words, the minor child's unearned income is taxed at the parent's marginal tax rate.²⁵⁰ In fact, in some circumstances, the parent can simply elect to report the minor child's unearned income on her own tax return.²⁵¹ If the kiddie tax applies to a minor child's unearned income, the child's parent is required to furnish to the child his/her taxpayer identification number, and the child is required to include that taxpayer identification number on his/her own return.²⁵²

²⁴⁵ I.R.C. § 1361(c)(1)(B); Treas. Reg. § 1.1361-1(c)(3) (as amended in 2008).

²⁴⁶ I.R.S. FORM 2553: ELECTION BY A SMALL BUSINESS CORPORATION, at 2 (2007).

²⁴⁷ *Id.* at 1 pt. 1, l. G.

²⁴⁸ *Id.*; see I.R.S. INSTRUCTIONS FOR FORM 2553 (2007) (making no mention of any reporting requirements).

²⁴⁹ I.R.C. § 1(g); see BITTKER LOKKEN, *supra* note 123, ¶ 111.3.8, available at 1997 WL 440072.

²⁵⁰ I.R.C. § 1(g)(1), (3), (4).

²⁵¹ *Id.* § 1(g)(7).

²⁵² *Id.* § 1(g)(6).

Assignment of income concerns are also the impetus behind § 704(e), which deals with family partnerships. Under § 704(e)(1), a person will be recognized as a partner in a partnership in which capital is a material income-producing factor, no matter whether that person's partnership interest was acquired by purchase or by gift. If a partnership interest is created by gift, then § 704(e)(2) requires that an allocation be made to the donor in an amount equal to reasonable compensation for any services that the donor renders to the partnership.²⁵³ Section 704(e)(2) further requires that the donee's distributive share of partnership income not be proportionately greater than the donor's distributive share with respect to the donor's own contributed capital.²⁵⁴ For this purpose, a purchase of a partnership interest between family members is recharacterized as a gift, and the fair market value of the purchased interest is treated as donated capital.²⁵⁵ Nevertheless, neither Form 1065 nor the accompanying instructions make any mention of family partnerships, let alone request any information regarding one family member's acquisition of a partnership interest from another.²⁵⁶

4. Spousal Attribution Rules

There are several attribution rules that apply just to spouses. For example, the first-time homebuyer credit in § 36 (discussed above) is available only to taxpayers who are at least eighteen years of age at the time of purchase.²⁵⁷ If two unmarried individuals purchase a home and only one meets the age requirement at the time of purchase, they may allocate the first-time homebuyer credit only to the individual who meets the age requirement and only she will be permitted to claim any part

²⁵³ Treas. Reg. § 1.704-1(c)(3)(i)(a)–(b) (as amended in 2008).

²⁵⁴ *Id.*

²⁵⁵ I.R.C. § 704(e)(3).

²⁵⁶ See generally FORM 1065, *supra* note 197; FORM 1065 INSTRUCTIONS, *supra* note 197.

²⁵⁷ I.R.C. § 36(b)(4). On the expiration of this credit, see *supra* note 223.

of the credit.²⁵⁸ If, however, these same two individuals are married, then one spouse's satisfaction of the age requirement will be attributed to the other spouse, and they both will be permitted to claim the credit.²⁵⁹

In addition, § 121 permits a taxpayer to exclude from gross income up to \$250,000 of the gain on the sale of a principal residence, provided, however, that the taxpayer meets certain ownership and use requirements and does not claim the exclusion more than once every two years. In the case of married different-sex couples, § 121 provides a variety of rules that attribute the ownership or use of the property from one spouse to the other so that they can qualify for the exclusion, including a rule that doubles the amount of the exclusion even where the spouses could not each independently qualify for a full exclusion.²⁶⁰ Notably, if a taxpayer qualifies for the exclusion, there is no need for the taxpayer to report the sale to the IRS, unless the taxpayer recognizes gain in excess of the permissible exclusion.²⁶¹ Similarly, for purposes of the passive activity limitations of § 469, the participation of each spouse in an activity is attributed to the other in determining whether they qualify for either the general exception for material participation in any trade or business activity or the limited exception for active participation in a rental real estate activity.²⁶²

To close the door to potential abuse, for purposes of the Code's grantor trust rules, the grantor of a trust is treated as holding any power or interest held by an individual who was either her spouse at the time the power or interest was created or

²⁵⁸ *Id.* § 36(b)(1)(C); I.R.S. Notice 2009-12, 2009-1 C.B. 446.

²⁵⁹ I.R.C. § 36(b)(4).

²⁶⁰ *Id.* § 121(b)(2), (b)(4), (b)(5)(C), (d)(1)–(3); see I.R.S. PUB. NO. 523, SELLING YOUR HOME 14 (2009) (containing a separate section describing all of the special rules that apply to married different-sex couples).

²⁶¹ I.R.S. PUB. NO. 523, *supra* note 260, at 19.

²⁶² I.R.C. § 469(h)(5), (i)(6)(D); Temp. Treas. Reg. § 1.469-5T(f)(3) (as amended in 1996).

became her spouse after the power or interest was created.²⁶³ Though some form of reporting with regard to grantor trust income is contemplated (either by the trust or by the payer of the income), no reporting is required regarding the reason why a trust is treated as a grantor trust or the attribution of a power or interest from one spouse to another.²⁶⁴

Section 1014(e) is designed to stymie attempts to obtain an artificial step-up in the basis of property by temporarily gifting the property to someone who is about to die in order to obtain a new fair market value basis in the property when the donee dies and passes the property back to the donor. Section 1014(e) disqualifies property from receiving a stepped-up basis regardless of whether the donee/decedent passes the property back to the original donor or to the donor's spouse, effectively attributing the spouse's ownership of the property to the donor herself.²⁶⁵ However, no one is required to notify the IRS when a transfer of property runs afoul of the antiabuse rule in § 1014(e).

Section 1092 contains loss deferral rules that apply to "straddles"—that is, two offsetting positions in the same or similar actively traded property (e.g., a contract or option to buy property and a contract or option to sell that same property).²⁶⁶ Prior to the enactment of § 1092, straddles were marketed as a tax shelter that could provide taxpayers with the opportunity to defer the recognition of income and, eventually, to convert ordinary income into long-term capital gain by exiting the offsetting positions in different taxable years.²⁶⁷ In determining whether the taxpayer has entered into offsetting positions, the

²⁶³ I.R.C. § 672(c); see ROBERT T. DANFORTH ET AL., *FEDERAL INCOME TAXATION OF ESTATES AND TRUSTS* ¶ 7.10 (2010), available at 2000 WL 1772582 (explaining the impetus for enacting this provision).

²⁶⁴ Treas. Reg. § 1.671-4 (as amended in 2006):

²⁶⁵ I.R.C. § 1014(e)(1)(B), (2)(B):

²⁶⁶ See *id.* § 1092(c)(2)(A) (defining "offsetting"), (d)(2) (defining "position").

²⁶⁷ See BITTKER LOKKEN, *supra* note 123, ¶ 57.6.1, -6.6, available at 1997 WL 439783 (describing how the widespread promotion of straddles as a form of tax shelter led to the enactment of these loss deferral rules).

taxpayer is treated as holding any position in property that is held by the taxpayer's spouse.²⁶⁸ To facilitate the enforcement of these antiabuse rules, taxpayers are required to identify any unrecognized gain from positions held on the last day of the taxable year, provided that the taxpayer has a recognized loss on a position during the taxable year.²⁶⁹ Though the instructions to the relevant tax form admonish taxpayers to report both positions that they hold as well as positions that related persons hold, the form requires no disclosure of whether a position is held by the taxpayer or by a related person (here, the taxpayer's spouse).²⁷⁰ Similarly, for purposes of the portions of § 1233 that address the consequences of tax-oriented short sales of property, a husband and wife are treated as a single taxpayer, meaning that their short sales and holdings of substantially identical property are considered together in applying these antiabuse rules.²⁷¹ Again, however, no reporting of the attribution of property from one spouse to the other is required.²⁷²

The original issue discount rules, which identify and determine the timing of the interest component in lending transactions, contain an exemption for loans under \$10,000 between natural persons.²⁷³ For purposes of determining whether their loans exceed the \$10,000 threshold, a husband and wife are treated as one person, which means that all loans made by them to the same person must be consolidated.²⁷⁴ Though the statutory language is susceptible of a broader interpretation, the regulations clarify that a husband and wife are not treated as one

²⁶⁸ I.R.C. § 1092(d)(4)(A)–(B)(i).

²⁶⁹ *Id.* § 1092(a)(3)(C); I.R.S. FORM 6781: GAINS AND LOSSES FROM SECTION 1256 CONTRACTS AND STRADDLES, at 1 pt. III (2009); *id.* at 4.

²⁷⁰ FORM 6781, *supra* note 269, at 1 pt. III (2009).

²⁷¹ I.R.C. § 1233(c)(2)(C); Trcas. Reg. § 1.1233-1(d)(3) (as amended in 1980).

²⁷² See SCHEDULE D INSTRUCTIONS, *supra* note 173, at D-4 (making no mention of reporting requirements).

²⁷³ I.R.C. § 1272(a)(2)(E).

²⁷⁴ *Id.* § 1272(a)(2)(E)(iii).

person with regard to loans that they make to each other; in other words, loans between a husband and wife are not disregarded for this purpose and those loans must also not exceed the \$10,000 threshold to qualify for this exemption.²⁷⁵ Notably, interest and original issue discount on a debt issued by a natural person are exempt from information reporting.²⁷⁶

C. Recapitulation

The picture painted by the attribution rules is something of a mirror image of the picture painted by the provisions discussed in Part II of this Article. Far from adopting a baseline of identification and documentation, the provisions incorporating the § 267 or § 318 attribution rules largely eschew identification and documentation of the familial relationships that trigger their application. Only a relative handful of the provisions incorporating the § 267 or § 318 attribution rules impose any sort of identification or documentation requirement. The small number of other attribution rules in the Code—some of which embrace identification and documentation requirements and others of which do not—echo the haphazard, uncoordinated quality of the family tax provisions discussed in Part II. Thus, the picture painted by the attribution rules only lends further support for the notion that the interconnecting lines of subordination that we will trace next are the product of endemic privilegings—that is, privilegings that have become so normal, so ingrained in our nature, such a part of our “world-view” that they manifest themselves without the conscious thought of legislators or regulators.

D. Resection

To begin the task of tracing the interconnecting lines of subordination in the administrative structure underpinning the family tax provisions in the Code, let us first revisit the baselines established in each of the three parts of this Article. From that vantage point, it will be easier to detect the point from which this web of subordination radiates.

²⁷⁵ Treas. Reg. § 1.1272-1(a)(2) (as amended in 1998).

²⁷⁶ I.R.C. § 6049(b)(2)(A); Treas. Reg. § 1.6049-5(b)(1) (as amended in 2006).

In the previous two parts of this Article, identification and documentation of family members was the baseline. In Part I, we considered the information-reporting requirements that apply to jointly held property that produces interest, dividends, or royalties. There, the general instructions' nominee/middleman reporting rule created a baseline of identification. The confusion in that area stemmed from the conflict among the regulations and between the regulations and the general instructions regarding the situations in which taxpayers will be exempt from nominee/middleman reporting. Recall that the only exception from reporting in the general instructions applies to married different-sex spouses. No rationale has been offered for this exception or for the general instructions' complete disregard of the more generous—and more sensible—exception that ostensibly applies to dividend reporting. The exception in the general instructions introduces inequality into the enforcement of the tax laws and bears the marks of having been influenced by the (expected) privileging of different-sex marriage in our tax laws. But this inequality in enforcement and further entrenchment of the privileging of marriage in our tax laws only arises because an exception has been carved out from a baseline of identification and documentation.

Then, in Part II, we examined the deductions, credits, and exclusions that are provided (or, conversely, denied) to a taxpayer with respect to her family members. Form 1040 and § 151(e) worked in tandem there to create a baseline of identification and documentation of family members. With respect to spousal relationships, recall that the Form 1040 requires married different-sex spouses to identify and document their relationship with each other, whether they file one return jointly or two returns separately.²⁷⁷ With respect to other family members, recall that § 151(e) requires a taxpayer to identify and document all of her dependents.²⁷⁸ The sense of haphazardness that grew out of the discussion in Part II stemmed not from these provisions, but from the filled, unfilled, and overfilled gaps between the baseline that they create and the other provisions

²⁷⁷ See *supra* notes 115–117 and accompanying text.

²⁷⁸ See *supra* notes 62–66 and accompanying text.

that afford (or deny) a taxpayer benefits with respect to her family members.

Juxtaposing the discussion in this Part with the previous two, it is clear that the baseline in the attribution rules is *not* to require the identification and documentation of family members. Here, the longest list of provisions—some sixty in all—is composed of those with no identification or documentation requirements. There was a small group of other provisions with limited identification and documentation requirements, but that mandated no significant reporting regarding the relationships that give rise to attribution. In contrast, there was a relative dearth of provisions that actually require identification and documentation of family members. This breakdown of the attribution rules provides ample evidence in support of the conclusion that the baseline in those rules is *not* to require taxpayers to identify or document their family members.

A comparison of these baselines reveals even further entrenchment of endemic privilegings. As discussed in Part I, the privileging of marriage in the information-reporting rules builds upon the foundation of a class-based privileging that subjects wealthy taxpayers to a less effective and less intrusive method of enforcement with respect to their investment income than is imposed upon those who earn their income from paid labor. The establishment of a baseline in the attribution rules of *not* requiring identification and documentation of family members serves to cement this class-based privileging into place.

This point is best illustrated by first considering the incidence of the rules discussed in Parts II and III of this Article. On one hand, the attribution rules discussed in Part III are premised on the idea of the family as an economic unit and generally treat the members of that unit as sharing the ownership of property (or, at the very least, as being indifferent to the allocation of legal ownership of property within the unit). Those with greater wealth are, quite naturally, more likely to be subject to such rules because they possess more property the ownership

of which can be attributed to others.²⁷⁹ On the other hand, the deductions, credits, and exclusions discussed in Part II are, at a general level, much more broadly applicable. Those rules afford (or deny) tax benefits based on familial relationships and, therefore, do not presuppose a certain level of property ownership. Instead, the rules discussed in Part II contemplate no more than the possibility of a taxpayer being born into a family, having friends, and marrying (but only someone different-sex). Turning to their specific operation, the provisions discussed in Part II are, if anything, skewed toward lower- and middle-income taxpayers. For instance, the amount of the dependent care assistance credit is reduced as a taxpayer's income increases; taxpayers with income above a ceiling amount are ineligible for the educational loan interest deduction; and the qualified tuition deduction, the exclusion for interest on U.S. savings bonds used to pay higher education expenses, the contribution limit for a Coverdell ESA, the child tax credit, the hope credit, the lifetime learning credit, the American

²⁷⁹ In 2008, fully 84% of the taxable net gain from capital assets on Form 1040, Schedule D was reported by the 3% of taxpayers with adjusted gross incomes of \$200,000 or more. I.R.S. PUB. NO. 1304, *supra* note 27, at 42 tbl.1.4.

A major complaint made by some about lower gains rates cut is that they primarily benefit very high income individuals. Capital gains are concentrated among higher income individuals because these individuals tend to own capital and because they are likely to own capital that generates capital gains. For example, the Joint Committee on Taxation indicated that for 2005, 88% of the benefit of lower rates [sic] to individuals with incomes over \$200,000 and 95% would go to individuals with incomes over \$100,000. Individuals with \$200,000 of income account for about 3% of taxpayers and individuals with incomes over \$100,000 account for less [sic] about 14%.

JANE G. GRAVELLE, CONG. RESEARCH SERV., LIBRARY OF CONG., REP. NO. 96-769, CAPITAL GAINS TAXES: AN OVERVIEW, at CRS-6 (2007); *see also Who Pays Capital Gains Taxes?*, CITIZENS FOR TAX JUSTICE, (Mar. 16, 2006), <http://www.ctj.org/pdf/cg0306.pdf> (indicating that, in 2005, "the wealthiest 10 percent of taxpayers enjoyed 90 percent of the capital gains eligible" for preferential rates, while "the poorest sixty percent of Americans, by contrast, collectively received just 2 percent of the capital gains eligible for the lower capital gains rates").

opportunity credit, and the earned income credit are all reduced and eventually phased out as a taxpayer's income increases.²⁸⁰

Now let us superimpose the incidence of these rules over their respective baselines. The attribution rules tend to apply to wealthy taxpayers and generally do *not* require them to identify or document their family members. This lack of accountability opens the door to potential abuse, because wealthy taxpayers can carelessly or erroneously apply the attribution rules and then play the audit lottery in the hopes that the IRS will never detect an error. The deduction, credit, and exclusion provisions that afford (or deny) tax benefits based on familial relationships are more widely available and, to the extent they bespeak any targeting based on economic class, are targeted at lower- and middle-income taxpayers. These lower- and middle-income taxpayers, unlike their wealthy counterparts, are generally required to identify and document their family members, in an effort to increase their tax compliance and reduce the possibility that they might abuse the Code. Thus, once considered together, the rules in Parts II and III provide evidence of class-based privileging in the identification and documentation of family members for tax purposes, with greater enforcement effort being

²⁸⁰ I.R.C. §§ 21(a)(2), 24(b)(1)–(2), 25A(d), (i)(4), 32(a)(2), (b), 135(b)(2), 221(b)(2), 222(b), 530(c).

directed toward lower- and middle-income taxpayers and lesser enforcement effort being directed at the wealthy.²⁸¹

And it cannot be said that the wealthy require lesser enforcement effort because we can repose greater trust in them to report correctly. The IRS found that, for tax year 2001, over 70% of the federal tax gap (i.e., the difference between taxes owed and taxes paid) was attributable to the individual income tax and that over 80% of the tax gap was attributable to

²⁸¹ An anonymous reviewer of this Article suggested that the difference in treatment between the provisions discussed in Parts II and III of this Article might be explained by the fact that the provisions discussed in Part II concern commonplace transactions or involve third parties who can easily report information to the IRS whereas the provisions discussed in Part III concern extraordinary, abusive transactions that are sophisticated in nature and require the use of tax professionals whom we can trust to safeguard the integrity of the tax system.

This suggested explanation, though a convenient justification of the status quo, is quite simply implausible. It is not true that most of the provisions discussed in Part III concern extraordinary or abusive transactions. First, as discussed at the beginning of Part III, attribution rules are sometimes used not to prevent abuse, but to confer a benefit on taxpayers even where the ownership of property is dispersed among family members. For example, § 1361(c) contains a beneficial attribution rule for purposes of determining which corporations can make a Subchapter S election, § 121(b)(4) and (5) contain beneficial attribution rules for spouses in determining their qualification for the exclusion from gross income for gain on the sale of a principal residence, and § 354(a)(2)(C) contains an exception from the general rule treating nonqualified preferred stock as boot if that stock is used in the recapitalization of a family-owned corporation.

In addition, whether these transactions are everyday or extraordinary depends very much on one's perspective—and we should be sure to view the provisions in Part II and Part III from the *same* perspective before classifying one group as commonplace and the other as extraordinary. As the anonymous reviewer contends, abuse of the employee fringe benefits rules in § 132, of § 179 expensing, or of the § 221 educational loan interest deduction (all discussed in Part III) may not be an everyday event for taxpayers. But, then, abuse of the provisions discussed in Part II may not be an everyday event for taxpayers either. Nevertheless, the provision and receipt of employee benefits, the purchase of equipment by small businesses, and the borrowing of educational loans *are* everyday transactions, just as the purchase of health insurance, the payment of medical expenses, and the payment of moving expenses (all discussed in Part II) are. In determining the tax consequences of these everyday transactions, the attribution rules, no more and no less than the provisions discussed in Part II, have the function of delineating the scope of a given tax provision where the relevant group for purposes of that provision includes not only the taxpayer herself but also family members.

underreporting (i.e., understating income or overstating deductions or credits).²⁸² The Transactional Records Access Clearinghouse (TRAC) has found that:

[N]o other class of individual tax returns comes close [to millionaires] in terms of the size of the underreporting errors. [In 2008], for example, the average IRS audit of the millionaire class of taxpayers resulted in agent recommendation of just under \$200,000 in additional taxes for each return. Even for the much less intensive correspondence audit contacts—which from start to finish typically require only a little over two hours to complete—the auditor recommendations for additional taxes averaged over \$136,000 per return²⁸³

OMB Watch has thus observed that “[t]he high yields on face-to-face audits of high-income filers show both that they are a good investment and also that there are significantly more taxes due

Moreover, regardless of frequency of occurrence, the point of imposing reporting and documentation requirements on these transactions is to increase taxpayer compliance and ensure that only those targeted by a provision are actually subject to it. This holds true with respect to *all* of the provisions discussed in *both* Part II *and* Part III. As discussed in the text immediately below, to pretend that we can simply rely on wealthy taxpayers’ advisers to weed out abuse and ensure compliance is, at best, wishful thinking and, at worst, a complete disregard of reality. *See generally* Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 VA. TAX REV. 589 (2003) (discussing abusive transactions in which tax professionals have been involved and the failure of the tax bar to police its own); Richard Lavoie, *Deputizing the Gunslingers: Co-opting the Tax Bar into Dissuading Corporate Tax Shelters*, 21 VA. TAX REV. 43 (2001) (discussing the pressure on the tax bar to participate in tax shelter activity).

²⁸² OFFICE OF TAX POLICY, U.S. DEP’T OF TREASURY, A COMPREHENSIVE STRATEGY FOR REDUCING THE TAX GAP 5 (2006), available at <http://www.treasury.gov/press-center/press-releases/Documents/otptaxgapstrategy%20final.pdf>.

²⁸³ Transactional Records Access Clearinghouse, *TRAC Says IRS Audit Rate for Wealthy “Sharply Declined,”* 2009 TNT 53-77 (LEXIS).

among those filers.”²⁸⁴ More generally, OMB Watch has noted that:

[T]he tax gap creates a patently perverse set of winners and losers—taxpayers who do not follow the law benefit and taxpayers who do lose out. Larger burdens also tend to fall on lower- and middle-income taxpayers, whose compliance rates are higher than other income levels. Higher-income taxpayers, small business owners, and corporations are the main beneficiaries, as their compliance rates are lower. Because of this, on the whole, the tax gap makes the tax code less progressive than the statutory structure indicates, though by exactly how much has not been quantified.²⁸⁵

Yet, this is not an isolated instance of class-based privileging in the enforcement of the tax laws. As mentioned above, though the information-reporting rules discussed in Part I establish an ostensibly strict baseline of requiring the identification and documentation of family members, these rules already represent a downward departure from the even more stringent baseline of the withholding tax that applies to wages.²⁸⁶ In other words, what appears to be greater enforcement effort in the reporting of investment income paradoxically represents the application of more lax enforcement measures to collect that income. In addition, an analysis of IRS audits by TRAC revealed that, in 2005, low-income taxpayers were six times more likely to be subject to a face-to-face audit than wealthy taxpayers and

²⁸⁴ OMB WATCH, BRIDGING THE TAX GAP: THE CASE FOR INCREASING THE IRS BUDGET 10 (2008), 2008 TNT 11-29 (LEXIS).

²⁸⁵ *Id.* at 4.

²⁸⁶ See *supra* notes 54–57 and accompanying text.

were twice as likely to be subject to the more common correspondence audit.²⁸⁷ As the TRAC report further explains:

It is not known whether the very low rate of face-to-face audits for millionaires reported in FY 2005—less than 2 out of 10,000—is new or whether the policy has been followed in previous years. This is because the IRS has never before provided information about the number of audits for various categories of wealthier taxpayers—\$100,000 to \$200,000, \$200,000 to \$1 million, and \$1 million and above. However, there have been other years when analysis has shown that in broad terms low-income individuals were more likely to be audited than rich. One of those occasions was in FY 1999 during the Clinton Administration. A factor contributing to this anomaly was an order from Congress that the IRS reduce non-compliance in the Earned Income Credit program, a special tax benefit for low-income Americans.²⁸⁸

Furthermore, despite a professed intention to focus increased scrutiny on wealthy taxpayers, the audit rate for those with an adjusted gross income of at least \$1 million dropped by at least 19% (and possibly as much as 36%) from 2007 to 2008.²⁸⁹ It was not until 2010 that the IRS reported a marked increase in audits of returns reporting the highest adjusted gross incomes—though, it is worth noting that the rate of audit for nearly all other categories of adjusted gross income increased as well.²⁹⁰ Nevertheless, as TRAC observed:

²⁸⁷ Transactional Records Access Clearinghouse, *TRAC Finds Lower IRS Audit Rate for Wealthy Than for Low-Income Taxpayers*, 2006 TNT 60-37 (LEXIS).

²⁸⁸ *Id.*

²⁸⁹ Transactional Records Access Clearinghouse, *supra* note 283.

²⁹⁰ Compare INTERNAL REVENUE SERV., DEP'T OF TREASURY, DATA BOOK: 2009, at 26 tbl.9b (2010), with INTERNAL REVENUE SERV., DEP'T OF TREASURY, DATA BOOK: 2010, at 26 tbl.9b (2011).

IRS's statistics indicate that 1 out of every 12 individuals with total positive income of \$1 million or more were audited through . . . regular programs during FY 2010. While the number of these examinations was up [that] year, this still left the returns of 11 out of 12 millionaires unexamined. And it should be noted, that of those audited about half received a very limited correspondence review on which the examiner spent just 1.8 hours on average to complete.²⁹¹

Again, such class-based privilegings entail their own disparate impacts along lines of race, ethnicity, gender, sexual orientation, and marital status due to, among other things, wage discrimination on these bases that detrimentally affects the ability to accumulate wealth.²⁹² A recent study found that, notwithstanding the widespread myth of LGBT affluence, there is a significant level of poverty in the lesbian, gay, and bisexual community.²⁹³ In particular, "lesbian couples are at a significantly higher risk of being in poverty than their different-sex couple counterparts who have the same characteristics."²⁹⁴

²⁹¹ Transactional Records Access Clearinghouse, *TRAC Says IRS High Wealth Taxpayer Program Failed to Meet Audit Targets*, 2011 TNT 73-43 (LEXIS). This same report focuses on the IRS's "special new unit to examine 'high wealth individuals' and the extent to which they were complying with the tax laws." *Id.* TRAC reports that this unit has only "managed to audit a handful of tax returns in its first 18 months." *Id.* Notwithstanding that "the IRS has very modest hopes for this new unit in FY 2011," the unit is already falling short of those limited targets in the first six months of the fiscal year. *Id.*

²⁹² See *supra* note 61.

²⁹³ RANDY ALBELDA ET AL., WILLIAMS INST., *POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY* 7 (2009), available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/poverty-in-the-lesbian-gay-and-bisexual-community/>. Among the factors potentially contributing to the increased risk of poverty for LGBT individuals are employment discrimination, lesser access to structures such as marriage that enhance a family's economic position, lesser access to health insurance coverage, lower likelihood of receiving family support, and higher likelihood of homelessness among LGBT youth. *Id.* at 1.

²⁹⁴ *Id.* at 12.

Moreover, despite having other characteristics that tend to reduce their risk of poverty (e.g., “lower rates of childrearing, a greater likelihood of being white, higher education levels, and, of course, being male”), gay couples “are more likely to be poor than are married couples, with adjusted poverty rates almost one percentage point higher than for married couples.”²⁹⁵

A recent study by the Transgender Law Center found that transgender Californians were twice as likely as the average Californian to report wages below the national poverty level.²⁹⁶ Notably, this far higher risk of poverty for transgender Californians was prevalent in a group of respondents who reported both relatively higher rates of labor force participation and higher levels of education.²⁹⁷ In fact, transgender Californians with bachelor’s degrees reported income 40% lower than the average college graduate in California.²⁹⁸ In terms of assets, the transgender Californians who responded to this survey reported limited assets, with 67% of all of the respondents reporting no financial assets beyond a savings account. Among the African-American and Latino/a respondents, even higher numbers reported no retirement or investment accounts (91% and 78%, respectively).²⁹⁹ The rates of transgender homeownership were also markedly below the average. Only 20% of the survey respondents owned a home, compared to the state average of 56%.³⁰⁰

Moreover, as this report from the Transgender Law Center suggests, class and other axes of subordination do not merely overlap, with a disproportionate number of individuals from

²⁹⁵ *Id.*

²⁹⁶ TRANSGENDER LAW CTR., THE STATE OF TRANSGENDER CALIFORNIA: RESULTS FROM THE 2008 CALIFORNIA TRANSGENDER ECONOMIC HEALTH SURVEY 7 (2009), available at http://transgenderlawcenter.org/pdf/StateTransCA_report_2009Print.pdf.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 8.

³⁰⁰ *Id.*

these groups populating the lower rungs of the economic ladder. Rather, the intersection of these axes of subordination can result in a compounding of the class-based privileging in the attribution rules. For example, "recent data for the US suggests that the largest gender wealth gap is found at the very top of the wealth distribution."³⁰¹ Similarly, African-American households exhibit both an internal stratification of wealth by class³⁰² and an external stratification of wealth vis-à-vis their white counterparts:

The data are very convincing in one simple respect: differences in observed income levels are not nearly sufficient to explain the large racial wealth gap The black-to-white wealth ratio comes closest to equality among prosperous households earning \$50,000 or more. Even here where the wealth gap is narrowest, however, blacks possess barely one-half (0.52) the median net worth of their high-earning white counterparts. For net financial assets, the mean ratio . . . ranges from 0.006 to 0.33. The highest earning black households possess twenty-three cents of median net financial assets for every dollar held by high-income white households. One startling comparison reveals that poverty-level whites control nearly as many mean net financial assets as the highest-earning blacks, \$26,683 to \$28,310. . . . Blacks and whites with equal incomes possess very unequal shares of wealth. More so than income, wealth holding remains very sensitive to the historically sedimenting effects of race.³⁰³

Consequently, the class-based privileging in the enforcement of the attribution rules promises far more potential benefit to high-income white households than to high-income African-American

³⁰¹ Deere Doss, *supra* note 61, at 3.

³⁰² OLIVER SHAPIRO, *supra* note 61, at 74–75.

³⁰³ *Id.* at 101.

households. Indeed, extrapolating from the conclusions of this study, high-income African-American households should only be as likely to benefit from the lax enforcement of the attribution rules as the poorest of white households.

By now, it should be apparent that, even though Congress and the IRS have not taken a deliberative approach when imposing identification and documentation requirements, endemic privilegings along multiple axes of subordination have subtly influenced decisions regarding whether or not to impose such requirements as a means of enforcing the Code's family tax provisions. As noted in the introduction to this Article, these endemic privilegings—and the resulting lines of subordination that they embed in the administrative structure of the Code's family tax provisions—are entirely consistent with the Gramscian notion of hegemony, which posits that the dominant group in society maintains control not only through force but also through control of the flow of ideas.³⁰⁴ These endemic privilegings have come to feel so normal and natural that they have permeated the administrative structure underpinning the family tax provisions in a way that has, until now, completely escaped notice. Gramsci's work thus nicely dovetails with a critical tax perspective, as both acknowledge that "domination is often subtle, invisible, and consensual."³⁰⁵ For this very reason, this Article began (and now ends) by explicitly drawing upon Gramsci's work on hegemony.

Having recognized the hegemonic qualities of the administrative structure underpinning the Code's family tax provisions, we can now turn to the concluding section of this Article. The conclusion outlines a proposal to redress the unconscious discrimination embedded in the administrative structure underpinning the family tax provisions in the Code.

CONCLUSION

Family is important for tax purposes. However, the extent to which taxpayers are required to identify and document the

³⁰⁴ See *supra* text accompanying note 15.

³⁰⁵ See Litowitz, *supra* note 14, at 519.

role that their family members play in their tax calculations varies widely and, seemingly, without reason. Too often, this variation appears to be influenced by endemic privilegings along the lines of class, race, ethnicity, gender, sexual orientation, and marital status.

Drawing on a comparative perspective, Professor Lily Kahng has advocated adopting “fairness and equality as fundamental policy goals in designing and evaluating the enforcement mechanisms of any tax system.”³⁰⁶ In keeping with Professor Kahng’s suggestion, it is time to bring not only order, but also fairness and equality to the enforcement of the Code’s family tax provisions. Elsewhere, I have argued in favor of adopting an individual tax filing regime that would allow individuals to choose their family for tax purposes and that would require both increased and more evenhanded reporting regarding a taxpayer’s familial relationships.³⁰⁷ Short of such a major restructuring of the Code’s family tax provisions, Congress and the IRS should take a more deliberative approach to determining when (and, if so, how) taxpayers should be required to identify and document their family members.

As a first step toward increasing taxpayer compliance and striving for more evenhanded enforcement of the tax laws, the same baseline of identifying and documenting family members should be applied to all of the family tax provisions in the Code, including the attribution rules. There is absolutely no reason why the attribution rules should, as a group, be treated differently from the information-reporting rules examined in Part I of this Article or the deductions, credits, and exclusions examined in Part II of this Article. The attribution rules are a part of the substantive tax rules that taxpayers must apply in determining their tax liability. To require identification and documentation of family members when the attribution rules apply to a taxpayer is to require nothing more than for the taxpayer to explain how she applied the substantive tax law to her individual situation so that the IRS can more effectively and efficiently police taxpayer compliance.

³⁰⁶ Kahng, *Investment Income Withholding*, *supra* note 13, at 338.

³⁰⁷ Infanti, *supra* note 46.

In other words, taxpayers should be required to “show their work” when filing their returns, whether on a form designed for this purpose or on an attachment to the return created by the taxpayer herself. The IRS already asks low-income taxpayers to do just this when claiming the earned income credit. A taxpayer claiming the earned income credit with respect to a qualifying child must complete a separate Schedule EIC that requires the taxpayer to identify and document all claimed children and to perform a step-by-step analysis to determine whether those children are “qualifying” children for earned income credit purposes.³⁰⁸ If low-income taxpayers can be asked to show their work when navigating the complexities of the earned income credit, why not ask wealthier (and generally better-advised) taxpayers to do the same?

Accordingly, with regard to the attribution rules, taxpayers should be required to list all related individuals or entities and explain how their ownership of property (or other relevant attributes) factored into the application of the tax laws to the taxpayer’s specific factual situation. There would be no need for the taxpayer to prove a negative when filing the return (e.g., there would be no need to provide unequivocal proof that the seller is unrelated to the purchaser of a loss property in order to avoid the disallowance rule in § 267(a)(1)). The explanation of the return position would put the IRS on notice of both the relevance of the attribution rules to a return position and the rationale for that return position. The IRS could then better assess whether the taxpayer’s position bears further scrutiny on audit, when a request for proof in support of a return position might be appropriate. In addition, by requiring affirmative disclosure of familial and other relationships as well as an explanation of how those relationships affected the application of the substantive tax laws to the taxpayer’s situation, the taxpayer would find it difficult either (1) to ignore the attribution rules altogether in the hope of winning the audit lottery and escaping scrutiny or (2) to invent post-hoc rationalizations for false or erroneous return positions. Conversely, the IRS would more easily be able to detect faulty or suspect legal analyses that bear further scrutiny on audit.

³⁰⁸ I.R.S. FORM 1040, SCHEDULE EIC: EARNED INCOME CREDIT (2009).

It is worth underscoring that the taxpayer (or, more likely, her tax advisor) must *already* perform this legal analysis prior to completing and filing the tax return. At present, we simply do not require the taxpayer to explain on her return *how* that analysis was performed. That the attribution rules can be complex and convoluted is no more of a reason to excuse the taxpayer from explaining herself than it apparently is for excusing low-income taxpayers from explaining the application of the earned income credit to their specific situations. If the attribution rules are too complex for taxpayers to apply, then this calls for changes to be made to the substantive tax laws and not for the creation of disparities in the enforcement of the tax laws.³⁰⁹ Moreover, this argument ignores the burdens created by the de facto documentation requirement in § 151(e), which can entail much more than simply listing a name, Social Security number, and relationship on the Form 1040.

In fact, when it was initially enacted, the requirement to identify and document dependents gave some in Congress great pause:

Finally, I must express my concern as to how the authors of this amendment propose to pay for partial restoration of the sales tax [deduction]. The amendment would require that children age 4 or older register with the Social Security system and obtain a Social Security number in order for their parents to claim a dependent deduction for them. I recognize that this so-called "compliance" measure will deter people from claiming dependent deductions for phantom children.

However, I wonder if this will not be perceived by our Nation's citizens as just one

³⁰⁹ Cf. Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 828–30 (2007) (asserting that, once it is understood that earned income credit recipients are white, the movement for simplification of the earned income credit will take hold); Francine J. Lipman, *The Working Poor Are Paying for Government Benefits: Fixing the Hole in the Anti-Poverty Purse*, 2003 WIS. L. REV. 461, 476–97 (proposing a variety of solutions to address the complexity of the earned income credit).

more step in the direction of Big Brother government from Washington. Registering with Social Security has always been a right of passage for young people entering the work force for the first time. Receipt of the card has always meant that a citizen has joined the social insurance program and has become a contributor to that system, and an ultimate beneficiary of that system. Today, when the promise of a Social Security is severely in doubt for many of today's young workers, it seems ironic to require infants to sign up to help the IRS enforce the tax laws.

Yet by the action we take today if we adopt this amendment, a Social Security card is being transformed into a form of National Identity Card. In the past, there has been a heated debate as to whether it would infringe individual liberties and the right to privacy to institute a National Identity Card. Often the debate has centered around the problem of illegal aliens in the work force. So far, we have rejected the idea of instituting such an identification system.³¹⁰

This sea change in the approach to obtaining Social Security numbers also created a significant burden for parents. To obtain a Social Security number for a child, parents must compile documents establishing their child's U.S. citizenship, age, and identity as well as documents proving their own citizenship.³¹¹

³¹⁰ 132 CONG. REC. S7892-02 (daily ed. June 19, 1986) (remarks of Sen. Durenberger).

³¹¹ The process for obtaining an original Social Security card is described on the Social Security Administration web site. See *Request a Social Security Number for a Baby*, SOC. SEC. ADMIN., http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/237 (last visited Sept. 30, 2011). From there, one can link to a description of acceptable forms of documentation that will satisfy each of these requirements. The Social Security Administration warns on this web page that it takes up to twelve weeks longer to request a card after a child's birth than it does to apply through the enumeration at birth program discussed in the text immediately below. *Id.*

These documents and the appropriate Social Security Administration (SSA) form must either be mailed or personally brought to the local SSA office for processing. In 1990, at least in part in response to increased demand for Social Security numbers following the enactment of the predecessor of § 151(e), the SSA established its enumeration at birth program, which permits parents to request a Social Security number at the time of a child's birth.³¹² To administer this program, the SSA must contract with the relevant vital statistics agency in each state, the District of Columbia, and New York City so that the agency can transmit the required information to SSA and SSA can, in turn, issue a Social Security number to the child and furnish it to the child's parents.³¹³ SSA has estimated that only about 75% of newborns receive their Social Security numbers through its enumeration at birth program.³¹⁴ Keep in mind that the burden § 151(e) imposes on parents and SSA is entirely related to tax compliance—unlike the attribution rules, which are part of the substantive tax laws.

In keeping with this move toward a uniform baseline of reporting, Congress should take steps to address the hodgepodge of explicit, de facto, and duplicative identification and documentation requirements described in Part II of this Article. As discussed at length above, the current, rather haphazard approach to administering the family tax provisions covered in Part II leaves some compliance gaps filled, others unfilled, and yet others overfilled. Congress could easily remedy this problem by moving the de facto identification and documentation requirement in § 151(e) into § 152, which contains the core definition of dependent that is incorporated by reference in so many other Code sections. The identification and documentation requirement could then be altered to apply to anyone whom the taxpayer claims as a dependent, whether as defined in § 152 or

³¹² OFFICE OF INSPECTOR GEN., SOC. SEC. ADMIN., AUDIT REP. NO. A-08-00-10047, AUDIT OF ENUMERATION AT BIRTH PROGRAM I (2001), *available at* <http://oig.ssa.gov/sitcs/default/files/audit/full/pdf/A-08-00-10047.pdf>.

³¹³ *Id.*; 20 C.F.R. § 422.103(b)(2), (c)(2) (as amended in 2006); SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYS. § RM 00202.001(C)(2) (as amended in 2002).

³¹⁴ OFFICE OF INSPECTOR GEN., *supra* note 312, at 1.

as that definition is incorporated by reference and modified in other Code sections. The Department of Treasury and the IRS could further be directed to promulgate regulations ensuring that this *de jure* identification and documentation requirement does not result in taxpayers being required to unnecessarily identify and document their dependents in multiple places on the same return.

Once this common and uniform baseline of reporting has been established, Congress and the IRS should revisit each of the family tax provisions to determine whether there are valid, articulable, and nondiscriminatory reasons for departing from the common baseline of reporting family relationships. An example of such an exception is described in Part I of this Article. I suggested there that a modified version of the exception to nominee/middleman reporting that ostensibly already exists for dividends be honored and extended to income produced by other jointly owned property. I advocated that the person paying the interest, dividend, or royalty simply be required (rather than merely permitted) to include the name, taxpayer identification number, and ownership percentage of joint owners on the initial Form 1099. This change would help to ensure compliance, relieve taxpayers from an onerous and confusing reporting burden, and make the Code more neutral with regard to the choice of relationships by ceasing to privilege different-sex marriage (at least in this one area).

From time to time, Congress and the IRS should pause when reviewing these provisions. They should consider whether the exceptions they are carving out, when taken together, disparately impact taxpayers along the lines of class, race, ethnicity, gender, sexual orientation, or marital status. As part of this review, Congress and the IRS should also be sure to avoid duplicative reporting and the possibility of misleading over-reporting.

Taken together, these steps would go far toward bringing order to the identification and documentation requirements in the Code's family tax provisions and would reduce the unacceptable inequality in the enforcement of these provisions that currently exists.