

Washington Law Review

Volume 93 | Number 1

3-1-2018

The Marital Wealth Gap

Erez Aloni

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Family Law Commons](#)

Recommended Citation

Erez Aloni, *The Marital Wealth Gap*, 93 Wash. L. Rev. 1 (2018).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol93/iss1/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

THE MARITAL WEALTH GAP

Erez Aloni*

Abstract: Married couples are wealthier than people in all other family structures. The top 10% of wealth holders are, in great proportion, married. Even among the wealthiest households, married couples hold significantly more wealth than others. The Article identifies this phenomenon as the “Marital Wealth Gap,” and critiques the role of diverse legal mechanisms in creating and maintaining it. Marriage also contributes to the concentration of wealth because marriage patterns are increasingly assortative: wealth marries wealth. The law entrenches or even exacerbates these class-based marriage patterns by erecting structural barriers that hinder people from meeting across economic strata.

How can the state restructure the law to alleviate the marital wealth gap? The Article proposes a fundamental shift in the way the state treats wealth and family status. It advances a theory grounded in transformative “recognition and redistribution” that decentralizes marriage’s monopoly on wealth-related benefits and simultaneously aims to reduce wealth concentration among the richest households. Principally, since marriage is the preserve of the well-off, the state should decouple wealth benefits from marriage. At the same time, it should combat the structures that enable wealth concentration among affluent married couples, thereby dismantling the architecture that supports the marital wealth gap.

INTRODUCTION	2
I. INEQUALITY: A LOOK AT WEALTH VS. INCOME	7
II. THE MARITAL WEALTH GAP.....	16
III. MARRIAGE AS A WEALTH MAXIMIZER	21
A. Does Marital Behavior Generate Wealth?.....	22
B. Family Background Impacts Wealth Accumulation	25

* Assistant Professor, Peter A. Allard School of Law, University of British Columbia. I am very grateful to many colleagues who provided immensely useful feedback in various stages of this project, including David S. Abrams, Anita L. Allen, Kim Brooks, June Carbone, Leslie Cohen, Wei Cui, Bridget J. Crawford, Tessa Davis, David G. Duff, Melissa J. Durkee, Maxine Eichner, Thomas P. Gallanis, Clare Huntington, Lily Kahng, Sheldon Bernard Lyke, Shannon Weeks McCormack, Shiri Regev-Messalem, Carol Sanger, Marc Spindelman, Allison Tait, and Jessica Dixon Weaver. I also benefited greatly from comments I received from audiences at the 2016 Family Law Scholars and Teachers Conference; the 2016 Law and Society Association Annual Meeting; the second conference on Trusts and Estates Meets Gender, Race, and Class; the 2016 SoCal Junior Faculty Workshop; Body and Market, Family and State: Setting New Agendas conference at the Radzyner Law School; the annual conference of Program on Democracy, Citizenship, and Constitutionalism, at the University of Pennsylvania; the *Canadian Journal of Women and the Law* workshop for emerging feminist scholars; and faculty workshops at Whittier Law School, the University of South Carolina School of Law, and the University of Washington School of Law. I offer many thanks to Sara Gold and Carly Stanhope for their excellent and creative research assistance; and last, but certainly not least, I would like to express my appreciation to the editors of *Washington Law Review* for their outstanding editorial work.

C.	The Law Confers Wealth Advantages on Affluent Married Couples.....	27
1.	Laws that Exacerbate Underlying Conditions	29
2.	Laws that Distinguish Couples Based on Marital Status	33
3.	Privatization Norms Encourage Married Couples to Keep Wealth in the Family	39
D.	Assortative Mating Exacerbates Wealth Inequality	43
1.	Individuals Select Partners Based on Parental Wealth ..	43
2.	State’s Support of Positive Assortative Mating.....	47
IV.	A NEW THEORY OF MARRIAGE’S ROLE IN WEALTH INEQUALITY	53
A.	Sorting Approaches for Change	53
B.	Transformative Redistribution and Recognition as a Paradigm.....	60
	CONCLUSION	69

INTRODUCTION

*Outward conditions oftenest rule in matching.
The laborer mates him with his like; the trader
A trader’s daughter weds; wealth marries wealth;
The courtier seeks his bride among the great.¹*

Married couples constitute the wealthiest family structure in the United States, holding far more wealth than any other family type.² In fact, households in the top 1% of the wealth distribution are most likely to be comprised of married couples.³ To illustrate, only 3% of the world’s billionaires, as featured in the *Forbes* list in 2013, were unmarried.⁴ The link between wealth and marital status is not limited to the top 1%. The next 9% of households by wealth are also composed primarily of married

1. GEORGE H. CALVERT, *COMEDIES* 85 (1856).

2. See *infra* Part II (presenting and analyzing data about family status and wealth accumulation).

3. THOMAS J. STANLEY, *THE MILLIONAIRE MIND* 23 (2001) (“[A] large majority . . . of millionaires are married. Only 2 percent have never been married, and about 2 percent are currently divorced or separated. The rest are widowed.”); Lisa A. Keister, *The One Percent*, 40 *ANN. REV. SOC.* 347, 356 (2014).

4. Edwin Durgy, *The World’s 12 Most Eligible Billionaire Bachelors*, *FORBES* (Mar. 6, 2013), <https://www.forbes.com/sites/edwindurgy/2013/03/06/the-worlds-12-most-eligible-billionaire-bachelors/#5456e2d130de> [<https://perma.cc/6NS6-NS5Y>]. The *Forbes* list includes the richest people in the world, while this Article focuses only on the United States. But the point is illustrative of the trend in the United States; and, in any event, the United States is the most represented country in the *Forbes* list.

couples.⁵ The representation of married couples in the top 10% of wealth holders is higher than it is in any other group along the descending line of net wealth.⁶ Further, even among the wealthiest, married couples are likely to hold significantly more wealth than their nonmarried counterparts.⁷ This Article calls the accumulation of wealth among married households in the top 10% (including the top 1%), in comparison with all households in the bottom 90%, “the marital wealth gap.” It then considers the gap’s causes and harms, and the possible solutions for narrowing this gap.

What explains the success of married couples at the top of the wealth distribution—compared with other families—in creating and retaining wealth? Scholars who have examined the connection between wealth and family structure have advanced two primary explanations: that marriage, as a legal and societal framework, is the cause of this advantage;⁸ and that economies of scale explain the relative success of married couples in amassing wealth.⁹

But these accounts serve only as partial explanations. Supplementing the existing interpretations, this Article reveals various legal mechanisms that privilege married couples in the creation and retention of wealth. Put differently, it exposes the various state policies that reinforce and amplify the preexisting power and wealth inequalities that serve as the foundation of the marital wealth gap. It shows that the law plays a crucial role in bestowing advantages that increase the accumulation and retention of wealth of married couples who are already well-off. To unveil aspects of the law’s role, this Article creates a taxonomy of the primary mechanisms by which marital status helps wealthy married couples to maximize their wealth holding.¹⁰ It argues, then, that marriage is a tool for the concentration of wealth, mainly benefiting those who already have

5. See *infra* Part II (providing data about wealth holding and family structure).

6. See *infra* Part II.

7. See *infra* Part II.

8. These scholars contend that married couples do better in terms of wealth holding because the marital framework encourages the kind of responsible behavior that results in wealth accumulation. See *infra* section III.A. This strand of scholarship, for the most part, has not aimed to think about wealth inequality but only to advance the theory that marriage should be promoted as a solution to poverty.

9. See, e.g., Allison Linn, *Why Married People Tend to Be Wealthier: It’s Complicated*, TODAY (Feb. 13, 2013), <https://www.today.com/money/why-married-people-tend-be-wealthier-its-complicated-1C8364877> [<https://perma.cc/A9TL-LCVU>] (“Once they are married, the couples also are able to take advantage of economies of scale. . . . [T]hose advantages go beyond just sharing expenses. People who are married also are able to divide up responsibilities in financially beneficial ways.”).

10. See *infra* section III.C.

significant amounts of wealth. The marital wealth gap is a piece of the larger puzzle of wealth inequality.

Exploring the connection between family structure and wealth inequality—to be distinguished from *income* inequality¹¹—is essential at a time when the wealth gap in the United States is expanding dramatically.¹² Yet, the link between laws pertaining to regulation of the household and wealth inequality remains underexplored and undertheorized. Thus, one of this Article’s principal interventions is to invite a shift in family law from a discourse focused more narrowly on income inequality to one that also addresses the wealth gap.¹³

The analysis is interdisciplinary. That is, by “family law,” this Article means more than the set of rules pertaining to marriage and divorce. Instead, it embraces a broader definition—one that includes explicit and implicit laws and norms that govern and impact the economics of the household. In so doing, this Article joins a newer strand of scholarship that views families as institutions affected by laws, norms, and economic structures,¹⁴ and the field of family law as encompassing the universe of laws, structures, norms, and institutions that affect the economics of the household.¹⁵ Thus, the family law that this Article explores includes the

11. See *infra* Part I (discussing the differences between wealth and income and arguing that because wealth inequality is more enduring and unbalanced family law should pay attention to it, too).

12. Wealth inequality has become an immense problem in the United States: since the 1960s, families at the tenth percentile of wealth holding have gone from holding no wealth to owing about \$1,000 in debt; meanwhile, the wealth of families in the ninetieth percentile has increased five-fold. *Nine Charts About Wealth Inequality in America (Updated)*, URB. INST. (Oct. 5, 2017), <http://apps.urban.org/features/wealth-inequality-charts/> [<https://perma.cc/39ZH-7KAP>]; see *infra* Part I (discussing wealth inequality in the United States).

13. See JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 50, 199 (2014) [hereinafter CARBONE & CAHN, MARRIAGE MARKETS] (arguing that falling marriage rates are influenced by economic inequality); June Carbone & Naomi Cahn, *Is Marriage for Rich Men?*, 13 NEV. L.J. 386, 403–06 (2013) (connecting economic inequality to family instability and the prospects of marriage); Nancy Leong, *Is Marriage for Rich People? A Book Review of Ralph Richard Banks’s Is Marriage for White People?*, 44 CONN. L. REV. 1325, 1336 (2012) (“Of course, the factors explaining the trend toward income inequality are many and complex, but it is clear that marriage insularity with respect to class exacerbates rather than alleviates the problem.”); *infra* section III.A (discussing the existing scholarly approaches to the connection between wealth holding and marital status).

14. See, e.g., CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS xii (2014) (exploring how “structural family law”—from employment discrimination to zoning laws—impacts families’ lives); Maxine Eichner, *The Family, in Context*, 128 HARV. L. REV. 1980, 1981 (2015) (book review) (describing a new trend in family law scholarship “[f]ueled by the recognition that families are social institutions profoundly affected by their social and economic contexts”).

15. This Article uses the term “family law” broadly to treat what Janet Halley and Kerry Rittich call “Family Law 1, 2, 3, and 4”—laws and norms, outside the traditional realm of family law, that explicitly or implicitly govern the laws of the household. See Janet Halley & Kerry Rittich, *Critical*

impact of rules and norms of various fields on households and relationships. For example, it considers tax law, trusts and estates, and norms of privatizations of support, as well as physical and economic structures that affect the ways individuals sort their potential intimate partners.

An interdisciplinary examination of the family wealth gap demonstrates that marriage is not an effective redistributive tool for wealth concentrated at the top.¹⁶ Focusing on wealth at the apex of wealth ownership reveals that marriage is a means for concentration of wealth, assisting those who are already well-off in consolidating and maximizing their wealth holding. The wealth-related benefits that are attendant to marriage are helpful only to those who already own significant assets; they do not assist married couples who are not at the top of the wealth distribution. Therefore, attaching wealth benefits to marriage cannot be justified as part of a policy of incentivizing non-affluent married couples to get married.

Are policies that help wealthy married couples to accumulate wealth justified? The theory is that marriage has the potential to *reduce* wealth inequalities by fragmenting inheritance over generations, if people from different wealth-holding quantiles marry in significant numbers.¹⁷ But, as sociological data unequivocally demonstrate, the trend in the United States is toward positive assortative mating; that is, people typically marry partners with socioeconomic and educational backgrounds similar to their

Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism, 58 AM. J. COMP. L. 753, 761 (2010). This approach is grounded in dismantling the exceptionalism of family law. It opposes the views that treat family as the opposite of the market (i.e., those views that treat the family as based on notions of altruism and status and not on selfishness and contracts—the latter being traditionally construed as describing the market).

16. Only a few commentators expressly discuss—typically on a theoretical level—the idea of marriage as a redistributive tool. The more traditional and common account is that marriage is a tool to fight poverty. See, e.g., ISABEL V. SAWHILL, *GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE* 5–12 (2014); W. Bradford Wilcox & Robert I. Lerman, *For Richer, for Poorer: How Family Structures Economic Success in America*, AM. ENTER. INST. (Oct. 28, 2014), <http://www.aei.org/publication/for-richer-for-poorer-how-family-structures-economic-success-in-america/> [https://perma.cc/Q6VB-C8YX]; Ari Fleischer, *How to Fight Income Inequality: Get Married*, WALL ST. J. (Jan. 12, 2014, 6:07 PM), <http://www.wsj.com/articles/SB10001424052702304325004579296752404877612> [https://perma.cc/4LCR-8TC9] (“If President Obama wants to reduce income inequality, he should focus less on redistributing income and more on fighting a major cause of modern poverty: the breakdown of the family.”). The question of marriage as a policy tool to combat poverty is not what this Article explores. The Article does tackle the question of marriage’s potential role in fighting (and contributing to) wealth concentration, but it concludes that the state should not rely on marriage to do the job of combating the marital wealth gap. See *infra* sections III.D.2 and IV.B.

17. See *infra* section IV.B (discussing the role of marriage in breaking up family fortunes).

own.¹⁸ Thus, in the United States, quite frequently wealth marries wealth.¹⁹ As this marriage pattern concentrates wealth, assortative mating further explains how marriage profits the more affluent by increasing the wealth owned via marriage.

How should the state respond to the role marriage serves in concentrating wealth? This Article proposes a fundamental shift in state and federal policies concerning wealth benefits and marital status, enabling the state to reduce marriage's role as a wealth aggregator. It argues that if marriage is already the preserve of the well-off, then the state should decouple wealth benefits from marriage. This approach is grounded in adoption of "transformative" remedies, which are designed to recognize diverse family types (not just marital households) while also combating the structures that enable wealth concentration among affluent married couples.²⁰ This framework would help dismantle the architecture that supports the marital wealth gap.

This Article proceeds as follows: Part I outlines the growth of wealth inequality in the United States and identifies its harms. It also suggests that family law scholarship's focus on wealth distribution at the time of divorce should expand to evaluating the role of marriage in economic inequality in society generally. Part II propounds data on the correlation between family structure and wealth ownership to demonstrate the marital wealth gap. Part III critiques the argument that marital behavior, alone or even primarily, explains the marital wealth gap and shows that various other factors, including intergenerational transfers, are significant in producing wealth inequality. Section III.C then identifies and produces a taxonomy of the ways the law contributes to wealth concentration within married households at the top of the wealth distribution. Section III.D asserts that class-based marriage patterns further explain the marital wealth gap and contribute to wealth inequality. This section contends that individuals' decisions to marry someone with similar socioeconomic backgrounds is frequently informed by our society's increased socioeconomic segregation. Part IV advocates a pioneering shift in the way the state treats wealth and family status. It advances a theory grounded in transformative "recognition and redistribution" that decentralizes marriage's monopoly on wealth-related benefits. It also

18. See *infra* section III.D.1 (providing and analyzing data about patterns of assortative mating).

19. See *infra* section III.D.1.

20. I build on the work of Nancy Fraser, who distinguishes between "recognition" and "redistribution" claims and between "affirmative" and "transformative" remedies. See Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age*, 212 *NEW LEFT REV.* 68, 70–74 (1995).

argues that such strategies should simultaneously aim to reduce wealth concentration among the richest households.

I. INEQUALITY: A LOOK AT WEALTH VS. INCOME

In recent years, wealth inequality in the United States has been impelled to the center of scholarly and public debate.²¹ At the heart of this discussion is the fact that, compared with analogous nations, the United States exhibits extreme wealth inequality,²² which has grown tremendously since the late 1970s.²³

To understand the discussion, one first needs to distinguish between wealth and income. “Wealth” refers to the market value of all the assets owned by households minus their liabilities (debt).²⁴ “Income,” on the other hand, is the “*flow* of financial resources”²⁵ and is derived mainly from wages, interest or investment in capital, or government transfer payments.²⁶ The two, of course, are connected—income affords the buying of capital, and capital produces income—but they are not the same.²⁷ People generally do not use their wealth for everyday living expenses (though they may use the income that capital yields for that

21. See, e.g., THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2014); David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626 (2014); Edward J. McCaffery, *Taxing Wealth Seriously* (USC Law Legal Studies Paper No. 16–10, 2016), http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2738848 [<https://perma.cc/8WU8-X5BP>]. Senator Bernie Sanders called attention to wealth inequality when he stated that “since the mid-1980s there has been an enormous transfer of wealth from the middle class and the poor to the wealthiest people in this country. That is the Robin Hood principle in reverse.” *Income and Wealth Inequality*, BERNIE, <https://berniesanders.com/issues/income-and-wealth-inequality/> [<https://perma.cc/Q4DP-H8DG>].

22. See, e.g., MARIKO LIN CHANG, *SHORTCHANGED: WHY WOMEN HAVE LESS WEALTH AND WHAT CAN BE DONE ABOUT IT* 6 (2010).

23. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q. J. ECON. 519, 523 (2016).

24. *Id.* at 525. Assets include all the nonfinancial and financial resources that provide economic benefits to their owners, such as property, cars, savings, retirement accounts, bonds, and stocks. *Id.*; see also LARS OSBERG, *ECONOMIC INEQUALITY IN THE UNITED STATES* 9 (1984) (wealth is “the total extent, at a point in time, of an individual’s access to resources”).

25. LISA A. KEISTER, *WEALTH IN AMERICA: TRENDS IN WEALTH INEQUALITY* 6 (2000) (emphasis in original).

26. OSBERG, *supra* note 24, at 10; see also McCaffery, *supra* note 21, at 7–8.

27. Further, income inequality and wealth inequality are related; due to large gaps in salaries, the top earners can buy more capital and still keep their existing capital. At the same time, some people who own significant wealth lack high income. For instance, retired persons often have homes or retirement plans, but their income is quite limited. See CHANG, *supra* note 22, at 5.

purpose), but they do use income for necessities and in the course of their everyday lives.²⁸

Wealth is a better indicator of financial status than income because it measures the total economic resources that are available to its holder.²⁹ Income alone is not an accurate indicator of wealth holdings for the reason that a relatively weak correlation exists between income level and wealth ownership.³⁰ Estimates from survey data during the 1980s suggested that the correlation between income and wealth was about 0.50; after removing income that derives from assets, the correlation fell to 0.26.³¹ As the economic gap in the United States widens, however, the correlation between income and wealth is getting stronger.³²

The case of women who have never married, and who work full time, demonstrates how income is an insufficient indicator of economic status. According to the 2013 Survey of Consumer Finances, the median income of never-married women was \$34,518, while the median income of never-married men working full time was \$35,429, which means that women earned 97% as much income as their male counterparts.³³ Thus, relying on income alone, it seems like women almost closed the economic gap between men and women. However, never-married women working full time held about one-third of the wealth of never-married men working full time. Specifically, women in this group only had a median net worth of \$6,750, while their male counterparts had a median net worth of \$18,500.³⁴ If income were our only lens, we would incorrectly assume that the financial situation of never-married women was quite similar to that of their male counterparts.³⁵

28. KEISTER, *supra* note 25, at 6.

29. See CHANG, *supra* note 22, at 4.

30. Lisa A. Keister & Stephanie Moller, *Wealth Inequality in the United States*, 26 ANN. REV. SOC. 63, 65 (2000).

31. *Id.* at 65.

32. RICHARD V. REEVES, DREAM HOARDERS: HOW THE AMERICAN UPPER MIDDLE CLASS IS LEAVING EVERYONE ELSE IN THE DUST, WHY THAT IS A PROBLEM, AND WHAT TO DO ABOUT IT 25 (2017) (“In fact, the link between income and wealth is strengthening over time.”).

33. MARIKO CHANG, ASSET FUNDERS NETWORK, WOMEN AND WEALTH: INSIGHTS FOR GRANTMAKERS 9 (2015), http://www.mariko-chang.com/AFN_Women_and_Wealth_Brief_2015.pdf [<https://perma.cc/6PED-Q5XT>].

34. *Id.*

35. For scholarly discussion of the “gender wealth gap,” its causes, and possible policies for remedy, see WOMEN AND THE DISTRIBUTION OF WEALTH (Carmen Diana Deere & Cheryl R. Doss eds., 2007); CHANG, *supra* note 22; Alyssa Schneebaum et al., *The Gender Wealth Gap Across European Countries*, REV. INCOME WEALTH (2017); Shannon Weeks McCormack, *Postpartum Taxation and the Squeezed Out Mom*, 105 GEO. L.J. 1323, 1327–28 (2017) (asserting that mothers

Additionally, it is important to consider wealth because wealth has some benefits that income does not. Wealth can be transferred to the next generation or sold to others (unlike employment).³⁶ It can also generate supplemental income, be used as collateral for loans with better tax conditions, serve as a cushion in times of emergency and unemployment, and provide flexibility in working patterns (one can generally rely more on the income from assets than from labor earnings). In short, wealth produces more wealth,³⁷ especially because income from capital is taxed more favorably than income from labor.³⁸

Finally, discussing wealth is important because, in the words of Lisa A. Keister, “while disparities in income and educational attainment are extreme, disparities in the ownership of wealth are likely worse and apparently more enduring across generations.”³⁹ Likewise, a recent OECD report that examined wealth inequality among eighteen countries concluded that “household wealth is much more concentrated than household income.”⁴⁰

Indeed, the wealth gap in the United States has reached ominous dimensions. The worrisome aspect of the gap, and the one that public debate is most focused on, is the concentration of wealth among the top 1% of wealth holders.⁴¹ In 2016, the top 1% owned 38.6% of the wealth in the United States, the highest proportion in almost a century.⁴² Further,

who try to reenter workforce after maternity leave see reductions in retirement savings and other benefits).

36. CHANG, *supra* note 22, at 4.

37. See OSBERG, *supra* note 24, at 198; Mariko Lin Chang, *Women & Wealth, in WEALTH ACCUMULATION AND COMMUNITIES OF COLOR IN THE UNITED STATES* 112, 112 (Jessica Gordon Nembhard & Ngina Chiteji eds., 2006); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 458 (2010).

38. See, e.g., I.R.C. § 1(h) (2012) (establishing preferential tax rates applicable to capital gain income).

39. KEISTER *supra* note 25, at 3–4; see also Michael Hiltzik, *U.S. Income Is Bad, but Wealth Inequality Is a Bigger Problem*, L.A. TIMES (Oct. 24, 2014, 3:23 PM), <http://www.latimes.com/business/hiltzik/la-fi-mh-us-income-inequality-is-bad-20141024-column.html> [<https://perma.cc/6B4H-8FP8>]; Christopher Ingraham, *If You Thought Income Inequality Was Bad, Get a Load of Wealth Inequality*, WASH. POST (May 21, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/05/21/the-top-10-of-americans-own-76-of-the-stuff-and-its-dragging-our-economy-down> [<https://perma.cc/23DE-56WG>].

40. ORG. FOR ECON. CO-OPERATION & DEV., *IN IT TOGETHER: WHY LESS INEQUALITY BENEFITS ALL* 274 (2015), <http://dx.doi.org/10.1787/9789264235120-en> [<https://perma.cc/TBR3-C7VF>]; see also PIKETTY, *supra* note 21, at 244 (“The distribution of capital ownership (and of income from capital) is always more concentrated than the distribution of income from labor.”).

41. See, e.g., REEVES, *supra* note 32, at 22 (stating that the debate about the top 1% is “especially salient” recently).

42. Bd. of Governors of the Fed. Reserve Sys., *Changes in U.S. Family Finances from 2013 to 2016: Evidence from the Survey of Consumer Finances*, 103 FED. RES. BULL. 3, 10–11 (2017),

according to one estimate, in two to three more decades the top 1% will eventually hold roughly 50% of the wealth in the United States.⁴³ The amassment of wealth becomes even more extreme in regard to the top one-tenth of 1% of Americans. This fraction owns almost as much wealth as the bottom 90%.⁴⁴ The group is composed of approximately 160,000 families; in 2012, their net assets on average per family were estimated at \$20 million or more.⁴⁵

Contrary to popular belief, the parameters of the wealth inequality problem extend beyond wealth concentration among the top 1%. Increasingly, the top 10% of wealth holders, as well, contribute to the growing wealth inequality in the United States.⁴⁶ In 2013, the Congressional Budget Office found that households in the ninetieth percentile of wealth held an average of \$942,000 in wealth.⁴⁷ Households in the ninety-fifth percentile held an average of \$1,872,000.⁴⁸ The wealth

<https://www.federalreserve.gov/publications/files/scf17.pdf> [<https://perma.cc/4KLN-Y959>]; *Wealth Inequality in the United States*, INEQUALITY.ORG, <https://inequality.org/facts/wealth-inequality/> [<https://perma.cc/UJ8Z-Q4RC>] (“Over the past century, the share of America’s wealth held by the nation’s wealthiest has changed markedly. That share peaked in the late 1920s, right before the Great Depression, then fell by more than half over the next three decades. But the equalizing trends of the mid 20th century have now been almost completely undone.”). Another recent article by Edward N. Wolff documented that in 2016 the top 1% held 39.6% of the country’s wealth. Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2016: Has Middle Class Wealth Recovered?* 44 (Nat’l Bureau of Econ. Research, Working Paper No. 24085, 2017), <http://papers.nber.org/tmp/7707-w24085.pdf> [<https://perma.cc/4CD8-782N>].

43. Baris Kaymak & Marcus Poschke, *The Evolution of Wealth Inequality Over Half a Century: The Role of Taxes, Transfers, and Technology*, 77 J. MONETARY ECON. 1, 19 (2016).

44. McCaffery, *supra* note 21, at 1.

45. Saez & Zucman, *supra* note 23, at 521.

46. Different commentators suggest different ways to characterize the group that generates economic inequality. Richard Reeves, for instance, insists that we should think in terms of the “upper middle class,” which comprises the top 20% of income earners in the United States and pulls away from the rest of society. Others suggest that we should look at the top 5% of wealth holders or focus only on the top 1%. See REEVES, *supra* note 32, at 19–20 (surveying a few of the main approaches to characterize the class divide). My focus on those who fall within the top 10% of wealth distribution is due to the fact that this group holds disproportional wealth compared with other groups. “In 2013, families in the top 10 percent of the wealth distribution held 76 percent of all family wealth” while “families in the 51st to the 90th percentiles held 23 percent.” CONG. BUDGET OFFICE, TRENDS IN FAMILY WEALTH, 1989 TO 2013, 1 (2016), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51846-familywealth.pdf> [<https://perma.cc/WD5B-FS2C>]. Thus, it seems justified to hold the line at 10%.

47. CONG. BUDGET OFFICE, TRENDS IN FAMILY WEALTH, 1989 TO 2013, SUPPLEMENTAL DATA & DATA UNDERLYING THE EXHIBITS AND FIGURE (2016), <https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51846-supplementaldata.xlsx> [<https://perma.cc/25EP-3AN2>] (using data primarily from the Survey of Consumer Finances).

48. *Id.*

owned by the top 10% of households increased from 67% in 1983 to 75% in 2013.⁴⁹

The amassment of wealth at the top correlates with erosion of wealth in the middle class and the groups below.⁵⁰ Emmanuel Saez and Gabriel Zucman define the “middle class” as families in the top 50–90% of wealth holders; notably, the bottom 50% own close to zero net wealth.⁵¹ While middle-class Americans held 35% of the wealth in the United States in the mid-1980s, they held only 23% in 2012.⁵² Quite astonishingly, the middle class presently possesses more or less the same proportion of wealth that it held seven decades ago.⁵³ In 2013, households at the twenty-fifth percentile or below had an average of \$13,000 in debt.⁵⁴ The bottom line is that the top 1%, together with the next 9%, holds around three-quarters of the wealth in the United States, leaving around 25% of net worth with the remaining households.⁵⁵

The uneven concentration at the top end of wealth distribution has a profoundly adverse effect on society. Much ink has been spilled over the question of whether economic inequality is, in and of itself, unjust.⁵⁶ That question is beyond the scope of this Article. Its potential moral problems aside, wealth inequality has palpably injurious effects to society and to individuals. Wealth inequality makes communities more polarized and segregated, geographically and culturally.⁵⁷ This is not a problem implicating solely the uber-rich but one that involves affluent families in general. The increasing class-segregation of neighborhoods provides these families more access to social capital, schools, and education.⁵⁸ This

49. See Kaymak & Poschke, *supra* note 43, at 1.

50. Gabriel Zucman, *Wealth Inequality*, in PATHWAYS: STATE OF THE UNION—THE POVERTY AND INEQUALITY REPORT 2016, 39, 42 (2016), <http://inequality.stanford.edu/sites/default/files/Pathways-SOTU-2016-Wealth-Inequality-3.pdf> [<https://perma.cc/CD9C-GLJ6>].

51. Saez & Zucman, *supra* note 23, at 554–55.

52. *Id.* at 523.

53. *Id.* at 555.

54. CONG. BUDGET OFFICE, *supra* note 46, at 1.

55. Keister, *The One Percent*, *supra* note 3, at 353.

56. See OSBERG, *supra* note 24, at 3 (1984) (explaining that “[m]ost people’s interest in the extent and causes of inequality stems, however, from the value which they place in ‘equality’”); Ann E. Cudd, *Economic Inequality and Global Justice*, in ECONOMIC JUSTICE: PHILOSOPHICAL AND LEGAL PERSPECTIVES 159, 160–61 (Helen M. Stacy & Win Chiat Lee eds., 2013) (arguing that “[e]conomic inequality is not necessarily unjust” but that “great inequalities in wealth can define power relations in a society that are problematic for justice”).

57. CHUCK COLLINS, 99 TO 1: HOW WEALTH INEQUALITY IS WRECKING THE WORLD AND WHAT WE CAN DO ABOUT IT 61–62 (2012).

58. See REEVES, *supra* note 32, at 31 (“The clustering of upper middle-class families into certain neighborhoods deepens the class divide.”).

geographical segregation can lead to less investment in public services, as the rich create and use a separate system of services.⁵⁹

Additional adverse effects of wealth inequality are well documented. Wealth inequality can aggregate political power in the hands of a few, thus distorting the preference of the majority by influencing elections and other political processes.⁶⁰ This, in turn, can result in less participation and representation of others in the political system. Again, while public discussions often attribute this harm to the top 1%, it is also true that those who belong to the top 10% have significant political power that helps them set policies that benefit them the most.⁶¹ Moreover, wide gaps in wealth concentration might also limit economic growth, as the less-wealthy live mainly from their incomes and are unable to produce more wealth. Wealth inequality thus contributes to increased debt and less economic activity and spending.⁶² At the same time, wealth concentration generates income from capital to the wealthiest and, thus, increases income inequality.⁶³

There are some indications that extreme financial inequalities also lead to more crime because people at the “losing end” of such inequalities may not have other ways to support themselves except through criminal acts, or may resort to crime because they feel they have been treated unfairly.⁶⁴ Finally, wide gaps in wealth holding contradict the idea of a society grounded in meritocracy—where people advance based on individual merit and not by the situation they were born into—because overconcentration makes social mobility and equal opportunity more confined.⁶⁵ The privilege that wealth provides is relevant, in varying

59. COLLINS, *supra* note 57, at 63–65.

60. *See, e.g.*, REEVES, *supra* note 32, at 8 (“An individual billionaire can have a disproportionate influence on an individual politician . . .”); Cudd, *supra* note 56, at 165 (“There is another source of unfairness leading to economic inequality, and that is inequality that is perpetuated or magnified by the rich who are able to rig the laws that determine what count as property rights and legitimate transactions in their favor.”).

61. *Cf.* REEVES, *supra* note 32, at 8 (“But the upper middle class has outsized political power, too.”).

62. COLLINS, *supra* note 57, at 65–67.

63. ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 40, at 36.

64. STEVEN PRESSMAN, UNDERSTANDING PIKETTY’S *CAPITAL IN THE TWENTY-FIRST CENTURY* 36–37 (2016).

65. *Id.* at 62–63; JAMES S. FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY 106–46 (1983) (discussing equal opportunity from a political theory point of view); HEATHER BETH JOHNSON, THE AMERICAN DREAM AND THE POWER OF WEALTH 9–10 (2006) (discussing the dominance of meritocracy in U.S. culture and politics); Benjamin Means, *Wealth Inequality and Family Businesses*, 65 EMORY L.J. 937, 943 (2016) (“Wealth inequality is disturbing, not only because of its magnitude but also because it often reflects family background more than individual merit.”).

degrees, to all those from advantaged wealthy backgrounds because even a small inheritance can make a large difference in life chances and in opportunities to accrue more wealth.⁶⁶

Although this Article focuses on the concentration of wealth at the top and does not deal with the poverty side of wealth inequality, the impact of the wealth gap on the poor must be recognized. The lack of wealth for most of the population raises a host of societal and moral problems related to poverty.⁶⁷ The impact of wealth inequality on the poor and working class is particularly pertinent in the United States due to the relatively thin safety net the state provides.⁶⁸ Savings are especially important in periods of unemployment, retirement, medical emergencies, and care for children. But the high cost of caregiving and healthcare—given the absence of inexpensive universal healthcare, subsidized paternity leave, or state-supported childcare—makes wealth more important in the United States than in other countries where the state provides a more generous safety net.⁶⁹ Savings are also essential in the United States due to the rising costs of higher education.⁷⁰

Wealth inequality also correlates with racial inequality.⁷¹ Based on the 2013 Survey of Consumer Finances, a Pew research report found that, in 2013, the median wealth of a white family was \$141,900, while for African American households it was \$11,000, and for Hispanic

66. See Stephen J. McNamee & Robert K. Miller, *Inheritance and Stratification*, in *INHERITANCE AND WEALTH IN AMERICA* 193, 194 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (“This applies not just to the top 1 percent . . . but in varying degrees to all those from relatively privileged backgrounds.”).

67. See, e.g., Cudd, *supra* note 56, at 160 (discussing the connections between poverty and economic inequality).

68. See Karen Jusko, *Safety Net*, in *PATHWAYS: STATE OF THE UNION—THE POVERTY AND INEQUALITY REPORT 2016*, 25, 25–31 (2016) (“The overall amount of poverty relief [in the U.S.] is the lowest among the 13 countries in our analysis; the baseline level of support is the fourth lowest among our countries; and the rate of relief falloff is just slightly above the median level.”).

69. Melissa Murray, *Black Marriage, White People, Red Herrings*, 111 *MICH. L. REV.* 977, 996 (2013) (“The European safety nets help contextualize the thin level of public support for American families.”).

70. See, e.g., Grey Gordon & Aaron Hedlund, *Accounting for the Rise in College Tuition* (Ctr. for Applied Econ. and Policy Research, Working Paper No. 2013-013, 2015), <http://www.iub.edu/~caepr/RePEc/PDF/2015/CAEPR2015-015.pdf> [<https://perma.cc/A95B-27HG>] (“From 1987 to 2010, sticker price tuition and fees [for college] ballooned from \$6,600 to \$14,500 in 2010 dollars. After subtracting institutional aid, net tuition and fees still grew by 78%, from \$5,790 to \$10,290.”).

71. It is difficult to generalize about the wealth-holding status of Asian Americans because of the wide disparities between ethnic groups within that community. Data are quite limited about intragroup inequality. See Paul Ong & R. Varisa Patraporn, *Asian Americans and Wealth*, in *WEALTH ACCUMULATION AND COMMUNITIES OF COLOR IN THE UNITED STATES*, *supra* note 37, at 173, 174–76.

households, \$13,700.⁷² The Census Bureau reported that African American households' overall median net worth decreased by \$3,746 between 2000 and 2011.⁷³ Similarly, "[t]he overall median net worth of Hispanic[] [households] decreased by \$5,576 . . . between 2000 and 2011."⁷⁴ Because primary data include only a small representation of Native Americans, information about wealth holding for this group is quite limited.⁷⁵ However, the data from the National Longitudinal Survey of Youth of 1979 (NLSY) show that Native Americans lag significantly behind all other groups in wealth holding.⁷⁶

Although the subject of wealth inequality has recently become commonplace in academic literature and popular debate,⁷⁷ scholarship in the area of domestic relations has not probed the connection between laws of adult relationships and the concentration of wealth among the richest families. In the past two decades, scholars often critiqued the separation between welfare law and family law, maintaining that family law is more preoccupied with middle-class families and neglects laws pertaining to low-income families.⁷⁸ Nevertheless, the current era of family law scholarship has produced tremendously important and thoughtful work on the complex modes in which family law interacts with economic inequality.⁷⁹ Such research primarily examines the impact of economic structures on the family unit and the connections between family law and

72. Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/> [<https://perma.cc/2WGL-VZJ3>].

Indeed, part of the platform of Black Lives Matter includes a call for fairer taxation of wealth. See ANJA RUDDIGER, CATHY ALBISA, & KARL KUMODZI, A PROGRESSIVE RESTRUCTURING OF ALL TAX CODES AT THE LOCAL, STATE, AND FEDERAL LEVELS TO ENSURE A RADICAL AND SUSTAINABLE DISTRIBUTION OF WEALTH, <http://taxprof.typepad.com/files/blm.pdf> [<https://perma.cc/YQM3-2FJM>].

73. MARINA VORNOVITSKY, ALFRED GOTTSCHALCK, & ADAM SMITH, U.S. CENSUS BUREAU, DISTRIBUTION OF HOUSEHOLD WEALTH IN THE U.S.: 2000 TO 2011, at 4 (2011), <https://www.census.gov/content/dam/Census/library/working-papers/2011/demo/wealth-distribution-2000-to-2011.pdf> [<https://perma.cc/XK37-8G27>].

74. *Id.*

75. Jay L. Zagorsky, *Native Americans' Wealth, in WEALTH ACCUMULATION AND COMMUNITIES OF COLOR IN THE UNITED STATES*, *supra* note 37, at 133, 134–35.

76. For instance, 25% of Native Americans in 2000 had zero wealth holding or had debt, compared with 10% of their counterparts with such level of debt (comparison is between baby boomers in the year 2000). *Id.* at 140.

77. See, e.g., Zucman, *supra* note 50, at 39 (“With the takeoff in income inequality by now well-known, attention has shifted of late to trends in wealth inequality.”).

78. See, e.g., Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 892 (2004) (“The family law governing the poor is also excluded from the family law canon.”).

79. See, e.g., CARBONE & CAHN, *supra* note 13.

poverty.⁸⁰ However, this strand of work does not investigate how family law supports affluent families in ways that result in structural economic inequalities. Nor does it explore the means by which the family, as an economic unit, generates economic inequality. What family law has not explored is, then, left to tax law scholarship.

The main discussion on the intersection of wealth and family law has focused on the “gender wealth gap”—the ways that rules about division of property after breakup operate to the detriment of women as the main caregivers in the family.⁸¹ However, outside the context of divorce, scholars have rarely analyzed how certain laws affecting the family as an economic unit interconnect with the wealth gap. One notable exception is Benjamin Means’s recent work on the relationship between family businesses and wealth inequality.⁸² Some of this lacuna in the family law literature has been occupied by critical tax scholarship documenting how the tax code unfavorably treats some types of families, especially those with dual equal earners, racial minorities, and low-income breadwinners.⁸³ This strand of scholarship examines the issue through the lens of taxation but does not directly address other aspects that affect the wealth accumulation of households outside questions relating to tax. The gap that this Article thus attempts to fill concerns the larger project of economic inequality and the way in which family status—and marriage in particular—preserves wealth, and the problems the marital wealth gap creates.

80. See, e.g., *id.* at 406 (“While high-status men will still marry more than low-status men, the *high-status* men are less likely to be married in cities with higher-income inequality than comparable men elsewhere.”).

81. See, e.g., Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J. L. & GENDER 317, 340, 345–47 (2016); Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1271–72 (2015) (arguing that current rules pertaining to division of property upon divorce—and, particularly, division of professional assets—do not reflect the marital bargain, and they primarily harm the main caregiver in the relationship).

82. Means, *supra* note 65, at 940 (arguing that, “[o]n the one hand, family businesses can entrench existing disparities in wealth and opportunity. . . . On the other hand, family businesses can be a powerful antidote to inequality”).

83. See, e.g., Lily Kahng, *Path Dependence in Tax Subsidies for Home Sales*, 65 ALA. L. REV. 187, 231 (2013) (“The gender and race dimensions of wealth inequality in the United States are indisputable and deeply troubling. Women of all races are less wealthy than men, and the wealth disparity is particularly acute for single women of color.”); Lily Kahng, *The Not-So-Merry Wives of Windsor: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 328 (2016) (arguing “that women in same-sex marriages will be less likely than other married people to enjoy significant marriage tax benefits, and more likely to incur substantial marriage tax burdens”); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 987 (1993); Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559, 560–63 (2016); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1573 (1996).

To summarize, wealth is an important indicator of one's economic position. Wealth inequality in the United States is growing rapidly and consistently, but the connections between wealth inequality and family status are mostly underexplored. The next Part reviews the empirical data about family status and wealth holding.

II. THE MARITAL WEALTH GAP

The marital wealth gap is captured by and illustrated through four sets of data. First, the Article examines the median wealth of married households compared with other households. Second, looking beyond the median, it reviews the connection between wealth holding and families at the apex of wealth ownership. Accordingly, the Article finds that households at the top 10% of wealth ownership are more likely to be married than any other group. Third, some data support the claim that even among the wealthiest taxpayers, married couples hold, on average, significantly more wealth than single individuals and unmarried couples. Fourth, the portfolio of investments held by married couples in general is more diversified than other families'.

Wealth ownership and family structure are highly correlated.⁸⁴ Data consistently show a ranking wherein married families own the most, followed by widowed, divorced, and, last, never-married individuals.⁸⁵ Of course, marriage merges the assets of couples (in terms of measuring their net wealth), so they have more wealth than a single individual.

84. Keister & Moller, *supra* note 30, at 73.

85. See, e.g., LISA A. KEISTER, GETTING RICH: AMERICA'S NEW RICH AND HOW THEY GOT THAT WAY 210–11, tbl.8.1 (2005) (“Marriage behavior affects wealth in important ways that are well documented but seldom discussed in detail. This is unfortunate because there are relationships between marriage, divorce, widowhood, and wealth that are fundamental to understand the accumulation of wealth of assets and wealth mobility.”); cf. Keister & Moller, *supra* note 30, at 73 (noting that “[f]amily structure also plays an important role in creating and maintaining differences in wealth ownership” and that “there is evidence that marriage and widowhood increase wealth ownership, while increased family size and family dissolution through divorce or separation have the opposite effect” (citation omitted)). The data this Part provides concern households with opposite-sex couples because, for the most part, the data are from years in which same-sex couples were not able to get married in the United States. Generally, the data about wealth holding by married and unmarried same-sex couples are nascent at this point. However, some indications are that married same-sex couples lag behind their opposite-sex counterparts in terms of wealth ownership. For example, according to data from the United States Census Bureau from 2014, 66.9% of married, same-sex-couple households owned homes, compared with 79.1% of their opposite-sex counterparts. Further, 68.3% of male-male married couples owned homes, compared with 65.5% of female-female married couples. See U.S. CENSUS BUREAU, HOUSEHOLD CHARACTERISTICS OF OPPOSITE-SEX AND SAME-SEX COUPLE HOUSEHOLDS: ACS 2014 tbl.1 (2014).

Nonetheless, as the data show, the wealth of married couples is often significantly greater than just double that of two single individuals.⁸⁶

Based on the NLSY 1979, noted above, which examines wealth ownership of adults born between 1957 and 1964,⁸⁷ Alexis Yamokoski and Lisa Keister estimated that, in 2000, married adults had a median net worth of nearly \$100,000, about seven and a half times the median net worth for all single adults reported on in these data.⁸⁸

After married couples, the wealthiest families are those in which one spouse has predeceased the other. Here, the wealth gap between men (widowers) and women (widows) is quite significant. For widowers, the median wealth was \$125,000, while, for widows, it was \$73,400—meaning that widows held only 59% of the wealth that widowers held.⁸⁹

The 2001 Survey of Consumer Finances data demonstrate an even wider gap between divorced and married households. Households with married couples (of all ages) owned a median wealth of \$148,700, while divorced men owned a median wealth of \$44,000, and divorced women, \$19,380.⁹⁰ Hence, the combined median wealth of the two households of divorced couples is approximately \$64,000, which means that the median wealth of a divorced household is around 43% that of a married household.

Most relevant to this Article is the wealth gap between cohabiting (unmarried) couples and married couples. Based on data from multiple panels of the Survey of Income and Program Participation, Alicia Eads

86. F. Thomas Juster, James P. Smith & Frank Stafford, *The Measurement and Structure of Household Wealth*, 6 LAB. ECON. 253, 263–64 (1999) (“Most directly, marriage combines the separate assets of men and women into a single unit so that, on average, married households will have twice the wealth of single households. But differences by marriage are much greater than that with married couples typically having three and one-half times as much wealth as nonmarried households.”).

87. The NLSY 1979 followed these adults annually from 1979 to 1994 and every other year since then. *National Longitudinal Survey*, BUREAU LAB. STATS., U.S. DEP’T LAB., <https://www.bls.gov/nls/y79summary.htm> [<https://perma.cc/5VTZ-J4ZX>] (last updated June 25, 2003). It followed the same group of people to sketch their development through the years. *Id.* Starting from 1985, when the respondents reached the age of 20, the survey has also collected data about wealth holding. *See* Lisa A. Keister & E. Paige Borelli, *Religion and Wealth Mobility: The Case of American Latinos*, in RELIGION AND INEQUALITY IN AMERICA: RESEARCH AND THEORY ON RELIGION’S ROLE IN STRATIFICATION 119, 126 (Lisa A. Keister & Darren E. Sherkat eds., 2014). In terms of measuring wealth inequality, it is an ideal scale because it tracks the wealth holding of the same group of people at different points in time. *See id.*

88. Alexis Yamokoski & Lisa A. Keister, *The Wealth of Single Women: Marital Status and Parenthood in the Asset Accumulation of Young Baby Boomers in the United States*, 12 FEMINIST ECON. 167, 178 (2006).

89. Chang, *supra* note 37, at 115.

90. *Id.*

and Laura Tach found that married couples own significantly more wealth than their unmarried counterparts.⁹¹ According to their data, which concerned couples' wealth holding from 1996 to 2013, married couples held median net wealth of \$142,000, while cohabiting couples held median net wealth of \$24,800.⁹²

Not only are married households wealthier than all other household structures, the top 10% of wealth holders are married in greater proportions than other groups in the descending array of wealth holding. Based on the 2010 Survey of Consumer Finances, Keister concludes "that members of the one percent are disproportionately male, white, and married."⁹³ However, the data she relies on do not distinguish between unmarried and married couples but simply track households headed by couples versus single individuals. Hence, using this information, we can only learn that households at the top 1% tend to be partnered but not necessarily legally married. These same data (derived from the Survey of Consumer Finances) further demonstrate that, looking at the top 1%, more than 90% of households consist of couples; in the next 9%, almost 79% of households are couples; and, regarding the bottom 90%, only 55% of households consist of couples.⁹⁴ This is already helpful, as it shows that single individuals have relatively less representation among the top 1% and the top 10% than other family types. While we do not know how many of these couples at the apex of wealth holding are married, data about income distribution teach that households at the top of the income distribution generally consist of married couples more than households in any of the other groups on this scale.⁹⁵ Although wealth and income do not always correlate, data about income of married couples serve as one indication for the pronounced inclination toward marriage among top wealth holders.⁹⁶ That the wealthiest households in the United States

91. Alicia Eads & Laura Tach, *Wealth and Inequality in the Stability of Romantic Relationships*, 2 RSF: RUSSELL SAGE FOUND. J. SOC. SCI. 197, 205–06 (2016).

92. *Id.* at 206 ("The median married couple had about \$68,000 in secured debt, \$1,800 in unsecured debt, and \$23,000 in liquid assets and \$189,000 in illiquid assets. The median cohabiting couple, by contrast, had no secured debt, \$700 in unsecured debt, \$1,500 in liquid assets, and \$24,000 in illiquid assets.").

93. Keister, *The One Percent*, *supra* note 3, at 356.

94. *Id.* at 357 tbl.1.

95. *Cf.* REEVES, *supra* note 32, at 28–29 (arguing that upper-middle-class individuals are more likely to get and stay married than other economic strata of the population).

96. CHRISTINE PERCHESKI & CHRISTINA GIBSON-DAVIS, FAMILY STRUCTURE & WEALTH INEQUALITY AMONG FAMILIES WITH CHILDREN, 1989–2013, at 8 (2017), http://www.ecineq.org/ecineq_nyc17/FILESx2017/CR2/p190.pdf [<https://perma.cc/85AB-84NK>] ("Income does not translate directly into wealth. Nevertheless, parents with higher incomes are likely to have more money that can be directed toward savings or asset accumulation.").

primarily consist of married couples finds further support in data about wealth holding among parents, based on family structure. According to a recent study, in 2013, married parents in the top seventy-fifth percentile held a median net worth of \$338,500, compared with \$49,440 for cohabiting parents.⁹⁷ Together, these studies offer a strong indication that the wealthiest households are more likely than any other group to be headed by married couples.

Another aspect of the marital wealth gap is that, even among the richest families in the United States, married couples hold, on average, significantly more wealth than singles and unmarried couples. Recently released IRS data documenting charitable bequests made by decedents in 2013 provide a solid sample that supports this argument. The population surveyed in these data, and that appear in Tables 1 and 2, consists of decedents making charitable bequests, *not* all decedents leaving estates. In 2013, this group included 2,634 decedents out of 10,568 estate tax returns from that year.⁹⁸ This means that approximately one quarter of the estates in 2013 are represented in these data, a sizeable sample, and there is no reason to assume that the population that made charitable contributions is different in terms of wealth holding and family status from those populations who did not make such contributions. The data are categorized by the sex and marital status of the decedent.⁹⁹

97. *Id.* at app. tbl.A2.

98. *SOI Tax Stats—Estate Tax Statistics Filing Year Table 1*, IRS (Oct. 6, 2017), <https://www.irs.gov/statistics/soi-tax-stats-estate-tax-statistics-filing-year-table-1> [<https://perma.cc/26DK-PURF>] (click link to table for 2013); *SOI Tax Stats—Estate Tax Data, by Year of Death*, IRS (Dec. 21, 2017), <https://www.irs.gov/statistics/soi-tax-stats-estate-tax-statistics-year-of-death-table-3> [<https://perma.cc/KAL9-MRY6>] (click link to table for 2013).

99. See *SOI Tax Stats—Estate Tax Data, by Year of Death*, *supra* note 98 (click link to table for 2013).

In the original data, the amount is in thousands of dollars; I converted to billions and rounded up. The average does not appear in the original data and average can, obviously, be affected by any single estate that is too big or too small. I did not take into consideration the category of “other”—which refers to marital statuses “unknown,” “divorced,” or “legally separated”—because it included too many variations.

Table 1:
Wealth of Estates Bequeathed by Male Decedents (2013)

Decedent male	Number of estates filed	Total net worth for the category (in billions)	Average wealth of an estate (in millions)
Married	557	16.7	30
Widowed	449	9.4	21
Single	209	2.4	11.4

Table 2:
Wealth of Estates Bequeathed by Female Decedents (2013)

Decedent female	Number of estates filed	Total net worth for the category (in billions)	Average wealth of an estate (in millions)
Married	130	2.5	19
Widowed	904	18.9	20.9
Single	137	1.3	9.8

The IRS data provide a clear illustration of this aspect of the marital wealth gap. Married men who died in 2013 held, on average, almost three times the wealth of a single male decedent (whether never married, or partnered but unmarried).¹⁰⁰ Meanwhile, at the time of death, single or partnered but unmarried women held, on average, half the wealth of their widowed and married counterparts.¹⁰¹ Hence, even among the wealthiest, marital status provides some advantage in wealth accumulation.

100. *Id.* Classifying a taxpayer as “single” means that the individual is unmarried according the relevant state law. See IRS, PUBLICATION 501: EXEMPTIONS, STANDARD DEDUCTION AND FILING INFORMATION 6 (2018), <https://www.irs.gov/pub/irs-pdf/p501.pdf> [<https://perma.cc/B5GK-3KT3>]. In all states, partners who live together in unmarried (and nonregistered) relationships, even long term, are not recognized as married. See, e.g., Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 587, 591 (2013). This signifies that “single individuals” in this data might include unmarried partners, even if they are in long-term and economically interdependent relationships.

101. See *SOI Tax Stats—Estate Tax Data, by Year of Death*, *supra* note 99. When it comes to women, the large number of widowed women is explained by the fact that wives often outlive their husbands. See Barry Johnson & Louise Woodburn, *Analyzing the Weighting Strategy for the Statistics of Income 1987 Estate Study*, in STATISTICS OF INCOME AND RELATED ADMINISTRATIVE RECORD RESEARCH: 1988–1989, 97, 103 (Beth Kilss & Bettye Jamerson eds., 1990).

Married couples are also unique in the greater diversity of their portfolio compositions.¹⁰² This is important because a diversified portfolio might immunize investments from sharp changes in the market. Married couples are most likely (compared with all other household categories) to be homeowners. According to Mariko Chang's calculation, based on the 2004 Survey of Consumer Finances, 83% of white married couples own their homes, with a median equity of \$85,000, compared with 55% of white single men, who own homes with a median equity of \$67,000.¹⁰³ Fifty-six percent of black married couples own their homes (median equity, \$50,000) compared with 36% of single black men (median equity, \$39,000) and 42% of black single women (median equity, \$28,000).¹⁰⁴ The same high representation of married couples is true in stock ownership, including mutual funds and retirement accounts, where 59% of married households own stock at a median value of \$23,450. In contrast, 45% of single males own stock (at a median value of \$13,200), and only 36% of single females own stock (at a median value of \$9,000).¹⁰⁵

In conclusion, the data are consistent in showing a marital wealth gap: marital households own more wealth than all other groups, across the various types of wealth. The top 10%, and especially the top 1%, are more likely to be married than the next 90%. And, even among the wealthiest, married couples possess considerably more wealth than their unmarried counterparts. The next Part investigates why this is the case.

III. MARRIAGE AS A WEALTH MAXIMIZER

This Part probes the causes of the marital wealth gap. It starts with scrutinizing the conventional sociological account that views marriage itself as explaining the fact that married households hold more wealth than other types of family structures. Section B then examines how factors related to family background (other than marital status) affect wealth accumulation. Section C develops a taxonomy of the ways in which the law bears some responsibility for part of the marital wealth gap by facilitating, and even encouraging, wealthy spouses to consolidate and

102. Percheski, *supra* note 96, at 29 (finding that married couples “had the most diverse assets portfolio (in terms of number of assets owned), and the highest median value of assets within each category”).

103. CHANG, *supra* note 22, at 82 tbl.5.7. Lisa Keister's study, based on the NLSY 1979, finds similar results: while married couples represent only 63% of respondents, 85% of them own primary residence, as compared to 47% of divorced women and 30% of never-married men. See KEISTER, *supra* note 85, at 216 tbl.8.2 (2005).

104. CHANG, *supra* note 22, at 82 tbl.5.7.

105. *Id.* at 84 tbl.5.8.

maximize their wealth. Finally, section D exposes the role of class-based assortative mating in the marital wealth gap, and delineates how the law, primarily in its inaction, supports the conditions for these selection practices.

A. Does Marital Behavior Generate Wealth?

The fact that married couples own significantly more wealth than other households may seem completely reasonable: married couples consolidate their assets and enjoy the benefits of economies of scale. Scholars have often embraced this account as the principal explanation for the marital wealth gap. As Keister explains, “Married couples typically join assets, income is considerably higher for married couples, and expenses tend to be lower for married couples.”¹⁰⁶ Likewise, Linda J. Waite and Maggie Gallagher argue that “being married in itself seems to encourage the creation and retention of wealth.”¹⁰⁷ While they concede, in one remark, that “[s]ome of the advantage married people have is undoubtedly due to selection,” they insist that the behavior of married couples, in and of itself, explains why marriage is correlated with increased wealth holding.¹⁰⁸

Scholars who advance this hypothesis put forth five main reasons to support their claim. First, married households cut expenditures as a result of labor specialization and the support that spouses provide one another.¹⁰⁹ For example, when one spouse cooks well, the household can save money on restaurants; or when one spouse can do the accounting for the family business, then the couple can save money, too. In addition, married couples enjoy economies of scale: they divide the payment for housing and utilities. Second, when couples marry, they promise each other to be there for better and for worse. Such promises serve as the equivalent of implied insurance in cases such as loss of employability or filing for

106. KEISTER, *supra* note 85, at 210.

107. LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 113 (2000).

108. *Id.* at 113, 122–23; *see also* W. BRADFORD WILCOX, JOSEPH PRICE, & ROBERT I. LERMAN, *STRONG FAMILIES, PROSPEROUS STATES* 29 (2015), <https://www.aei.org/wp-content/uploads/2015/10/IFS-HomeEconReport-2015-FinalWeb.pdf> [<https://perma.cc/4X6G-WEEC>] (“[M]arried couples are more likely to accumulate wealth than singles or cohabiting couples from similar backgrounds, even after adjusting for income. Furthermore, married parents receive more financial support from both sets of grandparents than do cohabiting couples or single parents.”).

109. *See* WAITE & GALLAGHER, *supra* note 107, at 114–15; Laurence J. Kotlikoff & Avia Spivak, *The Family as an Incomplete Annuities Market*, 89 J. POL. ECON. 372, 372 (1981).

bankruptcy.¹¹⁰ Third, the marital framework and the social norms associated with it lead couples to adopt financially responsible behavior.¹¹¹ Other scholars offer a somewhat comparable theory, positing that the marital framework motivates males to be more committed to earning an income.¹¹² Fourth, married couples get more financial support from in-laws and other extended family than do divorced and nonmarried couples, who receive much less economic assistance from either partner's family.¹¹³ Fifth, divorce has an adverse financial effect, as now the ex-spouses must use their same income and wealth to maintain two households instead of one.¹¹⁴

These accounts contain some valid observations. It is true that married couples enjoy economies of scale, that marriage (and other strong relationships) serves as an efficient alternative to insurance, that married couples get more financial support from their families, and that divorce adversely affects the finances of the family. However, these factors alone are insufficient in accounting for the marital wealth gap.

First, the fact that married couples fare better in terms of wealth accumulation shows *correlation rather than causation*: there is no proof that marriage is the cause of greater wealth rather than merely reflecting patterns of selection. That is, people with wealth, or with certain characteristics that can lead to wealth accumulation, are more likely to get married and stay married.¹¹⁵

In fact, wealth, or lack thereof, is often a reason that poor and non-wealthy individuals do not get married. Sociologist Daniel Schneider recently found that owning a financial asset increases the probability that a man will get married by 1.5 percentage points over a man who does not own any, and that car ownership increases the probability that a man will

110. WAITE & GALLAGHER, *supra* note 107, at 115–16.

111. *Id.* at 116–17.

112. WILCOX, PRICE, & LERMAN, *supra* note 108, at 28.

113. WAITE & GALLAGHER, *supra* note 107, at 127–28; *see also* WILCOX, PRICE, & LERMAN, *supra* note 108, at 29 (“Furthermore, married parents receive more financial support from both sets of grandparents than do cohabiting couples or single parents.”).

114. KEISTER, *supra* note 25, at 222 (“Likewise when couples separate or divorce, splitting assets eliminates the benefit of economies of scale.”); WAITE & GALLAGHER, *supra* note 107, at 130.

115. *See* GARY R. LEE, THE LIMITS OF MARRIAGE, WHY GETTING EVERYONE MARRIED WON'T SOLVE ALL OUR PROBLEMS 119 (2015) (“The research literature leaves no doubt that a major reason why married people are economically advantaged is that men with the most potential and actual economic advantages are more likely to marry, and they bring these advantages with them into marriage.”); Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 159 (2003) (“That married people are better off than unmarried people does not demonstrate that marriage makes people better off. As critics of the marriage movement have long charged, correlation is not causation.”).

get married by 2.6 percentage points.¹¹⁶ He further found that wealth explains marriage patterns—including the lack of marriage—more than education and income do.¹¹⁷

In addition, the argument that married couples are more committed to saving and productivity is also problematic. Many studies have found that the reason cohabitants do not get married is that they are concerned that their partners are not financially responsible.¹¹⁸ Thus, economically responsible behavior may indicate selection, rather than marriage's impact on couples' behaviors. Further, while it is true that divorced couples have to maintain two households and, therefore, fare less well financially than married couples, this argument also fails to acknowledge the correlation-versus-causation problem.¹¹⁹ Consequently, lack of wealth may be a *reason* to divorce—and it provides a more nuanced explanation as to why married couples stay together and are wealthier.¹²⁰

Second, although married couples do enjoy economies of scale, other households can and do enjoy similar benefits.¹²¹ Unmarried couples who live together, as well as nonconjugal partners who cohabit and are economically and emotionally interdependent, all enjoy, to different degrees, such advantages. Moreover, surely economies of scale cannot explain the marital wealth gap in relation to the top 1%. Therefore, economies of scale, alone, cannot explain the marital wealth gap.

Third, Waite and Gallagher fail to acknowledge that marriage is not economically better for everyone, as indicated by the fact that many married couples are poor: 46% of households with less than twice the

116. Daniel Schneider, *Wealth and the Marital Divide*, 117 AM. J. SOC. 627, 658 (2011).

117. *Id.* at 648–49.

118. Pamela J. Smock et al., “*Everything’s There Except Money*”: *How Money Shapes Decisions to Marry Among Cohabitants*, 67 J. MARRIAGE & FAM. 680, 686–92 (2005).

119. A recent study found that owning significant unsecured debt (i.e., debt unsecured by collateral, such as consumer or credit card debt)—to be distinguished from secured debt (like a mortgage)—is associated with a reduction in marital stability. Eads & Tach, *supra* note 91, at 211–12; *see also Researcher Finds Correlation Between Financial Arguments, Decreased Relationship Satisfaction*, KAN. ST. U. (July 12, 2013), <http://www.k-state.edu/media/newsreleases/jul13/predictingdivorce71113.html> [<https://perma.cc/K5BF-NAN7>] (2012 study of more than 4,500 couples indicated that financial arguments are the top predictor of divorce).

120. In addition, starting in the 1980s, the rate of divorce has significantly fluctuated among the less-educated while declining for the well-educated. *See* CARBONE & CAHN, MARRIAGE MARKETS, *supra* note 13, at 15–16. Because wealth and education have a strong correlation, divorce can be equally the result of the couple's lack of financial wealth.

121. *See* Robert S. McIntyre & Michael J. McIntyre, *Fixing the “Marriage Penalty” Problem*, 33 VAL. U. L. REV. 907, 912–13 (1999) (“[M]arital partners do not necessarily enjoy above average amounts of economies-of-scale benefits.”).

federal poverty-level income are married couples.¹²² And for African American families, unlike white households, marriage does not significantly elevate the family's wealth.¹²³ Recent census data support the claim that for people on the lower end of the economic spectrum, marriage does not increase wealth holding. In 2011, the median net worth for a married couple in the lowest quintile was $-\$3,733$; for a male householder, $-\$6,400$; and, for a female householder, $-\$3,202$.¹²⁴ So, assuming that marriage patterns are such that poor marry poor (or, more likely, do not marry at all), the combination of such partners' wealth could yield more debt.¹²⁵

In conclusion, marital behavior only partly explains why married couples fare better in terms of wealth accumulation. Wealth plays a significant role in the decision about whether to get married in the first place and in the decision about whether to stay married.¹²⁶ And, as this Article argues in section C, the rules of family law have direct implications for why some married couples are more successful in acquiring and retaining wealth—another aspect that the conventional account ignores. Similarly, Waite and Gallagher's argument lacks any reference to the effect of intergenerational transfers on wealth creation and retention. The following section discusses this issue further.¹²⁷

B. Family Background Impacts Wealth Accumulation

Completely absent from Waite and Gallagher's account presented above is the significant role that family background *apart* from family structure—such as religion, race, education, sexual orientation, and inheritance—plays in wealth accumulation and wealth mobility. Family

122. URBAN INST., *ASSESSING THE NEW FEDERALISM EIGHT YEARS LATER* 11 (2005), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/311198-Assessing-the-New-Federalism-Eight-Years-Later.PDF> [<https://perma.cc/ZCJ9-KG9U>].

123. THOMAS SHAPIRO, TATJANA MESCHÉDE & SAM OSORO, INST. ON ASSETS & SOC. POL'Y, *THE ROOTS OF THE WIDENING RACIAL WEALTH GAP: EXPLAINING THE BLACK-WHITE ECONOMIC DIVIDE* 4 (2013), <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf> [<https://perma.cc/75Y3-HBYL>].

124. U.S. CENSUS BUREAU, *SURVEY OF INCOME AND PROGRAM PARTICIPATION, 2008 PANEL, WAVE 10, tbl.1* (2014), <https://www2.census.gov/programs-surveys/demo/tables/wealth/2011/wealth-asset-ownership/distribution-2011.xlsx> [<https://perma.cc/R8SP-HUYK>].

125. In such cases of poverty, it is also likely that marital status has an adverse effect on eligibility for need-based welfare. *See generally* Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1291 (2014) (examining cases in which legal recognition of relationships results in financial hardship to the couple).

126. *See* Schneider, *supra* note 116, at 648–49, 658.

127. *See infra* section III.B.

background has a significant effect on households' ability and likelihood to create and retain wealth. This further supports this Article's argument that marital behavior or economies of scale tell a partial story.

Intergenerational transfers directly assist in wealth accumulation when offspring receive an inheritance. Most studies on wealth inequality indicate that intergenerational transfers (inter vivos and through inheritance) account for at least 50%—and perhaps more than 80%—of the net worth of families in the United States.¹²⁸ This proportion is likely going to grow; researchers from the Center on Wealth and Philanthropy at Boston College estimate that approximately \$59 trillion of wealth will be transferred by estates between 2007 and 2061.¹²⁹

Intergenerational transfers can also assist indirectly by contributing to investments likely to increase wealth accumulation.¹³⁰ Transfers that enable higher education and homeownership can be of particular importance.¹³¹ Even a small inheritance—such as one used for the down payment of a first home, typically the first investment that Americans make—“can create a stable base for saving throughout the life course.”¹³² Similarly, education has a special correlation to wealth, as it improves professional opportunities and can create social contacts that may provide business opportunities or even financial help.¹³³ Indeed, recent studies of inheritance patterns show that, given longer lifespans and the rising cost of higher education, the use of inter vivos transfers has increased.¹³⁴ Middle-class Americans typically transfer cash assistance during their

128. Keister & Moller, *supra* note 30, at 72; JACQUELINE L. ANGEL, INHERITANCE IN CONTEMPORARY AMERICA: THE SOCIAL DIMENSIONS OF GIVING ACROSS GENERATIONS 4 (2008); Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180, 2182 n.7 (2011) (“Economic studies have found that a large fraction (possibly in the range of eighty percent) of household wealth in the United States traces to gifts and inheritances, as opposed to participation in the labor economy.”).

129. John J. Havens & Paul G. Schervish, *A Golden Age of Philosophy Still Beckons: National Wealth Transfer and Potential for Philanthropy* (Boston College Tech. Report, 2014), http://www.bc.edu/content/dam/files/research_sites/cwp/pdf/A%20Golden%20Age%20of%20Philanthropy%20Still%20Bekons.pdf [<https://perma.cc/3P8F-ELRK>].

130. Yamokoski & Keister, *supra* note 88, at 174.

131. KEISTER, *supra* note 85, at 102.

132. *Id.*

133. *Id.* at 103.

134. *Cf., e.g.*, AMERIPRISE FIN., MONEY ACROSS GENERATIONS II STUDY: FAMILY FIRST 5 (2012), <http://newsroom.ameriprise.com/images/20018/MAG%20Research%20Report%20Family%20First%204-27-12.pdf> [<https://perma.cc/DUB3-LAW7>] (finding that 71% of surveyed parents financially assisted their children with college tuition); John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 723 (1988) (“[I]ntergenerational wealth transmission no longer occurs primarily upon the death of the parents, but rather, when the children are growing up . . .”).

lifetimes rather than transferring assets by bequest,¹³⁵ suggesting that parents' economic status has a high predictive value for the next generation.¹³⁶ Using the data from the NLSY 1979 cohort, Keister concludes that "inheritance has a direct effect on adult wealth."¹³⁷

The role of inheritance in perpetuating the racial wealth gap between white families and families of color is especially pivotal, as white families are likely to receive significantly larger inheritances.¹³⁸ For instance, data show that, among those who receive an inheritance, whites inherit about ten times more wealth than African Americans.¹³⁹ One study found that, even controlling for such individual characteristics as level of education, age, gender, and previous income, there are statistically significant differences in wealth holdings between African Americans and whites.¹⁴⁰ "Further, *parental net worth (wealth)*—not parental education, occupational prestige, or income—was the variable that mattered . . ."¹⁴¹

In short, wealth accumulation and retention are affected by variables other than marital behavior, such as parental wealth, intergenerational transfers, education, and race. The next section looks at another, more hidden, part of the puzzle: the role that the law plays in the marital wealth gap.

C. *The Law Confers Wealth Advantages on Affluent Married Couples*

This section adds another layer of explanation for the concentration of wealth at the top 10% by showing that the law plays a part in the marital wealth gap. It does not assert that these legal mechanisms are the only reason for this gap. In fact, as section B shows, various factors correlate with wealth holding. Yet, the Article argues that marriage can function as a wealth maximizer for those who are already well-off. It divides the laws that support wealth concentration by married couples into three categories: (1) laws that exacerbate underlying conditions; (2) laws that expressly prefer married couples based on their marital status; and (3) laws and norms that encourage married households to keep wealth within the family.

135. ANGEL, *supra* note 128, at 16–17.

136. Strand, *supra* note 37, at 466.

137. KEISTER, *supra* note 85, at 124–25.

138. Keister & Moller, *supra* note 30, at 76; Strand, *supra* note 37, at 467–68.

139. SHAPIRO ET AL., *supra* note 123, at 5.

140. DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 47 (10th anniversary ed. 2010).

141. Strand, *supra* note 37, at 469 (emphasis in original) (discussing Conley's study).

Two caveats: first, many fringe benefits, which this Article does not discuss, are bestowed on married couples, making their lives and finances better than those of other households. Such boons, including health insurance through a spouse,¹⁴² positively affect income and could eventually have an impact on wealth accumulation.¹⁴³ Here, however, the Article focuses on rules that directly involve the wealth accumulation of the household. Mariko Lin Chang calls such financial benefits “the wealth escalators”—a term that represents a variety of assists that “allow people to generate wealth at a much faster rate than can be obtained by collecting income alone.”¹⁴⁴ Further, the Article does not aim to document and analyze all of the benefits attendant to marriage that affect wealth but only to give a few illustrative rules. Second, in some cases, there could be significant financial benefits to being *unmarried*. One set of such benefits is applicable particularly to lower-income households;¹⁴⁵ other benefits, involving rules that serve to prevent tax avoidance by family members, can also provide financial benefit to couples in legally *unrecognized* relationships.¹⁴⁶ And there are also marriage penalties, which mainly affect wealthy couples with equal incomes.¹⁴⁷ While these rules could be economically detrimental to married couples, when it comes to the family wealth of couples in the top 10%, as explained below, the advantages accruing to the status of “married” sometimes outweigh the disadvantages.¹⁴⁸

142. See, e.g., Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Counter marriage*, 99 CALIF. L. REV. 235, 258–59 (2011) (enumerating the rights and benefits that are attached to marriage).

143. CHANG, *supra* note 22, at 44 (listing fringe benefits that “are indirectly linked with the wealth escalator”).

144. *Id.* at 40.

145. See Aloni, *supra* note 125, at 1291 (discussing the financial benefits that stem from legal nonrecognition of relationships).

146. Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529, 1531 n.2 (2008) (surveying some of the major tax rules that are designed to prevent tax abuse among family members).

147. See Martha T. McCluskey, *Razing the Citizen: Economic Inequality, Gender, and Marriage Tax Reform*, in GENDER EQUALITY: DIMENSIONS OF WOMEN’S EQUAL CITIZENSHIP 267, 280–82 (Linda C. McClain & Joanna L. Grossman eds., 2009).

148. Cf. Kelly A. Moore, *The Curious Case of Dr. Jekyll and the Estate Tax Marital Deduction: Should Prenuptial Agreements Alter the Relationship?*, 33 N. ILL. U. L. REV. 255, 262 (2013) (“To be sure, the Jekyll approach is more generous than the Hyde approach is restrictive. The focus on marriage and reliance on the economic unit presumption is firmly entrenched in the tax code.”). Further, because married couples at the very top of wealth ownership often have only one income-producing spouse, they are more likely to enjoy the marriage benefit than suffer the marriage penalty when it comes to income tax. See Katherine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 25–26 (2010) (“[T]he more wealth a married couple has, the more profound their gender specialization tends to be.” (footnote omitted)).

1. *Laws that Exacerbate Underlying Conditions*

This first category—laws that exacerbate underlying conditions—includes legal mechanisms that create preferences that are most profitable to married couples. They do this not by directly singling out married couples but, rather, by formalizing certain practices that redound to their benefit. This category includes rules that help married couples hold onto wealth they already have or to easily convert their income to wealth.

Capital Gains Exclusion for Sale of Principal Residence: Section 121 of the Internal Revenue Code provides for the exclusion of up to \$250,000 of capital gains—\$500,000 for married taxpayers—on the sale of a home owned and used as a principal residence by the taxpayer.¹⁴⁹ This rule equally applies to unmarried couples who have co-owned and lived in the same house in the two years prior, assuming that both partners are listed as co-owners on the title; in such case, each can claim up to \$250,000 from the gain (based on their relative shares in the home).¹⁵⁰ But, if they do not co-own the residency by title, they cannot enjoy the \$500,000 exclusion (unlike married couples who file together).

In any event, this tax benefit favors wealthy married couples because they are most likely to enjoy it. Data about home ownership by married couples versus others make it possible for us to estimate the proportion of each group seemingly able to use this tax benefit. Indeed, married couples own about 80% of homes in the United States.¹⁵¹ Because unmarried couples are significantly less likely to own homes than are married couples—let alone more expensive properties that appreciate by \$500,000—this benefit is of limited enjoyment to them and directly rewards wealthy married couples.¹⁵² Further, a recent report concluded

149. I.R.C. § 121(b) (2012).

150. Robert Bruss, *1 Year Later: Home Sale Tax Exemption of \$250,000/\$500,000*, CHI. TRIB. (Oct. 17, 1998), http://articles.chicagotribune.com/1998-10-17/news/9810170145_1_tax-free-sale-profits-principal-residence-tax-exemption [<https://perma.cc/HD9X-H8ZN>] (“Two (or more) [unmarried] co-owners of their principal residence can each qualify for up to \$250,000 of tax-free home sale profit. Of course, each co-owner must meet the two-out-of-the-last-five-years aggregate ownership and occupancy requirement.”).

151. Carlos Garriga, William T. Gavin & Don Schlagenhauf, *Recent Trends in Homeownership*, 88 FED. RES. BANK ST. LOUIS REV. 397, 399 (2006).

152. Cf. Rachel Bogardus Drew, *3 Facts about Marriage and Homeownership*, HARV. JOINT CTR. FOR HOUSING STUD.: HOUSING PERSP. (Dec. 17, 2014), <http://housingperspectives.blogspot.ca/2014/12/3-facts-about-marriage-and-homeownership.html> [<https://perma.cc/ZT8N-JY9B>] (“[M]arried couples are much more likely to be homeowners than unmarried individuals, due to their generally better socio-economic status. Married couples are also more likely to have children, and therefore more likely to want larger homes in areas with more family-friendly amenities such as safe neighborhoods and good schools.”); Chang, *supra* note 37, at 116 (data showing that, on average,

that even the \$250,000 exemption is “not likely to help young, low-income, and first-time homebuyers.”¹⁵³ Other data suggest that “[s]ingle people of color own homes at the lowest rates and with the lowest values.”¹⁵⁴ Thus, we can confidently presume that the double benefit, the \$500,000 exclusion, will be most beneficial to affluent married couples who own expensive properties.¹⁵⁵ This benefit goes to those who already owned a home and saw a great increase in its value.¹⁵⁶ It is not a minor exclusion: the Congressional Joint Committee on Taxation “estimated that the exclusion provision saved homeowners \$29 billion in income tax in fiscal 2016.”¹⁵⁷

Importantly, until 1997, the maximum exclusion amount was \$125,000, but married couples filing together were entitled only to one exclusion between them—i.e., a total of \$125,000 for both spouses.¹⁵⁸ In 2007, Congress amended the amount per individual to \$250,000 but also changed the law so spouses can each claim \$250,000—for a total of \$500,000. That is, this new rule “doubl[es] the exclusion amount for unmarried taxpayers, and quadrupl[es] it for married couples.”¹⁵⁹ The history of the amendment does not explain why the benefit was increased so much for married couples.¹⁶⁰

The double exclusion contrasts with the way the income tax system grants a marriage bonus to the lower tax brackets and imposes a marriage penalty on those who earn the most.¹⁶¹ The income tax system eliminates the marriage penalty for lower-earning spouses by simply doubling the

married households own more assets than other household types and have more median capital invested in them).

153. Garriga, Gavin & Shlagenhauf, *supra* note 151, at 401.

154. Kahng, *Path Dependence in Tax Subsidies for Home Sales*, *supra* note 83, at 232.

155. Cf. Phyllis C. Taitte, *Exploding Wealth Inequalities: Does Tax Policy Promote Social Justice or Social Injustice?*, 36 W. NEW ENG. L. REV. 201, 211 (2014) (“Since most middle to lower income taxpayers would not likely own homes that would bring these substantial gains, this subsidy is clearly intended to benefit the wealthier taxpayers.”).

156. REEVES, *supra* note 32, at 105 (“The IRS is generous when we sell our expensive homes too, giving us a break from any tax on capital gains. Half the value of this tax break goes to those of us in the top income quintile.”).

157. *Key Elements of the U.S. Tax System: What Are the Tax Benefits of Homeownership?*, TAX POL’Y CTR.: BRIEFING BOOK (Jan. 7, 2018), <http://www.taxpolicycenter.org/briefing-book/what-are-tax-benefits-homeownership> [https://perma.cc/JX93-7XMU].

158. Kahng, *Path Dependence in Tax Subsidies for Home Sales*, *supra* note 83, at 195–96.

159. *Id.* at 196.

160. *Id.* at 196 n.29 (“There is no explanation of why the exclusion amount was raised so substantially.”).

161. Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 59 (2000).

return rates that are imposed on each separately.¹⁶² Conversely, the tax code sets the rates of upper-earning married couples as the single-earner rate. Thus, at the 33% bracket, the cap remains the same for single returns and for married joint returns.¹⁶³ The income tax reflects the notion that some penalty is justified when treating affluent married couples.¹⁶⁴ But the same assumption is not extended to the capital gains exclusion for the sale of a principal residence; in the latter case, we simply double the benefit, helping the rich to get richer.

Social Security Retirement Benefits: At first glance, Social Security retirement benefits may seem to have little to no connection to the people in the top 10% of the wealth distribution. And while it is certainly the case that the people in this group are most likely to have private retirement accounts, Social Security still gives an advantage in wealth creation.¹⁶⁵ People in the top 10%, including individuals in the top 1%, frequently take their Social Security retirement benefit. President Trump once acknowledged in an interview, “I have friends that are worth hundreds of millions and billions of dollars and get Social Security. They don’t even know the check comes in.”¹⁶⁶ Manifestly, the money from Social Security is more significant to the group in the top 10% than to those in the top 1%.

Social Security retirement funds are the most common retirement income.¹⁶⁷ In 2011 almost 25% of married beneficiaries, and 45% of unmarried elderly beneficiaries age 65 and older, relied on Social Security for at least 90% of their income.¹⁶⁸ While marital status is ignored for the purposes of paying Social Security (each taxpayer is taxed individually),

162. Mitchell L. Engler & Edward D. Stein, *Not Too Separate or Unequal: Marriage Penalty Relief After Obergefell*, 91 WASH. L. REV. 1073, 1086 (2016).

163. *Id.*

164. Cf. Michael J. Graetz, *Paint-by-Numbers Tax Lawmaking*, 95 COLUM. L. REV. 609, 612 (1995) (“Sizeable penalties on marriage were enacted for high-income taxpayers in 1993 for the sole purpose of conforming to a specific combination of revenue and distributional targets . . .”).

165. In fact, the connections between Social Security and wealth inequality are the subject of extensive debate that exceeds the scope of this Article, which focuses on the marital wealth gap only. For an argument that Social Security “exacerbates wealth inequality” see Jagadeesh Gokhale & Laurence J. Kotlikoff, *The Impact of Social Security and Other Factors on the Distribution of Wealth*, in *THE DISTRIBUTIONAL ASPECTS OF SOCIAL SECURITY AND SOCIAL SECURITY REFORM* 85, 101–06 (Martin Feldstein & Jeffrey B. Liebman eds., 2002).

166. Heather Haddon, *Donald Trump: My Rich Friends Shouldn’t Take Social Security*, WALL ST. J.: WASH. WIRE (Oct. 12, 2015, 3:10 PM), <https://blogs.wsj.com/washwire/2015/10/12/donald-trump-my-rich-friends-shouldnt-take-social-security/> [<https://perma.cc/2RKW-4YBY>].

167. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-33, *RETIREMENT SECURITY: TRENDS IN MARRIAGE AND WORK PATTERNS MAY INCREASE ECONOMIC VULNERABILITY FOR SOME RETIREES* 1 (2014), <http://www.gao.gov/assets/670/660202.pdf> [<https://perma.cc/PPH6-B55Q>].

168. *Id.* at 7.

benefits are related to marital status, and Social Security allotments privilege married couples in several ways.¹⁶⁹ The data imply that high-earning married couples collect their Social Security benefits: in 2010, approximately 6% of the recipients of Social Security distributions were married couples with an annual income of \$200,000 or more.¹⁷⁰ Only 0.4% of the beneficiaries with \$200,000 or more per year were unmarried.¹⁷¹

At the very basic level, a married individual, or previously married individual (widowed or divorced, if married for more than ten years), is eligible to receive up to 50% of a spouse's (or ex-spouse's) benefit amount, based on the spouse's contribution alone.¹⁷² That is, even if a married, divorced, or widowed person did not work and therefore is ineligible to receive personal Social Security retirement benefits, that person is entitled to Social Security funds based upon the spouse's contribution.¹⁷³ The number of recipients who receive Social Security solely based on spousal contributions has declined significantly in the past half century; yet, in 2011, 9% of women received Social Security income based on spousal contribution, and 16% received widow benefits based exclusively on their spouse's work.¹⁷⁴

This asset is unavailable to never-married people or people married less than ten years. The qualification based on an ex-spouse's work recognizes the contribution of the nonworking spouse to the household, likely by providing support and care to the working spouse.¹⁷⁵ This special treatment can reflect a common pattern in which one spouse leaves the paid workforce, or works half time, to care for the household. Yet, this benefit is still under-inclusive as unmarried partners can be economically and emotionally interdependent, too. Indeed, according to an analysis by

169. Wendy Richards, Comment, *An Analysis of Recent Tax Reforms from a Marital-Bias Perspective: It Is Time to Oust Marriage from the Tax Code*, 2008 WIS. L. REV. 611, 633.

170. *Income of the Population 55 or Older, 2010*, SOC. SEC. ADMIN., at tbl.3.A2, https://www.ssa.gov/policy/docs/statcomps/income_pop55/2010/sect03.html#table3.a2 [<https://perma.cc/GDY3-YNPR>] (2.0% were 55–61, 1.5% 62–64, and 2.7% 65 and older).

171. *Id.*

172. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 167, at 6 tbl.1.

173. Social Security benefits based on spousal contribution go predominantly to women, as less than 1% who received benefits in 2012 based on their spouse were male. *See id.* at 27 n.33.

174. *Id.* at 27.

175. Although collecting social security based on an ex-spouse's work does not reduce an ex-spouse's eligibility to benefit. *Retirement Planner: If You Are Divorced*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/retire/divspouse.html> [<https://perma.cc/M46W-VH7T>] ("The amount of benefits you get has no effect on the amount of benefits your ex-spouse or their current spouse may receive." (emphasis deleted)).

the Social Security Administration, in 2009, 16% of women aged fifty to fifty-nine were ineligible to receive Social Security based on spousal contribution (an increase from 8% in 1990).¹⁷⁶

In addition, until 2015, the rules of claiming retirement funds gave another welcome advantage to married couples: this was a Social Security filing strategy, known as “file and suspend,” that allowed married couples to enjoy an 8% annual increase in social security payouts.¹⁷⁷ Married or single, people have always been able to delay getting their Social Security retirement funds in order to receive a larger amount when they do start collecting. But during this “waiting period,” married persons—under the eliminated loophole—could simultaneously collect other Social Security benefits based on their spouse’s eligibility. Accordingly, when the suspending spouse (Spouse A) filed and suspended in regard to Spouse A’s own benefits, this spouse was entitled to start receiving payments *from Spouse B’s* Social Security fund—and, all that while, Spouse A’s suspended benefits continued to grow. This option was available only to those able to delay getting their own retirement payouts and who had spouses entitled to such—in other words, to those doing well financially. In 2015, President Obama’s budget deal eliminated this loophole. Dropping “file and suspend” was a good step in the right direction, but Social Security still provides preferential treatment to married couples,¹⁷⁸ which is yet another factor in retention of their wealth and their ability to transfer more of it to the next generation.

2. *Laws that Distinguish Couples Based on Marital Status*

Under this category, the Article includes legal mechanisms that treat married couples uniquely, based solely on marital status, and thus result in paving the way for wealth accumulation. It starts with retirement plans and then moves to rules concerning intramarital wealth transfers.

176. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 167, at 28.

177. Jonnelle Marte, *One of the Most Lucrative Social Security Strategies for Married Couples Is Being Eliminated*, WASH. POST (Nov. 3, 2015), <https://www.washingtonpost.com/news/get-there/wp/2015/11/03/one-of-the-most-lucrative-social-security-strategies-for-married-couples-is-being-eliminated/> [https://perma.cc/G37D-S9VX].

178. Steve Vernon, *How Married Couples Can Max Out Their Social Security*, CBS NEWS: MONEYWATCH (Feb. 5, 2016, 5:45 AM), <http://www.cbsnews.com/news/how-married-couples-can-max-out-their-social-security/> [https://perma.cc/PGH2-2VV8]; *see also* Tom Anderson, *Married Couples Have 81 Ways to Claim Social Security. Here’s How to Maximize Your Benefits*, CNBC (June 6, 2017, 8:06 AM), <https://www.cnbc.com/2017/06/02/how-married-couples-can-maximize-their-social-security-benefits.html> [https://perma.cc/664Z-KNUG] (“The Social Security shopping mall has 81 stores for married couples . . .”).

Retirement Plans: Retirement assets are the middle class's second-largest component of wealth (after home ownership).¹⁷⁹ Retirement plans convert income into wealth directly and thus serve as a major wealth escalator.¹⁸⁰ In 2010, an estimated 71% of married households age 50–64 years old had some form of retirement plan (with a median of \$122,560 in their retirement plan), while only 39% of single male households (median of \$50,000) and 48% of single female households (median of \$32,800) had such plans.¹⁸¹ In 2015, almost 12,000 estate tax returns were filed at the IRS.¹⁸² Around 65% of these estates (7,804) had retirement assets that amounted to close to \$11 billion.¹⁸³

Retirement savings offer a few benefits to married couples that are unavailable to single or unmarried couples.¹⁸⁴ One example is Individual Retirement Accounts (IRAs), one of the growing types of retirement savings. In 2013, IRAs included assets worth approximately \$6 trillion, “accounting for 28 percent of U.S. retirement assets.”¹⁸⁵ IRAs allow eligible contributors to receive tax deductions, to defer tax on growth and earnings, and, depending on eligibility, may provide nonrefundable tax credits.¹⁸⁶

IRAs provide some advantages to married couples over singles or unmarried couples. First, for one to contribute money to an IRA, the contributor must have earned taxable income.¹⁸⁷ However, married persons who file a joint tax return can contribute to IRAs if their spouses have taxable compensation.¹⁸⁸ The implication is that a working spouse can contribute \$5,500 annually (or \$6,500 if the nonworking spouse is over fifty) for the nonworking spouse. At the same time, a single person who is not making any income cannot contribute to IRAs (and cannot have someone else contribute on their behalf), and a single earning person

179. CHANG, *supra* note 22, at 10.

180. *Id.* at 40.

181. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 167, at 33–34.

182. *SOI Tax Stats—Estate Tax Statistics Filing Year Table 1*, *supra* note 98 (click link to table for 2015).

183. *See id.*

184. *See* Ruth Colker, *The Freedom to Choose to Marry*, 30 COLUM. J. GENDER & L. 383, 420 (2015) (arguing that “[t]he benefits of marriage are important when it is time to retire, especially if the couple has experienced a traditional marriage”).

185. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 167, at 10.

186. Denise Appleby, *IRA Contributions: Deductions and Tax Credits*, INVESTOPEDIA, <http://www.investopedia.com/articles/retirement/05/022105.asp> [<https://perma.cc/82GJ-2PE3>].

187. *Topic No. 451—Individual Retirement Arrangements (IRAs)*, IRS (Jan. 31, 2018), <https://www.irs.gov/taxtopics/tc451.html> [<https://perma.cc/ZY8Y-WN45>].

188. *Id.*

cannot support another person. IRAs also grant some help, not available to others, in early withdrawals of funds without penalty to spouses. For example, an IRA holder may withdraw funds early, without penalty, if the money is used to pay qualified higher-education expenses incurred by the spouse.¹⁸⁹

Second, while an unmarried individual can inherit IRA funds, just as a surviving spouse can, married couples have some financial advantages in such a scenario. Surviving spouses can roll over the inherited funds from the deceased spouse's IRA into their own IRA, thus enjoying continued tax deferral.¹⁹⁰ If a surviving spouse is under fifty-nine and the contributing spouse died before the latter was seventy years old, the surviving spouse will not be taxed on the required minimum distribution until the surviving spouse reaches the age of seventy.¹⁹¹ Conversely, beneficiaries of an IRA who are not spouses cannot roll over the funds into their IRA or continue contributing to the IRA.¹⁹² A non-spouse beneficiary who inherits IRA funds has a few options, depending on the age of the IRA holder. If the IRA owner was younger than 70.5 years (the mandated time at which the funds distribution begins), then the non-spouse beneficiary has three options: lump-sum distribution; distributions over a five-year period; or distributions spread over the beneficiary's life expectancy, with the first distribution beginning within a year of inheritance.¹⁹³ While the life expectancy option "is preferable to a lump-sum distribution . . . it is not as attractive as a spousal rollover."¹⁹⁴ In sum, the rules offer beneficiaries who are not surviving spouses less flexibility in tax planning to maximize the funds from the IRA.

Wealth Consolidators: Another set of taxation rules privileges married couples over all other family types, enabling them to transfer wealth

189. I.R.C. § 72(t)(2)(E) (2012).

190. See *Clark v. Rameker*, ___ U.S. ___, 134 S. Ct. 2242, 2245 (2014) ("An inherited IRA is a traditional or Roth IRA that has been inherited after its owner's death. . . . If the heir is the owner's spouse, as is often the case, the spouse has a choice: He or she may 'roll over' the IRA funds into his or her own IRA, or he or she may keep the IRA as an inherited IRA" (citations omitted)).

191. Ray Martin, *How to Inherit an IRA*, CBS NEWS (Sept. 13, 2013, 10:55 AM), <http://www.cbsnews.com/news/how-to-inherit-an-ira/> [<https://perma.cc/J5B8-3G3H>].

192. I.R.C. § 408(d)(3)(C); *Clark*, 134 S. Ct. at 2245 ("When anyone other than the owner's spouse inherits the IRA, he or she may not roll over the funds; the only option is to hold the IRA as an inherited account.").

193. See *Clark*, 134 S. Ct. at 2245; IRS, PUBLICATION 590-B: DISTRIBUTIONS FROM INDIVIDUAL RETIREMENT ARRANGEMENTS (IRAs) 9–11 (2018), <https://www.irs.gov/pub/irs-pdf/p590b.pdf> [<https://perma.cc/FC3P-LYER>] (discussing the rules concerning individual designated beneficiaries).

194. SID MITTRA, ANANDI P. SAHU & BRIAN FISCHER, PRACTICING FINANCIAL PLANNING: FOR PROFESSIONALS AND CFP® ASPIRANTS 774 (2016).

between the spouses—and to their heirs—in a way that significantly enhances wealth accumulation and retention. Married couples are the wealthiest group in the United States,¹⁹⁵ and marriage is likely the best and most efficient estate-planning tool, resulting in a substantial economic boon for married couples.¹⁹⁶

Since the enactment of the Economic Recovery Tax Act of 1981, spouses can transfer 100% of their assets between each other without incurring tax consequences, an estate tool commonly known as the “marital deduction.”¹⁹⁷ This means that married couples are treated as one economic unit for purposes of estate and gift taxes.¹⁹⁸ The benefit of the marital deduction is that it allows spouses to strategically transfer wealth from the wealthier spouse to the less wealthy spouse, and, in that way, to maximize favorable tax rules (tax deductions, exemptions, exclusions, credits, and lower tax rates).¹⁹⁹ Additionally, the transfer allows spouses to delay the payment of estate tax until the death of the surviving spouse.²⁰⁰

In addition to the marital deduction, individuals (unmarried or married) receive a unified credit for both estate and gift taxes and can transfer \$5.45 million without taxation to persons other than their spouses. This amount is double for married couples (\$10.90 million in 2016).²⁰¹

195. CHANG, *supra* note 22, at 20.

196. Bridget J. Crawford, *One Flesh, Two Taxpayers: A New Approach to Marriage and Wealth Transfer-Taxation*, 6 FLA. TAX REV. 757, 759 (2004) (“Marriage is an excellent estate planning strategy.”); Joshua S. Rubenstein, *Estate Planning for Unmarried Partners*, N.Y.U. REV. EMP. BENEFITS § 21.01 (2008), https://www.kattenlaw.com/files/19823_Rubenstein—Chapter—Estate_Planning_for_Unmarried.pdf [<https://perma.cc/6LCR-AACX>] (“From an estate planning perspective, many estate planning devices favor married couples—particularly those that involve the marital deduction. There are any number of loopholes to favored estate planning devices over the years that have been “plugged” for spouses but not for unmarried partners.”).

197. Moore, *supra* note 148, at 255, 261 (“A primary justification for bestowing benefits on married taxpayers in the income and transfer tax systems, currently, is the policy pronouncement that married individuals constitute economic units and should not be required to account for intramarriage transfers, but only for transfers outside of the economic unit.”).

198. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 403, 95 Stat. 172, 301–05 (codified as amended in scattered sections of 26 U.S.C.).

199. Crawford, *supra* note 196, at 759.

200. *Id.*

201. I.R.C. §§ 2010, 2505 (2012). Furthermore, as of 2015, donors of lifetime gifts are provided an annual exclusion of \$14,000 per donee. If the non-donor spouse consents to split the gift with the donor spouse, then the annual exclusion is \$28,000 per donee. H.R. REP. NO. 114-64, at 5 (2015). Finally, a gift or bequest of appreciated (or loss) property is not an income-tax realization event for the transferor. This means that property acquired from a decedent’s estate generally takes a stepped-up basis. I.R.C. § 1014(a) (“[T]he basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or

The double exclusion that each individual spouse enjoys in the area of wealth taxation should not be taken for granted. In some other provisions of the tax code, married couples do *not* receive such a “double deduction”; rather, they have a separate tax rate equal to less than the doubled amount of one individual.²⁰² In other cases, the advantage that the spouses can claim together is equal to what one individual may claim. For instance, married couples can apply up to \$3,000 of net capital losses against ordinary income, the same amount an individual can apply.²⁰³

Further, since 2010, married couples have another helpful implement in their estate tax toolkit: portability.²⁰⁴ Prior to the enactment of portability, spouses could not transfer the estate tax credit (\$5.45 million per spouse in 2016) to the surviving spouse; the credit only applied to the individual decedent’s taxable estate.²⁰⁵ Spouses could plan, and often have planned, transfers of wealth between themselves to maximize the use of the unified credit, but this requires some arranging as well as foresight into which spouse will die first.²⁰⁶ Portability makes such planning easier because it allows the surviving spouse to use the deceased spouse’s unused amount of unified credit. For example: a married couple consists of Spouse A, who has not used his unified credit before death and has left a \$2 million estate to his son, and Spouse B, who, after the death of Spouse A, owns assets worth \$2 million dollars and has exhausted his amount of unified credit by transferring to their son a gift worth \$5.45 million. Before portability, Spouse B would have needed to transfer \$2 million worth of assets to Spouse A prior to the latter’s death, to take advantage of Spouse A’s available exemption at his death. With portability, Spouse

otherwise disposed of before the decedent’s death by such person, be . . . the fair market value of the property at the date of the decedent’s death.”).

202. See Seto, *supra* note 146, at 1560–80 (providing a detailed account of anti-abuse tax provisions under which married couples’ tax liability does not equal double the individual’s; rather, married couples receive specific rates for their benefits).

203. I.R.C. § 1211; Tessa R. Davis, *Mapping the Families of the Internal Revenue Code*, 22 VA. J. SOC. POL’Y & L. 179, 235 (2015) (“Yet, when that same married couple calculates capital gain for the year, the Code limits their losses to the same amount as that of a single individual: \$3000.”).

204. In 2010, the portability provision was only temporary. See Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 303, 124 Stat. 3296, 3302–04. In 2012, it became permanent. See American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101(c)(2), 126 Stat. 2313, 2318.

205. Steve L. Dellinger & Nathan L. Wadlinger, *The Portability Pill: Examining the Trial Stages of Federal Estate and Gift Tax Spousal Portability*, 47 REAL PROP. TR. & EST. L.J. 367, 368–69 (2012).

206. Kerry A. Ryan, *Marital Sharing of Transfer Tax Exemptions*, 57 B.C. L. REV. 1061, 1067 (2016).

A's \$3.45 million unused credit is available to Spouse B to guarantee his future gratuitous transfers to anyone he would like.²⁰⁷

But while it seems that portability merely provides married couples an efficient estate-planning tool by making it easier to exhaust the available credits, it actually "allow[s] spouses to obtain better tax results than they could have with the best estate planning."²⁰⁸ While with estate planning, as described in the example above, the couple could have avoided taxes on \$9.45 million (Spouse B uses his \$5.45 million credit and transfers assets worth \$2 million to Spouse A; Spouse A uses \$2 million of his own credit), with portability, this couple can shelter up to \$10.90 million (Spouse A transfers his unused credit of \$3.45 million in addition to the \$2 million he used and the \$5.45 that Spouse B used). Moreover, the surviving spouse could use this extra time to consume some part of the estate and reduce the estate tax. Congress was aware that portability provides an extra benefit (beyond the ease of planning) solely to married couples but chose to keep it this way.²⁰⁹ "As such, portability becomes a quasi-tax credit available only to married individuals."²¹⁰

Although portability has been applauded by some as a relatively efficient estate-planning tool that is consistent with the direction of estate tax,²¹¹ law professor Phyllis Taite offers a strong critique of portability. She argues that "[t]he primary, if not sole function, of the portability provision is to permit more wealth transmission to persons other than a surviving spouse. As such, portability is another form of shifting more wealth to the already wealthiest households."²¹² Indeed, the Joint Committee on Taxation estimates that 54% of estates would benefit from portability after ten years.²¹³

207. *Id.* at 1067–68.

208. *Id.* at 1069.

209. *Id.*

210. Dellinger & Wadlinger, *supra* note 205, at 397. Furthermore, an additional benefit of portability is that it allows the couple to use a double step-up basis: calculating the estate as fair market value on the date of the decedent's death and thus avoiding capital gain on the appreciation—the first step-up basis comes when the decedent spouse dies, and then the second step-up in basis is realized at the surviving spouse's death. *Id.*

211. STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., TAXATION OF WEALTH TRANSFERS WITHIN A FAMILY: A DISCUSSION OF SELECTED AREAS FOR POSSIBLE REFORM 10 (2008) ("Therefore, allowing for portability between spouses of unused exemption arguably would contribute to simplicity and facilitate compliance with the law, because it largely would eliminate the need for couples to employ the credit shelter trust strategy or to monitor and adjust the titling of assets.").

212. Taite, *supra* note 155, at 216.

213. Dellinger & Wadlinger, *supra* note 205, at 407.

These benefits—the marital deduction and portability—are not available to unmarried couples. The result is a significant advantage to the wealthiest married couples over other households.²¹⁴ But not only are these rules under-inclusive—that is, they do not treat nonmarried families the same as married households—the result is that they allow those who are already well-off to gain more wealth. With some estate planning, these benefits essentially let married couples lower their estate tax considerably, or even avoid it altogether, and thereby keep their fortunes in the family. Marriage, in effect, serves as a tax maximizer to preserve wealth within the family. The Joint Committee on Taxation estimates that the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010—which made the estate tax rate 35%, with an applicable exclusion amount of \$5 million—would cost \$67.5 billion over the years 2011 to 2015.²¹⁵

Data available from 2010 show how these massive exemptions encourage intergenerational transfers by married households. The data reveal that, in just over half of all estate tax returns, the decedents were married; in another 36%, they were widowed.²¹⁶ Only 13% of decedents were single, divorced, or separated.²¹⁷ Further, over 97% of the estates of married decedents, and 48% of estates overall, reported deductions for marital bequests, for a total of \$42 billion.²¹⁸ Only 9% of estates with a marital bequest owed estate tax.²¹⁹

3. *Privatization Norms Encourage Married Couples to Keep Wealth in the Family*

There are “strong cultural expectations in the United States for wealth to remain in the immediate family through bequests to spouses and children.”²²⁰ Rules concerning intergenerational transfers reinforce these

214. Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 644 (“As a result, the income, estate, and gift tax rules permit the shifting of substantial amounts of property within most nuclear and extended traditional families free of concerns about federal taxes.”).

215. STAFF OF JOINT COMM. ON TAXATION, 111TH CONG., ESTIMATED BUDGET EFFECTS OF THE “TAX RELIEF, UNEMPLOYMENT INSURANCE REAUTHORIZATION, AND JOB CREATION ACT OF 2010” 4 (2010).

216. IRS, ESTATE TAX STATISTICS (2010), <https://www.irs.gov/pub/irs-soi/10esesttaxsnap.pdf> [<https://perma.cc/3EED-R4PF>].

217. *Id.*

218. *Id.*

219. *Id.*

220. Stephen J. McNamee & Robert K. Miller, Jr., *Estate Inheritance: A Sociological Lacuna*, 59 SOC. INQUIRY 7, 18 (1989).

cultural norms, encouraging families to keep their wealth for the next generation rather than to redistribute it outside the family. Some rules provide clear incentives to keep wealth within the family, while others send a message that doing so is the norm.²²¹

These conventions are often stronger with regard to the married household. Federal estate and gift tax rules provide many benefits to married couples that encourage them to transfer wealth between themselves and to minimize the amount subject to the estate tax—rules that are not extended to nonmarried couples, to other relatives, or to nonfamily members.²²² The clearest example of legal directives that incentivize interspousal transfers are the rules discussed in section II.C.2, above, whose main justification is to reward bequests within the married family.²²³

State inheritance laws provide similar incentives; they sometimes tax inheritance to family members (other than the spouse) more favorably than inheritance to nonfamily members.²²⁴ For example, the general inheritance tax rate in Pennsylvania is 15%, which is reduced to 12% for transfers to siblings, a mere 4.5% for transfers to lineal heirs, and 0% to surviving spouses.²²⁵ In Kentucky, surviving spouses, parents, children, grandchildren, siblings, and half-siblings are entirely exempt from paying inheritance taxes.²²⁶ Such laws exemplify how legal devices reflect and perpetuate the social norm of encouraging wealth concentration within families. This effect is even more pronounced with regard to married

221. Other rules that provide incentives to keep wealth within the family, and are not discussed in this subsection, include I.R.C. § 6166, which provides a ten-year extension of time to pay estate tax where the estate consists of family-owned business interests; and I.R.C. § 2032A, which provides special valuation rules for real estate transferred to a “member of the decedent’s family.” For discussion of these provisions see Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITT. TAX REV. 1, 63 (2005).

222. See, e.g., Crawford, *supra* note 196, at 792; Harry L. Gutman, *Reforming Federal Wealth Transfer Taxes After ERTA*, 69 VA. L. REV. 1183, 1219 (1983).

223. See Anne L. Alstott, *Commentary Family Values, Inheritance Law, and Inheritance Taxation*, 63 TAX L. REV. 123, 131–32 (2009) (“[T]he state might craft an inheritance tax so that it rewards gifts and bequests within the family. The U.S. federal estate tax arguably does something like this by giving an unlimited spousal exemption.”).

224. Margaret Ryznar, *The Odd Couple: The Estate Tax and Family Law*, 76 LA. L. REV. 523, 529 (2015).

225. *Inheritance Tax for Pennsylvania Residents*, PA. DEP’T REVENUE, <http://www.montcopa.org/284/Inheritance-Tax-for-Pennsylvania-Residen> [<https://perma.cc/46WU-2PQQ>].

226. Whereas close lineal relatives are exempt from the Kentucky inheritance tax, other beneficiaries must pay anywhere between 4% and 16%. See Mary Randolph, *Kentucky Inheritance Tax*, NOLO, <http://www.executorscorner.com/resources/kentucky-inheritance-tax.html> [<https://perma.cc/9AWS-R9U2>].

couples. As mentioned above, in Pennsylvania and Kentucky, property inherited from a spouse is exempt from inheritance tax.²²⁷

In addition, by providing protection from disinheritance to a spouse, the state communicates that wealth, or at least a part of it, should stay in the family and particularly the marital family.²²⁸ Likewise, when a person dies intestate, the default rules designate the spouse and children—and, in their absence, other relatives—as the primary beneficiaries.²²⁹

This set of legal rules also attests to a strong norm of privatization of support and dependency in the United States. Privatizing support is part of a larger neoliberal approach that seeks to transfer economic risks from the collective to families themselves.²³⁰ In neoliberal thought, the role of marriage is to “impose discipline and privatized dependency among the poor.”²³¹ Marriage is a “gendered institution for privatizing social costs—women, dependent on husbands or the low-wage job market, must bear responsibility for child care costs.”²³² The ideology that the married family is at the center of society, and is the primary unit for support in time of economic crises, sends a signal that it is the spouses’ role to take care of one another. Keeping wealth within the family might be part of the spouses’ roles.

Privatization of support is one of the keystones of family law in the United States.²³³ The state “recognizes and bestows benefits on families so that they will serve a private welfare function, minimizing reliance on state and federal coffers.”²³⁴ Various doctrines enforce the role of the family in caregiving and general support. For instance, Maxine Eichner shows how aspects of employment law related to caregiving

227. PA. DEP’T REVENUE, *supra* note 225.

228. The justifications for elective share have been the subjects of extensive debates. The current prevailing theory is that elective share stems from marriage as an economic partnership. As such, the doctrine recognizes the surviving spouse’s contribution to the relationship, and elective share serves as a form of restitution or as an implied contract. See Rena C. Sepowitz, *Transfers Prior to Marriage and the Uniform Probate Code’s Redesignated Elective Share—Why the Partnership Is Not Yet Complete*, 25 IND. L. REV. 1, 48 (1991) (discussing the different theories for elective share). Thus, the doctrine of elective share protects spouses from losing their share based on their contributions, but it adds another layer of laws that assume that wealth should remain in the family.

229. Strand, *supra* note 37, at 464.

230. Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1558 (2006).

231. LISA DUGGAN, *THE TWILIGHT OF EQUALITY? NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* 64 (2003).

232. *Id.*

233. Ryznar, *supra* note 224, at 540–45.

234. Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866–67 (2014).

responsibility—particularly Title VII and the Family and Medical Leave Act—reflect the notion that dependency and care are private matters performed without state support.²³⁵ As the state has created many mechanisms that enforce the ideal of family as a private support system, transfer of wealth within the family falls squarely into this ideology and may incentivize families to retain wealth in order to fulfil their role as private providers of such basic needs as health, caregiving, and education.

The ideology that shifts the burden of care to private hands impacts society's rich, too. To succeed in a world in which goods like education are private, affluent families must preserve wealth. For families at the top 10% of wealth distribution it means paying for quality care from a young age, living in school districts in which housing is more expensive, and saving money for college, to name only a few items. For families at the top 1%, privatization looks different. A recent article in *Town and Country* magazine provides a good anecdote on why wealthy families want to accumulate wealth.²³⁶ The article aimed to imagine the net worth that “a typical wealthy family living in New York City”—which constitutes “a married couple in their forties with two teenage kids”—needs for living.²³⁷ The amount calculated was \$190 million to sustain a lifestyle of an uber-rich New York family and includes “the cost of a no-expense-spared educational strategy that included extensive private tutoring, music lessons, sports, enrichment activities, private school, trips abroad, and, ultimately, four years in the Ivy League.”²³⁸ This amount is estimated at \$1.7 million per child. Norms of privatization are obviously impacting socioeconomic groups in significantly different ways, but privatization has an impact on all families.

To conclude, the marital wealth gap is aggravated by a host of rules and norms that support accumulation of wealth within married households and are either unavailable to nonmarried households or beneficial primarily to married couples. The next section looks at another, final elucidation of the marital wealth gap.

235. MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* 28–39 (2010).

236. Norman Vanamee, *Here's Exactly How Much Money You Need to Be Happy*, *TOWN & COUNTRY* (Nov. 16, 2017), <http://www.townandcountrymag.com/society/money-and-power/a13528013/how-much-money-you-need-to-be-happy/> [<https://perma.cc/QGK5-TC49>].

237. *Id.*

238. *Id.*

D. Assortative Mating Exacerbates Wealth Inequality

The marital wealth gap has another, more subtle, explanation: the extent to which wealth marries wealth. Class-based mating patterns, founded on parental and personal wealth, are a great contributor to the growing wealth inequality. This section begins by unveiling how and why positive assortative mating patterns keep accelerating, and how they increase wealth inequality in the United States. It then contends that the law entrenches or even exacerbates these patterns by supporting, and failing to combat, the conditions for the growth of positive assortative mating.

1. Individuals Select Partners Based on Parental Wealth

The patterns of marriage and partner selection have an effect on wealth distribution. Put simply, if people marry people from similar economic strata, the result is less social mobility and more concentration of wealth, because inherited fortunes are not generally distributed away from the lineal heirs.²³⁹ As Thomas Piketty explains,

At the level of the family, it is obvious why positive assortative mating can contribute to make inequality more persistent across generations: if children's abilities depend on the characteristics of both parents, then the fact that men and women with similar characteristics tend to mate together makes intergenerational mobility lower than it would be under random matching.²⁴⁰

If, on the other hand, individuals marry people from higher economic groups, then the concentration of inherited wealth will likely decrease and the distribution of inherited wealth is likely to equalize over generations.²⁴¹ Undeniably, acquiring wealth through marriage is a familiar story in United States culture, and most people do not oppose acquiring wealth by marriage (as opposed to acquiring wealth through inheritance).²⁴² Some even view it as a characteristic of a meritocracy—

239. OSBERG, *supra* note 24, at 203.

240. Thomas Piketty, *Theories of Persistent Inequality and Intergenerational Mobility*, in 1 HANDBOOK OF INCOME DISTRIBUTION 429, 467 (Anthony B. Atkinson & François Bourguignon eds., 2000).

241. OSBERG, *supra* note 24, at 203.

242. McNamee & Miller, *supra* note 66, at 195; *see also* Matthew Clayton, *Equal Inheritance: An Anti-perfectionist View*, in INHERITED WEALTH, JUSTICE AND EQUALITY 98, 98 (John Cunliffe, Guido Erreygers eds., 2013) (“[U]nequal inheritance, which produces unequal life chances, appears to be problematic from the point of view of egalitarian justice. . . . [T]he sheer good luck of being born to wealthy parents, for example, is not, according to most egalitarians, a cause of inequality that justifies the inequality it causes.” (citation omitted)).

using personality and perhaps physical appearance to achieve upward mobility.²⁴³ One study found that the majority of people who identify as poor or working class prefer that their children “marry up.”²⁴⁴

To find out whether individuals in a certain society tend to marry people from different socioeconomic backgrounds, we need to understand the factors that lead individuals to select certain partners. This section examines patterns of “assortative mating”—the term sociologists and economists use to describe a phenomenon in which individuals sort partners who share similar characteristics (homogenous selection).²⁴⁵ Generally, a higher degree of assortative mating indicates that people marry others with a similar background.²⁴⁶ Studies on patterns of partner selection examine the influence of factors relevant to the family of origin, such as parental education, income, and wealth, and their impact on mate sorting.²⁴⁷ Likewise, these studies often explore the effect of spouses’ individual characteristics—such as race, ethnicity, religion, attractiveness, income, and level of education—on partner sorting.²⁴⁸

The effect of educational background on partnership selection is of special interest in sociology and is a widely explored topic.²⁴⁹ In the United States, patterns of marriage selection based on education have become increasingly homogenous and less random.²⁵⁰ In fact, rates of positive assortative mating based on education grew significantly between the beginning and end of the twentieth century. Between the 1940s and

243. McNamee & Miller, *supra* note 66, at 195.

244. LEONARD BEEGHLEY, STRUCTURE OF SOCIAL STRATIFICATION IN THE UNITED STATES 110 (2008).

245. See HANS PETER BLOSSFELD & ANDREAS TIMM, WHO MARRIES WHOM? EDUCATIONAL SYSTEMS AS MARRIAGE MARKETS IN MODERN SOCIETIES 1–6 (2003); Ana Swanson, *The Real Reason Some People End Up with Partners Who Are Way More Attractive*, WASH. POST (May 3, 2016), <https://www.washingtonpost.com/news/wonk/wp/2016/05/03/the-real-reason-some-people-end-up-with-partners-who-are-way-more-attractive/> [https://perma.cc/SLY3-6KKH] (“[C]ouples tend to be more similar in many respects—including their genetics, physical attractiveness and cultural characteristics such as religion, politics and socioeconomic status—than two randomly selected people would be. Scientists call this ‘assortative mating.’”).

246. See BLOSSFELD & TIMM, *supra* note 245, at 1–6.

247. *Id.* at 10.

248. See, e.g., Yue Qian, *Gender Asymmetry in Educational and Income Assortative Marriage*, 79 J. MARRIAGE & FAM. 318, 322 (2017) (“Income assortative mating has received far less attention than educational assortative mating. Yet in recent decades, income may have become increasingly important in the selection of marriage partners.”); Megan M. Sweeney & Maria Cancian, *The Changing Importance of Economic Prospects for Assortative Mating*, CAL. CTR. FOR POPULATION RESEARCH 4 (2001), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.202.4866&rep=rep1&type=pdf> [https://perma.cc/4BTC-7YUL].

249. See Blossfeld & Timm, *supra* note 245, at 3–5; Qian, *supra* note 248, at 321.

250. See, e.g., Qian, *supra* note 248, at 331–33 (analyzing marriage trends from the 1980s onward).

1960s, marriage patterns were more class heterogenic than they are now.²⁵¹ Between the 1960s and today, educational positive assortative mating became much more prevalent, leading to a decrease in cross-class marriages.²⁵² Indeed, the percentage of college graduates who marry other college graduates has doubled since the 1960s.²⁵³ The chance that a woman with a college degree will marry someone who did not go beyond a high school education is one in ten.²⁵⁴ This change in marriage homogeneity exists even when controlling for the growing rate of women who pursue higher education, and hence cannot be attributed only to women closing the education gap during these years.²⁵⁵

Prospective partners do not select their partners based only on similar income, profession, or educational level. A recent study of couples who were married in 1998 documented a strong correlation between parental wealth and marriage selection patterns; it found that individuals are very likely to marry spouses whose parents have wealth similar to that of their own parents.²⁵⁶ This study shows that it is especially unlikely for people from opposite ends of the quintile (the wealthiest and the least wealthy) to marry one another. For example, only 7% of husbands with parents in the lowest quintile of parental wealth distribution were married to women with parents in the top quintile of the parental wealth distribution.²⁵⁷ The study concludes, “People are hugely likely to marry spouses from similar parental backgrounds, and the further a spouse’s parental background is from their own, the sharply lower the incidence of marriage.”²⁵⁸ Importantly, the study found a higher degree of assortative mating based

251. CARBONE & CAHN, MARRIAGE MARKETS, *supra* note 13, at 62.

252. Christine R. Schwartz & Robert D. Mare, *Trends in Educational Assortative Marriage From 1940 to 2003*, 42 DEMOGRAPHY 621, 641 (2015) (“The increasing resemblance of spouses in terms of educational attainment . . . through the late 1980s continued through the 1990s and into the twenty-first century.”).

253. See Jeremy Greenwood, Nezih Guner, Georgi Kocharkov & Cezar Santos, *Marry Your Like: Assortative Mating and Income Inequality* 10 tbl.1 (Nat’l Bureau of Econ. Research, Working Paper No. 19829, 2014).

254. ALISON WOLF, THE XX FACTOR: HOW THE RISE OF WORKING WOMEN HAS CREATED A FAR LESS EQUAL WORLD 207 (2013).

255. See, e.g., LASSE EIKA, MAGNA MOGSTAD, & BASIT ZAFAR, FED. RESERVE BANK N.Y., EDUCATIONAL ASSORTATIVE MATING AND HOUSEHOLD INCOME INEQUALITY 3 (2014), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr682.pdf [<https://perma.cc/MD5Y-T9FT>].

256. Kerwin Kofi Charles, Erik Hurst & Alexandra Killewald, *Marital Sorting and Parental Wealth*, 50 DEMOGRAPHY 51, 52–53 (2013).

257. *Id.* at 58.

258. *Id.* at 59.

on parental wealth than on education.²⁵⁹ The likely reason that parental wealth matters more than education is that, even with uneven levels of education, individuals with significant parental wealth meet people from similar socioeconomic backgrounds in places outside universities that shape the marriage market,²⁶⁰ moreover, wealth is an attractive attribute in the marriage market.²⁶¹

What is important for the purpose of this Article is not the affirmation of one's intuitive sense that wealth marries wealth. Rather, the studies about assortative mating based on parental wealth help us to understand why married couples are more successful in getting and retaining wealth: they not only get more wealth by intergenerational transfers, they *also gain more from marriage by combining wealth from both spouses*. Such marital trends limit wealth equalization and increase wealth concentration, thereby promoting greater economic disparities between the haves and have-nots. The data imply that encouraging more people to get married will not result in significant downward redistribution of wealth unless the patterns of selection change.²⁶²

Sorting partners based on parental wealth is even more worrisome for the future. If children of the wealthy continue to select spouses based on parental wealth, then their children will inherit their wealth and their spouse's wealth. Increased assortative mating based on wealth, therefore, suggests that wealth will become concentrated within an even smaller group of households than it currently is.²⁶³ The result will be exacerbated inequality of life chances, based on parental wealth. Given the law's ineffectiveness in preventing or responding to wealth inequality, on the

259. *Id.* at 67.

260. Another possible theory for the importance of parental wealth over education is that partners who marry later might evaluate their financial situation based on actual financial means rather than proxies for one's economic situation, such as education. See Valerie K. Oppenheimer, *A Theory of Marriage Timing*, 94 AM. J. SOC. 563, 563–66 (1988).

261. See Blossfeld & Timm, *supra* note 237, at 243; Christine R. Schwartz, Zhen Zeng & Yu Xie, *Marrying Up by Marrying Down: Status Exchange Between Social Origin and Education in the United States*, 3 SOC. SCI. 1003 (2016) (finding support for the thesis that people with higher education backgrounds and lower socioeconomic backgrounds tend to marry those with lower education backgrounds from more privileged socioeconomic backgrounds).

262. Redistribution is defined as “[t]he act or process of distributing something again or anew.” *Redistribution*, BLACK'S LAW DICTIONARY (10th ed. 2014). This Article adopts a broader meaning, expanding on Nancy Fraser's definition, which follows:

The remedy for economic injustice is political-economic restructuring of some sort. This might involve redistributing income, reorganizing the division of labour, subjecting investment to democratic decision-making, or transforming other basic economic structures. Although these various remedies differ importantly from one another, I shall henceforth refer to the whole group of them by the generic term redistribution.

Fraser, *supra* note 20, at 73.

263. See MARINA AD SHADE, *DIRTY MONEY: THE ECONOMICS OF SEX AND LOVE* 99 (2013).

one hand, and positive assortative mating trends, on the other, marriage among wealthy couples is likely to lead to greater wealth concentration.

2. *State's Support of Positive Assortative Mating*

What is the law's role in these class-based selection patterns? It seems, *prima facie*, to have no role, as people's selection of partners is a product of multiple highly individualized and personal preferences. However, as the Article shows below, social policy plays a role in buttressing homogenous marriage patterns, as people's ability to meet in certain venues increases their chances to select partners from different backgrounds. And vice versa: people's limited ability to meet individuals from other socioeconomic backgrounds (in settings where intimate partners meet) decreases their chances for cross-class relationships. To get an account of how people sort their partners and how the organization of social spaces impacts the selection patterns, one needs to understand the mechanisms of individuals' attractions.

The main question that scholars debate is whether selection is affected by exposure to diverse populations and opportunities to meet others, or by innate personal preferences that are hard to modify. In sociology, these two possible options derive from "the supply-side perspective," which argues that the networks and social contexts in which people participate make up the pool from which they select their mates.²⁶⁴ In other words, according to this viewpoint, "assortative mating is fostered by assortative meeting."²⁶⁵ "Demand-side theories," conversely, emphasize personal decisions and preferences in selecting mates.²⁶⁶ If demand-side theories fully explain the phenomenon under discussion, then social policies that enable economic segregation or integration have little or nothing to do with mating selection. But if these are not mutually exclusive theories, then part of the reason that people marry individuals from similar socioeconomic backgrounds is of our own design.

The sociological research in the area suggests that exposure to a pool of people from different backgrounds matters for assortative mating. In a 2013 study, professors Michèle Belot and Marco Francesconi considered whether assortative mating primarily reflects an intrinsic personal preference or, rather, people's greater access to peers from their own

264. Matthijs Kalmijn & Henk Flap, *Assortative Meeting and Mating: Unintended Consequences of Organized Settings for Partner Choices*, 79 *SOC. FORCES* 1289, 1290 (2001).

265. *Id.* at 1309.

266. *Id.* at 1290.

social cohorts.²⁶⁷ To examine the issue, the researchers studied 1,800 male and 1,800 female speed-daters from eighty-four speed-dating events.²⁶⁸ During these events, each participant would attend roughly twenty-two “dates” lasting three minutes each; at the end of the night, each participant would submit a form to the agency, listing the names of the partners they want to see again.²⁶⁹ The speed-dating environment was designed to reduce the issue of disproportionate access to similarly situated individuals to see whether assortative mating still appeared when meeting opportunities were broadened beyond a person’s ordinary social circle.

The study concluded that innate personal preferences and meeting opportunities are *both* responsible for assortative mating.²⁷⁰ First, the researchers observed that even when given equal opportunities to meet diverse types of people the speed-daters tended to gravitate toward others of similar age, height, and education level.²⁷¹ Second, the researchers observed that, regardless of each dater’s personal attributes, some traits seemed universally to be more desirable than others. For both genders, younger partners were most frequently “proposed to” via the matching service at the end of the events. Women preferred nonsmoking males, while men preferred women with higher education.²⁷² Although the foregoing traits were generally desired, the composition of each speed-dating group influenced their relative popularity. The researchers noticed a direct correlation between the prevalence of a trait and its desirability. For example, when there were only a handful of women with higher education at an event, these women tended to receive fewer proposals than did higher-educated women at an event teeming with such women.²⁷³ Thus, the effect of innate preferences on assortative mating may be compounded by the greater number of similarly situated individuals in a person’s circle.

This finding does not support the intuitive assumption that people’s innate desire to meet a similar mate drives them to seek social circles with more similarly situated people, for the speed-daters in the study did not have any say in the composition of the dating groups they joined. Rather, the simple fact that similarly situated people tend to predominate in a

267. Michèle Belot & Marco Francesconi, *Dating Preferences and Meeting Opportunities in Mate Choice Decisions*, 48 J. HUM. RES. 475, 475–77 (2013).

268. *Id.* at 480.

269. *Id.* at 479–80.

270. *Id.* at 477.

271. *Id.*

272. *Id.* at 497.

273. *Id.*

person's social circle increases the prevalence-based desirability of those traits. This, in combination with people's innate attraction to similarly situated partners, reinforces assortative mating.

Another recent study examined whether having greater racial diversity in a classroom's cohort affects the probability that interracial intimate relationships will be formed. The study found that, on average for nonblack students, having 2% more black students than in the average cohort increases the chances of those students having future intimate relationships with black students by 0.6%.²⁷⁴

Beyond the availability of diverse potential partners, some spheres are of particular importance to marriage markets and to assortative mating. Dutch researchers used data from married and cohabiting couples in the Netherlands to examine whether couples who met through common social settings (work, school, neighborhood, family connections, or community organizations) were more likely to align in terms of each partner's age, education, religion, class upbringing, and present socioeconomic status than couples who did not meet through these venues.²⁷⁵ The researchers found that 42% of the couples met through at least one of the five organized social settings, with school and family connections accounting for the greatest proportion of meeting opportunities.²⁷⁶ Partners who met at the same school had a higher incidence of aligning along most of the attribute metrics.²⁷⁷ Partners who met at the same workplace were more likely to belong to the same socioeconomic class at the time that they met. However, the homogenizing effects of the other social settings, while extant, were not as strong.²⁷⁸ Further, the results revealed that the couples who met at random or through mutual friends, rather than through one of the five organized settings, also tended to align in terms of their personal attributes. The study thus suggests that, while meeting opportunities certainly play a significant role, "preferences remain an important source of homogamy in partner choice."²⁷⁹

The bottom line of these studies is that *both* personal preferences and meeting pools, especially in particular settings, make a difference in regard to intimate selection. This means that increasing meetings among

274. Luca Paolo Merlino, Max Friedrich Steinhardt & Liam Wren-Lewis, *More Than Just Friends? School Peers and Adult Interracial Relationships* 3 (July 23, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2999043 [<https://perma.cc/SD5N-ZJ4C>].

275. Kalmijn & Flap, *supra* note 256, at 1289.

276. *Id.* at 1297–98.

277. *Id.* at 1289.

278. *Id.* at 1309.

279. *Id.*

people from different backgrounds can result in an upturn of cross-cultural relationships. At the same time, fewer opportunities for people from different socioeconomic backgrounds to meet may be another explanation for the growing trend of socioeconomic-based selection.

But current policies drive toward further socioeconomic separation and a decrease in cross-class relationships. Irrefutably, today the United States features growing socioeconomic segregation and fewer opportunities for encounters between people from different economic strata.²⁸⁰ In the past three decades, residential segregation by income has increased. According to data by the Pew Research Center, 28% of lower-income households in 2010 were located in a majority lower-income census tract, up from 23% in 1980.²⁸¹ At the same time, 18% of upper-income households were located in a majority upper-income census tract, up from 9% in 1980. The law's role here is beyond mere inaction. As Richard Reeves explains, "This inverse ghettoization is a product of a complex web of local rules and regulations regarding the use of land. The rise of 'exclusionary zoning,' designed to protect the home values, schools, and neighborhoods of the affluent, has badly distorted the American property market."²⁸² Moreover, "[z]oning ordinances . . . have become important mechanisms for incorporating class divisions into urban physical geographies."²⁸³

This growing residential ghettoization is mirrored in school segregation patterns. Indeed, "[e]conomic sorting at the neighborhood level leads to social sorting in terms of schools, churches, and community groups. This means fewer interactions and social ties across social classes."²⁸⁴ Data consistently show that from the 1970s to 2010, school populations became more homogenous socioeconomically.²⁸⁵ According to a 2016 study, in

280. See Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1553 (2006) ("This concern with family life as the creation and protection of private space, when played out in a legal environment that permits affluent localities to separate themselves from the concerns of poor localities, has meant the erosion of any sense of 'linked fate' between rich and poor, black and white.").

281. Richard Fry & Paul Taylor, *The Rise of Residential Segregation by Income*, PEW RES. CTR. (Aug. 1, 2012), <http://www.pewsocialtrends.org/2012/08/01/the-rise-of-residential-segregation-by-income/#fn-14312-1> [<https://perma.cc/LB4E-VPAT>].

282. REEVES, *supra* note 32, at 102.

283. *Id.* at 103.

284. *Id.* at 106.

285. See, e.g., Sean Corcoran & William N. Evans, *Income Inequality, The Median Voter, and the Support for Public Education* 21 (Nat'l Bureau of Econ. Research, Working Paper No. 16097, 2010), <http://www.nber.org/papers/w16097.pdf> [<https://perma.cc/DD9M-YAZN>] ("[M]ost U.S. school districts experienced growth in income inequality between 1970 and 2000."); Ann Owens, Sean F. Reardon & Christopher Jencks, *Trends in School Economic Segregation, 1970 to 2010*, 22 (Stanford Ctr. for Educ. Policy Analysis Working Paper, 2014), <https://cepa.stanford.edu/sites/default/>

the public-school system, between-district differences in income segregation increased by over 15% from 1990 to 2010.²⁸⁶

The cost of higher education serves as another barrier for meeting people from different economic strata.²⁸⁷ Numerous studies indicate that education is one of the most significant sources of assortative mating, because attending college provides an opportunity to meet potential spouses and because people tend to self-select partners with a similar education level.²⁸⁸ Further, as couples get married at older ages, the likelihood of finding a partner in educational institutions increases.²⁸⁹ The rising cost of college tuition serves as a barrier to pursue higher education and likely increases incidents of homogenous marriage. College tuition has escalated twelve-fold since 1978, far surpassing the inflation rate.²⁹⁰ Although some lower-income students have opted to incur more debt,²⁹¹ others have been unable to attend college due to the hefty price tag.²⁹²

files/owens%20reardon%20jencks%20school%20income%20segregation%20july2014.pdf [https://perma.cc/MSU7-XGJ2] (“Economic segregation between schools and school districts has increased over the past several decades.”).

286. Ann Owens, Sean F. Reardon & Christopher Jencks, *Income Segregation Between Schools and School Districts*, 53 AM. EDUC. RES. J. 1159, 1159 (2016).

287. Beyond the price of higher education, there are other significant advantages to wealthier people in college admissions, from the college admission process to a preferential advantage if their parents graduated from the same college. See REEVES, *supra* note 32, at 107–09.

288. Belot and Francesconi’s study of speed-daters attests to the important role that meeting opportunities play in fueling assortative mating. See *supra* note 267. In 2013, Facebook analyzed its users’ data to determine that 28% of married couples attended the same college. Cara Newton, *College Students Still Often Find Spouses on Campus* (Oct. 17, 2013, 7:50 AM), <http://www.usatoday.com/story/news/nation/2013/10/15/college-marriage-facebook/2989039/> [https://perma.cc/QDB9-CXZ5]. Although not all these couples met *at* their respective colleges, as partners may have attended at different times or attended at the same time but never crossed paths, Facebook’s finding still supports the notion that people tend to gravitate toward partners with a similar educational level.

289. Robert D. Mare, *Five Decades of Educational Assortative Mating*, 56 AM. SOC. REV. 15, 15 (1991).

290. Michelle Jamrisko & Ilan Kolet, *Cost of College Degree in U.S. Soars 12 Fold: Chart of the Day*, BLOOMBERG (Aug. 15, 2012, 3:00 AM), <http://www.bloomberg.com/news/articles/2012-08-15/cost-of-college-degree-in-u-s-soars-12-fold-chart-of-the-day> [https://perma.cc/MW9Y-DY82].

291. Total outstanding student debt has quadrupled since 2003, surpassing all other forms of debt, including credit card debt. Ann Marie Weirsch, *The Cost of College: Student Loan Debt on the Rise*, 5 FOREFRONT 1, 10 (2014), <https://www.clevelandfed.org/en/newsroom-and-events/publications/forefront/ff-v5n01/ff-v5n014501-the-cost-of-college-student-loan-debt.aspx> [https://perma.cc/8HYG-ZNWK].

292. Up to 40% of low-income students who are accepted to college do not end up matriculating because “[t]hey’re stymied by tuition sticker shock, Kafkaesque paperwork requirements and a quiet, corrosive feeling that they don’t belong.” Meredith Kolodner, *Why Are Low-Income Students Not Showing Up to College, Even Though They Have Been Accepted?*, HECHINGER REP. (Aug. 14, 2015),

A 2017 study that relied on data from 30 million students who attended college in the years 1999–2013 affirms that college has become a more homogenous place in socioeconomic terms. This study has documented that, among the most prestigious universities, more students come from families in the top 1% of income distribution (14.5%) than the bottom half of income distribution (13.5%).²⁹³

For these reasons, Arnold Kling, former economist for the Federal Reserve System, bluntly asserts that “the value of college is in assortative mating.”²⁹⁴ Accordingly, the notion that college is a vehicle for assortative mating “explains rising tuition costs. If your goal as a parent is to put your child in a milieu of affluent children, then a school with higher tuition may be *more* attractive to you.”²⁹⁵ Then, as Kling suggests, the institution of college “explains rising inequality,” for the exorbitant tuition serves as a barrier for lower-income students to attend, resulting in colleges’ being populated predominately by students from wealthier backgrounds. This, in turn, encourages homogenous mating among higher-income students who meet at college or who meet elsewhere but are attracted to one another due to their shared education backgrounds.²⁹⁶

In a similar context, scholars recognized that the connection between physical spaces, social policy, and urban design, on the one hand, and family lives, on the other hand, is crucial in its impact on families’ well-being.²⁹⁷ These physical and economic realities make it harder for individuals from different classes to meet in the areas that constitute the main arenas for forming intimate relationships. These structures therefore cultivate socioeconomic inbreeding, which contributes to the marital wealth gap.

In conclusion, marriage is often an instrument for wealth aggregation. Besides economies of scale and the behavior of married couples, a host of rules that prefer married couples in wealth amassment are conducive to the existence and growth of the marital wealth gap. Positive patterns of

<http://hechingerreport.org/why-are-low-income-students-not-showing-up-to-college-even-though-they-have-been-accepted/> [<https://perma.cc/VA77-QGEC>].

293. Raj Chetty, John N. Friedman, Emmanuel Saez, Nicholas Turner & Danny Yagan, *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility* (Nat’l Bureau of Econ. Research, Working Paper No. 23618, 2017).

294. Arnold Kling, *Education, Assortative Mating, and Inequality*, LIBR. ECON. & LIBERTY: ECONLOG (Mar. 26, 2008), http://econlog.econlib.org/archives/2008/03/education_and_i_1.html [<https://perma.cc/8UE9-T2AJ>].

295. *Id.*

296. *Id.* (“It explains why education is highly correlated with income . . . [for] [g]oing to college increases your chances of landing a high-income spouse.”).

297. *See, e.g.*, HUNTINGTON, *supra* note 15, at 180–85 (showing how urban design impacts the creation of positive relationships among family members).

assortative mating also contribute to this amassment of wealth. The legal and social architectures that compose the primary venues in which people meet people from other strata are gradually becoming more socioeconomically segregated. The next Part considers potential theoretical foundations for guiding the creation of remedies to these problems.

IV. A NEW THEORY OF MARRIAGE'S ROLE IN WEALTH INEQUALITY

This Part introduces a few theoretical principles for narrowing the marital wealth gap. Two important caveats follow. First, the marital wealth gap is only one strand of the tangle that constitutes wealth inequality.²⁹⁸ Restructuring rules that support the marital wealth gap will only be one step in combating wealth inequality. Other scholars have offered analyses of further structural changes required to close the wealth gap.²⁹⁹ The suggestions set forth below are limited to the intersection of partner selection and household structure with wealth concentration. Second, a plan to eliminate preferential treatment of marital status—as related to wealth holding—entails a complicated set of considerations ranging from the political feasibility of such plans to the administrative difficulties attached to taxing families.³⁰⁰ Scholars have put forward multiple proposals addressing such issues and sketching such a detailed plan exceeds the scope of this Article. This Part outlines the broad theoretical contours of what such reforms involve but does not endorse any particular plan. Put differently, the Article does not aim to close the conversation but rather to deepen it.

A. *Sorting Approaches for Change*

So far, the Article has recognized several shortcomings concerning wealth inequality and family law. These shortcomings may be framed as follows.

298. See, e.g., McCaffery, *supra* note 21, at 2 (“[T]he American tax system [pertaining to families] is a significant cause of these problems.” (emphasis added and omitted)).

299. See, e.g., *id.* at 82–90 (proposing a comprehensive plan to tax wealth); CHANG, *supra* note 22, at 117–42 (suggesting policies to combat the gender wealth gap).

300. On the feasibility of plans to change taxation of married couples, see, e.g., Crawford, *supra* note 221, at 63; Infanti, *supra* note 214, at 621 (“The adoption of an individual tax filing system in the United States is not as politically unrealistic as other commentators believe.”). For discussion of the administrative problems in taxing the marital unit, see, e.g., Moore, *supra* note 148, at 290 (discussing the principles of simplicity of a taxation system).

The system is under-inclusive: The rules governing wealth accumulation and retention provide benefits to married couples that are not available to other types of relationships, such as unmarried couples and nonconjugal ones.³⁰¹ In section III.C, the Article details how various legal directives favor married couples over single people and unmarried couples.³⁰² As noted earlier, while married couples benefit from tax-free intraspousal transfers and portability—as well as benefits in retirement savings and taxation of capital gains from the sale of a primary residence—individuals in nonmarital relationships cannot use them.

Wealth benefits to those who already own more: In *The Supportive State*, Maxine Eichner argues that “the state would have little justification for funneling general economic support to those in adult-adult relationships, given that these adults, on average, do better financially due to the economies of scale of living together.”³⁰³ Not only, as Eichner points out, do married couples fare better financially than other families, but marital status also becomes *more* financially advantageous the richer the couple is.³⁰⁴ Marriage is increasingly the preserve of those who are already better off, and yet the state attaches benefits that support concentration of wealth within affluent married households.³⁰⁵ As people increasingly marry others who share their own socioeconomic status, the justifications for bestowing such benefits weaken.

Norms of privatization encourage families to keep wealth in the family: As Eichner further warns, “The state’s support of family ties runs the risk that closer family bonds will lead to wealth being held within families and therefore to the increased disparities of wealth and opportunities across families.”³⁰⁶ As this Article shows in section III.C, the norms of privatization and rules related to inheritance and estate taxation often

301. Bridget J. Crawford, *Valuation, Values, Norms: Proposals for Estate and Gift Tax Reform*, 57 B.C. L. REV. 979, 993–94 (2016) (“Commentators also have critiqued the economic unity rationale for granting certain privileges to married couples, explaining that the benefit is both too broad . . . and too narrow . . .”).

302. *Supra* notes 149–235.

303. EICHNER, *supra* note 235, at 107.

304. *Cf. Infanti, supra* note 214, at 644 (“The estate and gift taxes may impose a hefty levy on such transfers; however, in the context of the traditional family, these taxes only apply to an exceedingly small slice of very wealthy transferors, who can still benefit from special rules that look to the existence of familial relationships when either reducing or deferring tax.”).

305. Leong, *supra* note 13, at 1336 (“Marriage has become the province of the educated and wealthy. It has become a mechanism by which these privileged individuals perpetuate their privilege across generations.”).

306. EICHNER, *supra* note 235, at 102.

motivate families, especially married households, to create more wealth and to keep it to themselves.³⁰⁷

Legal structures that create conditions that encourage assortative mating: In section III.D, this Article demonstrates that increased instances of marriage among persons from similar stratum are another contributor to the marital wealth gap.

Scholars of various fields, but mainly tax law scholars, have suggested various methods to address these shortcomings. In what follows, the Article divides their suggestions into three groups in order to assess which approach will solve the above-mentioned problems; it has also developed a fourth category, concerning the structural barriers that maintain assortative mating. The categories are: (1) combating the under-inclusiveness of laws governing wealth accumulation; (2) implementing marriage neutrality; (3) encouraging altruism; and (4) reducing wealth-based assortative mating.

These categories are not mutually exclusive, in the sense that advocating for a particular position does not necessarily contradict supporting one of the other categories. In addition, because the proposals incorporated in each category derive from scholars in separate legal fields, who often work in silos, those proposals frequently address only one aspect related to wealth holding and the family at a time. Thus, no single proposal considers all aspects of wealth benefits and their connection to relationships together. To address such fragmentation, the Article also envisions additional proposals appropriate to each category.

Combating the under-inclusiveness of laws governing wealth accumulation: This category includes strategies intended to reduce the special status of marriage by breaking down marriage's monopoly on tax-free wealth transfers and distribution of wealth escalators.³⁰⁸ This approach assembles proposals advocating that wealth-transfer benefits, granted mainly to married couples, should be extended to other types of families.³⁰⁹ Shari Motro, for instance, suggests that benefits from income

307. See *supra* notes 182–207.

308. In a thought experiment, Bridget Crawford contemplates “an ultra-autonomous approach” to taxation wealth transfers, under which each individual could share the tax exemption with another person or persons of the individual’s choice—not necessarily a spouse. Such a regime “would allow each taxpayer to freely transfer his or her applicable exclusion to anyone at all, without regard to the existence of a marital relationship.” Crawford, *supra* note 294, at 995. Crawford concludes that such a regime would result in a revenue loss to the government, and thus “it is fiscally and politically unrealistic that the law would move in that direction.” *Id.* at 996.

309. Cf. Theodore P. Seto, *A Coasean Theory of Marriage* 12 (Loyola Law Sch. Legal Studies Paper No. 2014–20, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2424563 [<https://perma.cc/U37S-99QT>] (“[T]he property and contractual aspects of the law of marriage should

splitting, including double estate and gift tax exclusions, should be restricted to married couples who are economically interdependent (i.e., those who pool their incomes and properties). Couples who do not function as one economic unit, such as couples who entered into a prenuptial agreement that restricts the sharing of assets between the couple, should not enjoy the benefits of income splitting. Simultaneously, laws would bestow these benefits on economically interdependent couples who are not married, including nonintimate couples.³¹⁰

By the same token, this approach could suggest that unmarried couples should use portability the same way married couples do.³¹¹ And, similarly, a single person should be entitled to designate someone (with whom that person is economically interdependent) who could exclude from the estate tax the unused applicable-exclusion amount of a deceased partner. Likewise, according to this rationale, any person who shows economic interdependence with another should be eligible to transfer assets without incurring tax consequences, regardless of marital status. This arrangement would likely support maintaining the exclusion for the sale of a principal residence, because it applies also to unmarried couples, but would insist that only couples (married or otherwise) who are economically interdependent could use it. It would also enable using the capital gains exclusion even if unmarried partners do not hold title as co-owners, as the current regulations require.³¹²

be structured to maximize the legal security of welfare-enhancing exchanges and transfers between spouses.”).

310. Shari Motro, *A New “I Do”: Towards A Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1513 (2006) (“Thus, I propose that tax law consider individuals’ legally binding economic status independent of their marital status, and that only couples committed to sharing all taxable income equally should be treated as such for tax purposes.”).

311. To clarify, I am unaware of such existing proposals—rather, I envision what the proposals that fall under this group would look like.

312. The proposals in this category are incomplete in that they do not address other dimensions that provide preferential benefits to marital households that result in wealth concentration. For example, I am unaware of any suggestion regarding how to eliminate discrimination against unmarried couples in the retirement savings system. *See generally* BELLA DEPAULO, SINGLED OUT: HOW SINGLES ARE STEREOTYPED, STIGMATIZED, AND IGNORED, AND STILL LIVE HAPPILY EVER AFTER (2006) (discussing how the Social Security system discriminates against singles). However, in speculating about what such proposals would look like, we can conjecture that they would advocate a system in which family *status* is irrelevant—and that, rather, they would consider only the function of relationships. Such a system is akin to what Nancy Polikoff calls a “valuing all families” approach. Polikoff advocates that families be recognized by their function rather than by marriage or by any status. NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 125–29 (2008).

Toward marriage neutrality: Under this approach I categorize proposals that advocate marriage neutrality.³¹³ These proposals reflect the principle that marital status should not be a factor that contributes to wealth amassing. They advocate decoupling marriage from some wealth benefits, or reducing the preferential status of marriage. The outcome of this approach is to reduce wealth consolidation among married couples. Much of the focus in this group of proposals is on changing distortion in the system of income tax (the advantages of joint taxation to some married couples), which is outside the scope of this Article.³¹⁴ Some scholarship more relevant to our purpose, however, explicitly tackles the wealth benefits attendant to marriage.³¹⁵

Bridget Crawford suggests eliminating the marital deduction to make gratuitous wealth transfers between spouses fully taxable.³¹⁶ The result, she argues, is increased tax revenues and reduced administrative costs related to the collection of estate and gift taxes. She contends that such a plan is generally more consistent with an approach that treats all types of relationships equally. Anthony Infanti presents a comprehensive plan to switch the United States tax system from joint filing to single filing, which “decentralizes” the special benefits that the traditional family structure receives under the current system.³¹⁷ Building, in part, on the model of the Canadian tax system, Infanti offers a scheme of individual filing that treats all economically interdependent relationships equally. When it comes to taxation of wealth transfer among partners, like Crawford, he suggests repealing the estate and gift tax marital deductions.³¹⁸

313. Cf. Yair Listokin, *Taxation and Marriage: A Reappraisal*, 67 TAX L. REV. 185, 185 (2014) (“Proponents of marriage neutrality, by contrast, contest the notion that married couples are a single unit and abhor the marriage penalties and marriage bonuses that follow from a progressive income tax with couples equity.”).

314. Several tax law scholars have criticized the joint filing aspects of tax in the United States and suggested a move to an individual filing system, including in the system of wealth transfers. See, e.g., Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 683–84 (2010); Martha T. McCluskey, *Taxing the Family Work: Aid for Affluent Husband Care*, 21 COLUM. J. GENDER & L. 109, 198 (2011) (arguing that joint filing provides unfair benefits to married couples and advocating shifting to an individual filing system).

315. For other relevant proposals, see Joseph M. Dodge, *A Feminist Perspective on the Qtip Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1748 (1998) (“For estate tax purposes, the unlimited marital deduction should be replaced by an estate-equalization limitation.”); James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409, 1434 (2010) (“The joint return (and special rates for married taxpayers) should be abolished as an incoherent penalty and subsidy of marriage. Joint filing is indefensible as a component of a progressive tax system.”).

316. Crawford, *supra* note 196, at 797–805.

317. Infanti, *supra* note 214, at 67.

318. *Id.* at 656.

Although combating the inclusiveness aspect (proposed by Motro) and advocating for marriage neutrality (espoused by Crawford and Infanti) advance similar goals—that is, recognizing relationships other than marriage—they use different strategies. Motro’s approach would maintain a system of income splitting but would be more selective in terms of who gets to use it. Crawford and Infanti, on the other hand, suggest fighting non-inclusiveness by dismantling the structural problem, by switching to a system of individual filing, or by repealing the marital deduction.

Similarly, Lily Kahng explores the evolution of tax rules for capital gains on the sale of one’s primary residence and the rules’ impact on different taxpayers. She finds that “these subsidies for home sales rest upon questionable policy justifications, flawed logical reasoning, and poor design choices.”³¹⁹ She thus suggests repealing the capital gains exclusion on a principal residence and treating gains on home sales in the same manner as all other types of capital gains.³²⁰ While this proposal does not address marriage neutrality explicitly, the repeal of the special treatment for taxation of gains from the sale of residences also means the cancellation of the double exclusion for married couples.

Encouraging altruism: The third group of proposals is advanced by scholars who worry that norms of close family connections incentivize family members to keep wealth within the family. Consequently, these proposals suggest that the state should create mechanisms for incentivizing transfers of wealth outside the family. For instance, Eichner suggests that the state should encourage wealth transfer outside affluent families, such as tax incentives for charitable giving.³²¹ Mark L. Ascher argues that the state should adopt a deduction for donations to charities as a means to encourage philanthropy. In his words, “Given the incentives for lifetime giving that reallocation at death would create, the allowance of a gift tax charitable deduction would surely result in a marked increase in lifetime charitable giving.”³²²

In fact, such incentives already exist: the tax code allows, in certain circumstances, the deduction of charitable contributions from income

319. Kahng, *Path Dependence in Tax Subsidies for Home Sales*, *supra* note 83, at 189.

320. *Id.* at 236–37.

321. EICHNER, *supra* note 235, at 108. In a similar vein, Bill Gates recently noted, “Philanthropy also can be an important part of the solution set. It’s too bad that Piketty devotes so little space to it Philanthropy done well not only produces direct benefits for society, it also reduces dynastic wealth.” See Bill Gates, *Why Inequality Matters*, GATES NOTES (Oct. 13, 2014), <https://www.gatesnotes.com/Books/Why-Inequality-Matters-Capital-in-21st-Century-Review> [<https://perma.cc/F988-H2PG>].

322. Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 98–99 (1990).

tax.³²³ And there is also an estate tax charitable deduction, allowing a free transfer to charities from estates.³²⁴

Reducing wealth-based assortative mating: This category incorporates the author's own thought experiment, with two rationales. First, if marriage is a concentrator of wealth, it can also serve as a wealth redistributor in the same way that socially conservative scholars advocate promoting marriage as a means to reduce poverty.³²⁵ It is not a new idea that marriage can help redistribute wealth downward by breaking up the concentration of wealth and creating opportunities for upward socioeconomic mobility. For instance, as early as the end of the fourth century, the Catholic Church began to prohibit marriage between cousins.³²⁶ The reasons for the prohibition are complex, but one hypothesis is that the Church aimed to break "the continuity of European family estates and maneuver[] property into the church."³²⁷ In this early example, lawmakers regulated marriage and relationships in a way that transferred wealth from a few families to others, including to the Church itself, thus preventing wealth from remaining in the family. In the United States, the prohibition against cousin marriage emerged in the second half of the nineteenth century. While much of the reasoning and debate about banning first-cousin marriage focused on eugenic arguments, anthropologists suggest that the ban also sprang from the desire to have immigrants assimilate (by marrying outside their groups), as well as from a reaction against the elite's consolidation of wealth through consanguineous marriages.³²⁸

323. See I.R.C. §§ 170(c), 2055(a), 2522(a) (2012).

324. *Id.* §§ 2501–2524.

325. The notion that an increase in marriage rates can substitute for legal measures to promote income equalization has loomed large among socially conservative commentators. In a 2015 report titled *Strong Families, Prosperous States*, W. Bradford Wilcox, Joseph Price, and Robert Lerman argue that "[h]igher levels of marriage, and especially higher levels of married-parent families, are strongly associated with more economic growth, more economic mobility, less child poverty, and higher median family income at the state level in the United States." WILCOX, PRICE & LERMAN, *supra* note 108, at 3. As Senator Marco Rubio put it, marriage is "the greatest tool to lift children and families from poverty." Annie Lowery, *Can Marriage Cure Poverty?*, N.Y. TIMES MAG. (Feb. 4, 2014), http://www.nytimes.com/2014/02/09/magazine/can-marriage-cure-poverty.html?_r=0 [<https://perma.cc/JJW4-P4C2>]. Brad Wilcox and Bob Lerman thus suggest that, to overcome economic inequality, the state should take measures to increase marriage rates. Wilcox & Lerman, *supra* note 16. Such measures include launching a national campaign to encourage marriage and eliminate marriage penalties. *Id.*

326. MARTIN OTTENHEIMER, FORBIDDEN RELATIVES: THE AMERICAN MYTH OF COUSIN MARRIAGE 63 (1996).

327. *Id.* at 68.

328. *Id.* at 152–53.

Second, the state can try to eliminate the schemas that stand in the way of cross-class meetings, since, as stated before, assortative mating is at least partly a result of assortative meeting. Of course, beyond its interest in increasing instances of meetings between people from different socioeconomic strata, the state has many other excellent reasons to fight these trends of segregation.³²⁹

The next section evaluates which of the above approaches would help design a family law paradigm that mitigates the concentration of wealth among married couples.

B. Transformative Redistribution and Recognition as a Paradigm

This section provides a theoretical basis to assess which of the mentioned approaches would resolve the problems identified above. This Article achieves this by uncovering the proposals' normative implications, focusing on the harms they would fix. To this end, it relies on the analytical categories that critical theorist Nancy Fraser presents in her work on claims for "recognition" versus "redistribution" and on "affirmative" versus "transformative" remedies.

In a number of articles and books, Fraser puts forth a theory of social justice that serves as a normative baseline for the question of which struggles for justice are equitable.³³⁰ Her intervention is in parsing the differences between claims aiming to fight cultural *misrecognition* (demand for recognition of differences, typically "under the banners of nationality, ethnicity, 'race', gender, and sexuality") versus claims to fight *socioeconomic* injustice.³³¹ Claims for redistribution are grounded in efforts to abolish the class differences that arise from an unjust political economy. Conversely, cultural recognition struggles can either advocate for the celebration of differences or for the deconstruction of differences.³³² Fraser contends that contemporary politics have often focused on eliminating cultural misrecognition, to the neglect of claims about maldistribution of resources.³³³ The rise of the politics of recognition, Fraser observes, has eclipsed the previously dominant

329. See, e.g., Richard D. Kahlenberg, *Why Economic School Segregation Matters*, NYU FURMAN CTR. (Mar. 2014), <http://furmancenter.org/research/iri/essay/why-economic-school-segregation-matters> [<https://perma.cc/VFC9-9ACD>].

330. See, e.g., NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* (2009).

331. See Fraser, *supra* note 20, at 68.

332. FRASER, *supra* note 330, at 18, 49–51.

333. See Fraser, *supra* note 20, at 68, 70–74 ("[G]roup identity supplants class interest as the chief medium of political mobilization.").

politics of redistribution, which sought to remedy socioeconomic injustices through the fair distribution of resources.³³⁴

In addition, Fraser makes a useful distinction between the types of remedies that individuals and groups have advocated as a means to fix these dual prongs of injustice. Accordingly, she distinguishes between affirmative strategies and transformative strategies, where affirmative strategies are “remedies aimed at correcting inequitable outcomes of social arrangements without disturbing the underlying framework that generates them,”³³⁵ and transformative remedies “mean remedies aimed at correcting inequitable outcomes precisely by restructuring the underlying generative framework.”³³⁶ Transformative remedies are those that remake the legal structure and dismantle the architecture that embeds the harm. Strategies of affirmative recognition, in contrast, are more focused on fixing the current problem; they bandage an injury without addressing the source of the injury itself. Fraser’s central claim is that transformative remedies to redress misrecognition do not contradict transformative remedies to redress economic injustice. The contrary is true: the combination of transformative recognition and redistribution constitute “folk paradigms of justice”—linked elements that (should) inform struggles for social justice.³³⁷

These paradigms are valuable in evaluating the categories discussed above. In the case of family law and wealth inequality, the misrecognition (cultural) aspect stems from the special status given to marriage simultaneously with privation of recognition of other relationships. The distributional aspect is the overconcentration of wealth in married households in the top 10%, including the top 1%, and particularly the effect of diverse legal directives and norms on such concentration. Categorizing the approaches for solving the problem under the categories of “recognition and redistribution” and of “affirmative versus transformative” provides an analytical tool for assessing which proposals fix only one paradigm and which can address both. Table 3, below, shows the classifications.³³⁸

334. *See id.*

335. *Id.* at 82.

336. *Id.*

337. NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 11 (Joel Golb et al. trans., 2003) (“[I]n their political reference. . . the terms ‘redistribution’ and ‘recognition’ refer not to philosophical paradigms but rather to *folk paradigms of justice*, which inform present-day struggles in civil society.”).

338. *Cf.* Fraser, *supra* note 20, at 87.

Table 3:
Analytical Paradigms

	Affirmative	Transformative
Redistribution	Encouraging altruism	Reducing wealth-based assortative mating
Recognition	Combating under-inclusiveness	Marriage neutrality

Combating under-inclusiveness is an approach most apposite to the category of “affirmative recognition.” This approach, which aspires to solve the problem of the preferential treatment of married couples and the misrecognition of other select groups of couples, is fundamentally grounded in recognition of other types of families. The problem with such an approach is that, although it formally equalizes treatments for different types of relationships, it still contributes to the amassing of wealth in the hands of a few better-off individuals, ignoring the larger socioeconomic maldistribution. That is, even if a larger portion of the population can use wealth benefits and escalators, there still exists the problem of the concentration of wealth among a small number of affluent families. Eventually, even if singles and unmarried couples become entitled to transfer more wealth among themselves—in the same way as married couples can—they will likely transfer it to people who are from relatively similar economic strata (e.g., their children, friends, or siblings). In fact, studies show that nonmarried couples also tend to pair with people from similar socioeconomic and educational backgrounds.³³⁹ The outcome is that recognition of more family types for purposes of wealth benefits does not solve the problem of concentration. It simply allows additional wealthy individuals to enjoy the legal structures that permit wealth retention within the family, albeit more diverse types of families.

Moreover, the types of estate and gift tax benefits available to married couples already apply to those who, jointly, have more than \$11 million in their estate. Data show that the median net worth of people sixty-five

339. See, e.g., Debra L. Blackwell & Daniel T. Lichter, *Homogamy Among Dating, Cohabiting, and Married Couples*, 45 SOC. Q. 719, 732 (2004) (concluding that, overall, “the rather stringent sorting criteria that men and women use in selecting a marital partner, which manifests itself in marital homogamy, is also used in dating and cohabiting relationships”); Christine R. Schwartz, *Trends and Variation in Assortative Mating: Causes and Consequences*, 39 ANN. REV. SOC. 451, 459 (2013) (“These findings suggest that increases in cohabitation have not substantially altered trends in assortative mating, at least in the United States.”).

years and older in the fifth quintile of wealth in the United States in 2011 (which represents the top 10% of United States residents) was \$899,608.³⁴⁰ In 2013, only 10,568 decedents filed federal estate tax returns.³⁴¹ This means that equalizing the tax benefits of marriage to other households will only assist a small percentage of unmarried individuals who are very wealthy.

Even if we fix other inequalities, such as the preferential treatment of married couples in retirement plans, by extending the benefits to singles and unmarried couples, we still do not solve the fundamental structural inequality: family support as a pillar of privatization. One structural problem with retirement saving is what political scientist Philipp Rehm calls the “privatization of social policy risks.”³⁴² Rehm points out that, in most rich democracies, there has been a shift from a system of defined-benefit pension plans to a system based mainly on defined-contribution plans (such as 401(k)s and IRAs). And the more that the latter become popular, the more they become necessary to maintain a reasonable standard of living after retirement.³⁴³ This shift, Rehm argues, “stealthily contributes to wealth inequality” because defined-contribution plans are savings that are transferred to the next generation upon death of the beneficiary (unlike traditional pensions that expire with the death of the recipient).³⁴⁴ The outcome is that more wealth is being transferred to the next generation. In his words:

[I]f one wants to retire comfortably, one accidentally will make one’s offspring rich in the process. The inherited wealth may well be significant enough for the offspring to pay itself a private and fairly generous monthly stipend (“private basic income”) to sustain a middleclass level of living, without participating in the labor market.³⁴⁵

So, while incentivizing more people to save for retirement and ending discrimination against singles are important goals, the result may again be the transfer of more wealth to the next generation without fixing the underlying cause of wealth inequality.

340. Vornovitsky et al., *supra* note 73 at 1, 7 tbl.A1.

341. *SOI Tax Stats—Estate Tax Statistics Filing Year Table 1*, *supra* note 98 (click link to table for 2013).

342. PHILIPP REHM, *RISK INEQUALITY AND WELFARE STATES: SOCIAL POLICY PREFERENCES, DEVELOPMENT, AND DYNAMICS* 201 (2016).

343. *Id.* at 211.

344. *Id.* at 210–11.

345. *Id.*

Solving the inclusiveness aspect does not change the systematic problem that relationship status confers benefits on wealthy couples and entrenches norms of privatization of support. In fact, it can result in an expanded group of people who use tax exemptions and benefits, and thereby reduce state revenue. As Patricia Cain points out in a similar context, “Thus, to extend a flawed provision to unmarried couples might create formal equality; but it would not further substantive justice.”³⁴⁶

Encouraging altruism advances a redistributive goal, but it is not transformative. It remedies economic injustice because it creates incentives to redistribute outside the family. There are several questions about how efficient such mechanisms are in reducing wealth amassment. Critiques abound concerning the current system of encouraging charitable contributions.³⁴⁷ In short, scholars argue that this tax deduction provides more subsidies to wealthier individuals than to the poor, who can give only a smaller proportion of their wealth away, and that individuals can contribute to purposes that do not serve the public interest (e.g., golf clubs or foundations that their offspring control).³⁴⁸ These critiques, as well as the various suggestions on how to solve this problem, are beyond the scope of this Article. For our purpose, suffice it to note that the current system is problematic because it does not result in breaking up concentration of wealth. Indeed, a recent report indicates that mechanisms to encourage altruism yield limited success. A 2014 Family Wealth Transfers Report from researchers at Wealth-X shows that members of United States families with ultra-high net worth are expected to pass on \$6 trillion at death over the next three decades.³⁴⁹ But only \$170 billion of these fortunes—or about .028%—are estimated to be philanthropic bequests.³⁵⁰

Finally, this approach is not transformative because it does not prevent the overconcentration to begin with. Even assuming that encouraging people to give away some of their wealth is effective, this still does not combat the fundamental moral and societal problems of wide gaps in wealth holding. A truly transformative approach should tackle the concentration via marriage, not just find ways to redistribute it after it is

346. Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677, 702 (2000).

347. See Brian L. Frye, *Solving Charity Failures*, 93 OR. L. REV. 155, 169–70 (2014) (surveying the different critiques on encouraging charitable contributions).

348. *Id.* at 169–71.

349. WEALTH-X, FAMILY WEALTH TRANSFERS REPORT 26 (2014), http://www.wealthx.com/wp-content/uploads/2015/01/WealthX_NFP_FamilyWealthTransfersReport-2014.pdf [<https://perma.cc/Y8FZ-FBQW>].

350. *Id.* at 30.

amassed. Moreover, a system that relies on encouraging altruism does not remedy the structural problems embedded in the distribution of wealth because it does not address the other pillars of privatization that signal married couples to keep wealth in the family.

Marriage neutrality advances transformative recognition of families, and, to a lesser extent, promotes redistributive ends. This approach aims to decouple some of the wealth benefits attendant to marital status and to reduce the preferential treatment of married couples. The basic rationale is that married couples already do better in terms of wealth accumulation, so there is no reason for the state to bestow further benefits on them. Rather than extending existing benefits to others, the state should—when fair—treat relationships neutrally, regardless of status. This arrangement is grounded in a cultural recognition claim because its other purpose is to promote various, nontraditional families. It fights misrecognition because it does not single out marriage for special treatment. Rather, it looks functionally for those relationships that create interdependency and, thus, should be entitled to legal recognition. In this way, all relationships are evaluated by their function and not by their status. This approach is also redistributive because, eventually, it will curtail some of the wealth aggregation by married households. That is, these proposals strive to transfer more revenue to the state—which should, at least in theory, use it to provide more benefits to society.

Finally, this approach is transformative because it deals with the roots of the problem, “restructuring the underlying generative framework,” rather than promoting a change that leaves the current structure as is.³⁵¹ For instance, Khang’s proposal to repeal the exclusion of capital gains from the sale of a primary residence and treat it as any other capital gains is transformative because, as she shows, this exclusion is not an effective way to encourage homeownership.³⁵² This proposal does not advocate allowing more couples to enjoy it. It suggests an approach that recognizes all families and individuals and, at the same time, fixes a problem of political economy. More generally, changing the architecture requires, for our purpose, plans that end the preferential treatment of marriage, effectively tax the transfer of great wealth within families, and fix the infrastructures that cause some families to be unable to save.³⁵³

351. Cf. Fraser, *supra* note 20, at 82.

352. Khang, *supra* note 83, at 237 (“Moreover, based on our recent experience with the housing market and its particularly adverse impacts on minority homeowners and communities, we must reevaluate how the government can more effectively promote equality and prosperity.”).

353. Other possible reforms include, in the area of retirement savings, not only ending the preferential treatment of married couples but also acknowledging that some individuals encounter

Reducing wealth-based assortative mating has elements of cultural and redistributive paradigms and can be transformative or affirmative. In its thin version, the state will try to encourage marriage between people from different socioeconomic backgrounds. The thin version is not only ineffective but also affirmative (not transformative). Theoretically, to fight the concentration of wealth through marriage the state can use legislation. Just as certain relatives are banned from marrying each other, the state could, hypothetically, ban people with a certain high level of wealth from marrying their counterparts.³⁵⁴ The state, to be sure, cannot and should not adopt such a ban because it infringes on individual liberty and autonomy in a way that contradicts fundamental principles of a liberal state.³⁵⁵ A softer version of lawmaking that could potentially reduce marriage rates between wealthy families is to give tax benefits for individuals who marry into very different economic ranks.³⁵⁶ But such regulation, while it may encourage a socially good purpose, would also infringe too much on personal autonomy.³⁵⁷ Suggesting that the state needs to pay rich people in order to marry those who are less well off, or to pay poor people to marry richer people, would stigmatize the rich and

structural impediments in saving for retirement. See, e.g., *Advisory Council Report on Disparities for Women and Minorities in Retirement Savings*, U.S. DEP'T OF LABOR (2010), <https://www.dol.gov/agencies/ebsa/about-ebsa/about-us/erisa-advisory-council/disparities-for-women-and-minorities-in-retirement-savings> [<https://perma.cc/CDP4-5CWG>] (reporting that women and workers of ethnic minorities, in both the public and private sectors, struggle to save ample retirement funds). One problem is that women who decrease their participation in the labor force when giving birth and serving as the primary caregiver generally have a harder time saving for retirement. Chang, *supra* note 37, at 65–68. Because retirement plans depend on the years the beneficiary had in the paid workforce, that person's earnings, and whether that person worked full time, women are often thrown off one of the main wealth escalators (retirement savings). A transformative remedy will not aim to repair this problem by increasing eligibility based on the other partner's savings. There are several suggestions for rectifying this problem using structure-based changes. *Id.* at 125–39.

354. As a thought experiment, contemplating a list of measures that the state should not adopt in trying to discourage intimate discrimination in the contexts of race or disability, Elizabeth Emens suggests the state can create a regime in which only mixed race or mixed disability marriages were allowed. This is, as Emens clarifies, absurd and “[n]obody, of course, would actually advocate a law that so patently impinges on individual liberty and autonomy.” Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1382–83 (2009).

355. *Cf. id.*; EICHNER, *supra* note 227, at 104 (“Liberalism’s great respect for individual autonomy requires that the state give individuals the freedom to engage or not engage in consensual relationships with others as they choose.”).

356. Here also this Article builds on Emens’s list of things the state should not do in order to encourage marriages between people of mixed races or when one spouse has a disability. Emens, *supra* note 344, at 1385–36.

357. *Cf. id.* at 1356 (“To impinge on people’s individual preferences in the intimate domain would seem a gross imposition on personal autonomy, in the absence of a substantial showing of countervailing harm.”).

the poor.³⁵⁸ In any event, it is doubtful how effective such tax incentives would be.

In a more reasonable version of this approach, because marriage selection is a source of enduring wealth inequality, the state could be justified in creating conditions for further social integration that might result in a more heterogeneous marriage market. If “[a] vigorous liberal democracy should be able to privilege some relationships over others for important public ends,”³⁵⁹ then it can also adopt policies that encourage some types of relationships over others.

For example, because school settings, including higher education, constitute one of the most significant partnership markets,³⁶⁰ the state could adopt measures to diversify school attendance. Correspondingly, the state could take measures to decrease residential economic-based segregation. Proposals for how it could do these things—increase school heterogeneity, decrease higher education costs to increase heterogeneity, and reduce the number of economic-based segregated neighborhoods—abound, and exceed the scope of this Article.³⁶¹ The state has various other compelling reasons to fight socioeconomic segregation; contesting wealth-based assortative mating serves as an additional justification for adopting such proposals.

This approach can be transformative or not, depending on its effectiveness and, more important, its aim. Even if the state takes steps to increase the supply side of mate selection, this will likely still yield limited results. Even in integrated settings, individuals are often attracted to people with traits similar to theirs.³⁶² In addition, studies show that class sensibilities are sticky: giving people from different classes more opportunities to interact does not mean that they will get along, as it is tough to change cultural norms and intimate preferences.³⁶³ Further,

358. *Cf. id.* at 1385 (concluding that tax benefits to encourage marriage with people with disabilities can stigmatize people with disabilities).

359. EICHNER, *supra* note 227, at 112.

360. Kalmijn & Flap, *supra* note 264.

361. *See, e.g.*, RICHARD D. KAHLBERG, THE FUTURE OF SCHOOL INTEGRATION: SOCIOECONOMIC DIVERSITY AS AN EDUCATION REFORM STRATEGY 309–11 (2012); LeighAnn M. Smith, *Affirmatively Further Fair Housing—and Potentially Further Fair Schooling*, 24 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 329, 331 (2015) (discussing the connection between housing policy, economic segregation, and diversity in schools).

362. Debra Blackwell & Daniel T. Lichter, *Homogamy Among Married, Dating, and Cohabiting Couples*, 45 SOC. Q. 719, 720–21 (2004) (“Even in culturally diverse settings, individuals often make themselves available for dating and ultimately for cohabitation and marriage primarily to persons with similar and easily observable traits (e.g., racial characteristics).”).

363. In her study of thirty-two “different-origin” middle-class married couples consisting of one blue-collar-raised and one white-collar-raised spouse, Jessi Streib demonstrated that class upbringing

individuals increasingly meet more through virtual matchmaking apps, a trend that, perhaps counterintuitively, entrenches patterns of assortative mating.³⁶⁴ It may be that the degree of assortative mating in online dating is less than in a physical-meeting context;³⁶⁵ still, most studies show that assortative mating is persistent in online matchmaking websites.³⁶⁶ Moreover, creating policies that affect mate selection in the virtual world is even more challenging than creating them in other arenas.³⁶⁷

But the biggest weakness of fighting assortative marriage as a means to reduce inequality is not its level of effectiveness. Rather, while integration is an important cause in and of itself, it is a method that, once again, relies on marriage as a vehicle for change. As such, it is grounded in notions of privatization rather than in concrete state regulation that will combat the amassment of wealth. For too long, marriage has been the primary mechanism advocated to remedy economic inequality.³⁶⁸ Such a stratagem leaves the important problems of wealth inequality to the domain of private choice; it will advance some equalization of wealth but will not attack the structures that help maintain the marital wealth gap. Hence, this approach is only transformative to the extent that it is part of a larger project to combat socioeconomic segregation rather than as a primary weapon to fight economic justice via marriage.

In conclusion, the Article does not propose a unified, detailed plan for transformative recognition and redistribution. Its aim is to point out that addressing only distributive injustice or only cultural harm will likely yield inequitable or inadequate results. The proposals mentioned under

embeds values and traits that typically endure into adulthood. This held true even when, as was the case for all of Streib's couples, both partners had achieved middle-class status when they met. Streib calls the ingrained values and traits "sensibilities," which encompass finance management, relationship to employment, leisure habits, spontaneity, parenting style, and emotional expression. JESSI STREIB, *THE POWER OF THE PAST: UNDERSTANDING CROSS-CLASS MARRIAGES* (2015).

364. *Cf., e.g.*, Schwartz, *supra* note 339, at 458 ("This suggests that matches formed through the internet may not differ substantially from those formed in other ways, but research on how technology changes the nature of marriage markets and romantic relationships is in its infancy.").

365. Gina Potarca, *Does the Internet Affect Assortative Mating? Evidence from the U.S. and Germany*, 61 SOC. SCI. RES. 278, 278 (2017) ("Internet promotes weaker couple endogamy compared to conventional contexts typically known to foster endogamy, such as school, family, friends, or religious venues.").

366. Kevin Lewis, *The Limits of Racial Prejudice*, 110 PROC. NAT'L ACAD. SCI. U.S. 18,814, 18,814–19 (2013); Ken-Hou Lin and Jennifer Lundquist, *Mate Selection in Cyberspace: The Intersection of Race, Gender, and Education*, 119 AM. J. SOC. 183, 183–215 (2013).

367. For a discussion of the challenges and possible solutions of combating structural discrimination in online websites, see Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2794 (2008).

368. Murray, *supra* note 69, at 994 ("[M]arriage continues to ensure economic provision and security, relieving the state of this burden.").

the categories of “toward marriage neutrality,” and possibly some versions of fighting socioeconomic segregation, are good steps in this direction.

To clarify, this approach does not advocate eliminating all rights and benefits attendant to the status of being married—only those that are disproportionately benefiting married couples (discussed in section III.C). Some might be concerned that such reforms would lead to reduced rates of marriage. However, the wealth-enhancement benefits attendant to marriage do not promote marriage among the poor and working class, who rarely own assets, so eliminating them will not further reduce the marriage rate of that group of people.

The transformative approaches are not without problems. A system that embeds the dual goal of transformative recognition and redistribution is not easy to construct and not easily politically feasible. Transformative remedies are harder to pursue than affirmative remedies because, by their nature, the former are more revolutionary. Especially in the area of taxation, major reforms are harder to achieve.³⁶⁹ Another question is what to do until transformative change occurs; some argue that perhaps it is better to seek incremental (affirmative) change that protects some people rather than to work for structural change that may never come.³⁷⁰

These valid questions are at the center of every debate regarding social and legal change. This Article does not offer an answer to this predicament. Rather, the Article crafts a general vision that could be useful even in considering small changes in the law; that is, revisions to specific laws—not only big revolutions—should follow the offered paradigm.

CONCLUSION

In the nineteenth century, Thomas Piketty observes, “France was a patrimonial society characterized by a hyperconcentration of capital, in which inheritance and marriage played a key role and inheriting or marrying a large fortune could procure a level of comfort not obtainable through work or study.”³⁷¹ In a similar fashion, marriage and

369. Wendy Richards, *An Analysis of Recent Tax Reforms from a Marital-Bias Perspective: It Is Time to Oust Marriage from the Tax Code*, 2008 WIS. L. REV. 611, 648 (“Usually, the tax code is altered in small steps, such as those taken in the recent tax reforms, but critics have persistently called for fundamental reform.”).

370. *Id.* (“Reforms come in two flavors: small, incremental changes or fundamental, large-scale reforms Fundamental reform, while academically popular, is probably the most difficult to implement. Yet major reform is necessary to remove the marital bias in the code.”).

371. PIKETTY, *supra* note 21, at 342.

intergenerational transfers perform a key role in maintaining and increasing the wealth inequality in the United States today.

Marriage is one of the causes for such inequality—but can it also be a corrective? Two related processes occur simultaneously and make marriage a wealth concentrator. First, as a result of personal taste as well as socioeconomic structural separation, cross-class marriages are declining. Second, wealthy people are more likely than any other group to get married, while the poor are the least likely. These two processes suggest that marriage will not serve as an effective mechanism for fairer distribution of wealth. On the contrary, marriage among the wealthy exacerbates wealth inequality. And for racial minorities, who are the least likely to marry and to transfer wealth to the next generation, marriage will not remedy the wealth gap.

Even if the state *could* change patterns of assortative marriage (and I doubt if it can in both an effective and constitutional manner), fixing wealth inequality through marriage is an unsound idea. For far too long, marriage has served as a vehicle to privatize support—shifting the responsibility of people's economic survival from the state to private individuals. For that reason, making marriage the vehicle for upward mobility reiterates the same technique: the state renounces its responsibility to fight inequality and delegates that responsibility to the private choices of individuals. But this does not mean that the state should not try to address the architecture that encourages class-based assortative mating. The state has many reasons to promote socioeconomic integration; wealth inequality is just one of them.

The fact that married couples fare better economically than others should, alone, call into question the policies that link marriage to the bundle of wealth escalators and consolidators. Combined with the positive patterns of assortative mating—where the benefits of marriage are distributed to those who are already well-off—these policies do not withstand scrutiny.

To date, scholarship has engaged in relatively little discussion on the connections between family law and wealth inequality, outside the context of division of property at the end of marriage. No doubt, the connections this Article identifies here are only the tip of the iceberg. The hope is that this Article sparks a conversation about the role of rules pertaining to families in the preservation of wealth. Indeed, family law scholarship is changing, from a field focused primarily on marriage, children, and parents to one that inquires broadly into all aspects of household life. Boundaries of who is part of the family and which sets of laws are part of family law as a field are constantly challenged. Within this

transformation, wealth inequality should serve as one of the main frontiers of family law scholarship.

As a point of departure for future scholarship, the framework of transformative recognition and redistribution is promising. It engages the two main harms embedded in the current system: the misrecognition of diverse family structures (and their inability to build and retain wealth), combined with the financial injustice grounded in the concentration of wealth by a few.

Of course, the rules pertaining to family and wealth are resistant to change. Politically and administratively, the relationship of family to wealth raises difficult questions whose answers require some creativity. But this is a time of change. Family law has changed; demography is constantly changing in a way that renders existing rules inadequate; and new political forces, as well as scholarship, have placed the issue of wealth inequality at the center of debate. This offers an opportunity: transformative changes have already occurred, and more are achievable. It is worthwhile—even imperative—to put this issue at the top of the agenda of family law scholars and others.