

WE CAN DO IT? HOW THE TAX CUTS AND JOBS ACT PERPETUATES IMPLICIT GENDER BIAS IN THE CODE

ANNE BRYSON BAUER¹

ABSTRACT

In December of 2017 Congress passed sweeping tax “reform” legislation known as the Tax Cuts and Jobs Act. This article highlights three aspects of the legislation that reflect implicit bias in the Code and facilitate the marginalization of women as a result of tax policy that fails to consider underlying demographic data with respect to the equitable distribution of tax expenditures. Specifically, this article analyzes the elimination of the alimony inclusion/deduction regime under §§ 71 and 215 of the Code, the disallowance of a deduction for legal fees associated with the settlement of sexual harassment and abuse claims that include nondisclosure agreements under § 162(q), and specific provisions designed to promote small businesses that exclude the vast majority of businesses owned by women.

This article suggests that tax reform should endeavor to eliminate implicit bias in the Code by addressing the circumstances giving rise to the need for alimony in the first place; the barriers to success faced by women in the market, including discrimination, sexual harassment, and sexual assault; and the circumstances that propel female entrepreneurs toward the types of business models that are excluded from substantial benefits under the Code.

In order to effectuate the equitable distribution of tax expenditures and facilitate economic efficiency through tax policy, tax reform should reevaluate the normative view of marriage, families, and traditional business models reflected in the Code by taking into consideration underlying demographic data with respect to the effects of tax legislation on discrete groups of people. Further, tax reform should adopt a more holistic approach that takes into consideration the interconnected nature of the private and public lives of women struggling to participate equitably in the market and become economically self-sufficient.

¹ Former Visiting Assistant Professor of Law, University of Pittsburgh School of Law (2017-2019). B.A. Trinity College 2001; J.D. University of Pittsburgh School of Law 2008; LL.M. (Taxation) Georgetown University Law Center 2009. I would like to acknowledge and extend my gratitude to the many advisors, mentors, colleagues, and friends who provided encouragement, inspiration, guidance, and supportive feedback. I would especially like to thank Professors Anthony Infanti, Philip Hackney, and Deborah Brake, faculty participants in the Junior Faculty workshops at the University of Pittsburgh School of Law, Professor Annette Nellen for her fundamental insight, and Professor Caroline Bruckner for her invaluable research and tireless efforts to promote the interests of women business owners. I am also grateful for the support of the University of Pittsburgh School of Law during the research and writing of this article. Finally, thank you to Michael, for his unwavering support of my professional endeavors.

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INTRODUCTION

Women comprise more than 50% of the U.S. population and 47% of the workforce.² More women than men have attained a bachelor’s degree or higher, women control 51% of the personal wealth in the United States, and women are the primary breadwinner in more than 40% of U.S. households.³ Moreover, 67.9% of Black working mothers, 47.9% of Hispanic working mothers, and 29.6% of white working mothers are single, and therefore the primary economic provider for their family.⁴ Yet, as of 2017, women on

² Michael J. McManus, *Women’s Business Ownership: Data from the 2012 Survey of Business Owners*, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., 1 (13th ed. 2017), <https://www.sba.gov/sites/default/files/advocacy/Womens-Business-Ownership-in-the-US.pdf> [<https://perma.cc/24CX-W7BN>].

³ *Id.*

⁴ Valerie Wilson, *Working Economics Blog*, ECON. POL’Y INST.: WORKING ECONS. BLOG (May 11, 2017, 10:00 AM), <https://www.epi.org/blog/african-american-women-stand-out-as-working-moms-play-a-larger-economic-role-in-families/> [<https://perma.cc/8A9X-KDLB>].

average earn only 80% of that earned by male peers,⁵ single Black and Hispanic mothers earn less than their white counterparts,⁶ and the percentage of women participating in the workforce continues to decline as the cost of child care rises.⁷ At the same time, our tax laws do not adequately take into consideration the diverse identities and needs of women or their contributions to the nation's economic well-being. Policy makers disregard the role tax policy plays in establishing and maintaining social hierarchies based on gender, race, sexual orientation, and socio-economic background,⁸ and the marginalizing effects are at best an afterthought to those writing the law.⁹

⁵ See Xaquín G.V., *Can We Talk About the Gender Pay Gap?*, WASH. POST (Oct. 26, 2017), https://www.washingtonpost.com/graphics/2017/business/women-pay-gap/?utm_term=.08d5d016b17f [<https://perma.cc/VA4L-VC87>]; see also Ariane Hegewisch, *The Gender Gap: 2017, Earnings Differences by Gender, Race and Ethnicity*, INST. FOR WOMEN'S POL'Y RES. (Sept. 2018), <https://iwpr.org/wp-content/uploads/2018/09/C473.pdf> [<https://perma.cc/4GRA-QHLE>].

⁶ Wilson, *supra* note 4.

⁷ See Claire Cain Miller & Liz Alderman, *Why U.S. Women Are Leaving Jobs Behind*, N. Y. TIMES (Dec. 12, 2014), <https://www.nytimes.com/2014/12/14/upshot/us-employment-women-not-working.html> [<https://perma.cc/C3JW-MT98>].

⁸ See generally Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307 (1998) (exposing the role of tax policy in creating and maintaining social hierarchies through a historical examination of the tax treatment of waged childcare, reproductive labor, and employment related childcare expenditures); Dorothy Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. 755 (2005) (exposing the unequal treatment of children and families and the implications of such treatment with respect to the Earned Income Tax Credit and the Child Tax Credit). See also Deborah L. Brake, *Back to Basics: Excavating the Sex Discrimination Roots of Campus Sexual Assault*, 6 TENN. J. RACE GENDER & SOC. JUSTICE 7, 15 (2017) (noting the “intersectional critique of monolithic gender theorizing and postmodern questioning of the stability of sex and gender itself” and that “[d]ifferences among women shape women’s social positions”).

⁹ For example, the House Committee on the Budget did not hold hearings specifically directed at the effects of the new tax law on working families until almost a year and a half after the passage of Public Law No. 115-97. See *2017 Tax Law – Impact on the Budget and American Families: Hearing Before the H. Comm. on the Budget*, 116th Cong. (2019) (Pre-Hearing Document), https://budget.house.gov/sites/democrats.budget.house.gov/files/documents/2017%20Tax%20Law%20Impacts%20FINAL_1.pdf [<https://perma.cc/Q37Z-UHMD>]. Similarly, during a Subcommittee on Tax Policy hearing on May 23, 2018, Congresswoman Linda Sanchez noted the Committee’s failure to address important concerns prior to the enactment of Pub. L. No. 115-97. *Tax Reform and Small Businesses: Growing our Economy and Creating Jobs: Hearing Before the Subcommittee on Tax Policy of the Comm. on Ways & Means*, 115th Cong. 57 (2018), <https://docs.house.gov/meetings/WM/WM05/20180523/108364/HHRG-115-WM05-Transcript-20180523.pdf> [<https://perma.cc/26VK-V933>] (“I agree with Mr. Doggett that we should have had legislative hearings about how the actual tax cuts would impact important constituencies like small businesses, but here we are doing a little Monday morning quarterbacking instead.”). Further, legislation to address the presumably inadvertent inclusion of victims in the expense disallowance under I.R.C. § 162(q) (2012 & Supp. V 2017), see discussion *infra* Part II.B., was not addressed until May 10, 2018 and a more comprehensive resolution was not proposed until June 5, 2018 in the Senate and July 17, 2018 in the House. See *Repeal the Trump Tax Hike on Victims of Sexual Harassment Act of 2018*, S. 2820, 115th Cong. (2018); *EMPOWER Act-Part 1*, S. 2994, 115th Cong. (2018); *EMPOWER Act-Part 2*, S. 2988, 115th Cong. (2018); *EMPOWER Act*, H.R. 6406, 115th Cong. (2018).

The Tax Cuts and Jobs Act¹⁰ is the latest example of federal tax legislation to perpetuate gender bias in the Tax Code.

Just months prior to the enactment of the Tax Cuts and Jobs Act, the federal Commission on Evidence-Based Policymaking released its final report noting that “[t]axpayers and policymakers should receive credible information to know and understand how well the programs and policies they fund achieve their intended goals.”¹¹ Yet, Congress, in enacting the most sweeping tax reform legislation in decades, failed to adequately collect or consider evidence reflecting the direct and indirect effects of tax expenditure policies on historically disempowered groups of people. Because “race, gender, and heteronormativity intertwine to stratify and subordinate women,”¹² this article urges the need to consider underlying demographic data with respect to the equitable distribution of tax expenditures.¹³ The collection and consideration of demographic data is a necessary component to understanding the unique circumstances, historical bias, structural barriers, and inequities that compound the marginalizing effect of the Code on women who are also members of other historically disempowered groups.

Rather than enacting real substantive reform, the Tax Cuts and Jobs Act simply served to disproportionately reduce the tax burden on businesses and wealthy individuals.¹⁴ Congress funded the resulting revenue losses by reducing tax expenditures without regard for the distributional effects of those reductions on women, minorities, and lower income taxpayers.¹⁵ One such

¹⁰ Pub. L. No. 115-97, 131 Stat. 2054 (2017); H.R. 1, 115th Cong. (2017) (enacted). The official title of the bill signed into law on December 22, 2017 is “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.” See Pub. L. No. 115-97, § 11000. The Senate parliamentarian struck the title “Tax Cuts and Jobs Act” from the final enacted legislation; however, the enacted legislation continues to be referred to as “the Tax Cuts and Jobs Act” and is referred to as such in the Conference Report accompanying the Act. See H.R. REP. NO. 115-466 at 1 (2017) (Conf. Rep.); Howard Gleckman, *The 2017 Lump of Coal Award: Tax Cuts And Jobs Act Edition*, FORBES (Dec. 22, 2017, 1:50 PM), <https://www.forbes.com/sites/beltway/2017/12/22/the-tax-vox-2017-lump-of-coal-award-tax-cuts-and-jobs-act-edition/#2b2554f321f7> [<https://perma.cc/C2YD-RYDK>]; see also Daniel Shaviro, *The Act With No Name*, START MAKING SENSE (Dec. 21, 2017, 3:03PM), <http://danschaviro.blogspot.com/2017/12/the-act-with-no-name.html> [<https://perma.cc/M9DR-MEZ6>].

¹¹ COMMISSION ON EVIDENCE-BASED POLICYMAKING, THE PROMISE OF EVIDENCE-BASED POLICYMAKING, at 106 (Sept. 17, 2017), <https://www.cep.gov/report/cep-final-report.pdf> [<https://perma.cc/NB3N-5A3S>].

¹² Brake, *supra* note 8, at 15.

¹³ Congress’s failure to collect and consider demographic data contributes to the difficulty in engaging in a more comprehensive and in-depth intersectional approach to tax policy grounded in empirical data. The purpose of this article is to introduce three ways in which the Tax Cuts and Jobs Act reflects the consequences of that failure.

¹⁴ See Linda Sugin, *The Social Meaning of the Tax Cuts and Jobs Act*, 128 YALE L.J. FORUM 403, 404 (2018) (“As has been widely reported, the legislation substantially reduces the tax obligation of the most affluent Americans and reduces taxes only slightly and temporarily for the least affluent.”). Professor Sugin notes that in doing so, the legislation “contributes to the perpetuation of traditional power structures.” *Id.* at 431.

¹⁵ Rather than enacting tax reform legislation through regular order, Congress fast-tracked the legislation through the budget reconciliation process to avoid extensive floor debate, risk of filibuster by Democrats, and the need for more than a simple majority to

tax expenditure to find itself on the chopping block was the deduction for alimony payments. Because men generally pay alimony, the elimination of a corresponding deduction would appear to impose a burden on men; however, women will bear the economic cost of this expenditure elimination.¹⁶ Eliminating the alimony deduction reduces the incentive for payer spouses to agree to alimony and eliminates the associated income shifting mechanism that previously reduced the financial burden faced by divorcing couples as they struggle to establish separate households. As a consequence, women will likely face greater hardship as they transition to working outside of the home in the wake of separation or divorce. While some advocate for the reinstatement of the alimony deduction,¹⁷ reinstatement alone ignores the burdens faced by women already struggling to work outside the home and fails to address the larger issue of inequitable and biased treatment of families under the Code.¹⁸

In a seemingly unrelated attempt to help victims of sexual harassment and abuse in the workplace, Congress enacted section 162(q). Section 162(q) disallows any deduction for payments, including legal fees, relating to settlements of these claims that include nondisclosure agreements. While the elimination of the deduction for legal fees is designed to target employers

pass. Use of the budget reconciliation process required Congress to comply with the Byrd Rule, a procedural rule designed to limit long term effects on the deficit, which necessarily resulted in the inclusion of hastily drafted and shortsighted provisions to offset revenue losses from the bill's tax cuts. The partisan legislation was drafted behind closed doors and pushed through Congress so quickly that at times members were voting on legislation with handwritten amendments. See Samuel A. Donaldson, *Understanding the Tax Cuts and Jobs Act 1* (GA State Univ. College of Law Legal Studies Research Paper No. 2018-07, Jan. 3, 2018); Edward Kleinbard, *Senators Picked Americans' Pockets Via Degraded Tax Policy Process*, THE HILL (Dec. 4, 2017, 10:00 AM), <http://thehill.com/opinion/finance/363096-senators-picked-americans-pockets-via-degraded-tax-process> [<https://perma.cc/YPW7-6W3Q>]. For a more comprehensive discussion of the oversights, errors, and general degradation of the integrity of the Code resulting from the hastily enacted tax legislation as well as an acknowledgment of a few welcome changes to the Code, see David Kamin et. al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439 (2018).

¹⁶ See 2017 CENSUS DATA, *infra* note 63 and accompanying text.

¹⁷ See e.g. A.B.A. FAMILY LAW REPORT, *infra* note 56 and text accompanying note 81.

¹⁸ For purposes of this article, the term "family" or "family unit" is used to refer to any legally recognized familial relationship and non-legally recognized cohabitation arrangements characterized by economic interdependence between two or more individuals, whether or not inclusive of children. For example, this would include cohabitating married individuals, whether same- or different-sex, domestic partnerships and civil unions, as well as divorced or separated couples to the extent they continue to be connected by financial obligations. The term also includes households headed by a single parent or guardian and any parent who is not part of that household but is connected through financial obligations. For further discussion on the treatment of economically interdependent personal relationships and how the Code might better address the diverse types of economically intertwined personal relationships that exist in our society today, see generally Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605 (2010) (rejecting the privileging of the traditional nuclear family under the Tax Code and proposing a more inclusive alternative approach).

attempting to brush these claims under the rug, poor drafting resulted in legislation that disallows the deduction for victims. While Congress, the Joint Committee of Taxation, and the Internal Revenue Service have all attempted to clarify that the disallowance should not extend to victims, the statute as drafted further compounds the harm suffered by these employees by forcing victims to choose between confidentiality and a deduction for payments relating to settlements of these claims.

The Tax Cuts and Jobs Act reduced the top corporate tax rate to 21%;¹⁹ however, this reduction does not extend to the millions of businesses that are not incorporated or otherwise taxed as corporations. In an attempt to place unincorporated businesses on the same footing, Congress enacted new section 199A.²⁰ To reduce the effective tax rate for unincorporated businesses, section 199A authorizes a temporary deduction for the qualified business income of pass-through entities; however, service industry and W-2 wage limitations included in the provision reduce the likelihood that women-owned businesses will enjoy any material benefit from the deduction. To stimulate economic growth through capital investment, Congress also expanded the availability and amount of depreciation deductions for businesses that purchase depreciable property.²¹ While these provisions were intended to help small businesses, these expenditures will do little to benefit the eleven million small businesses owned by women.²²

By failing to consider underlying demographic data, the distribution of tax expenditures among different groups of people, and the manner in which the Code affects taxpayers differently based on different identifying attributes,²³ Congress enacted tax legislation that perpetuates implicit bias in the Code. The Tax Cuts and Jobs Act will reduce financial resources available to recently divorced women, further disempower victims of sexual harassment and abuse, and exclude women business owners from coveted tax and corre-

¹⁹ Pub. L. No. 115-97, § 13001, 131 Stat. 2096.

²⁰ Pub. L. No. 115-97, § 11011, 131 Stat. 2063–2071 (2017). *See also* JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF P.L. 115-97 20 (2018) (“The provision reflects Congress’s belief that a reduction in the corporate income tax rate does not completely address the Federal income tax burden on businesses.”).

²¹ Pub. L. No. 115-97, § 13101, 131 Stat. at 2101; Pub. L. No. 115-97, § 13201, 131 Stat. at 2105. Congress generally justifies these types of tax expenditures based on the belief that businesses will use the tax savings generated by the deduction toward capital investment, thereby stimulating economic growth. For example, in enacting § 168, “Congress concluded that prior law rules for determining depreciation allowances and the investment tax credit needed to be replaced because they did not provide the investment stimulus that was felt to be essential for economic expansion.” JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981 75 (1981). *See also infra* note 211 and accompanying text.

²² *Small Business Tax Reform: Modernizing the Code for the Nation’s Job Creators*, Hearing Before the H. Comm. on Small Bus., 115th Cong. 6 (Oct. 4, 2017) (statement of Prof. Caroline Bruckner, Kogod School of Business Tax Policy Center) [hereinafter *2017 House Hearings*], https://smallbusiness.house.gov/uploadedfiles/10-4-17_bruckner_testimony.pdf [<https://perma.cc/QU9v-HQTD>].

²³ For example, race, gender, sexual orientation, socioeconomic status, and marital status.

sponding economic benefits. These three seemingly distinct aspects of the Tax Cuts and Jobs Act marginalize and subordinate women as they navigate various stages of participation in the market.²⁴ Part I of this article discusses the elimination of the alimony deduction/inclusion regime under §§ 71 and 215, the immediate economic hardship this change may impose on some women, and the relationship between this change and implicit racial and gender bias in the treatment of families under the Code; Part II explains how § 162(q) marginalizes and disempowers victims of sexual harassment and abuse and fails to adequately address underlying discrimination and harassment in the workplace; and Part III discusses the marginalizing effect of the Tax Cuts and Jobs Act on women business owners.

This article concludes that tax reform should adopt a more holistic approach, considering the intersectional nature of the economic challenges faced by women and the interconnected nature of public and private spheres with respect to those challenges. Specifically, Congress must first endeavor to collect and consider the underlying demographic data concerning the intended and unintended beneficiaries of tax expenditures.²⁵ Second, Congress should recognize and consider the interconnected relationships between women's ability to earn a living outside of the home, hostile and discriminatory work environments, access to financing, access to quality and affordable child care, the Code's preference for marriage and the traditional single earner family, and the tax treatment of families generally. Viewing these social and economic issues in isolation risks further marginalizing women broadly, and women of color in particular. Moreover, this perspective imposes limits on the realm of possible policy solutions that aim to improve lives while maximizing society's economic output. In other words, with an eye toward equity and efficiency, good tax policy would recognize the relationship between the taxation of "domestic relations" (e.g., marriage, alimony, child support, and access to affordable, and quality childcare), workplace discrimination (including sexual harassment and abuse), and the

²⁴ Specifically, this article addresses the effect of the Tax Cuts and Jobs Act on women attempting to return to the workforce following divorce, women employed in the workforce who become victims of sexual harassment and abuse or repeat victimization, and women who leave the workforce to start their own businesses.

²⁵ As noted by Prof. Caroline Bruckner in her report on the effect of current tax policy on women business owners, "Congress passed bipartisan legislation to establish a federal commission on Evidence-Based Policymaking (the 'Commission') to, among other things, 'determine the optimal arrangement for which administrative data on Federal Programs and tax expenditures, survey data and related statistical data may be integrated and may be available to facilitate program evaluation, continuous improvement, policy-relevant research, and cost-benefit analysis by qualified researchers and institutions.'" Caroline Bruckner, *Billion Dollar Blind Spot: How the U.S. Tax Code's Small Business Expenditures Impact Women Business Owners* at 22, AMERICAN UNIVERSITY KOGOD TAX POLICY CENTER (June 2017) (quoting Evidence-Based Policymaking Commission Act of 2016, Pub. L. No. 114-140, 130 Stat. 317, 318 (2016)), https://american.edu/kogod/research/upload/blind_spot_accessible.pdf [<https://perma.cc/Q597-CU88>].

ability of women to participate equally in the market and achieve economic self-sufficiency.

I. ELIMINATION OF THE SECTION 71 AND 215 ALIMONY REGIME

In contrast to the deduction for legal fees by victims of sexual harassment and abuse or the equitable distribution of tax expenditures among small business owners, the bias and corresponding harm with respect to the elimination of the alimony regime is more difficult to discern and susceptible to challenge. In particular, advocacy on behalf of women affected by the elimination of the alimony inclusion/deduction regime seems misplaced given the small number of affected taxpayers and the fact that these women exist on the privileged “side of the ‘power line’ with respect to certain identity categories.”²⁶ Specifically, alimony recipients are typically white women previously able to withdraw from the workforce as a result of their marriage and the income level of their spouse who, in the event of divorce, can afford to pay alimony.²⁷ However, their privilege directly implicates the implicit bias in the Code with respect to marriage and the treatment of families. In many instances, the Code itself incentivizes a married individual’s withdrawal from the labor market and imposes a greater tax burden and corresponding financial hardship on those that remain employed.²⁸ The corresponding diffi-

²⁶ Stephanie M. Wildman et al., *Revisiting the Work We Know So Little About: Race, Wealth, Privilege, and Social Justice*, 2 U.C. IRVINE L. REV. 1011, 1012 (2012). The “power line” refers to the delineation between “privileged characteristics that define social norms” and those identity characteristics that are not privileged. *See id.*

²⁷ For further discussion of the privilege associated with women’s withdrawal from the market as an ideological construct that is premised on and facilitates class, gender, and racial hierarchies, *see* Fellows, *supra* note 8, at 318–319 (“The marketplace became characterized as harsh, crude, and brutish while the home became characterized as clean, orderly, and a haven for social and moral graces. The separate spheres made it possible for a man to earn respect through self-control and good character by looking to his home, wife, and children, leaving him free to lust for power and wealth in the marketplace. Not coincidentally, the barbaric marketplace became a justification for virtuous women to remain in the home and not to compete with men by entering into the public arenas of the workplace, education, or politics. This era is frequently referred to as either the *cult of the lady* or the *cult of domesticity*.”). In contrast, women of color with the financial resources to withdraw from the workforce to care for their families were viewed with contempt. *See id.* at 329.

²⁸ As a result of the joint return and corresponding graduated rate structures for married couples as compared to unmarried couples and single taxpayers, married couples may enjoy a “marriage bonus” depending on income levels and the allocation of income between spouses. *See, e.g.,* Lily Kahng, *One Is the Loneliest Number: The Single Taxpayer in a Joint Return World*, 61 HASTINGS L.J. 651, 658–60 (2009) (noting that “the tax system has moved in the direction of greater unmarried couple penalties (i.e. greater marriage bonuses) since 2001” and observing that “there is never a single person’s bonus – that is, a single person never pays less relative to a couple, whether married or unmarried, with the same amount of income as the single person”). The “marriage bonus” is most pronounced in the case of single earner marriages. *See id.* at 658. The incentive for even lower and middle income women to leave the workforce is reinforced by the fact that “[a] single-income couple benefits from the value of household and other unpaid services performed by the stay-at-home spouse (imputed income) and, as a result, is bet-

culty in re-entering the labor market in the event of divorce provides the current justification for alimony, which is frustrated by the elimination of the alimony inclusion/deduction regime. Further, by prioritizing marriage²⁹ and perpetuating gender stereotypes in the Code, Congress sends a message to those who marry and remain in the workforce, divorce, never marry in the first place, or otherwise fail to conform to traditional gender norms and the Code's normative view of family: their concerns and contributions are not worthy of consideration with respect to the distribution of tax benefits.³⁰

A. Gould and the Enactment of Sections 71 and 215

Prior to the enactment of the Code's alimony regime under §§ 71 and 215, the tax treatment of alimony was governed by case law. As a matter of federal tax law, gross income includes "all income from whatever source derived."³¹ While the Code expressly disallows any deduction for "personal, living, or family expenses,"³² Congress makes exceptions to this general rule for policy reasons.³³ The starting point for any tax analysis, therefore, is whether a transfer of value is includible in the recipient's gross income. In 1917, this question came before the U.S. Supreme Court with respect to alimony payments in the case of *Gould v. Gould*.³⁴ Pursuant to a divorce decree, Howard Gould was to pay Katherine Gould \$3,000 per month for the duration of her life as support and maintenance.³⁵ The question for the Court was whether this amount should be included in Katherine Gould's income and subject to tax under the recently enacted income tax legislation.³⁶

ter off than a comparable dual-income couple. In addition, a dual-income couple incurs more in the way of nondeductible expenses of producing income, such as childcare, clothing, and commuting expenses, also leaving them worse off than the single-income couple." *Id.* at 662. As a result, for some families, after taxes and the costs of commuting and childcare, the second spouse simply cannot afford to work outside of the home.

²⁹ See, e.g., *id.* at 672–73 (discussing the Code's preference for marriage). Professor Kahng notes that "there exists an 'ideology of marriage and family' that exalts marriage and the nuclear family above all other personal relationships, and that is so deeply ingrained in our society that it goes unrecognized and unchallenged." *Id.* at 672 (quoting Bella M. DePaulo & Wendy L. Morris, *Singles in Society and in Science*, 16 PSYCHOL. INQUIRY 57, 58, 77 (2005)).

³⁰ For further discussion concerning the prioritization of the "traditional family" in the Tax Cuts and Jobs Act, see Sugin, *supra* note 14, at 405–11.

³¹ I.R.C. § 61 (2012 & Supp. V 2017) (emphasis added).

³² I.R.C. § 262(a) (2012).

³³ See, e.g., I.R.C. §§ 163(h)(3), 164, 213 (Supp. V 2019). For example, subject to limitation, the Code authorizes deductions for "qualified residence interest" (home mortgage interest) under § 163(h)(3); state, local, and real property taxes under § 164; and, personal medical expenses under § 213.

³⁴ *Gould v. Gould*, 245 U.S. 151 (1917).

³⁵ *Id.* at 152.

³⁶ See *id.* The Revenue Act of 1913 provided that "there shall be levied, assessed, collected and paid annually upon the entire net income arising or accruing from all sources in the preceding calendar year to every citizen of the United States . . . a tax of 1 per centum per annum upon such income." Revenue Act of 1913, ch. 16, § 2(A)(1), 38 Stat. 114, 166 (1913) (current version at I.R.C. § 61 (2012 & Supp. V 2017)). Net in-

After first reviewing the statutory language, the Court noted that use of the term “income” in the definition of income “cause[d] some obscurity,” but declined to conclude that the statute raised any doubt as to its meaning.³⁷ The Court was simply “unable to assert that alimony paid to a divorced wife under a decree of court falls fairly within any of the terms employed.”³⁸ With a view of marriage rooted in the laws of coverture, the Court instead regarded alimony as arising from “the natural and legal duty of the husband to support the wife” and as “a portion of the husband’s estate to which the wife is equitably entitled.”³⁹ In part due to the nature of the marital relationship and influence of coverture on state marriage and divorce laws, Congress and courts have historically grappled with the appropriate tax treatment of inter-spousal transfers of money or property.⁴⁰ In this case, the Court viewed such transfers, derivative of the union of husband and wife, as a nonevent, despite being negotiated or ordered as part of (and occurring after) the dissolution of that union.

While views of women and marriage have evolved, the need to revisit the Court’s conclusions in *Gould* was eliminated in 1942 when Congress added new subsection (k) to the definition of gross income under § 22.⁴¹

come, on which the tax is imposed after application of any exemption and deductions, included “gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever, including the income from but not the value of property acquired by gift, bequest, devise, or descent.” *Id.* at 167.

³⁷ *Gould*, 245 U.S. at 153.

³⁸ *Id.*

³⁹ *Id.* at 153 (quoting *Audubon v. Shufeldt*, 181 U.S. 575, 577–78 (1901)). The Court in *Gould* also references the opinion of the Court in *Audubon* that “[a]limony does not arise from any business transaction,” which warrants further consideration and evaluation in light of contemporary discussions on transfers of property and shared economic responsibilities within same-sex and different-sex households after the Supreme Court’s decisions in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), and *United States v. Windsor*, 570 U.S. 744 (2013). *Gould*, 245 U.S. at 153 (quoting *Audubon*, 181 U.S. at 577).

⁴⁰ For example, in 1962, the Supreme Court held that the transfer of appreciated stock by a husband to his former spouse pursuant to a separation agreement in exchange for her relinquishment of all marital rights and claims against his property was a taxable exchange of property. *United States v. Davis*, 370 U.S. 65, 66 (1962). Congress disagreed and enacted § 1041(a), providing that there is no gain or loss on transfers of property between spouses or between former spouses when the transfer occurs incident to divorce. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 421(a), 98 Stat. 494, 793–94 (codified as amended at I.R.C. § 1041 (2012)). Similarly, under the federal estate and gift tax regime, the Code authorizes deductions for gifts to donee spouses and the portion of a decedent’s estate that passes to a surviving spouse. I.R.C. §§ 2056(a), 2523(a) (2012).

⁴¹ Revenue Act of 1942, Pub. L. No. 77-753 § 120, 56 Stat. 798, 816–17 (1942) (“In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such

Section 22(k) required the inclusion of alimony in the recipient spouse's gross income and authorized a deduction of that amount from the gross income of the payee spouse.⁴² This reversal of course did not develop from objection to the Court's view in *Gould* that alimony arises from a husband's obligation to support his wife.⁴³ Congress, instead, viewed the new inclusion/deduction regime as a necessary solution to the "hardships and inequities" faced by divorced men who, in addition to wartime surtaxes, were required to pay tax on the portion of their income paid out as alimony.⁴⁴ Rather than a complete exclusion from tax and to achieve a more equitable outcome based on ability-to-pay, the payments would be included in the taxable income of the recipient spouse.⁴⁵ To exempt alimony recipients from tax would unfairly privilege divorced women under the tax laws.⁴⁶ Opponents to

decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband.") (current version at I.R.C. §§ 71(a) and 215(a) (2012 & Supp. V 2017)).

⁴² *Id.*

⁴³ See S. REP. NO. 77-1631, at 84 (2d Sess. 1942) (distinguishing alimony payments from property settlements and noting that new § 22(k) only applies "where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support"). For a more detailed analysis of the history and bases for the alimony inclusion/deduction regime, see Wendy Gerzog Shaller, *On Public Policy Grounds, A Limited Tax Credit for Child Support and Alimony*, 11 AM. J. TAX POL'Y 321 (1994).

⁴⁴ H.R. REP. NO. 77-2333, at 46 (2d Sess. 1942). See also *Revenue Revision of 1942: Hearing Before the H. Comm. on Ways and Means*, 77th Cong. 91-92 (1942) [hereinafter *1942 Hearings*] (statement of Randolph Paul, Tax Adviser to the Secretary of the Treasury) (labeling the tax treatment of alimony as an "additional example of hardships and inequities" faced by divorced men). Because of the exceptionally high tax rates enacted to finance the United States' involvement in World War II, Congress feared that without a deduction for the expense of maintaining a separate household, divorced men would not have enough money to meet their increased federal tax obligations. See Revenue Act of 1942, §§ 102, 103, 56 Stat. at 802-03; H.R. REP. NO. 77-2333, at 1, 46.

⁴⁵ S. REP. NO. 77-1631, at 83 (2d Sess. 1942) ("[t]hese amendments are intended to treat such payments as income to the spouse actually receiving or actually entitled to receive them and to relieve the other spouse from the tax burden upon whatever part of the amount of such payments is under the present law includible in his gross income"). See also *1942 Hearings* at 3 (statement of Henry Morgenthau, Jr., Secretary of the Treasury) (expressing the need to adhere "to the basic principle of our tax system, namely, that taxes should be fair and non-discriminatory and imposed in accordance with ability to pay"); *1942 Hearings* at 92 (statement of Randolph Paul, Tax Adviser to the Secretary of the Treasury).

⁴⁶ *1942 Hearings* at 92 (statement of Randolph Paul, Tax Adviser to the Secretary of the Treasury) ("Rising tax rates have in some cases absorbed the entire income of the husband required to pay the tax on his income and that of his divorced wife. At the same time, divorced wives receiving tax-free alimony possess a privileged status under our tax laws which relieves them of any share of the tax burden. The fair solution is that recommended by the Senate last year, namely to tax alimony payment to the divorced wife."). It is true that exempting alimony payments privileges alimony recipients under the tax laws; however, this perception of privilege was exaggerated in 1942 by the stereotype of the wealthy divorcee living off of her former husband's income for life. See *1942 Hearings* at 2164-65 (statement of Congressman Dingell dismissing concerns regarding a tax on alimony income, stating that alimony recipients may just as well be "unscrupulous, scheming [women]" who simply object to turning over a portion of their champagne

the proposed regime argued that alimony is unequivocally not income⁴⁷ and a deduction for support and maintenance payments is contrary to the general rule that personal living expenses are not deductible.⁴⁸ Further, any hardship or inequity resulting from wartime surtaxes should be relieved by appeal to the courts, which considered net income after taxes in awarding alimony.⁴⁹ In 1942, arguments over the appropriate treatment of alimony income were resolved by statute.

Without reference to gender or traditional gender roles,⁵⁰ § 71(a) expressly includes alimony and separate maintenance payments in the recipient spouse's gross income while § 215(a) authorizes a corresponding deduction against the payer spouse's gross income.⁵¹ To fall within the purview of § 71(a), payments must be made in cash and received by a spouse (or former spouse) under a divorce or separation agreement; the agreement must not designate the payments as anything other than includible under § 71 or deductible under § 215; the payer and payee spouses must not be members of the same household; and, payments must terminate on or before the death of the payee spouse.⁵² Congress also added "[a]limony and separate mainte-

allowance to fund the war, and expressing his resolve that "that 'gal' is going to pay."). This is a dangerous characterization in light of the current rehabilitative and temporary nature of alimony, because imposing tax on the recipient spouse in addition to eliminating the deduction for alimony would increase the financial burden on divorcing families. See discussion *infra* Part I.C. (concerning the worst-case scenario if *Gould* is reconsidered in light of the modern judicial understanding of gross income).

⁴⁷ *Id.* at 2075 (statement of Benjamin A. Javits, attorney from New York, NY "Most emphatically, alimony payments are not income to the recipient. Alimony is the amount which by agreement or court order a husband pays to his wife or ex-wife in order to support and maintain her in a separate household, which she is entitled to have because the husband has committed some violation of the marital status which justifies or compels his wife to live separate and apart from him.").

⁴⁸ *Id.*

⁴⁹ *Id.* at 2076, 2079. The opposite argument is made now, namely that state courts have come to use gross income in calculating alimony and, therefore, inclusion of alimony payments in the taxable income of the payer spouse forces courts and state legislatures to reformulate alimony calculations. The change also forces couples with preexisting prenuptial agreements or alimony trusts under § 682, neither of which are grandfathered under the Tax Cuts and Jobs Act, back into court to renegotiate and relitigate these agreements. See discussion *infra* note 82. In addition, because the payer's net after-tax income may change from year to year due to the fluctuating availability of other deductions and credits, calculating alimony based on net income may become quite complicated and result in an endless cycle of renegotiation.

⁵⁰ Congress amended §§ 71 and 215 as part of the Deficit Reduction Act of 1984 and in doing so, removed references to "husband" and "wife." Deficit Reduction (Tax Reform) Act of 1984, Pub. L. No. 98-369, § 422(a), 98 Stat. 494, 795-99 (1984). Prior to 1984, alimony was only included in the income of the "wife" and only a "husband" was entitled to deduct such payments. See I.R.C. §§ 71, 215 (1954). Interestingly, Congress momentarily considered whether a husband could be awarded alimony in 1942, but at the time, most state laws would not allow a husband in need of support to receive alimony from a wealthy wife. 1942 *Hearings* at 2084 (exchange between Chairman Doughton and Benjamin A. Javits, attorney from New York, NY).

⁵¹ I.R.C. §§ 71(a), 215(a) (2012 & Supp. V 2017). Section 71(d) specifically provides that for purposes of § 71, "spouse" includes a former spouse. I.R.C. § 71(d) (2012 & Supp. V 2017).

⁵² I.R.C. § 71(b) (2012 & Supp. V 2017).

nance payments” to the list of items specifically included in income under § 61(a)⁵³ and included the alimony deduction in the list of above-the-line deductions under § 62(a).⁵⁴ To prevent abuse and manipulation of the rules to achieve greater tax savings, § 71(c) excludes child support from the definition of alimony and § 71(f) is designed to recapture nondeductible property settlements disguised as alimony.⁵⁵

In modern collaborative and court proceedings, the alimony deduction has come to be regarded and relied upon as an incentive to reach financial settlements and an inducement for payer spouses to agree to larger payments than might otherwise be acceptable or affordable to that spouse.⁵⁶ When the payer spouse is in a higher marginal tax bracket, the value of the deduction exceeds the amount of tax paid by the recipient spouse. The recipient spouse, generally subject to tax at lower marginal tax rates,⁵⁷ is less concerned with the income inclusion under § 71 because after deductions, credits, and lower applicable rates, the recipient spouse will owe very little tax, if any, on that income. The alimony inclusion/deduction regime is therefore particularly valuable not just to the payer spouse, but to the financial wellbeing of the overall family unit.⁵⁸ A larger alimony payment yields a larger deduction for the payer spouse, and a larger portion of the family unit’s collective income

⁵³ I.R.C. § 61(a)(8) (2012 & Supp. V 2017).

⁵⁴ I.R.C. § 62(a)(10) (2012). “Above-the-line” deductions are those that reduce a taxpayer’s adjusted gross income. Reductions to adjusted gross income have the effect of increasing or decreasing the likelihood that a taxpayer will qualify for other tax benefits (and reduce the likelihood that a taxpayer will phase-out of other benefits). *See, e.g.*, I.R.C. § 67(a) (2012) (limiting the deduction for miscellaneous itemized deductions based on adjusted gross income), I.R.C. §§ 151(d)(3) (2012 & Supp. V 2018) (limiting the deduction for personal exemptions available to taxpayers with adjusted gross income in excess of a specified amount). In addition, taxpayers may deduct these items regardless of whether they itemize their deductions or take the standard deduction. *See* I.R.C. § 63(b) (2012 & Supp. V 2017).

⁵⁵ *See* I.R.C. § 71; Marjorie A. O’Connell, *The Domestic Relations Tax Reform Act: How We Got It and What We Can Do About It*, 18 FAM. L.Q. 473, 492 (1985) (“the task force worked out a compromise solution in the form of a three-year ‘recapture’ and tax to the payer for any payments for property that were disguised as alimony.”).

⁵⁶ ROBERTA S. BATLEY, A.B.A. SEC. FAM. L. REP. TO THE HOUSE OF DELEGATES 3 (2018) [hereinafter A.B.A. FAMILY LAW REPORT]; Kate Rockwood, *Until Tax Deduction Do Us Part: IRS Overhaul Throws Divorce Calculations into Turmoil*, A.B.A. J. 10 (June 2018) (describing the § 215 alimony deduction as a “spoonful of sugar” to help the payer spouse swallow alimony obligations).

⁵⁷ *See* Tyler Hardcastle & Margaret Ryznar, *Reconsidering the Tax Treatment of Alimony*, 162 TAX NOTES 299, 299 (2019) (“In 2015 the 50th percentile of adjusted gross income for alimony payers fell between \$75,000 and \$200,000. On the other hand, the 50th percentile of AGI for alimony payees fell between \$30,000 and \$50,000.”) (citing IRS Statistics of Income Division, *SOI Tax States – Individual Income Tax Returns Publication 1304 (Complete Report)* at Table 1.4, tax year 2015).

⁵⁸ *See id.* at 299 (“[T]he section 71 alimony income inclusion and corresponding section 215 deduction had an overall positive impact on U.S. families. Specifically, sections 71 and 215 favorably affected divorcing couples and supported people undergoing major life changes.”); *see also* Rockwood, *supra* note 56, at 11.

will be taxed at the recipient spouse’s lower marginal tax rate.⁵⁹ Referred to by critics as a “divorce subsidy” or “divorce bonus,” this income shifting to the spouse in a lower tax bracket has the effect of shielding a portion of each alimony payment from tax and keeping that savings within the family unit.⁶⁰

The following table provides a simple example comparing the after-tax income of a single income married couple earning \$75,000 per year against the after-tax income of that same couple in the event of divorce under the alimony inclusion/deduction regime.⁶¹

TABLE 1.

	MFJ* (no alimony)	Divorce under 71/215 Regime	
Gross Income	\$75,000	\$75,000 (P)	\$6,000 (R)
Less Standard Deduction	(\$24,000)	(\$12,000)	(\$12,000)
Less Alimony Deduction	n/a	(\$6,000)	n/a
Taxable Income	\$51,000	\$57,000	\$0
Marginal Rate Bracket	12%	22%	n/a
Tax Due	\$5,739	\$8,480	\$0
Income After Tax & Alimony	\$69,261	\$60,520	\$6,000
Total After Tax Income within “Family Unit”	\$69,261	\$66,520	

*Married Filing Jointly

⁵⁹ See Malcolm S. Taub, *How Tax Reform Could Radically Change Divorce*, FORBES (Nov. 9, 2017, 4:31 PM), <https://www.forbes.com/sites/nextavenue/2017/11/09/how-tax-reform-could-radically-change-divorce/#6827d0924e02> [<https://perma.cc/3ZZE-PNTQ>].

⁶⁰ See A.B.A. FAMILY LAW REPORT, *supra* note 56, at 3–4; see also O’Connell, *supra* note 55, at 487. Congress, as well as critics of the alimony deduction, characterized the disparity between the value of the deduction to the payer spouse and the imposition of tax on the recipient tax as a government subsidy for divorced families that is not available to married couples with the same income, resulting in horizontal inequity between similarly situated families. See H. COMM. ON WAYS AND MEANS, 115th Cong., TAX CUTS AND JOBS ACT H.R. 1 SECTION-BY-SECTION SUMMARY 18 (2017) (“The provision would eliminate what is effectively a ‘divorce subsidy’ under current law, in that a divorced couple can often achieve a better tax result for payments between them than a married couple can.”). However, a counterargument may be raised that married and divorced families are not in fact similarly situated as married families need not allocate the same amount of income to the support of two separate households.

⁶¹ This example uses 2018 marginal rates and standard deduction amounts. The Tax Cuts and Jobs Act temporarily suspended the deduction for personal exemptions. Pub. L. No. 115-97, § 11041, 131 Stat. 2082 (2017). For the sake of simplicity, this calculation does not take into account dependency exemption(s) or other deductions or credits to which the recipient spouse may be entitled and which would further reduce the recipient spouse’s tax liability, nor does it take into account state and local income taxes.

As a result of income shifting and tax savings derived from the alimony deduction at the payer spouse's marginal rate of 22%, the cost to the payer spouse of a \$6,000 alimony payment is only \$4,680 in net after-tax dollars. The recipient spouse, by comparison, pays no tax on that income (presuming of course that the recipient spouse has no other source of income during the year). The payer spouse effectively pays only \$4,680 after taxes, while the recipient spouse receives \$6,000 in net after-tax income. Consequently, almost \$1,320 remains within the family unit instead of being collected by the IRS. The tax savings eases the financial burden on divorcing couples and as a result, the payer spouse may be willing and able to pay more. This incentive to agree to alimony becomes especially important in light of the modern justification for alimony and the Code's role in encouraging women to withdraw from the workforce during marriage. Despite the tax savings derived from the alimony deduction, the Code's bias in favor of marriage is clear. The divorced couple in this example pays more in taxes (a "divorce penalty") and has less after-tax income to direct toward the expenses of divorce, including the establishment of two separate households, than a married couple maintaining a single household. While the alimony deduction provides some relief from a divorce penalty, it does not rise to the level of a "divorce bonus."

All deductions are a form of government subsidy; however, the elimination of this "subsidy" may do more harm to middle- and lower-income alimony recipients. Without the deduction, payer spouses will be less willing to agree to, and in some cases unable to afford, larger alimony payments.⁶² Because over 98% of alimony recipients are women, women will bear the economic burden of this change to the Code.⁶³ Wealthier families have the resources to bear the loss of this deduction.⁶⁴ Women in middle-and-lower

⁶² See, e.g., Marlene Eskind Moses & Manuel Benjamin Russ, *Elimination of the Alimony Deduction: A Tax Break for Some, a Hike for Others*, 54 TENN. B. J. 34, 35 (2018) ("Settlements that contemplate alimony may well begin to reflect this change to the detriment of the receiving spouse as attorneys negotiating for the payer spouse argue that the payer spouse's liability has changed significantly under the new code and this should be somehow offset in another area of the overall divorce settlement."); Taub, *supra* note 59 ("If alimony is no longer deductible, the ability of an ex-spouse to pay it may be limited, due to other fixed expenses, such as child support payments, and education expenses for children. There is only so much juice that can be squeezed from the orange.").

⁶³ According to the most recent data from the U.S. Census Bureau, 98.5% of the 268,000 alimony recipients in 2017 were women. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2017 SOURCE OF INCOME IN 2017, 2018 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT (2018) [hereinafter 2017 CENSUS DATA], https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-08.html#par_textimage_10 [<https://perma.cc/E23Q-389D>]. See also Rockwood, *supra* note 56, at 3.

⁶⁴ See Rockwood, *supra* note 56, at 3. While wealthier families may be better positioned to bear the loss of the alimony deduction from a financial perspective, they are not immune to the effects of this change to the Code. Divorces will likely become more contentious, taking a greater emotional toll on families, regardless of wealth. A.B.A. FAMILY LAW REPORT, *supra* note 56, at 4. In addition, the elimination of the deduction may cause financial burdens for *payer* spouses and a windfall for recipient spouses with

income families, already struggling to adjust to the financial burden of establishing and maintaining two separate households, will bear the economic hardship imposed by the elimination of the alimony deduction.⁶⁵

B. The Tax Cuts and Jobs Act and a Return to the Rule of Gould

As part of the Tax Cuts and Jobs Act, Congress eliminated §§ 71 and 215 from the Code.⁶⁶ While many of the individual tax changes to the Code became effective for 2018 and sunset after December 31, 2025, the elimination of the alimony inclusion/deduction regime is permanent and applies to divorce or separation agreements entered into after December 31, 2018.⁶⁷ The intent of Congress in repealing the alimony inclusion/deduction regime was expressly “to follow the rule of the United States Supreme Court’s holding in *Gould v. Gould*, in which the Court held that such payments are not income to the recipient.”⁶⁸ The House Ways and Means Committee, in an early summary of the proposed legislation, considered that “[t]he provision would eliminate what is effectively a ‘divorce subsidy’ under current law, in that a divorced couple can often achieve a better tax result for payments between them than a married couple can” and “recognizes that the provision of spousal support as a consequence of a divorce or separation should have the same tax treatment as the provision of spousal support within the context of a married couple, as well as the provision of child support.”⁶⁹ The Joint

preexisting prenuptial agreements or § 682 alimony trusts, *see* discussion *infra* note 82, to which negotiation and agreement was premised on the availability of the alimony deduction. A.B.A. FAMILY LAW REPORT, *supra* note 56, at 4. Existing pre- and post-nuptial agreements as well as § 682 alimony trusts were not grandfathered by the legislation because they do not fall within the definition of “divorce or separation instrument” and § 682 was eliminated by the Tax Cuts and Jobs Act. *See* discussion *infra* note 82. Unless these couples return to court to renegotiate their preexisting arrangements, payer spouses will be legally bound to comply with existing agreements requiring larger payments without the benefit of the deduction. A.B.A. FAMILY LAW REPORT, *supra* note 56, at 4.

⁶⁵ *See* Rockwood, *supra* note 56, at 3 (“The people on the higher end of the wealth spectrum won’t really feel it, as opposed to a firefighter earning \$75,000 a year, supporting an ex-wife and two kids.”); Taub, *supra* note 59 (“Two separated families cannot live as cheaply as one It is very difficult for divorcing couples to instantaneously make lifestyle adjustments which coincide with the necessary reduction of income to each party.”).

⁶⁶ Pub. L. No. 115-97, § 11051, 131 Stat. 2089. Congress also removed alimony from the list of items includible in gross income under § 61(a) and removed the alimony deduction from the list of “above-the-line” deductions under § 62(a). *Id.*

⁶⁷ Pub. L. No. 115-97, § 11051, 131 Stat. 2090.

⁶⁸ H.R. REP. NO. 115-466 at 277 (2017) (Conf. Rep.). *See also* JOINT COMM. ON TAXATION, JCS-1-18, GENERAL EXPLANATION OF PUBLIC LAW 115-97 78 (2018) (“the intent of the provision is to adopt the approach reflected in the United States Supreme Court’s holding in *Gould v. Gould*”).

⁶⁹ H. COMM. ON WAYS AND MEANS, 115th Cong., TAX CUTS AND JOBS ACT H.R. 1 SECTION-BY-SECTION SUMMARY 18 (2017), https://waysandmeansforms.house.gov/uploadedfiles/tax_cuts_and_jobs_act_section_by_section_hr1.pdf [https://perma.cc/R8C9-2XR5].

Committee on Taxation expects this change alone to generate \$6.9 billion in revenue over the next 10 years.⁷⁰

Table 2 provides a simple example of how the Tax Cuts and Jobs Act's elimination of the alimony inclusion/deduction regime will affect the allocation of tax between the divorcing spouses from Table 1, and correspondingly, motivations and outcomes in divorce settlements entered into after December 31, 2018.⁷¹

TABLE 2.

	MFJ* (no alimony)	Divorce under 71/215 Regime	
Gross Income	\$75,000	\$75,000 (P)	\$6,000 (R)
Less Standard Deduction	(\$24,000)	(\$12,000)	(\$12,000)
Less Alimony Deduction	n/a	(\$6,000)	n/a
Taxable Income	\$51,000	\$57,000	\$0
Marginal Rate Bracket	12%	22%	n/a
Tax Due	\$5,739	\$8,480	\$0
Income After Tax & Alimony	\$69,261	\$60,520	\$6,000
Total After Tax Income within "Family Unit"	\$69,261	\$66,520	

*Married Filing Jointly

Because the \$6,000 alimony award is included in the taxable income of the payer spouse, this payment will cost the payer spouse \$7,320 in after-tax dollars, rather than the \$4,680 under pre-Tax Cuts and Jobs Act law.⁷² The eliminated tax savings combined with the additional tax imposed on the

⁷⁰ JOINT COMM. ON TAXATION, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" REP. NO. JCX-67-17 at 3 (Dec. 18, 2017) [hereinafter JOINT COMM., ESTIMATED BUDGET EFFECTS], <https://www.jct.gov/publications.html?func=startdown&id=5053> [<https://perma.cc/MHS9-B3Y3>]; H. COMM. ON WAYS AND MEANS, 115th Cong., TAX CUTS AND JOBS ACT H.R. 1 SECTION-BY-SECTION SUMMARY 18 (2017), https://waysandmeansforms.house.gov/uploadedfiles/tax_cuts_and_jobs_act_section_by_section_hr1.pdf [<https://perma.cc/DDX7-3NRM>].

⁷¹ The elimination of the §§ 71/215 alimony income/deduction regime was not effective until 2019, but for purposes of illustration 2018 rates are used. The Tax Cuts and Jobs Act temporarily suspended the deduction for personal exemptions. Pub. L. No. 115-97, § 11041, 131 Stat. 2082. Further, for the sake of simplicity, this calculation does not take into account other deductions or credits to which the recipient spouse may be entitled and which would further reduce the recipient spouse's tax liability, nor does it take into account state and local income taxes.

⁷² Prior to the Tax Cuts and Jobs Act, the payer spouse could deduct a \$6,000 alimony payment from taxable income, creating a tax savings of \$1,320. Effectively, that \$6,000 payment only cost the payer spouse \$4,680. After the Tax Cuts and Jobs Act, the

payer spouse's income leaves the couple with even less money to cover the costs of divorce and the establishment of two households.

A payer spouse previously willing to pay \$6,000 in alimony must now include the amount paid out as alimony in their own taxable income. With a fixed amount of \$6,000 to be allocated between support and tax, the elimination of the deduction results in an overall economic loss to the couple, likely borne by the recipient spouse. Specifically, the increase in tax to the payer spouse⁷³ will be reflected in a lower payment to the recipient spouse.⁷⁴ Because over 98% of alimony recipients are women, this means that women—recently divorced and often re-entering the workforce—will have fewer financial resources on which to rely during this time.⁷⁵ Women and children, who already bear harsher economic consequences from divorce,⁷⁶ will now likely bear the financial burden of the elimination of the alimony deduction.

Congress briefly contemplated the repeal of §§ 71 and 215 in 1984 as a way to simplify the Code, but efforts were abandoned precisely because of the anticipated effect on women.⁷⁷ In an attempt to promote simplified domestic relations tax rules, the American Bar Association (ABA) formed the Domestic Relations Simplification Task Force (ABA Task Force) in 1980.⁷⁸ After considerable effort, ABA Task Force and other women's organizations convinced the Senate to abandon its proposals to eliminate the alimony de-

payer spouse will pay \$1,320 in tax on the \$6,000 as part of his own income such that a \$6,000 alimony payment now costs him \$7,320 after taxes.

⁷³ It has been observed that while the loss of the deduction alone will increase the tax liability of the payer spouse, the loss of the deduction may also push taxpayers not already subject to the highest marginal rates into a higher tax bracket. *See, e.g.,* Edward Lyman, *GOP Should Divorce Itself from Alimony Scheme in Tax Bill*, THE HILL (Nov. 13, 2017, 03:40 PM), <https://thehill.com/opinion/finance/360127-gop-should-divorce-itself-from-alimony-scheme-in-tax-bill> [http://perma.cc/YX7B-HKYG].

⁷⁴ In order to limit the payer spouse's net after-tax outlay to \$6,000, alimony must be reduced to \$4,918, the amount that subject to tax would equal a total payment of \$6,000 inclusive of tax ($\$4,918 \times 1.22 = \$6,000$). *See* Hardcastle & Ryznar, *supra* note 57, at 300 ("the TCJA makes alimony less appealing because of the absence of a deduction for the payer . . . [f]or these reasons, many matrimonial lawyers and scholars have concluded that less alimony will be awarded under the law.").

⁷⁵ 2017 CENSUS DATA, *supra* note 63; Rockwood, *supra* note 56, at 3.

⁷⁶ Joanna L. Grossman, *Family Law's Loose Canon*, 93 TEX. L. REV. 681, 686 (2015) (reviewing JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* (2014)) ("Most studies have shown that divorce imposes harsher economic consequences on women and children than on men.").

⁷⁷ O'Connell, *supra* note 55, at 494–96.

⁷⁸ *Id.* at 475. In 1962, the ABA Tax Section formed a Committee on Domestic Relations Tax Problems to propose legislation in response to the Supreme Court's decision in *United States v. Davis*, 370 U.S. 65 (1962) (holding that a transfer of appreciated property in exchange for the relinquishment of marital rights was a taxable realization event). O'Connell, *supra* note 55, at 476. The Committee evolved into the ABA Task Force and expanded over the years to include input from state bar associations, the AICPA Federal Tax Division, and government representatives as the Domestic Relations Tax Reform Act of 1983 came out of committee and eventually became part of the Deficit Reduction Act of 1984. *Id.* at 475, 486–87, 493.

duction as part of the Deficit Reduction Act of 1984.⁷⁹ Similar efforts were not organized prior to the enactment of the Tax Cuts and Jobs Act. While the ABA Task Force worked for years drafting reports and meeting with interested parties and government representatives before the House's proposed Domestic Relations Tax Reform Act of 1983⁸⁰ merged into the Deficit Reduction Act of 1984,⁸¹ the haste with which Congress drafted and enacted the Tax Cuts and Jobs Act left little time to organize, object, or even appreciate the consequences of the elimination of the alimony inclusion/deduction regime. The ABA Section of Family Law has, however, drafted a post-hoc report and resolution calling for the ABA to urge Congress to reinstate § 215.⁸²

The ABA Family Law Report highlights many of the concerns and challenges posed by eliminating the deduction. As a preliminary matter, many

⁷⁹ Pub. L. No. 98-369, 98 Stat. 494 (1984); see O'Connell, *supra* note 55, at 494–96. In meetings with government representatives from the Department of Treasury, the House Ways and Means Committee, the Joint Committee on Taxation, and the Senate Finance Committee, the ABA Task Force argued that income shifting was equitable; the expenses associated with establishing two separate households far outweighed any “divorce bonus” resulting from the alimony inclusion/deduction regime; and elimination of the deduction would “hit lower income couples the hardest.” *Id.* at 486–87. In particular, the ABA Tax Force noted that the alimony deduction put lower income couples on the same economic footing as wealthier couples with the income producing assets and means to create § 682 alimony trusts “allowing the grantor spouse to escape taxation on the trust’s income while the beneficiary spouse would be taxed on this income.” *Id.* at 486; see also discussion of § 682 alimony trusts *infra* note 82. This particular argument, however, has been weakened by the elimination of § 682 as part of the Tax Cuts and Jobs Act. Pub. L. No. 115-97, § 11051(b)(1)(C), 131 Stat. 2089. Advocates for retaining the inclusion/deduction regime included independent members of the ABA Tax and Family Law Sections, state bar association members, members of the American Academy of Matrimonial Lawyers, and the Congressional Caucus for Women’s Issues, as well as appeals to other women’s groups, including the National Organization of Women, the Women’s Equity Action League, the National Association of Business and Professional Women, and the National Women’s Political Caucus. O’Connell, *supra* note 55, at 494.

⁸⁰ The Domestic Relations Tax Reform Act of 1983 (DRTRA) was introduced as Title II to the Tax Law Simplification and Improvement Act of 1983, H.R. 3475, 98th Cong. (1983).

⁸¹ Pub. L. No. 98-369, 98 Stat. 494 (1984).

⁸² See A.B.A. FAMILY LAW REPORT, *supra* note 56, at 1. Much of the ABA Family Law Report focuses on the inequity of grandfathering pre-2019 divorce and separation agreements but not pre-2019 pre- and post-nuptial agreements or existing § 682 alimony trust arrangements. See *id.* Former § 682 “allowed the grantor spouse to transfer separate property to a trust [created as part of a divorce decree or separation agreement] for the benefit of the other spouse. Upon divorce, the beneficiary spouse would receive the income from the trust for a certain term and pay the taxes on the income received. The principal would eventually revert back to the grantor spouse.” *Id.* at 5; see also I.R.C. § 682 (2012 & Supp. V 2017). Because the Tax Cuts and Jobs Act eliminated § 682 without grandfathering existing arrangements and did not include pre- and post-nuptial agreements in the definition of “divorce or separation instrument”, payments received by a beneficiary from a § 682 alimony trust will be taxable to the grantor spouse while payer spouses obligated to make payments under a pre- or post-nuptial agreement will not receive the benefit of the alimony deduction despite relying on its availability at the time of agreement. A.B.A. FAMILY LAW REPORT, *supra* note 56, at 5, 7. Renegotiation of these agreements may result in additional legal fees and familial stress as well as the uncertainty and possible litigation that these agreements were intended to avoid. *Id.* at 7.

state laws and courts granting alimony awards assume the availability of the alimony deduction and, accordingly, use the payer spouse's gross income as a basis for calculating alimony awards.⁸³ These states must now amend their laws and establish a new methodology for calculating alimony.⁸⁴ Further, any methodology that uses net income risks becoming unnecessarily complicated as a payer spouse's net after-tax income may fluctuate from year to year depending on the availability of other federal and state deductions and credits.⁸⁵ This will result in more frequent modification requests and the accumulation of additional legal fees.⁸⁶

Aside from the increased burden on states granting divorces, Congress greatly underestimated the value of the alimony deduction in securing settlements. An additional concern among family law attorneys is that divorces will become more contentious, resulting in fewer settlements and increased litigation costs,⁸⁷ not to mention the emotional toll these proceedings will take on children and families. Finally, and perhaps of greatest concern, is that without the alimony deduction, support orders will be lower because there is less net after-tax income to support two separate households.⁸⁸ Rather than simply eliminating a "divorce subsidy," the elimination of the alimony deduction creates a "divorce penalty" as divorced couples may incur a greater tax obligation than married couples with the same amount of gross income.⁸⁹ Perhaps most disturbingly, the ABA Family Law Section fears that couples may stay in unhappy or abusive relationships "because they will simply be unable to afford to get divorced."⁹⁰

Today, most states permit only short-term rehabilitative alimony⁹¹ based on necessity, taking into consideration numerous factors including the length

⁸³ A.B.A. FAMILY LAW REPORT, *supra* note 56, at 4. A deductible alimony payment is essentially income exempt from tax in the hands of the payer spouse. Therefore, the payer spouse's overall tax liability will not affect his or her ability to afford alimony. When the alimony payment is includible in the payer spouse's taxable income, the incidence of tax reduces the amount of income available to pay out as alimony. This is precisely the reason why Congress enacted §§ 71 and 215 in 1942 when taxpayers were subject to exceptionally high wartime tax rates. *See supra* notes 45–46 and accompanying text.

⁸⁴ A.B.A. FAMILY LAW REPORT, *supra* note 56, at 4.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*; *see also* Margaret Ryznar, *Alimony in Tax Reform*, 157 TAX NOTES 1629, 1630 (2017).

⁸⁹ A.B.A. FAMILY LAW REPORT, *supra* note 56, at 4.

⁹⁰ *Id.*

⁹¹ Lee A. Sheppard, *Safe Harbor Divorce*, 33 TAX NOTES 531, 531 (1986); *see also* Ryznar, *supra* note 88, at 1630 ("[V]ery few states continue to permit lifelong alimony, instead limiting it by duration or circumstance"). Rehabilitative alimony has been defined as "short-term support awards to enable a divorced person to acquire professional or job training." O'Connell, *supra* note 55, at 492. Unlike permanent alimony awarded as damages for breach of the marital contract or to satisfy a husband's antiquated obligation of support, an award of rehabilitative alimony is often justified by the recipient's contributions "to the earnings of the working spouse by staying at home." Sheppard, *supra* note 91, at 531.

of marriage, relative earnings and earning capacity, sources of income, potential future earnings, age and health, marital misconduct, parental/household responsibilities during the marriage and after, post-divorce custody of minor children, and *federal, state, and local tax consequences of alimony*.⁹² Contrary to the antiquated view of alimony articulated by the Supreme Court in 1917, alimony awards are not founded on the “natural and legal duty of the husband to support the wife” nor is permanent alimony “regarded . . . as a portion of the husband’s estate to which the wife is equitably entitled.”⁹³ Because alimony is increasingly viewed as an equalizer and granted as temporary maintenance rather than lifelong support, temporarily retaining those funds within the family unit is all the more significant for families following the trauma and financial burden imposed by divorce.⁹⁴

The Code is rife with provisions extending relief to taxpayers faced with financial hardship.⁹⁵ Relief is not conditioned on whether or not a taxpayer previously occupied a position of privilege. It seems contrary to established policy, then, to simultaneously subject taxpayers dealing with the financial hardship of establishing two separate households following divorce to higher taxes and the elimination of a deduction that would have lessened that burden and facilitated a path for a previously unemployed spouse to achieve financial independence. As a bridge to self-sufficiency and economic independence for the recipient spouse, equitable tax policy should at least consider maximizing the income available during this brief transitional

⁹² See, e.g., 23 PA CONS. STAT. § 3701(a), (b) (2014).

⁹³ *Gould*, 245 U.S. at 153 (quoting *Audubon*, 181 U.S. at 577–78).

⁹⁴ The importance of “rehabilitative” or temporary alimony as an equalizer played a role in limiting the recapture period under § 71(f) to three years. See O’Connell, *supra* note 55, at 492. Section 71(f) was added to the Code to curb abuses associated with wealthy taxpayers using property settlements masquerading as alimony to procure deductions. See *id.* A requirement that alimony payments extend beyond three years in order to qualify as “alimony” for tax purposes would exclude rehabilitative alimony arrangements, then becoming the norm, from the §§ 71/215 inclusion/deduction regime. *Id.*

⁹⁵ See, e.g., I.R.C. § 108(a)(1) (2012 & Supp. V 2017) (excluding cancellation of indebtedness income from gross income in the event of bankruptcy or insolvency of the taxpayer); I.R.C. § 165(c) (2012 & Supp. V 2017) (allowance of personal deduction for losses incurred as a result of “fire, storm, shipwreck, or other casualty, or from theft”). The IRS often extends filing deadlines for victims of natural disasters. See, e.g., I.R.S. News Release IR-2018-187 (Sept. 15, 2018) (announcing extension of deadlines and provision of tax relief for victims of Hurricane Florence). Further, the Code provides for relief from collections in the event of financial hardship. See, e.g., I.R.C. § 7122 (2012 & Supp. V 2017) (offers in compromise) and § 6015 (2012 & Supp. V 2017) (innocent spouse relief). These provisions, specifically those regarding bankruptcy, insolvency, or losses from casualty or theft, may be distinguished on the grounds that the taxpayer’s circumstances are beyond his or her control; however, the financial hardship imposed by divorce is arguably beyond the control of taxpayers as well. For example, state law may require taxpayers to live separate and apart in order to obtain a divorce, thereby mandating the establishment of two separate households regardless of the financial resources available to do so. See, e.g., 23 PA CONS. STAT. § 3301(d)(1) (2014). Under Pennsylvania law, absent fault, mutual consent, or institutionalization, “the court may grant a divorce where a complaint has been filed alleging that the marriage is irretrievably broken and an affidavit has been filed alleging that the parties have lived separate and apart for a period of at least one year and that the marriage is irretrievably broken . . .”. *Id.*

period when the effect on revenue is minimal and “alimony is more likely to be awarded if there is a tax advantage to the payer.”⁹⁶

C. *The Rhetoric of Gould and the Subordination of Women*

Perhaps more objectionable than the potential economic impact on some women from a return to the rule of *Gould* is the terminology used by the Court to justify its conclusion that alimony is not income to the recipient spouse. Specifically, the language of *Gould* is grounded in a paternalistic and heteronormative view of marriage that perpetuates gender stereotypes and the subordination of women.⁹⁷ A return to the rule of law in *Gould* marks a regression to an antiquated legal standard that characterizes alimony as arising from “the natural and legal duty of the husband to support the wife” and as “a portion of the husband’s estate to which the wife is equitably entitled.”⁹⁸ Further, by its use of the terms “divorced husband” and “divorced wife,”⁹⁹ the language of *Gould* assumes marriage between a man and a woman. While views of marriage as an economic or contractual partnership are not without criticism,¹⁰⁰ §§ 71 and 215 use the gender neutral term “spouse” to prescribe the tax treatment for payments between two individu-

⁹⁶ Ryznar, *supra* note 88, at 1631. If the primary goal is in fact revenue generation, a less objectionable approach might be to better enforce § 71. *See id.* at 1629. A 2014 report issued by the Treasury Inspector General for Tax Administration (TIGTA) found that only half of the returns filed in 2010 claiming a deduction for alimony had a corresponding return reporting the receipt of that alimony as income. *See* TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, SIGNIFICANT DISCREPANCIES EXIST BETWEEN ALIMONY DEDUCTIONS CLAIMED BY PAYERS AND INCOME REPORTED BY RECIPIENTS 1 (2014) [hereinafter 2014 TIGTA REPORT]. TIGTA determined that this resulted in \$1.7 billion in lost tax revenue over 5 years. *Id.* at 4; Ryznar, *supra* note 88, at 1630. While increasing enforcement of § 71 may not generate the \$6.9 billion expected over ten years from the elimination of the alimony deduction, *see* 2014 TIGTA REPORT at 20, it would generate substantial revenue without the negative economic impact on women and families. *See* Ryznar, *supra* note 88, at 1630. It is also questionable as to whether the elimination of the alimony inclusion/deduction regime will come close to generating the \$6.9 billion figure as it is unclear whether Congress and the Joint Committee on Taxation in its projections took into consideration the chilling effect this legislation may have on alimony awards.

⁹⁷ While the language of *Gould* is rooted in gender stereotypes, even today, over 98.5% of alimony recipients are women. *See* 2017 CENSUS DATA, *supra* note 63.

⁹⁸ *Gould*, 245 U.S. at 153 (quoting *Audubon*, 181 U.S. 575, 577–78 (1901)).

⁹⁹ *Gould*, 245 U.S. at 153.

¹⁰⁰ *See, e.g.,* Marjorie E. Kornhauser, *Theory Versus Reality: The Partnership Model of Marriage in Family and Income Tax Law*, 69 TEMP. L. REV. 1413 (1995). Kornhauser notes that “[t]he partnership model of marriage and the consequent changes in domestic law have proved to be disastrous for women and children, thrusting many into poverty when the marriage ends.” *Id.* at 1418. She argues that the equal partnership model is flawed because it rests on theoretical ideals rather than reality by assuming a unity of interest and equality between spouses. *Id.* at 1413, 1449. Similarly, regarding the devastating economic effect of no-fault divorce laws on some women, it has been argued that “gender equality in marriage is still an aspiration, not a *fait accompli*” and “beliefs to the contrary have bred both complacency and some harsh results based on a reality that isn’t.” *See* Grossman, *supra* note 76, at 685.

als dissolving a relationship for tax purposes, regardless of how that relationship is viewed from a legal, social, political, or academic perspective.

Because *Gould* was decided over a century ago and rests on an antiquated view of both marriage and alimony as well as a narrow view of gross income,¹⁰¹ it is not beyond the realm of possibility that *Gould* could be overturned. An opportunity now presents itself for the Court to reevaluate whether alimony falls within our current understanding of the definition of income for federal tax purposes. Yet, such consideration may result in a worst-case scenario: If a court holds that alimony *is* includible in the gross income of the recipient spouse and there is no corresponding deduction for the payer spouse, the income is taxed twice—once when earned by the payer spouse and again in the hands of the recipient spouse. Under the Tax Cuts and Jobs Act, alimony payments are not deductible, but the recipient spouse is not required to include the receipt of alimony payments in gross income.

The elimination of the corresponding *deduction* for alimony payments will, however, indirectly impose economic hardship on women. The characterization of alimony payments as a nondeductible personal expense may warrant further consideration and evaluation in light of contemporary discussions on transfers of property and shared economic responsibilities within same-sex and different-sex households after the Supreme Court's decisions in *Obergefell v. Hodges*¹⁰² and *United States v. Windsor*.¹⁰³ However, without express statutory authority, the argument that alimony payment obligations are anything other than inherently personal is a difficult hurdle to overcome. The explicit Congressional intent to return to the rule of *Gould* all but eliminates the possibility of characterizing divorce as the dissolution of a business or economic relationship. The language of *Gould* clearly contemplates marriage as a personal relationship between a man and a woman and alimony as a nondeductible personal expense.¹⁰⁴ Further, any resort to distinctions vis-a-vis public vs. private or business vs. personal with respect to the characteri-

¹⁰¹ Judicial understanding of what constitutes gross income has evolved and expanded over time. It was not until 1955 that the Supreme Court referred to the words “from any source whatever” in § 61 as a catchall phrase and clarified what is meant by “income” as an “undeniable accession[s] to wealth, clearly realized, and over which the taxpayers have complete dominion.” *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955). Today, temporary rehabilitative alimony, when premised on the future earnings of the payer spouse, could be viewed as an undeniable accession to wealth, clearly realized, and certainly over which the recipient spouse has complete dominion; however, judicial consideration of whether alimony fits within this definition or the catchall language became unnecessary when Congress enacted § 71 and specifically included alimony in the list of includible items under what is now § 61(a).

¹⁰² 135 S. Ct. 2584 (2015).

¹⁰³ 133 S. Ct. 2675 (2013). *See, e.g.*, Anthony C. Infanti, *Victims of our Own Success: The Perils of Obergefell and Windsor*, 76 OHIO ST. L. J. FURTHERMORE 79, 82–3 (2015) (highlighting the need for relationship neutral laws in light of *Obergefell* and *Windsor*).

¹⁰⁴ *Gould*, 245 U.S. at 153 (“Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on a contract, express or implied.”) (quoting *Audubon*, 181 U.S. 575, 577–78 (1901)).

zation and tax treatment of support obligations “risk[s] perpetuating class, gender, and racial hierarchies.”¹⁰⁵

*D. Addressing the Question of Privilege: Elimination
of the Alimony Deduction is Not “Reform”
(but Neither is Reinstatement Alone)*

Though well-intentioned, calls to reinstate the inclusion/deduction regime perpetuate the subordination of working class mothers by ignoring the plight of women and families who lack the privilege of choice with respect to their employment options. These women must remain in the workforce while struggling to access quality, affordable child care regardless of gender or marital status.¹⁰⁶ Because “the economics of the decision to enter and stay in the work force [have] been different for white women as opposed to women of color,” disregard for these women bears a disturbing similarity to the exclusion of Hispanic women and women of color from government pension programs during World War I.¹⁰⁷ These programs excluded Mexican widows on the “ground that their ‘feudal background’ made it ‘difficult for them to understand not to abuse the principle of a regular grant of money from the state,’” and women of color were excluded on the ground that “they were self-supporting as domestic workers.”¹⁰⁸ To presume that working women do not encounter the same (or entirely different) obstacles, financial or otherwise, as those women attempting to reenter the workforce following divorce simply because they are already “self-sufficient” perpetuates the same class, race, and gender biases used to justify the exclusion of women from these World War I era programs.

Calls for reinstatement alone also ignore the influence of tax laws in creating a need for alimony in the first place¹⁰⁹ and ignore the interconnected nature of tax provisions and structural bias that affect the ability of women to participate in the market and achieve economic self-sufficiency.¹¹⁰ Eliminating the alimony inclusion/deduction regime also begs further consideration of the tax treatment applicable to the allocation of financial resources within legally recognized familial relationships and non-legally recognized cohabitation arrangements as well as further study into the efficacy of rela-

¹⁰⁵ Fellows, *supra* note 8, at 360 n.249.

¹⁰⁶ For a more in-depth discussion concerning the subordination of working-class women and specifically women of color with respect to childcare, see *id.* at 341.

¹⁰⁷ *Id.* at 331, 337.

¹⁰⁸ *Id.* at 331.

¹⁰⁹ See discussion *supra* note 28 and accompanying text.

¹¹⁰ See generally *infra* Parts II and III (discussing implicit bias in the Code with respect to victims of sexual harassment and abuse in the workplace and the economic challenges faced by women entrepreneurs who are marginalized by the Code’s preference for corporations and capital intensive, non-service industry businesses).

tionship-neutral laws.¹¹¹ Reinstating the alimony deduction regime alone fails to adequately address implicit bias in the Code and ignores the myriad of historical, societal, and economic challenges that women face in varying degrees as a result of their race, class, and gender in attempting to enter and remain in the workforce. Rather, what is required is a comprehensive evaluation of current tax policy and Code provisions that directly and indirectly affect the ability of women to participate in the market, taking into consideration underlying demographics including race, class, and gender.

Addressing the appropriateness of the alimony inclusion/deduction regime could be part of a first step to reform the treatment of families under the Code, but without a comprehensive plan to implement subsequent steps, elimination of the regime by itself serves only to make a complex and difficult problem worse.¹¹² Reform efforts should instead focus on issues underlying the need for alimony in the first place, most notably, the Code's bias toward marriage and both tax and non-tax incentives for married women to withdraw from the labor market, including the availability of affordable, quality childcare. For example, in examining the distribution of tax expenditures, allocating \$6.9 billion toward reinstating a deduction for alimony that helps recently divorced white women transition back into the labor market might be better spent on a plan to assist all working families in obtaining quality, affordable childcare, regardless of marital status, thereby reducing the incentive for married women to leave the workforce and in theory reducing the need for alimony in the first place. To devise a more comprehensive plan for the tax treatment of families and to facilitate the equitable participa-

¹¹¹ See, e.g., Infanti, *supra* note 18, at 606 (proposing “a more inclusive approach to determining who is family for tax purposes”); Infanti, *supra* note 103, at 82–3 (highlighting the need for relationship neutral laws in light of *Obergefell* and *Windsor*); Kahng, *supra* note 28, at 662 (questioning why “coupled people (whether married or not) should be treated in a separate category from single people to begin with” and noting the position of many scholars that “the obvious alternative is to treat all people individually”). See also Shaller, *supra* note 43, at 337–40 (proposing the creation of an alimony credit).

¹¹² For example, among the reasons offered by Congress for eliminating the deduction for alimony is to establish parity between spousal support and child support. See H. COMM. ON WAYS AND MEANS, 115th Cong., TAX CUTS AND JOBS ACT H.R. 1 SECTION-BY-SECTION SUMMARY 17 (2017), https://waysandmeansforms.house.gov/uploadedfiles/tax_cuts_and_jobs_act_section_by_section_hr1.pdf [http://perma.cc/52PY-4NMM]. However, in leveling down, Congress failed to consider any potential bias in the Code with respect to the tax treatment of child support, which could only be uncovered by reference to underlying demographic data, as well as the fact that the treatment of alimony affects only previously married individuals, whether or not children are involved, while the treatment of child support affects divorced couples and those never married in the first place. In addition, drawing parallels between alimony and child support for the purpose of establishing parity in the Code fails to recognize that the purpose of alimony is to provide temporary maintenance to facilitate economic self-sufficiency based on need, while child support is a legally recognized support obligation. Eliminating the disparate treatment of alimony versus child support in the Code by making both payments nondeductible is arguably a step in the wrong direction. Real reform would attempt to resolve the disparate treatment of these two often related, but fundamentally different, familial financial obligations and take a more comprehensive approach to overhauling the Code with respect to the tax treatment of families.

tion of women in the market, policy makers should consider the struggles facing all women, whether married, never married, or divorced, who work outside the home. In doing so, Congress should consider the “obsolescence of the heterosexual married couple as the societal norm”¹¹³ and undertake an analysis of demographic data to promote tax policy and structural change that disrupts the manner in which tax law “facilitate[s] class, gender, and race subordination.”¹¹⁴ It is clearly time for a modern Domestic Relations Tax Reform Act.

II. DISALLOWANCE OF EXPENSE DEDUCTIONS RELATING TO SEXUAL HARASSMENT AND ABUSE CLAIMS

A. *Victims of Workplace Related Sexual Harassment and Abuse*

The #MeToo movement shined a blinding spotlight on the epidemic of sexual harassment and abuse in America. Across industries, victims spoke out about shockingly ubiquitous harassment, abuse, assault, and discrimination reflecting “the normalization of sexual assault and harassment in the workplace.”¹¹⁵ Just as women are more likely to be alimony recipients, women in the workplace, and in particular women of color, are more likely than men to be victims of sexual harassment and gender discrimination.¹¹⁶ Ac-

¹¹³ Kahng, *supra* note 28, at 674.

¹¹⁴ Fellows, *supra* note 8, at 392.

¹¹⁵ Lesley Wexler, et al., *#MeToo, Time’s Up, and Theories of Justice* 2019 U. ILL. L. REV. 45, 92 (2019) (“Such wrongdoing has become a basic fact of life for women in the workforce; the expectation of being harassed or assaulted is something women have to take into account when deliberating about which jobs to accept, which actions from their employers to contest, and how to act in the workplace.”). In addition to Hollywood and the media, specific industries rife with sexual harassment and discrimination include the fast food industry, the legal profession, Wall Street, and the retail industry. *See, e.g.*, Nancy Gagliardi, *New Survey on Sex Harassment in Fast Food and Restaurant Industry Adds to Workers’ Issues*, FORBES.COM (Dec. 11, 2014, 11:30 AM), <https://www.forbes.com/sites/nancygagliardi/2014/12/11/new-survey-on-sex-harassment-in-fast-food-and-restaurant-industry-adds-to-workers-issues/#6e89a0da7f00> [http://perma.cc/WQ62-X3DJ]; Liane Jackson, *Race and Gender Bias Is Rampant in Law, Says New Report That Also Offers Tools to Fight It*, A.B.A. JOURNAL (Sept. 6, 2018, 08:26 AM), http://www.abajournal.com/news/article/race_and_gender_is_bias_rampant_in_law_says_new_report_that_also_offers_too [http://perma.cc/39CT-SPVC]; *Confronting Sexual Harassment and Other Workplace Misconduct in the Federal Judiciary, Hearing Before the Senate Committee on the Judiciary*, 115th Cong. (June 13, 2018) (testimony of Jaime A. Santos); Patrick McGeehan, *Morgan Stanley Settles Bias Suit with \$54 Million*, N. Y. TIMES (Jul. 13, 2004), <https://www.nytimes.com/2004/07/13/business/morgan-stanley-settles-bias-suit-with-54-million.html> [https://perma.cc/C4GD-F6YD]; Al Norman, *Sex Discrimination Wal-Mart: The ‘Bitches’ Story That Won’t Go Away*, HUFFPOST (Jul. 17, 2017, 01:11 PM), https://www.huffingtonpost.com/entry/sex-discrimination-t-wal-mart-dthe-bitches-story_us_578bbafae4b0b107a24147d3 [http://perma.cc/RCU6-WNBD].

¹¹⁶ With respect to institutional liability for discrimination claims, it is well established that sexual assault is a form of sexual harassment and sexual harassment is a form of sex discrimination with respect to claims under Title VII and Title IX. *See Brake, supra* note 8, at 21–25.

cording to a 2017 Pew Research Center study (“2017 Pew Research Study”), 42% of women said they experienced gender discrimination in the workplace, while only 22% of men made such claims.¹¹⁷ Twenty-five percent of women said they earn less than male coworkers with similar jobs versus five percent of men, and women are three times as likely as men to experience sexual harassment in the workplace.¹¹⁸ According to a 2016 report published by the Equal Employment Opportunity Commission, between 25% and 85% of women say they have experienced sexual harassment.¹¹⁹ Further, “sexual assault, like sexual harassment, is a practice most often performed by men to women”¹²⁰ that is inextricably tied to concepts of gender and power.¹²¹ In 2018 alone, there were 7,609 charges of sexual harassment filed with the EEOC, 84% of which were filed by women, and over \$56 million was paid out to settle such claims.¹²² To the extent that those payments were deductible by employers as business expenses, the corresponding tax subsidy allocated to employers who settle sexual harassment claims is significant.

While women are more often victims of harassment than men and members of racial minority groups experience higher levels of discrimination than whites, women who are members of racial minority groups experience higher levels of harassment than white women and higher levels of harassment than men who are members of racial minority groups.¹²³ In the 2017 Pew Research Study, 53% of Black women surveyed said they exper-

¹¹⁷ Kim Parker & Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, PEW RESEARCH CENTER (Dec. 14, 2017) [hereinafter 2017 PEW RESEARCH STUDY], <http://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/> [<http://perma.cc/6HW8-RRL3>].

¹¹⁸ *Id.*

¹¹⁹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC at 8 (June 2016) [hereinafter 2016 EEOC REPORT]. The variation in this figure is attributable to the way in which “sexual harassment” was defined in the question, but at the very least, one in four women has been the victim of sexual harassment in the workplace.

¹²⁰ Brake, *supra* note 8, at 25–26 (noting specifically with respect to campus sexual assault, “[t]he overwhelming majority of victims or sexual violence are women—although it is often overlooked that this category includes women who identify as lesbian as well as women who identify as straight. Women are not the only gender-subordinated group to experience high levels of sexual assault. Both men and women who are sexual minorities and gender non-conforming experience disproportionately high rates of sexual assault and misconduct.”).

¹²¹ Brake, *supra* note 8, at 13–14 (“Sexual harassment and objectification—along with rape and assault—have historically functioned as effective tools to separate women from power On the other side of this gender power dynamic, sexual objectification, and harassment solidifies a certain kind of power among men.”).

¹²² *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2018*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2018).

¹²³ 2016 EEOC REPORT, *supra* note 119, at 14. The authors of the EEOC Report note that empirical data regarding intersectional harassment is lacking and more research is needed as most race-based studies focus on men and gender-based studies have historically focused on white women. *Id.*

perienced gender discrimination in the workplace, while 40% of white women and 40% of Hispanic women reported the same.¹²⁴

Available data is under-inclusive because an estimated 90% of victims never take formal action.¹²⁵ Often, women who experience sexual harassment and gender discrimination in the workplace fear they will not be believed or no action will be taken.¹²⁶ In many cases, they blame themselves or fear social or professional retaliation.¹²⁷ The fear that “claiming discrimination will trigger social and occupational penalties is well-grounded in reality”¹²⁸ and “[o]bjective evidence that the claimant *did*, in fact, experience discrimination does not protect people from being disliked when they complain of discrimination.”¹²⁹ Before overcoming these external fears and obstacles, victims must first overcome their own resistance to self-identification as “victim”—a stigmatized identity—and the tendency to self-blame.¹³⁰ Only then do they face the second barrier to coming forward: a fear that they will not be believed, their claims dismissed, or that others will question the victim’s ability to accurately perceive their own experiences.¹³¹ Further, there is a fear that women who seek monetary compensation for sexual violence will be characterized as “gold-digger[s]” or “‘ambulance chasers.’”¹³² Women of color and members of other historically disempowered groups face additional hurdles with respect to pursuing claims for sexual harassment and abuse. For example, scholars suggest that women of color, as well as trans and non-binary persons, “are more likely to be abused, less likely to be believed,” and may fear that speaking out will contribute to racial stereotyping and further marginalize their communities.¹³³

¹²⁴ 2017 PEW RESEARCH STUDY, *supra* note 117.

¹²⁵ 2016 EEOC REPORT, *supra* note 119, at 8.

¹²⁶ *Id.* at v.

¹²⁷ *Id.*

¹²⁸ Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679, 702 (2007).

¹²⁹ *Id.* at 701.

¹³⁰ *Id.* at 690 (discussing the effect of a “just world” ideology in hindering the ability of victims of discrimination to identify as such). “This ideology appeals to many people because it enables them to believe that they have control over their destiny. Seeing oneself as a victim of discrimination contradicts that belief. The ideology of individual responsibility ‘turn[s] the word *victim* into a synonym for *failure* or *irresponsibility*.’ This belief system creates an aversion to being perceived as a victim of discrimination, especially when one’s victim status is linked to membership in a social group whose members are stigmatized and devalued.” *Id.*

¹³¹ *Id.* at 680–81, 684–85.

¹³² Wexler, et al., *supra* note 115, at 77–79.

¹³³ *Id.* at 55–56. See also Brake, *supra* note 8, at 26 (“Both men and women who are sexual minorities and gender non-conforming experience disproportionately high rates of sexual assault and misconduct. In a recent study by the American Association of Universities on the prevalence of campus sexual assault, over 39% of students who identify as trans, gay, queer, or gender non-conforming reported having experienced sexual misconduct during their college years—the highest rate of any demographic group studied.”)

Legislation designed to address workplace sexual harassment and abuse should respect the concerns of victims, specifically with respect to confidentiality and fears of stigmatization and retaliation. Instead, Congress elevated the problem of “pluralistic ignorance”¹³⁴ over the well-documented concerns of individual victims when it drafted § 162(q) to discourage employers from demanding nondisclosure. “Pluralistic ignorance” exists when “individuals suppress or deny their awareness of a problem in part because they interpret the silence of others to confirm its absence.”¹³⁵ The impetus, therefore, behind Congress’s response to the #MeToo movement was the view that publicity and transparency concerning the settlement of claims for sexual harassment and abuse would encourage more victims to come forward, thereby disrupting the cycle of normalcy and collective silence.¹³⁶ However, because some victims prefer confidentiality, the addition of § 162(q) to the Code fails to adequately or appropriately address the problem of sexual harassment and abuse, further disempowers and marginalizes victims, and may, contrary to its purpose, quell employment-related sexual harassment and discrimination claims. Further, the consequences of § 162(q) only extend to employers who are subject to tax. If a mechanism exists within the Code to disrupt the suppression of pervasive workplace sexual harassment and abuse, that mechanism should respect the agency of all victims and extend to all employers regardless of tax status.

B. Tax Treatment of Expenses Related to the Litigation and Settlement of Claims of Sexual Harassment and Abuse

Section 162 authorizes a deduction for “ordinary and necessary” business expenses, which include legal fees and settlement payments when “the claim arises in connection with the business’s profit-seeking activities.”¹³⁷ Therefore, an employer who is sued based on a claim of sexual harassment or abuse may generally deduct litigation expenses and the costs associated with the settlement of such claims. A victim of sexual harassment or abuse must include any proceeds from litigation or the settlement of legal claims in gross income, including proceeds that are paid to an attorney as legal fees;¹³⁸

¹³⁴ Brake, *supra* note 128, at 704 (citing the use of the term by social psychologist John T. Jost).

¹³⁵ *Id.*

¹³⁶ *Id.* (“When people are reluctant to publicly identify or challenge gender bias within institutions, their silence contributes to a normalcy in which individuals interpret their own experiences and perceptions consistently with that collective silence. In this way, the silence of others operates to inhibit and potentially undermine an individual’s perception of bias.”).

¹³⁷ I.R.C. § 162(a) (2012 & Supp. V 2017); U.S. v. Gilmore, 372 U.S. 39, 48 (1963).

¹³⁸ Commissioner v. Banks, 543 U.S. 426, 430 (2005). An exclusion exists under § 104(a)(2) for “damages (other than punitive damages) received (whether by suit or agreement . . .) on account of personal physical injuries or physical sickness,” but absent an express exclusion, damages and settlement payments are includible in the recipient’s gross income. I.R.C. § 104(a)(2) (2012 & Supp. V 2017).

however, before passage of the Tax Cuts and Jobs Act, victims could deduct legal fees either as an “above-the-line” deduction in calculating adjusted gross income or as a miscellaneous itemized deduction.¹³⁹ The Tax Cuts and Jobs Act suspended the deduction for miscellaneous itemized deductions,¹⁴⁰ but victims of employment discrimination, which generally includes employment-related sexual harassment and abuse, may still deduct fees associated with the costs of litigation as an “above-the-line” deduction under § 62(a)(1), *unless* the settlement includes a nondisclosure agreement.¹⁴¹

New subsection 162(q) targets employers who perpetuate the suppression of workplace sexual harassment and abuse claims by insisting on confidentiality agreements in the process of resolving such claims. Due to poor drafting, the legislation appears to disallow a deduction for the victims’ attorney fees as well. The provision, prompted by the Harvey Weinstein allegations relating to sexual harassment and assault in Hollywood¹⁴² and the #MeToo movement, was originally introduced as part of the STOP Act.¹⁴³ When introducing the legislation, Rep. Ken Buck (R-Colo.) stated that “[w]hen we allow companies to deduct sexual assault and sexual harassment-related settlements, we’re asking the American taxpayer to subsidize hush money payments that cover-up sexual misconduct,” and the provision, as part of the STOP Act, was expressly intended to only disallow the employer’s deduction of related costs as business expenses under § 162.¹⁴⁴

¹³⁹ Victims of employment related sexual harassment or abuse may deduct associated legal fees under I.R.C. § 62(a)(20) (2012 & Supp. V 2017). Section 62(a)(20) authorizes victims of employment discrimination and whistleblowers to deduct expenses for attorney fees and court costs as “above-the-line” deductions. *See* discussion *supra* note 53 (concerning the significance of “above the line” deductions). Section 62(e) defines “unlawful discrimination” by reference to the various federal acts prohibiting discrimination in employment, including discrimination based on sex, and includes federal whistleblower claims. I.R.C. § 62(e) (2012 & Supp. V 2017). For attorney fees incurred in the pursuit of other legal claims, for example non-employment related sexual harassment and abuse claims, litigants could previously deduct those expenses under I.R.C. § 212(1) as miscellaneous itemized deductions in calculating taxable income under § 63(a). The Tax Cuts and Jobs Act, however, suspended the deduction of miscellaneous itemized deductions.

¹⁴⁰ Pub. L. No. 115-97, § 11045, 131 Stat. at 2088.

¹⁴¹ *See* Pub. L. No. 115-97, § 13307, 131 Stat. at 2129 (inserting new subsection § 162(q)).

¹⁴² *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html?_r=0&mtref=www.recode.net&gwh=97FD82617FA1D776D8B196AF6DB0216D&gwt=pay [<https://perma.cc/W8V3-JG2M>].

¹⁴³ Settlement Tax Deductions Are Over for Predators (STOP) Act, H.R. 4495, 115th Cong. (2017).

¹⁴⁴ Press Release, Congressman Ken Buck, Buck and Colleagues Introduce STOP Act (Nov. 30, 2017), <https://buck.house.gov/media-center/press-releases/buck-and-colleagues-introduce-stop-act> [<http://perma.cc/B55X-6T62>]; STOP Act, H.R. 4495, 115th Cong. (2017) (“To amend the Internal Revenue Code of 1986 to deny as a trade or business expense deduction amounts paid or incurred in connection with the settlement of a sexual harassment or sexual assault claim.”).

As drafted and included in the Tax Cuts and Jobs Act, new subsection 162(q) provides,

No deduction shall be allowed under this chapter for—

- (1) Any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a non-disclosure agreement, or
- (2) Attorney’s fees related to such a settlement or payment.¹⁴⁵

Overly broad, the provision does not distinguish expenses paid or incurred by the victim from those paid or incurred by the defendant employer. Because the statute applies to any deduction “allowed under this chapter,” it includes not only payments made by employers and otherwise deductible as business expenses under § 162, but also payments made by victims to cover legal costs which were deductible as expenses incurred for the collection of income.¹⁴⁶ In addition, the new subsection includes payments related to sexual harassment or sexual abuse, but fails to define those terms and, fails to include payments related to claims of sexual assault.¹⁴⁷ The settlements and payments to which the disallowance applies is quite ambiguous and open to interpretation, but the provision may act to disallow *any* legal expense incurred by any party, including the victim, if there is a nondisclosure agreement. In fact, the provision is drafted so broadly that § 162(q) may even disallow non-legal expenses, such as medical expenses incurred by a victim for psychological treatment relating to an incident of harassment or abuse.¹⁴⁸

Further, while the provision was enacted as a disincentive for defendant employers to insist on nondisclosure agreements, the drafters overlooked that, due to fears of unwanted publicity, retaliation, or social stigma, victims may desire confidentiality.¹⁴⁹ In some cases, the attention “might only add to their victimization and make future employment difficult or impossible.”¹⁵⁰ Nowhere has a victim’s desire for confidentiality been more public than during the recent confirmation hearings for then Supreme Court nominee Brett

¹⁴⁵ Pub. L. No. 115-97, § 13307, 131 Stat. at 2129.

¹⁴⁶ Pub. L. No. 115-97, § 13307, 131 Stat. at 2129.

¹⁴⁷ See Leandra Lederman, *Are Sexual Harassment Plaintiffs’ Attorneys’ Fees Inadvertently Disallowed by the Tax Cuts Bill?*, THE SURLY SUBGROUP (Dec. 19, 2017), <https://surlysubgroup.com/2017/12/19/are-sexual-harassment-plaintiffs-attorneys-fees-inadvertently-disallowed-by-the-tax-cuts-bill/> [http://perma.cc/4LH5-KTTS]. The STOP Act made reference to specific offenses under chapter 109A of title 18 of the United States Code (which include incidents of sexual assault) and defined “sexual harassment”; however, these references were left out of the Tax Cuts and Jobs Act. *Id.*; see also 18 U.S.C. §§ 2241–2246 (2018).

¹⁴⁸ See Anthony C. Infanti, *Why Are Republicans Punishing Sexual Harassment Victims in the Tax Bill?*, THE HILL (Dec. 19, 2017, 01:20 PM), <https://thehill.com/opinion/finance/365592-why-are-republicans-punishing-sexual-harassment-victims-in-the-tax-bill> [http://perma.cc/E9GA-LKF7].

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Kavanaugh. According to a statement released by her office, Sen. Diane Feinstein delayed taking action in response to allegations of sexual assault made against Kavanaugh precisely because the victim, Dr. Christine Blasey Ford, requested confidentiality.¹⁵¹ Her identity was eventually revealed, and just as many victims fear, Dr. Ford's credibility was questioned by members of the Trump administration and Congress, who summarily dismissed both Dr. Ford and her allegations.¹⁵² While the disclosure of Dr. Ford's identity and the publicity surrounding her allegations prompted other women to come forward, the dismissal of Dr. Ford and her allegations is precisely why many victims prefer to keep their claims confidential. In the face of stigmatization, disbelief, and retaliation, many victims choose not to come forward at all.¹⁵³

The enactment of § 162(q) disempowers women with respect to the resolution of employment related sexual harassment and abuse claims by taking control over the publicity associated with their claims and placing that control in the hands of the employer (who in order to preserve its tax deduction for legal expenses, will presumably refuse to enter into a nondisclosure agreement). The #MeToo movement prompted many victims of sexual harassment and abuse to come forward and the law should operate to facilitate rather than suppress disclosure in order to disrupt the culture of harassment and abuse. Over time, facilitating this disruption will presumably minimize the stigmatization of and retaliation against victims that discourages some victims from coming forward.¹⁵⁴ However, while the law should support victims who wish to publicize their experience, neither Congress nor an employer has the right to make that choice for any individual victim. Because "sexual harassment functions to reduce smart professional women to their fragmented body parts, diminishes their organization power, and undermines their competence," a satisfactory resolution must respect victim autonomy.¹⁵⁵ A tax provision that prioritizes publicity with respect to workplace sexual harassment and abuse over the needs of individual victims who seek to avoid publicity only serves to further subordinate and marginalize those women in the workplace.

Section 162(q) disallows a deduction for employers when a settlement involves a nondisclosure agreement. Consequently, victims who desire confidentiality may be unable to secure a commitment to confidentiality from

¹⁵¹ See Laura Litvan & Greg Stohr, *Feinstein Refers Mystery Kavanaugh Info to FBI, Sparking Confusion*, BLOOMBERG (Sept. 13, 2018, 01:05 PM), <https://www.bloomberg.com/news/articles/2018-09-13/feinstein-says-she-sent-kavanaugh-information-to-authorities> [https://perma.cc/4Q7J-CSDL].

¹⁵² See Steven Petrow, *Her Name Is Dr. Christine Blasey Ford. Use It.*, WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/opinions/call-her-by-her-name-christine-blasey-ford/2018/09/21/77f3963a-bdd0-11e8-be70-52bd11fe18af_story.html?utm_term=.3359c97d1de1 [http://perma.cc/L7Q5-PCWR].

¹⁵³ See Brake, *supra* notes 134–136 and accompanying text.

¹⁵⁴ *Id.*

¹⁵⁵ Brake, *supra* note 8, at 9.

their employer. Faced with a choice between unwanted publicity and remaining silent, victims may choose not to come forward. In other words, § 162(q) may facilitate the very suppression of claims that drafters intended to eliminate and calls into question the appropriateness of the Code as a mechanism to address these issues. Because different victims face different challenges, both internal and external,¹⁵⁶ and differ in their preferences relating to confidentiality, any proposal that fails to respect victim autonomy serves only to further disempower these victims.

Finally, attempting to address workplace sexual harassment and abuse through the disallowance of a deduction fails to adequately resolve the pervasive concealment of sexual harassment and assault claims because it only serves to deter employers that pay taxes. Many employers, such as religious organizations, educational institutions, and government entities, are tax-exempt.¹⁵⁷ The disallowance of a deduction will not deter tax-exempt employers from insisting on nondisclosure to settle allegations of sexual harassment or sexual abuse.¹⁵⁸ For the Code to adequately address this problem, the consequences must extend to deter both taxable and tax-exempt employers.

C. Legislative and Administrative Responses

Though lacking the authoritative value of a technical correction, the Joint Committee on Taxation (JCT), members of Congress, and the IRS attempted to address the outcry and criticism that followed the enactment of § 162(q). In response to fears that the provision, as drafted, would disallow the deduction of legal fees by victims of sexual harassment and assault, both the JCT in its Bluebook analysis¹⁵⁹ and the Senate Finance Committee¹⁶⁰ expressed Congressional intent to exempt the recipient (victim's) attorney's fees from the disallowance provision. Most recently, the Internal Revenue Service announced that § 162(q) does not preclude victims of sexual harassment from deducting attorney's fees, even if their settlement contains a non-disclosure agreement.¹⁶¹ However, declining to enforce the provision with respect to the victim's expenses fails to address victim concerns regarding confidentiality.

¹⁵⁶ See Brake, *supra* note 136 and accompanying text.

¹⁵⁷ See Infanti, *supra* note 148.

¹⁵⁸ See *Id.*

¹⁵⁹ See JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF P.L. 115-97 195 (2018). The JCT noted, however, that a technical correction may be necessary to reflect this intent. *Id.* at n.981.

¹⁶⁰ Letter from Senate Finance Comm., to Steven T. Mnuchin and David J. Kautter, Dept. of Treasury, (August 16, 2018).

¹⁶¹ Internal Revenue Service, *Section 162(q) FAQ*, Feb. 28, 2019, https://www.irs.gov/newsroom/section-162q-faq?cm_ven=ExactTarget&cm_cat=DD+03052019&cm_pla=All+Subscribers&cm_ite=https%3a%2f%2fwww.irs.gov%2fnewsroom%2fsection-162q-faq&cm_lm=cbruck@american.edu&cm_ainfo=&&utm_source=MarketingCloud&&utm_medium=newsletters&&utm_campaign=news-DD&& [https://perma.cc/RJZ9-7Q3G].

Senators Kamala Harris and Lisa Murkowski as well as Congresswoman Lois Frankel proposed a more comprehensive approach that would allow victims to deduct attorney's fees while disallowing a related deduction for employers regardless of whether the settlement included a nondisclosure agreement.¹⁶² Collectively referred to as the EMPOWER Act, this legislation would address victims' concerns regarding confidentiality as the disallowance of the employer's deduction is indifferent to the existence of a nondisclosure agreement. However, because the deterrent effect is premised on the elimination of a tax benefit, the proposed legislation fails to remedy the immunity of tax-exempt employers.¹⁶³

Because sexual harassment and assault are forms of gender subordination, if Congress wants to affect institutional change through the distribution of tax expenditures relating to sexual harassment and assault claims, Congress should also consider the underlying demographics, stereotypes, inequalities, and concerns among victims. "Victims of sexual and other violence have the right to control their cases and deserve to be accorded the agency to decide the goals of their claims for redress."¹⁶⁴ By taking the power to demand confidentiality away from victims, § 162(q) takes away the right of victims to control their cases. Attaching financial consequences to an employer's insistence on nondisclosure may very well serve to facilitate the exposure of rampant sexual harassment and abuse, thereby prompting other victims to come forward. However, the effect of § 162(q) ignores the debilitating hurdles that women and members of other historically disempowered groups must overcome prior to coming forward and subjects victims to the stigmatization and professional consequences associated with public disclosure.

Congress cannot craft tax policy that adequately addresses the concerns of affected groups without first acknowledging underlying demographic data and consulting with those affected groups to understand what justice requires to adequately redress their injury. A law that prioritizes punitive and deterrent measures by compelling public disclosure further disempowers and

¹⁶² *Ending the Monopoly of Power Over Workplace Harassment through Education and Reporting (EMPOWER) Act*, H.R. 6406, S. 2994 (Part I), S. 2988 (Part II), 115th Cong. (2018). The proposed bills disallow any deduction for amounts paid or incurred pursuant to litigation related to workplace harassment, including sexual harassment, or for expenses and attorney's fees (other than plaintiff/claimants' expenses and fees), or for insurance that covers the defense or liability; add new § 139H excluding from gross income any amount received in connection with a judgment or settlement of claims relating to workplace harassment (including sexual harassment) or other unlawful discrimination defined in § 62(e); add new § 1302 limiting tax imposed on employment discrimination compensation; and, make it unlawful for employers to condition aspects of employment on agreement to nondisclosure agreements pertaining to workplace harassment, including sexual harassment.

¹⁶³ To extend the effect of this proposed legislation to tax exempt entities, Congress should explore the possibility of treating payments made to settle sexual harassment and abuse claims as unrelated business income (UBIT).

¹⁶⁴ Wexler et al, *supra* note 115, at 78 (noting that restorative justice requires that a victim have the ability to determine appropriate remedies).

marginalizes the victims of workplace sexual harassment and assault. The enactment of § 162(q) incorrectly assumes victim preference for public disclosure, fails to consider the well-grounded fears of retaliation, social stigma, disbelief, and blame associated with publicity, and marginalizes victims by elevating the goal of eliminating the concealment of workplace sexual harassment and abuse over individual victims' needs and preferences.

III. THE TAX CUTS AND JOBS ACT MARGINALIZES WOMEN BUSINESS OWNERS

The Tax Cuts and Jobs Act not only negatively affects women with respect to their personal finances and tax obligations, but provides tax cuts and incentives that will disproportionately benefit male-owned businesses. Women-owned businesses¹⁶⁵ will be left by the wayside while they continue to struggle to generate capital and receipts. A recent report from the Congressional Research Service states that “[t]he federal tax burden on small firms and its effect on their formation and growth have long been matters of legislative concern for Congress[;]”¹⁶⁶ however, it does not appear that Congress, Treasury, the IRS, or the Small Business Administration (SBA) have *ever* been concerned with the effects of the federal tax burden on the formation and growth of small firms owned specifically by women.¹⁶⁷ The consequence of this failure is that billions of dollars in tax expenditures aimed at small businesses are not available to the millions of women-owned businesses operating in the United States.¹⁶⁸

¹⁶⁵ Women-owned businesses are generally regarded as those in which women own at least 51% of the equity or stock. Bruckner, *supra* note 25, at 6; *see also* VENTURENEER FOR AMERICAN EXPRESS OPEN, 2017 STATE OF WOMEN-OWNED BUSINESSES REPORT 3 (2017) [hereinafter 2017 AMERICAN EXPRESS OPEN REPORT], https://about.americanexpress.com/sites/americanexpress.newshq.businesswire.com/files/doc_library/file/2017_SWOB_Report_FINAL.pdf [<https://perma.cc/7LVH-UMXC>].

¹⁶⁶ GARY GUENTHER, CONG. RESEARCH SERV., SUMMARY TO SMALL BUSINESS TAX BENEFITS: CURRENT LAW AND ARGUMENTS FOR AND AGAINST THEM (updated July 4, 2018).

¹⁶⁷ *See* 2017 House Hearings, *supra* note 22, at 6 (statement of Prof. Caroline Bruckner, Kogod School of Business Tax Policy Center) (“neither Congress nor Treasury or IRS or SBA has ever measured how the tax code impacts women business owners”). On May 21, 2017, the Small Business Association (SBA) did release Issue Brief Number 13 which contains data relating to women’s business ownership from the 2012 Survey of Business Owners; however, the study itself was not focused on understanding how federal tax laws affect women-owned businesses. U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY, ISSUE BRIEF NO. 13, WOMEN’S BUSINESS OWNERSHIP: DATA FROM THE 2012 [CENSUS BUREAU] SURVEY OF BUSINESS OWNERS (2017) [hereinafter SBA ISSUE BRIEF No. 13], <https://www.sba.gov/sites/default/files/advocacy/Womens-Business-Ownership-in-the-US.pdf>.

¹⁶⁸ For example, prior to consideration of the Tax Cuts and Jobs Act, the Joint Committee on Taxation “estimated that small business tax expenditures alone will cost U.S. taxpayers more than \$270 billion in revenue losses from 2016 through 2020.” Bruckner, *supra* note 25, at 6.

In 1972, the Census Bureau conducted its first count of firms in the United States owned by women and, in 1976, released its results counting 402,025 women-owned firms operating in the U.S.¹⁶⁹ These businesses, representing only 4.6% of all U.S. operated firms, were primarily small-service or retail firms with low receipts and few employees.¹⁷⁰ In 2012, 9.9 million majority women-owned businesses operating in the United States “generated \$1.4 trillion in sales and employed over 8.4 million individuals.”¹⁷¹ Today, women own more than eleven million U.S. operated firms and comprise 38% of all U.S. firms.¹⁷² These firms employ almost nine million people (“8% of the total private sector workforce”) and generate \$1.7 trillion in sales (“4.2% of total business revenues”).¹⁷³ Ninety-nine percent of the firms owned by women are small businesses.¹⁷⁴ Increases in women-owned businesses over the past 20 years are due in large part to the entrepreneurial enterprise of women of color.¹⁷⁵ Women own 47% of all minority-owned businesses, 44% of all Hispanic-owned businesses, and 59% of all African American-owned businesses.¹⁷⁶ “As of 2017, minorities accounted for 46% of all women-owned businesses (an estimated 5,400,100 [firms], employing 2,105,900 people and generating \$361 billion in revenues).”¹⁷⁷

Today, women-owned firms continue to operate primarily as small service and retail oriented businesses with few employees and few capital investments.¹⁷⁸ Minority-owned, including minority women-owned, businesses are less likely than nonminority owned businesses to be employers and struggle to generate sales.¹⁷⁹ Historically, lack of access to capital contributed to the large number of women-owned businesses operating in the service and retail industries, and “recent research has reiterated that lack of access to capital ‘continues to be a barrier for women-owned businesses’ and

¹⁶⁹ *See id.*

¹⁷⁰ *See id.* at 10.

¹⁷¹ SBA ISSUE BRIEF No. 13, *supra* note 166, at 1.

¹⁷² 2017 House Hearings, *supra* note 21, at 6 (statement of Prof. Caroline Bruckner); Bruckner, *supra* note 24, at 6.

¹⁷³ 2017 AMERICAN EXPRESS OPEN REPORT, *supra* note 165, at 3.

¹⁷⁴ SBA ISSUE BRIEF No. 13, *supra* note 167, at 2 (defining small businesses as those with less than 500 employees).

¹⁷⁵ *See* 2017 AMERICAN EXPRESS OPEN REPORT, *supra* note 165, at 5.

¹⁷⁶ SBA ISSUE BRIEF No. 13, *supra* note 167, at 11.

¹⁷⁷ 2017 AMERICAN EXPRESS OPEN REPORT, *supra* note 164, at 6. *See also* 2017 Tax Law – Impact on the Budget and American Families Before the H. Comm. on the Budget, 116th Cong. 4 (2019) (testimony of Professor Caroline Bruckner, Kogod Tax Policy Center) [hereinafter Bruckner, 2019 House Budget Committee Testimony] (“Firms owned by women of color are the ‘driving force behind the growth of women-owned firms.’ Firms owned by women of color grew at a rate of 163% during the last 10 years and today, women of color own 64% of the new women-owned businesses launched each day.”).

¹⁷⁸ Bruckner, *supra* note 25, at 12–13 (“For every dollar of revenue an average women-owned employer business earns, a male-owned business earns \$2.30. For every 10 employees at a women-owned business, a male-owned business employs 15.”).

¹⁷⁹ SBA ISSUE BRIEF No. 13, *supra* note 166, at 11.

that a gender gap persists in financing needed for startups and growth.”¹⁸⁰ Women of color face additional barriers in accessing capital as a result of historic structural bias in the housing market and discriminatory lending practices.¹⁸¹ Rather than remove these barriers to success, the business tax provisions of the Tax Cuts and Jobs Act propel businesses that already have a head start—corporations and unincorporated businesses with large payrolls and substantial capital investments. As a result, the majority of women-owned businesses in the United States will not benefit from the provisions of the Tax Cuts and Jobs Act specifically intended to benefit American businesses.

Congress cannot claim ignorance, careless drafting, or innocuous oversight on this aspect of the Tax Cuts and Jobs Act. Prior to passing the Tax Cuts and Jobs Act, experts advised members of the House Committee on Small Business that three of the four existing tax expenditures intended to benefit small businesses were “so limited in design that they either (i) explicitly exclude service firms, and by extension, the majority of women-owned firms; or (ii) could effectively bypass women-owned firms who are not incorporated or who are service firms with few capital-intensive equipment investments altogether.”¹⁸² Congress “doubled down”¹⁸³ on its disregard for the effect of federal tax laws on women-owned businesses and demonstrated a resolute unwillingness to examine the distributional effect of billions of dollars in tax expenditures on women-owned businesses when it enacted the Tax Cuts and Jobs Act less than three months later.¹⁸⁴

¹⁸⁰ Bruckner, *supra* note 25, at 13.

¹⁸¹ See CHRISTINE KYMN, ACCESS TO CAPITAL FOR WOMEN- AND MINORITY-OWNED BUSINESSES: REVISITING KEY VARIABLES, ISSUE BRIEF NO. 3, 2–3 (2014), <https://www.sba.gov/sites/default/files/Issue%20Brief%203%20Access%20to%20Capital.pdf>. Home equity loans act as an alternative form of financing when traditional business credit is not available. *Id.* Therefore, past discriminatory lending and housing market practices that continue to affect the incidence of home ownership among minorities may further limit the ability of women of color to access capital.

¹⁸² 2017 House Hearings, *supra* note 22, at 6. While Prof. Bruckner’s testimony was intended primarily to encourage Congress to develop strategies to collect data on how tax expenditures affect women-owned business, her testimony nonetheless establishes that Congress was aware of the disproportionate benefit afforded to male-owned businesses due to the nature of women-owned businesses.

¹⁸³ Bruckner, 2019 House Budget Committee Testimony, *supra* note 177, at 5–6 (“This means we have a billion dollar blind spot when it comes to understanding how effective and equitable tax expenditures are, and the latest distributional analysis from JCT on certain provisions from tax reform indicates that Congress doubled-down on it.”).

¹⁸⁴ At least one member of Congress has taken notice of the issues affecting women-owned businesses, including access to capital. Recognizing that “[w]omen business owners, particularly women of color, are underestimated, underrepresented and undercapitalized” and “[e]xisting tax incentives do not do nearly enough to help women-owned small businesses,” Senator Wyden introduced the PROGRESS Act on October 30, 2019. Wyden Introduces Bill to Boost Capital Access for Women-Owned Business, U.S. SENATE COMM. ON FINANCE (Oct. 30, 2019) (announcing the introduction of the Providing Real Opportunities for Growth to Rising Entrepreneurs for Sustained Success (PROGRESS) Act, S.____, 116th Cong. (2019)), <https://www.finance.senate.gov/ranking-members-news/wyden-introduces-bill-to-boost-capital-access-for-women-owned-busi->

A. *The Corporate Rate Cut*

A hallmark of conservative tax reform efforts, the Tax Cuts and Jobs Act reduced the corporate tax rate to 21%.¹⁸⁵ This expenditure is expected to cost the federal government \$1.348 trillion between 2018 and 2027.¹⁸⁶ While there is insufficient data available to adequately assess the predominant form that women-owned businesses take, by collecting data from various sources, researchers at American University's Kogod Tax Policy Center pieced together some information on women's choice of entity.¹⁸⁷ This data indicates that women-owned businesses generally operate as sole proprietorships or pass-through entities.¹⁸⁸ Of all small nonemployer firms, regardless of majority ownership, 86.4% operate as unincorporated sole proprietorships, 9.13% are partnerships, and 4.7% are S corporations.¹⁸⁹ Because 89.5% of women-owned businesses are non-employer firms, most women-owned firms likely operate as sole-proprietorships.¹⁹⁰ Of small businesses that employ workers, 14.8% are sole-proprietorships, 11.3% are partnerships, 46.9% are S corporations, and only 19.7% are taxed as C corporations.¹⁹¹ Of firms owned only by women, available data finds that 32.04% are sole-proprietorships, 9.13% are partnerships, 44.66% are S corporations, and 12.43% are taxed as C corporations.¹⁹² Because the reduced corporate tax rate does not reduce the tax liability of unincorporated businesses, and firms owned and operated by women are generally unincorporated, \$1.348 trillion in tax expenditures allocated to American businesses in the form of a corporate rate cut will bypass women-owned businesses.

ness. The Act proposes two tax incentives designed to increase access to capital and facilitate the hiring of new employees. While only in the early stages of the legislative process, the PROGRESS Act indicates an awareness of and attempt to address some of the circumstances that prevent women-owned businesses from realizing the full benefit of tax provisions designed to help small businesses.

¹⁸⁵ Pub. L. No. 115-97, § 13001, 131 Stat. 2096.

¹⁸⁶ See JOINT COMM., ESTIMATED BUDGET EFFECTS, *supra* note 70, at 3.

¹⁸⁷ See Bruckner, *supra* note 25, at 11–13, Table 1.1.

¹⁸⁸ *Id.* Pass-through entities are generally those entities that are taxed as partnerships or S corporations for federal tax purposes. Instead of imposing tax at the entity level, items of income, gain, deduction, and loss “pass through” to the individual owners and are incorporated into each individual owner’s tax return. Any resulting tax liability is subject to tax at the owner’s marginal rates.

¹⁸⁹ Bruckner, *supra* note 25, at 12–13, Table 1.1 (citing data obtained from the SBA’s Office of Advocacy). S corporations are incorporated small businesses that have elected under § 1362(a) to be taxed as pass-through entities for federal income tax purposes. See I.R.C. § 1361 (2012 & Supp. V 2017).

¹⁹⁰ Bruckner, *supra* note 25, at 11.

¹⁹¹ *Id.* at 13, Table 1.1.

¹⁹² Bruckner, *supra* note 25, at 13 (citing data from a 2017 survey of members of Women Impacting Public Policy (WIPP) and its coalition partners conducted by the American University Kogod Center for Tax Policy).

B. New Section 199A

To place unincorporated businesses on equal footing with corporations benefiting from the new reduced corporate tax rate, Congress enacted new § 199A.¹⁹³ Section 199A(a) authorizes a deduction for partnerships, S corporations, and sole-proprietorships with “qualified business income.”¹⁹⁴ The deduction is equal to the lesser of either a taxpayer’s “combined qualified business income” or 20% of that taxpayer’s taxable income (reduced by net capital gains and qualified cooperative dividends), *plus* the lesser of 20% of cooperative dividends or taxable income (reduced by net capital gains).¹⁹⁵ A taxpayer’s “combined qualified business income” (combined QBI) is generally comprised of the taxpayer’s deductible qualified business income (deductible QBI).¹⁹⁶ A taxpayer’s deductible QBI is equal to the *lesser* of either 20% of the taxpayer’s “qualified business income” (QBI) or the W-2 wage limitation.¹⁹⁷ “Qualified business income” is the net amount of a taxpayer’s qualified income, gain, deduction, and loss.¹⁹⁸ The W-2 wage limitation operates to limit the allowable deduction to the greater of either 50% of the business’s W-2 wages or 25% of W-2 wages plus 2.5% of the unadjusted basis of all qualified property if this amount is less than 20% of the taxpayer’s QBI.¹⁹⁹ In addition, the deduction is only available to qualified trades or businesses, which excludes any “specified service trade or business” and “the trade or business of performing services as an employee.”²⁰⁰ Excluded specified service trades or businesses include businesses that perform services in the fields of “health, law, . . . accounting, actuarial science, performing arts, consulting, athletics, financial services, brokerage services or any trade or business where the principal asset of such trade or business is the reputation of skill of 1 or more of its employees” and services that involve “investing and investment management, trading, or dealing in securities . . . partnership interests, or commodities.”²⁰¹

¹⁹³ Pub. L. No. 115-97, § 11011, 131 Stat. 2063–2071 (2017).

¹⁹⁴ I.R.C. § 199A(a) (Supp. V 2017).

¹⁹⁵ *Id.*

¹⁹⁶ See I.R.C. § 199A(b) (Supp. V 2017).

¹⁹⁷ See I.R.C. § 199A(b)(2) (Supp. V 2017). For a small business with few employees, the W-2 wage limitation will likely be the lesser amount that establishes the cap on deductible QBI. Therefore, women business owners, even those operating non-specified service trades or businesses, will be excluded from realizing the full benefit of § 199A, while businesses with payrolls that exceed 20% of QBI will be able to deduct the full 20%.

¹⁹⁸ I.R.C. § 199A(c)(1) (Supp. V 2017).

¹⁹⁹ I.R.C. § 199A(b)(2) (Supp. V 2017). Qualified property is generally depreciable property as defined in § 199A(b)(6). I.R.C. § 199A(b)(6) (Supp. V 2017).

²⁰⁰ I.R.C. § 199A(d) (Supp. V 2017).

²⁰¹ I.R.C. § 199A(d)(2) (Supp. V 2017) (incorporating businesses described in § 1202(e)(3)(A) but excluding engineering and architecture services). See also Prop. Reg. § 1.199A-5(b)(2) (defining “any trade or business where the principal asset of such trade or business is the reputation of skill of 1 or more of its employees”).

The result of the enactment of § 199A is that unincorporated non-service industry businesses will generally be able to deduct 20% of their business income, subject to phase-in of the wage limitation.²⁰² The deduction is generally not available to service industry trades or businesses unless the taxable income of the taxpayer is “less than the sum of the threshold amount plus \$50,000 (\$100,000 in the case of a joint return).”²⁰³ Therefore, small-scale service industry businesses may reap a correspondingly small benefit from the § 199A deduction, but the income from a spouse, for example, could easily put this deduction out of reach for many small business taxpayers.

The W-2 wage limitation and exclusion of service industry firms pose an almost insurmountable obstacle with respect to the flow of benefits from the § 199A deduction to women-owned businesses. Section 199A benefits non-service industry businesses with more employees and larger payrolls. Eighty-nine percent of women-owned businesses are non-employer businesses, and women-owned businesses “remain predominately active in service industries and are underrepresented in other industries.”²⁰⁴ Women-owned businesses, when they do employ workers, generally have fewer workers and smaller payrolls than male-owned businesses.²⁰⁵ Therefore, while male-owned businesses may utilize increased cash flows derived from this and other tax benefits to increase profits and expand their workforce, women-owned businesses, with lower receipts and difficulty raising capital, are not in a position to do so. Without the benefits of this deduction, women business owners may find themselves in an inescapable cycle of exclusion—precisely because they do not qualify for the benefits of § 199A, they may be unable to expand and hire employees to increase payrolls and, correspondingly, unable to realize the full benefits of § 199A. While there are valid policy reasons for extending tax benefits to industries that create jobs, women-owned businesses cannot grow and hire more employees to avail

²⁰² The wage limitation only applies to limit the deduction if the taxpayer’s taxable income exceeds the threshold amount. I.R.C. § 199A(b)(3) (Supp. V 2017). The “threshold amount” is \$157,500 for individuals (\$315,000 for joint filers), adjusted annually for inflation. I.R.C. § 199A(e)(2) (Supp. V 2017). The wage limitation is phased-in for taxpayers with taxable income in excess of the threshold amount that does not exceed the threshold amount plus \$50,000 for individuals or \$100,000 for joint filers. I.R.C. § 199A(b)(3)(B) (Supp. V 2017).

²⁰³ I.R.C. § 199A(d)(3) (Supp. V 2017). The threshold amount is \$157,500 for individuals (\$315,000 for joint filers), adjusted annually for inflation. I.R.C. § 199A(e)(2) (Supp. V 2017).

²⁰⁴ Bruckner, *supra* note 25, at 11–12. One study reported that “as of 2016, 61% (or 6.9 million) of women-owned firms are found in the following four service sectors: 22% in other services (e.g., home to hair and nail salons and pet care); 15% in health care or social assistance; 13% in professional/scientific/technical services (e.g., accountants, lawyers, architects, PR and management consultants); and 11% in administrative, support and waste management services.” *Id.* According to the 2017 survey of members of Women Impacting Public Policy (WIPP) conducted by American University’s Kogod Tax Policy Center, 84% of respondents reported operating in services. *Id.*

²⁰⁵ SBA ISSUE BRIEF NO. 13, *supra* note 167, at 3.

themselves of the tax expenditures that were designed to help small businesses if their businesses do not qualify in the first place.

C. Accelerated Depreciation

Section 179 generally allows taxpayers to immediately deduct up to \$500,000 of the cost of depreciable property placed in service during the taxable year, rather than expensing the cost of such property over its useful life.²⁰⁶ Similarly, § 168(k) authorizes “bonus depreciation” under which taxpayers may immediately expense 50% of the adjusted basis of qualifying property acquired after December 31, 2007 and before January 1, 2020.²⁰⁷ The Tax Cuts and Jobs Act amended § 179(b) by increasing the annual limitation so that going forward, taxpayers may immediately deduct up to \$1,000,000 of the cost of depreciable property placed in service during the taxable year, and by expanding the definition of qualifying property.²⁰⁸ This increased expenditure is expected to cost the federal government \$25.9 billion between 2018 and 2027.²⁰⁹ The Tax Cuts and Jobs Act also increased the allowable deduction under § 168(k) to 100% of the adjusted basis of qualifying property.²¹⁰ The amendments to § 168(k) are expected to cost the federal government \$86.3 billion between 2018 and 2027.²¹¹

From a tax policy perspective, this type of accelerated or bonus depreciation is intended to facilitate economic growth by encouraging investments and reducing the tax liability of businesses, thereby freeing up revenue for other business uses. Specifically, Congress believes these types of tax expenditures will encourage businesses to purchase more equipment and employ more workers to operate the equipment.²¹² In addition, the ability to immediately expense large capital investments eliminates the administrative and record-keeping burdens of tracking basis and depreciation deductions for tax compliance.²¹³ However, women-owned businesses lack access to capital, operate primarily in retail and services, and consequently do not incur large capital expenditures against which they can take depreciation deductions.²¹⁴ Therefore, increasing deduction limits on accelerated depreciation accomplishes very little with respect to facilitating growth of

²⁰⁶ I.R.C. §§ 179, 1245(a)(3) (2012 & Supp. V 2017).

²⁰⁷ I.R.C. § 168(k) (2012 & Supp. V 2017).

²⁰⁸ Pub. L. No. 115-97, § 13101, 131 Stat. at 2101.

²⁰⁹ JOINT COMM., ESTIMATED BUDGET EFFECTS, *supra* note 70, at 3.

²¹⁰ Pub. L. No. 115-97, § 13201, 131 Stat. at 2105.

²¹¹ See JOINT COMM., ESTIMATED BUDGET EFFECTS, *supra* note 70, at 3.

²¹² Bruckner, *supra* note 25, at 19. See also Guenther, *supra* note 166, at 10 (noting the expectation of increased cash flows resulting from the ability to immediately expense investments in depreciable assets).

²¹³ Bruckner, *supra* note 25, at 19.

²¹⁴ See Bruckner, *supra* note 25, at 19 (discussing survey results from a group of sophisticated women business owners, 53% of which either were not aware of the deduction under § 179 or did not make use of the deduction precisely because their businesses do not require the purchase of property eligible for depreciation, but noting that addi-

women-owned businesses and relegates over \$100 billion in tax expenditures primarily to businesses owned by men.

Excluding women-owned businesses from tax benefits designed to help businesses expand further disadvantages women entrepreneurs who already struggle to generate capital and grow their businesses.²¹⁵ In fact, precisely because of the wage and service industry limitations in the new § 199A, the availability of this deduction for most women-owned businesses is premised on those businesses *failing* to achieve economic growth and financial success.²¹⁶

Not only is there a “blind spot”²¹⁷ when it comes to research and data on women business owners, but members of Congress appear to have put on blinders with respect to the needs of women business owners when it came to passing tax legislation designed to help American businesses.²¹⁸ A Department of Commerce Interagency Task Force on Women Business Owners, created by President Carter, recognized in 1978 that,

“[t]axation plays a key role in the survival and growth of small businesses, primarily through its effect on equity infusion. The major source of equity capital for expansion of a business is reinvested profits. The amount of tax the business must pay determines the amount of money available for growth and expansion.”²¹⁹

Yet, forty years later, no serious attention has been paid to the effect of the Code on women business owners, despite Congress’s express authority to investigate and evaluate tax expenditures on a recurring basis.²²⁰ While small business tax expenditures were expected to exceed \$255 billion between 2016 and 2020 (prior to the enactment of the Tax Cuts and Jobs Act), Congress has not conducted a “formal accounting as to whether and how these expenditures impact or are distributed to or among women-owned firms.”²²¹

tional research is crucial to fully understanding whether or not women benefit from these expenditures).

²¹⁵ See *id.* at 13.

²¹⁶ Businesses with gross receipts falling below the statutory threshold are not precluded from claiming the deduction. Therefore, as long as women-owned service industry businesses fail to generate gross receipts in excess of that threshold, they will qualify for the deduction.

²¹⁷ See generally Bruckner, *supra* note 25 (highlighting the disturbing degree to which we lack government research and data on access to capital and tax expenditure allocations among women-owned businesses as well as the difficulty that this information gap creates in attempting to craft effective tax policy).

²¹⁸ See Bruckner, *2019 House Budget Committee Testimony*, *supra* note 177, at 5–6.

²¹⁹ See Bruckner, *supra* note 25, at 6.

²²⁰ See Bruckner, *2019 House Budget Committee Testimony*, *supra* note 177, at 3 (citing Rules of the House of Representatives, Rule X, cl. 4(b)(6)). See also COMMISSION ON EVIDENCE-BASED POLICYMAKING, THE PROMISE OF EVIDENCE-BASED POLICYMAKING at 4 (Sept. 17, 2017) (recommending that Congress “[modernize] the country’s evidence-building capacity to make sure our government’s decision-making process is among the best in the world”).

²²¹ *2017 House Hearings*, *supra* note 22, at 7.

Because Congress has not investigated the effects of the Code on women-owned businesses, there is no way to precisely know whether or not women business owners are in fact excluded from the economic benefits of these provisions. For example, research conducted by the Kogod Tax Policy Center at American University suggests that § 1202, a \$6.7 billion tax incentive designed to help small businesses attract capital, is significantly underutilized by women-owned businesses.²²² The result is that a \$6.7 billion tax benefit intended to help small businesses attract capital appears to exclude businesses facing the greatest difficulty in attracting capital as a result of the gender gap in access to financing; however, there is no publicly available data collected by the IRS or Treasury to support or contradict this observation.²²³ We cannot evaluate the effectiveness of our tax laws, let alone “object to [or eliminate] the codification of prejudice in the tax law”²²⁴ without first collecting and considering demographic data as it relates to the equitable and effective distribution of tax expenditures.

Because of the pass-through, service-oriented nature of women-owned businesses and gender bias in access to capital and financing, tax reform that encourages economic growth by lowering rates and increasing deductions for corporations and capital intensive, non-service industries further marginalizes women business owners and diminishes their chances for economic growth and success. The Tax Cuts and Jobs Act bypasses women entrepreneurs and allocates hundreds of billions of dollars in tax expenditures designed to facilitate economic growth to the types of businesses that already operate from a position of privilege and opportunity—male-dominated industries that fit the Code’s normative view of business operations as corporate entity deriving income from the use of tangible capital assets.²²⁵ The Tax Cuts and Jobs Act’s stated goal of furthering economic growth and creating jobs fails to equitably serve the public good with respect to the millions of businesses owned by women. Rather than furthering public good, these “reforms” ensure that “the goal of advancing economic growth [con-

²²² Bruckner, *2019 House Budget Committee Testimony*, *supra* note 177, at 5 n.13. Like § 199A, § 1202 is designed to exclude service sector businesses. *Id.* See also Bruckner, *supra* note 25, at 15–16.

²²³ See Bruckner, *supra* note 25, at 22. Emphasizing the lack of data with respect to women business owners and the obstacles they face, Professor Bruckner notes that, “because the Code is facially neutral, neither Congress nor Treasury or IRS have considered or developed data on how the Code’s small business tax expenditures impact women-owned firms independent from data or research collected and reviewed on small businesses generally. This blind spot constrains policymakers from developing effective tax policy with respect to women-owned firms to addresses the persistent challenges these small businesses encounter growing their receipts and accessing capital.” *Id.*

²²⁴ Sugin, *supra* note 14, at 431.

²²⁵ See, e.g., *id.* at 430 (“The preference for things rather than people is reinforced by the TCJA’s treatment of capital income compared to labor income.”).

tinues] to be one that primarily serves the *private* good of an already privileged few.”²²⁶

To facilitate tax reform that promises a more equitable distribution of business tax expenditures, Congress must first resolve to engage in tax expenditure analysis that considers underlying demographic data with respect to the types of businesses that are generating growth in the small business sector, the intersection of identities among those small business owners, and the tax and non-tax barriers to success faced by those owners. Further, Congress must be willing to deviate from the Code’s adherence to the normative view of businesses as incorporated entities with large capital investments generating income through the use of tangible assets. The economic landscape is changing. More and more taxpayers are leaving the traditional employer-employee labor market in pursuit of alternative means of generating income.²²⁷ An increasing number of these entrepreneurs are women with varied and divergent interests, motivations, and obstacles to overcome.²²⁸ To maximize equality and economic efficiency in the Code, tax reform must incorporate, rather than exclude, the interests of women business owners.

VI. CONCLUSION

A primary function of law generally is to “organize social power among groups” and to “distribute social resources and treasure for the living

²²⁶ See Anthony C. Infanti, *Tax Reform Discourse*, 32 VA. TAX REV. 205, 218 (2012) (proposing that a system intended to fund public expenditures should serve the public good, and, therefore, the goal of tax reform should be to advance human development, not simply economic growth).

²²⁷ For example, the number of small businesses starting up each quarter has increased steadily over the past two decades and each year thousands of taxpayers are entering the gig economy for the first time. See U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY, 2018 SMALL BUSINESS PROFILE 2 (2018), [<https://perma.cc/7W8N-UFE3>]; TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, Ref. No. 2019-30-016, EXPANSION OF THE GIG ECONOMY WARRANTS FOCUS ON IMPROVING SELF-EMPLOYMENT TAX COMPLIANCE 36 (2019). Based on Census Bureau data, it is estimated that as of 2014 there were 7.1 million individuals operating as independent contractors (defined as self-employed individuals operating as sole proprietorships) and 3.1 million individuals participating in the on-demand market. See CAROLINE BRUCKNER & THOMAS L. HUNGERFORD, CENTER FOR RETIREMENT RESEARCH AT BOSTON COLLEGE, FAILURE TO CONTRIBUTE: AN ESTIMATE OF THE CONSEQUENCES OF NON- AND UNDERPAYMENT OF SELF-EMPLOYMENT TAXES BY INDEPENDENT CONTRACTORS AND ON-DEMAND WORKERS ON SOCIAL SECURITY 15–16 (2019). Independent contractors were more likely to be white, female, and age 55 or over, while on-demand workers were more likely to be white, female, and between the ages of 34–54. *Id.* at 27–28. The growth in small businesses owned by women, however, is largely attributable to growth among businesses owned by women of color. See 2017 AMERICAN EXPRESS OPEN REPORT *supra* note 164, at 5. Yet in establishing the tax treatment of income earned through these different means, Congress does not consider the underlying identities of those parties.

²²⁸ Bruckner & Hungerford, *supra* note 227, at 27–28. See also 2017 AMERICAN EXPRESS OPEN REPORT *supra* note 165, at 5.

of life.”²²⁹ This distribution is nowhere more apparent than in our system of federal tax laws. The Code determines the allocation of actual financial and economic resources among members of society. The impact of such allocation is felt not only in the way the Code directly allocates tax expenditures and imposes tax, but in the ancillary distribution of benefits and burdens resulting from the influence of the tax laws on personal and business decisions.

The elimination of the alimony inclusion/deduction regime affects only a small number of taxpayers. Further, the fact remains that most alimony recipients occupy a position of racial and socioeconomic privilege in society.²³⁰ Nevertheless, tax policy analysis should consider the role of the Code in incentivizing and creating that privilege, the modern temporary nature and need-based justification for alimony awards, and the role that the alimony deduction plays in facilitating a return to the labor market and financial independence for these women.

A return to the rule of *Gould* leaves us with tax law precedent that perpetuates gender stereotypes and the historic subordination of women by exhuming normative views of women and marriage previously put to rest by gender-neutral statutory law. A return to this precedent also imposes economic hardship on families struggling in the wake of divorce. Because the Court’s narrow view of “income” is susceptible to challenge, this hardship may be amplified in the future without a corresponding statutory deduction. However, simply reinstating the alimony deduction marginalizes women who were never married or eligible for alimony and ignores the underlying struggles faced by women in the labor force that necessitate alimony awards in the first place. Therefore, rather than simply reinstating the alimony inclusion/deduction regime, tax policy should adopt a holistic approach that considers implicit bias in the Code, underlying demographics, and the interconnected nature of the social structures and tax policies that subordinate and marginalize women with respect to their attempts to participate equally in the market.

Similarly, with regard to addressing the injury and harm brought to light by the #MeToo movement, lawmakers should consider first, the agency of victims by inquiring into and crafting solutions that protect victims rather than further disempowering them, and second, whether the Code is the appropriate place to redress these harms. If the Code is an appropriate mecha-

²²⁹ Catherine A. MacKinnon, *Introduction: Realizing Law, in WOMEN’S LIVES, MEN’S LAWS* 1, 3 (2005).

²³⁰ The privilege derives from the choice these women possess with respect to remaining in the labor market and the associated benefit from untaxed imputed income drawn from their domestic labor following their withdrawal from the workforce. See Kahng, *supra* note 28, at 662. For a broader discussion and critique of the effect of characterizing reproductive labor as imputed income with respect to determining the tax treatment of intrafamily transfers of value, see Fellows, *supra* note 8, at 360.

nism to redress those harms, similar consequences should extend to tax exempt employers.

The effect of the Tax Cuts and Jobs Act on women-owned businesses marks the clearest example of how a failure to consider underlying demographic data facilitates the perpetuation of implicit gender bias in the Code. Congress allocated over \$400 billion in tax expenditures intended to facilitate economic growth among small businesses, yet because businesses owned by women do not conform to the normative business model prioritized by the Code, the vast majority of those tax expenditures will not benefit women-owned businesses. These expenditures propel businesses that already benefit from access to capital and historic opportunity while women-owned businesses struggle to stay afloat. Proposals to facilitate the economic success of women-owned businesses must not only take into consideration underlying demographic data concerning owners, employers, entity classification, and types of businesses, but also the ancillary issues that affect choice of entity, access to capital, and the Code's preference for income derived from tangible assets over service income—Why do women choose not to incorporate their businesses? Why do women operate service industry businesses over other business models? Why do women lack access to capital? Just as Congress should address the underlying societal and economic barriers and influences that necessitate alimony awards in the first place, Congress should consider the reasons why women tend to operate businesses that deviate from traditional business model norms assumed by the Code and consider the interconnected nature of the public and private (i.e., domestic and reproductive) spheres with respect to women's ability to participate in the market.

The Tax Cuts and Jobs Act ensures that going forward, women in the United States will receive an even smaller share of the “resources and treasure for the living of life.”²³¹ The Code now marginalizes women to a greater degree with respect to reentering the workforce following divorce, seeking redress for employment-related discrimination and abuse, and maximizing the success of their business operations. The marginalizing effect is more profound for women who identify with other historically subordinated groups. Rather than perpetuate gender stereotypes and the marginalization of women, tax reform should rest on thoughtful consideration of underlying demographic data to expose implicit bias in the Code and reveal the interconnected nature of public and private spheres of those women who participate in the market. Such consideration establishes a foundation for the purposeful reconsideration of tax expenditure allocations and tax policy measures aimed at equity and efficiency by facilitating equitable participation in the market.

²³¹ MacKinnon, *supra* note 229 at 3.