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THERE'S NO PLACE LIKE "HOME": § 162(A)(2) AND WHY MARRIED TAXPAYERS JUST CAN'T GET "AWAY"

ABSTRACT

This Comment examines § 162(a)(2) of the Internal Revenue Code, which allows a taxpayer to deduct expenses incurred while traveling "away from home" for business purposes. Under this provision, a taxpayer may deduct expenses for travel fares, meals, and lodging. Although such expenses would seem to be non-deductible because they are personal in nature, Congress created a limited exception under § 162(a)(2) to alleviate the burden on the taxpayer whose job requires him to work away from home and therefore essentially incur duplicate living expenses. On the face of the statute, the only apparent requirement is that a taxpayer must be "away from home," but the statute's simplicity is deceptive.

Taxpayers who wish to deduct travel expenses under § 162(a)(2) face nearly a century of inconsistent interpretations and arbitrary limitations of when a taxpayer is considered "away." By analyzing a range of both cases and characteristics of different taxpayers, this Comment reveals an additional complication: the Internal Revenue Service (IRS) and courts have created a "marriage penalty" that severely limits the availability of the § 162(a)(2) deduction for married taxpayers. This Comment further uncovers a gender bias against married women in the application of the provision by the IRS and courts. The gender makeup of the workforce has changed significantly since § 162(a)(2) first appeared in the Tax Code in 1921, and a revision is necessary to alleviate the burden it imposes on working families.

INTRODUCTION

Every presidential election, the public pressures the candidates to release their income tax returns, and the 2008 election was no exception.¹ While serving as governor of Alaska, Sarah Palin worked out of both Juneau, the state capital, and Wasilla, her hometown where she resides with her husband and children.² On her 2007 income tax return, Governor Palin claimed a \$16,591 deduction under § 162(a)(2) for travel expenses she incurred while working out of Wasilla.³ Under § 162(a)(2) of the Internal Revenue Code, only expenses incurred while “away from home” are deductible.⁴ A taxpayer unfamiliar with § 162(a)(2) might assume that Governor Palin could deduct the expenses incurred in Juneau because only then was she truly away from her hometown of Wasilla. However, the answer is not so simple.

If “home” is defined in the ordinary sense, then the governor could deduct from her income any travel expenses incurred in Juneau because she would be away from her home in Wasilla.⁵ However, if “home” is defined as the taxpayer’s “principal place of business,” then Governor Palin would be unable to deduct expenses incurred in Juneau because Juneau is her principal place of business. By analyzing a range of “away from home” cases, this Comment reveals an additional complication in attempting to answer the governor’s tax dilemma: by severely limiting the availability of the § 162(a)(2) deduction, the Internal Revenue Service (IRS) and courts have created a “marriage penalty” for married taxpayers.⁶ Unfortunately for Governor Palin, the bad news does

¹ See James V. Grimaldi & Karl Vick, *Palin Billed State for Nights Spent at Home*, WASH. POST, Sept. 9, 2008, at A01 (describing expenditures Sarah Palin charged to the State of Alaska).

² *Id.* When Palin stayed in Wasilla, she actually worked in nearby Anchorage. *Id.* (“Palin moved her family to the capital during the legislative session last year, but prefers to stay in Wasilla and drive 45 miles to Anchorage to a state office building.”).

³ *Id.* The controversy surrounding Palin’s taxes focused specifically on “per diem” payments she received from Alaska. *Id.* Palin should only be able to omit these employer reimbursements from her gross income if she could legitimately deduct these expenses under § 162(a)(2) of the Tax Code.

⁴ See 26 U.S.C. § 162(a)(2) (2006) (allowing a deduction for “traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business”).

⁵ “Home” is defined as “one’s place of residence,” “a place of origin,” or “the social unit formed by a family living together.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1082 (2002). Black’s Law Dictionary defines “home” as “dwelling place,” but then differentiates between “family home” and “tax home.” BLACK’S LAW DICTIONARY 638, 750, 1502 (8th ed. 2004).

⁶ See *infra* Part II.

not end here. This Comment further uncovers in the courts' application of § 162(a)(2) a gender bias against earnings by married women.⁷

Generally, a taxpayer can deduct his business expenses but cannot deduct any "personal, living, or family expenses."⁸ Deducting business but not personal expenses is permitted because "a person's taxable income should not include the cost of producing that income."⁹ Section 162(a)(2) allows a taxpayer to deduct expenses for travel, meals, and lodging, although such expenses appear to be non-deductible because they are personal in nature.¹⁰ Congress created a limited exception under § 162(a)(2) to alleviate the burden on the taxpayer whose business requires him to work "away from home," and therefore essentially incur duplicative living expenses.¹¹ Accordingly, some living expenses are non-deductible because they are personal expenses, while duplicative living expenses may be deductible under § 162(a)(2).¹² As a result, a taxpayer whose expenses qualify for the deduction under § 162(a)(2) has a

⁷ *Id.*

⁸ 26 U.S.C. § 262(a) (2006).

⁹ *See, e.g.,* Nathan R. Gerhardt, *Internal Revenue Code § 162(a)(2): Where is "Home?,"* 2002 FED. B. ASS'N SEC. TAX'N REP. 2, 2 (quoting *Hantzis v. Comm'r*, 638 F.2d 248, 249 (1st Cir. 1981)).

¹⁰ IRS.gov, Topic 511 - Business Travel Expenses, <http://www.irs.gov/taxtopics/tc511.html> (last visited Jan. 21, 2010). Under § 162(a)(2), a taxpayer can deduct:

1. Travel by airplane, train, bus, or car between your home and your business destination
2. Using your car while at your business destination[.]
3. Fares for taxis or other types of transportation between the airport or train station and your hotel, the hotel and the work location, and from one customer to another, or from one place of business to another[.]
4. Meals and lodging[.]
5. Tips for services related to any of these expenses.
6. Dry cleaning and laundry.
7. Business calls while on your business trip
8. Other similar ordinary and necessary expenses related to your business travel. These expenses might include transportation to and from a business meal, public stenographer's fees, computer rental fees, and operating and maintaining a house trailer.

Id. Travel expenses do not include everyday non-deductible commuting expenses between a taxpayer's residence and primary workplace. Mark E. Battersby, *On the Road with Uncle Sam: Tax Deductions for Traveling on Business*, PA. LAW., Nov.-Dec. 2007, at 50.

¹¹ *Kroll v. Comm'r*, 49 T.C. 557, 562 (1968) ("The purpose of the 'away from home' provision is to mitigate the burden of the taxpayer who, because of the exigencies of his trade or business, must maintain two places of abode and thereby incur additional and duplicate living expenses.").

¹² *See James v. United States*, 308 F.2d 204, 206 (9th Cir. 1962) (arguing that since a taxpayer must eat and sleep regardless of whether he is traveling, "that portion of the cost of food and lodging while on business travel which would have been incurred even at [his place of residence] is actually a personal living expense").

distinct advantage over a taxpayer whose expenses do not qualify for the deduction.¹³

This Comment first examines the varying and often conflicting strains of jurisprudence governing the interpretation of § 162(a)(2) and presents a coherent analysis of what constitutes a taxpayer's "home" and when a taxpayer is considered "away."¹⁴ After Congress adopted the provision in 1921, the interpretation of this provision has been left to courts.¹⁵ This Comment demonstrates that in the vast majority of cases, married taxpayers are unable to obtain the benefit of the deduction because courts, by repeatedly restricting the availability of § 162(a)(2) to married taxpayers, have created a marriage penalty.¹⁶ This Comment asserts that the two primary victims of the § 162(a)(2) marriage penalty are dual wage earners and married women because courts fail to consider the implications of their decisions on these groups, thereby creating an additional disincentive for wives to enter and remain in the workforce.¹⁷ The workforce has changed significantly since § 162(a)(2) first appeared in the Tax Code in 1921, and a revision is necessary to alleviate the burden on working families imposed by the marriage penalty and to facilitate the entry of more women into the workforce.

Part I of this Comment discusses the development of § 162(a)(2) case law and demonstrates the increasing reluctance of courts to allow a taxpayer to receive the deduction. Part II argues that courts have created a § 162(a)(2)

¹³ See *id.* at 207–08 (“This discriminates against taxpayers whose business does not require travel, and who therefore pay tax upon all of the income which they devote to their personal living expenses. The discrimination may be substantial . . . [T]he resulting situation is no doubt inequitable.”); Kara Fratto, *The Taxation of Professional U.S. Athletes in Both the United States and Canada*, 14 SPORTS LAW J. 29, 33 (2007) (“Expenses for travel while *away from home* are an attractive deduction because they are an ‘above the line’ deduction from gross income to arrive at the adjusted gross income.” (emphasis added)).

¹⁴ See *infra* Part I.

¹⁵ See John A. Lynch, Jr., *Travel Expense Deductions Under I.R.C. § 162(a)(2)—What Part of “Home” Don’t You Understand?*, 57 BAYLOR L. REV. 705, 712 (2005) (noting that the legislative history surrounding § 162(a)(2) is “scant and ambiguous”).

¹⁶ See *infra* Part II. The inability of married taxpayers to obtain the deduction will be referred to as the “marriage penalty” throughout this Comment. This term does not refer to the marriage penalty that already exists in the Tax Code’s progressive rate structure and the married filing jointly status. See, e.g., Laura Ann Davis, *A Feminist Justification for the Adoption of an Individual Filing System*, 62 S. CAL. L. REV. 197, 199 (1988) (providing “a feminist justification for the use of a separate tax filing system” in part because the progressive rate structure and the joint filing system discriminate against married women taxpayers); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983, 989 (1993) (“The most common complaints made in the tax policy and economic literature regarding the biases of the income tax against women concern the system of aggregated spousal rates, or ‘joint filing.’ The system has given rise to the ‘marriage penalty.’” (footnote omitted)).

¹⁷ See *infra* Part III.

marriage penalty, which prevents married taxpayers from obtaining the deduction. Part III argues that there are two primary victims of the marriage penalty: (1) dual wage earners, and (2) married women taxpayers. Part IV advocates for the enactment of a special provision reinterpreting § 162(a)(2) for married couples who file jointly, whereby "home" is defined as a taxpayer's place of residence. Solving the problems created by the current interpretation of § 162(a)(2) through a statutory amendment is neither drastic nor unprecedented; the IRS and courts have made similar exceptions for certain groups of taxpayers in the past.¹⁸

It is important to note that § 162(a)(2) also has created obstacles for groups other than married and women taxpayers. However, such obstacles are based on the occupation of the taxpayer and do not trigger marital status and gender concerns.¹⁹ This Comment addresses the situation of these other taxpayers briefly in Part IV but focuses on the need for a legislative solution for married women taxpayers.

I. THE EVOLUTION OF § 162(A)(2) "AWAY FROM HOME" JURISPRUDENCE

Section 162(a) of the Internal Revenue Code allows a taxpayer to deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."²⁰ Under § 162(a)(2) these expenses include "traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business."²¹ On its face, the statute has only two requirements: (1) the taxpayer must be "away from home;" and (2) the taxpayer must be "in the pursuit of a trade or business." Therefore, it would appear that Governor Palin could deduct expenses she incurred in Juneau because she was working away from her hometown of Wasilla. However, the question of whether an expense is deductible under § 162(a)(2) has been "a prolific and continuous source of

¹⁸ See *infra* Part IV.

¹⁹ E.g., *York v. Comm'r*, 160 F.2d 385, 385 (1st Cir. 1947) (taxpayer is a lawyer); *Wallace v. Comm'r*, 144 F.2d 407, 410 (9th Cir. 1944) (taxpayer is an actress); *Johnson v. Comm'r*, 115 T.C. 210, 211 (2000) (taxpayer is a ship captain); *Horton v. Comm'r*, 86 T.C. 589, 589 (1986) (taxpayer is a professional athlete); see also *Deblock v. Dep't of Revenue*, 7 Or. Tax 191, 192 (Or. T.C. 1977) ("The question has arisen in practically as many contexts as there are occupations in the vast and varied economy of the country." (quoting the plaintiffs' trial memorandum)).

²⁰ 26 U.S.C. § 162(a) (2006).

²¹ *Id.* § 162(a)(2). See also IRS.gov, *supra* note 10 (providing examples of deductible travel expenses while away from home).

litigation under the income tax law.”²² At the heart of the controversy is what constitutes a taxpayer’s “home” for purposes of § 162(a)(2).²³

Because neither the Tax Code nor the Supreme Court provides a definition of the word “home,” the IRS and lower courts have interpreted the term inconsistently.²⁴ A shrinking minority of courts define “home” in this context as the taxpayer’s “place of residence.”²⁵ On the other hand, the IRS and the Tax Court have adopted the position that a taxpayer’s “home” is his “principal place of business.”²⁶ Although the Supreme Court has addressed § 162(a)(2) on three different occasions, it has failed to offer clear guidance on the interpretation of “home.”²⁷ This section explains and distinguishes the minority rule, the majority rule, and the Supreme Court’s position.

A. “Home” Means Home

The ordinary meaning of the word “home” is one’s “place of residence.”²⁸ Such an interpretation does not appear to conflict with the purpose of the deduction, which is to avoid taxing people whose business requires them to travel away from home and thus incur duplicative living expenses.²⁹ If Congress had intended for “home” to mean something unusual, it could have used a “more appropriate term.”³⁰ In the dissent to *Commissioner v. Flowers*,

²² *Deblock*, 7 Or. Tax at 192.

²³ *E.g.*, Crystal Ovsak, *The Not So Slippery Slope: The Eighth Circuit Determines That Employer-Paid Airfare Is Not “Wages” Subject to Withholding Taxes*, 77 N.D. L. REV. 433, 438–41 (2001) (discussing the split of authority in defining “home” as either place of residence or principal place of business).

²⁴ Compare *Wallace v. Comm’r*, 144 F.2d 407, 410 (9th Cir. 1944) (defining home as taxpayer’s place of residence), and *Coburn v. Comm’r*, 138 F.2d 763, 764 (2d Cir. 1943) (same), with *Hantzis v. Comm’r*, 638 F.2d 248, 254 (1st Cir. 1981) (defining home as taxpayer’s principal place of business), and *Bixler v. Comm’r*, 5 B.T.A. 1181, 1184 (1927) (same).

²⁵ See *infra* Part I.A.

²⁶ See *infra* Part I.B. Some courts use different terms to describe a taxpayer’s principal place of business. *E.g.*, *Hantzis*, 638 F.2d at 249 (defining home as a taxpayer’s “place of employment”); *Filler v. Comm’r*, 321 F.2d 900, 900 (8th Cir. 1963) (defining home as a taxpayer’s “principal post of duty”).

²⁷ See *infra* Part I.C.

²⁸ See *supra* note 5. Courts sometimes use the term “abode” to describe a taxpayer’s personal residence. *See, e.g.*, *Henderson v. Comm’r*, 143 F.3d 497, 499 (9th Cir. 1998).

²⁹ *See, e.g.*, *Rosenspan v. United States*, 438 F.2d 905, 912 (2d Cir. 1971) (finding that a taxpayer with no permanent residence cannot obtain the § 162(a)(2) deduction).

³⁰ *Wallace v. Comm’r*, 144 F.2d 407, 410 (9th Cir. 1944). The court further explained:

The plain, obvious and rational meaning of a tax statute is always to be preferred to any narrow or hidden sense . . . and while the meaning to be given to terms used will be determined from the character of their use by the legislature in the statute under consideration, words in common use should not be distorted by administrative or judicial interpretation.

Id.

Justice Rutledge rejected the notion of "home" as the taxpayer's principal place of employment because he could find "no purpose stated or implied in the Act, the regulations or the legislative history to support such a distortion."³¹ According to Justice Rutledge, the only stated purpose of § 162(a)(2) is to relieve the tax burden when a taxpayer is away from home on business.³² Therefore, a taxpayer who is away from her place of residence, like Governor Palin, should be able to deduct those costs incurred in the pursuit of business.

Today, however, for purposes of § 162(a)(2) only a minority of courts define "home" as a taxpayer's residence. In *Coburn v. Commissioner*, the Second Circuit found that the taxpayer's "home" was his home in the "ordinary meaning of the word."³³ In *Coburn*, the taxpayer maintained a residence in New York, but spent 263 days of the taxable year in California pursuing an acting career.³⁴ Although he engaged in some business-related activities in New York, the taxpayer derived the majority of his income from his work in California, where he had rented an apartment and employed a cook and chauffeur.³⁵ The Tax Court denied him the deduction of these expenses under § 162(a)(2) based on a finding that his principal place of business was in California.³⁶ The Second Circuit reversed the Tax Court's decision,³⁷ reasoning that the travel expenses were deductible because "nothing in the statute bears evidence of any unusual meaning" and "[t]he fact that by chance he got five short-term contracts which caused him to spend 263 days in California did not wrest him from New York City permanently even in a professional sense."³⁸

Similarly, in *Wallace v. Commissioner*, the Ninth Circuit defined "home" as the taxpayer's place of residence, which allowed a taxpayer to take the § 162(a)(2) deduction.³⁹ The taxpayer, an actress, worked for seven months in Hollywood, California, during the taxable year but maintained her residence in

³¹ 326 U.S. 465, 477 (1946) (Rutledge, J., dissenting) (agreeing with the court of appeals that "if Congress had meant 'business headquarters,' and not 'home,' it would have said 'business headquarters'" and stating that "[w]hen it used 'home' instead, I think it meant home in everyday parlance, not in some twisted special meaning of 'tax home' or 'tax headquarters.'").

³² *Id.* at 474–75.

³³ 138 F.2d 763, 764 (2d Cir. 1943).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* The court noted that a tax "home" should be limited to a place where the taxpayer is "regularly employed or customarily carries on business." *Id.* (emphasis added).

³⁸ *Id.* at 764–65.

³⁹ 144 F.2d 407, 411 (9th Cir. 1944).

San Francisco.⁴⁰ Under § 162(a)(2), the taxpayer deducted the costs she incurred working in Hollywood, including her rent and food expenses.⁴¹ In allowing the deduction, the Ninth Circuit considered the particular situation of the taxpayer: Her connections to Hollywood were only “casual, professional and temporary Her physical presence and her place of abode in the vicinity of Hollywood were business necessities, and at no time did she manifest any intention or desire to remain there after completion of her work.”⁴² Like the taxpayer in *Coburn*, the actress would not have been able to deduct her business expenses under the “principal place of business” definition.

B. “Home” as Principal Place of Business

In contrast to the opinions cited above, the IRS, the Tax Court, and the majority of United States circuit courts have adopted the position that a taxpayer’s “home” is generally his “principal place of business.”⁴³ The courts have justified this interpretation because the average taxpayer maintains a home close to his place of employment.⁴⁴ Under such an interpretation, a taxpayer who maintains his place of residence somewhere other than his principal place of business is unable to receive the deduction.

One of the earliest cases in which the Tax Court adopted the principal place of business rule is *Bixler v. Commissioner*.⁴⁵ In *Bixler*, the taxpayer maintained a residence in Mobile, Alabama, with his family and was employed by state fairs and expositions throughout the country.⁴⁶ In 1922, he worked in Hammond, Louisiana, from January until April, and at a fair in Houston,

⁴⁰ *Id.* at 408.

⁴¹ *Id.* at 408–09.

⁴² *Id.* at 410–11.

⁴³ Rev. Rul. 63-82, 1963-1 C.B. 33. An exception to this general rule is that when a taxpayer has no regular principal place of business he can deduct § 162(a)(2) expenses under the place of residence definition; however, if he cannot establish a regular place of residence, the taxpayer is deemed “homeless” and is unable to deduct any expenses. *See, e.g.,* Henderson v. Comm’r, 143 F.3d 497, 499–500 (9th Cir. 1998) (recognizing exception but disallowing deduction because taxpayer did not incur continuous and substantial costs at his place of residence and had no business reason to maintain it); Whitman v. United States, 248 F. Supp. 845, 850 (W.D. La. 1965) (recognizing exception but disallowing deduction because taxpayer’s home “in a real and substantial sense” was his mobile home at each job site).

⁴⁴ *See* Bixler v. Comm’r, 5 B.T.A. 1181, 1184 (1927) (“A taxpayer may not keep his place of residence at a point where he is not engaged . . . and take a deduction from gross income for his living expenses while away from home.”).

⁴⁵ *Id.* at 1184.

⁴⁶ *Id.* at 1182.

Texas, from April through early December.⁴⁷ The taxpayer then returned to Mobile, where his family had remained, to work at a fair for all of 1923.⁴⁸ The court prohibited the taxpayer from deducting the living expenses he incurred in Hammond and Houston in 1922 because it defined the taxpayer's "home" for purposes of § 162(a)(2) as his principal place of business.⁴⁹ Under this rule, the taxpayer's "home" was Hammond while he worked in Hammond and became Houston when worked in Houston.⁵⁰ Accordingly, he could not deduct expenses for either location because at the time he was not considered "away from home."⁵¹ The court offered little explanation for this interpretation of "home," stating only that "we *think* [§ 162(a)(2) was] intended to allow a taxpayer a deduction of traveling expenses while away from his post of duty or place of employment on duties connected with his employment."⁵²

C. *The Supreme Court's Position*

The Supreme Court has declined to define "home" for purposes of § 162(a)(2), despite multiple opportunities to do so.⁵³ The Supreme Court first addressed § 162(a)(2) in *Commissioner v. Flowers*, where the taxpayer lived in Jackson, Mississippi, but traveled to his office in Mobile, Alabama, for work.⁵⁴ The Court held that the taxpayer could not deduct the transportation costs from Jackson to Mobile, or the meal and lodging expenses he incurred while working in Mobile.⁵⁵ The Court established three requirements that must be met for a taxpayer to deduct travel expenses under § 162(a)(2):

1. The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes

⁴⁷ *Id.*

⁴⁸ *Id.* at 1183.

⁴⁹ *Id.* at 1184 ("[T]raveling and living expenses are deductible under the provisions of this section only while the taxpayer is away from his place of business, employment, or the post or station at which he is employed, in the prosecution, conduct, and carrying on of a trade or business.").

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* (emphasis added).

⁵³ See *Comm'r v. Stidger*, 386 U.S. 287, 292 (1967) (deciding that it was "not necessary for us to decide here whether this congressional action (or inaction) constitutes approval and adoption of the Commissioner's interpretation of 'home'"); *Peurifoy v. Comm'r*, 358 U.S. 59, 60 (1958) (finding it was "inappropriate to consider such questions"); *Comm'r v. Flowers*, 326 U.S. 465, 472 (1946) (finding it was "unnecessary here to enter into or to decide this conflict").

⁵⁴ *Flowers*, 326 U.S. at 468. For the first year at issue, the taxpayer spent 203 days in Jackson and 66 days in Mobile and made 33 trips between the two locations. For the second year at issue, the taxpayer spent 168 days in Jackson and 102 days in Mobile and made 40 total trips. *Id.*

⁵⁵ *Id.* at 473.

such items as transportation fares and food and lodging expenses incurred while traveling.

2. The expense must be incurred “while away from home.”
3. The expense must be incurred in pursuit of business.⁵⁶

The Court then found that the third requirement had not been met because the expenses were not incurred in pursuit of the employer’s business, but rather for “personal” reasons—the taxpayer’s desire to reside in Mississippi but work in Alabama.⁵⁷ Therefore, his travel expenses were not deductible.⁵⁸ By focusing on the third requirement, the Supreme Court avoided the task of interpreting “home” for the purposes of § 162(a)(2).⁵⁹

In his dissent, Justice Rutledge declined to adopt the test set out by the majority, arguing that he would have allowed the deduction under § 162(a)(2) because a taxpayer’s “home” is his place of residence.⁶⁰ Therefore, under Justice Rutledge’s model, the taxpayer’s “home” was in Jackson and the transportation, lodging, and food expenses he incurred in Mobile would be deductible.⁶¹ Like the court in *Wallace*, Justice Rutledge emphasized the taxpayer’s strong connection to his place of residence⁶²: Over the course of thirty years, the taxpayer had worked and lived, paid local and state taxes, sent his kids to school, owned a home, and established a law firm all in Jackson.⁶³ In comparison, the taxpayer worked in Mobile for only one-third of the year and spent the remainder of the year in Jackson.⁶⁴ Although the taxpayer’s decision to work in Mobile was “motivated chiefly by . . . personal considerations,” he still did much of his work in Jackson.⁶⁵ Therefore, Justice Rutledge would have allowed the deduction, deemphasizing the taxpayer’s motivation for working in one city and residing in another.

⁵⁶ *Id.* at 470.

⁵⁷ *Id.* at 472–73. The Court noted that if the taxpayer had lived and worked in one city, his living expenses and commuting expenses would not be deductible; the nature of the expense did not change simply because the taxpayer had moved farther away. *Id.* at 473.

⁵⁸ *Id.* at 472–73.

⁵⁹ Gerhardt, *supra* note 9, at 2–3. However, it appears that the taxpayer would have lost under either definition of “home” using the *Flowers* test because the taxpayer would still fail to meet the third requirement. JOEL S. NEWMAN, FEDERAL INCOME TAXATION: CASES, PROBLEMS, AND MATERIALS 327–28 (3d ed. 2005).

⁶⁰ *Flowers*, 326 U.S. at 474–75 (Rutledge, J., dissenting).

⁶¹ *Id.* at 475.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

In *United States v. Correll*, the Court again dodged the issue of defining a taxpayer's "home" and instead more narrowly interpreted "away from home" to require an overnight stay.⁶⁶ The taxpayer was a traveling salesman who "customarily left home early in the morning, ate breakfast and lunch on the road, and returned home in time for dinner."⁶⁷ He deducted the cost of his morning and noon meals on his income tax returns for 1960 and 1961 under § 162(a)(2).⁶⁸ The Commissioner argued that the cost of the meals was a non-deductible personal expense because the taxpayer's trips "requir[ed] neither sleep nor rest, regardless of how many cities a given trip may have touched, how many miles it may have covered, or how many hours it may have consumed."⁶⁹ Although the Sixth Circuit had rejected the rule as an invalid regulation, the Supreme Court deferred to the Commissioner and adopted the "sleep or rest" requirement, which prohibits deductions of expenses under § 162(a)(2) for day trips.⁷⁰ It reasoned that although arbitrary, the rule simplified the enforcement of § 162(a)(2).⁷¹ In his dissent, Justice Douglas agreed with the Sixth Circuit and rejected the majority's adoption of the overnight requirement.⁷² He argued that the rule was inappropriate because it injected a time element into the provision in "an era of supersonic travel."⁷³

In *Peurifoy v. Commissioner*,⁷⁴ the Supreme Court again refrained from defining "home" for purposes of § 162(a)(2) but created an exception to the *Flowers* "personal-versus-business" distinction. In *Peurifoy*, the taxpayers were three construction workers employed in Kinston, North Carolina, for continuous periods of 8 1/2 months, 12 1/2 months, and 20 1/2 months, respectively.⁷⁵ Each taxpayer maintained a permanent residence in another part of the state and wanted to deduct the expenses incurred for board and lodging while working in Kinston.⁷⁶ Following the reasoning in *Flowers*, the Court found that the construction workers' expenses were incurred because of a personal choice not to live and work in the same place.⁷⁷ Under the general

⁶⁶ 389 U.S. 299 (1967).

⁶⁷ *Id.* at 300.

⁶⁸ *Id.*

⁶⁹ *Id.* at 302–03.

⁷⁰ *Id.* at 303, 307.

⁷¹ *Id.* at 303–04.

⁷² *Id.* at 307 (Douglas, J., dissenting).

⁷³ *Id.* (quoting *Correll v. United States*, 369 F.2d 87, 89–90 (6th Cir. 1966)).

⁷⁴ 358 U.S. 59 (1958).

⁷⁵ *Id.* at 59.

⁷⁶ *Id.*

⁷⁷ *Id.* at 60.

rule of *Flowers*, a taxpayer cannot take advantage of § 162(a)(2) if the expenses are not required “by the exigencies of business.”⁷⁸ The Court in *Peurifoy* did however adopt the Tax Court’s exception to the general rule: when a taxpayer’s employment is temporary, expenses may be deductible under § 162(a)(2) even though they are not required “by the exigencies of business.”⁷⁹ Stated another way, taxpayers do not need a business reason for maintaining their place of residence, as long as their job away from home is temporary. While the exception appears to help taxpayers like those in *Peurifoy*—two of whom were away from home for less than a year—the Court found that the employment terms for all three taxpayers were not temporary and therefore the expenses were non-deductible.⁸⁰ Once again, the Court failed to address the definition of “home,” and instead decided the case on a “narrow question of fact.”⁸¹

As demonstrated above, courts have struggled to arrive at reasonable and coherent rules to apply § 162(a)(2) to address the complexities of everyday life for taxpayers who may not live where they work. Justice Rutledge accurately characterized the courts’ decisions in this way:

By construing “home” as “business headquarters”; by reading “temporarily” as “very temporarily” into [§ 162(a)(2)]; by bringing down “ordinary and necessary” from its first sentence into its second; by finding inequity where Congress has said none exists; by construing “commuter” to cover long-distance, irregular travel; and by conjuring from the “statutory setting” a meaning at odds with the plain wording of the clause, the Government makes over understandable ordinary English into highly technical tax jargon.⁸²

Moreover, courts have yet to grapple with the implications of their interpretations of the Tax Code on married couples or to address the resulting gender bias. Parts II and III of this Comment describe these problems and outline the argument for reform.

⁷⁸ *Id.* (citations omitted).

⁷⁹ *Id.* at 60–61. However, if a taxpayer’s employment was “indefinite” or “indeterminate,” expenses are not deductible under § 162(a)(2). *Id.*

⁸⁰ *Id.* at 61.

⁸¹ *Id.* at 60; *see also supra* note 53.

⁸² *Comm’r v. Flowers*, 326 U.S. 465, 479–80 (1946) (Rutledge, J., dissenting).

II. THE § 162(A)(2) "MARRIAGE PENALTY"

In allowing taxpayers to deduct lodging, meal, and travel expenses under § 162(a)(2), "Congress freed from taxation income spent on personal living expenses while on business trips."⁸³ The taxpayer who qualifies for the deduction receives a distinct advantage because he may deduct otherwise personal living expenses and thereby lower his tax liability.⁸⁴ Unfortunately, in the vast majority of cases, married taxpayers are unable to obtain the § 162(a)(2) deduction.⁸⁵ This section argues that courts have created a § 162(a)(2) marriage penalty by imposing four restrictions that target married taxpayers: (1) the principal place of business rule, (2) the overnight requirement, (3) the limitations to the temporary exception, and (4) the personal-versus-business distinction.⁸⁶ While single taxpayers are also limited in their ability to deduct § 162(a)(2) expenses, married taxpayers are disproportionately affected by these limitations because of their social and economic realities.⁸⁷

A. *How the "Principal Place of Business" Rule Is Particularly Harmful to Married Taxpayers*

The majority of courts have defined "home" for the purposes of § 162(a)(2) as a taxpayer's principal place of business.⁸⁸ By adopting a definition of "home" that is inconsistent with its ordinary meaning, courts took their first big step in limiting the § 162(a)(2) deduction for married taxpayers, albeit perhaps

⁸³ *James v. United States*, 308 F.2d 204, 206–07 (9th Cir. 1962); *see also* *Griesemer v. Comm'r*, 10 B.T.A. 386, 389 (1928) ("Simply because the amounts in question happen to be 'living' expenses in a strict sense does not prevent them from being deductible. . . .").

⁸⁴ *United States v. Correll*, 389 U.S. 299, 301–02 (1967) (noting that a taxpayer who receives a deduction for personal living expenses while on business travel receives "something of a windfall"); *James*, 308 F.2d at 207 (noting that the "discrimination may be substantial" when one taxpayer is allowed the deduction and another taxpayer is not); *see also supra* note 10.

⁸⁵ This Comment examines § 162(a)(2) cases from 1927 through 2008, specifically decisions where (1) the taxpayer is the husband and primary wage earner and his wife is the secondary wage earner; (2) the taxpayer is the wife and primary wage earner and her husband is the secondary wage earner; (3) the taxpayer is the husband and it is unclear whether he is the primary wage earner; (4) the taxpayer is a single male; and (5) the taxpayer is a single female. Taxpayers who are considered itinerant or "homeless" are outside the scope of this survey.

⁸⁶ *See infra* Part I.A–D.

⁸⁷ *See* *Davis*, *supra* note 16, at 216–18 (noting that the "social and economic reality" that is the traditional justification for joint filing for married couples in part no longer exists); *Lynch*, *supra* note 15, at 772–77 (discussing the application of the "tax home doctrine to deny deduction of business related living expenses . . . of married couples where the spouses work in different places").

⁸⁸ *See supra* Part I.B–C.

unintentionally. Recall the taxpayer in *Bixler* who maintained a family residence in Mobile, Alabama, but worked at state fairs and expositions throughout the country.⁸⁹ The court denied the taxpayer the deduction when he was traveling away from Mobile because it determined his tax home was his principal place of business, making “home” wherever the job took him.⁹⁰ To avoid duplicative living expenses, the taxpayer would have had to relocate his family from Mobile to Hammond in early-1922, from Hammond to Houston in mid-1922, and then from Houston back to Mobile in late-1922.⁹¹ In the alternative, the taxpayer could maintain his place of residence by quitting his job and risking unemployment.

Bixler demonstrates that the majority approach “assumes that an employee will locate the employee’s residence as close as possible to his or her workplace” and is able to avoid the cost of maintaining two homes, one at his principal place of business and one at his place of residence.⁹² The principal place of business definition disadvantages married taxpayers because such couples are less likely to relocate and significantly more likely to travel for business purposes than their single counterparts.⁹³ In comparison to single taxpayers, married taxpayers tend to form stronger ties to communities and are therefore less willing to move.⁹⁴ This is especially true in the case of married taxpayers with young children.⁹⁵ Additionally, married couples, who account for seventy-seven percent of all homeowners,⁹⁶ are often more reluctant to relocate because they are more likely to already own a home that they must

⁸⁹ See *supra* text accompanying notes 45–52.

⁹⁰ *Id.*

⁹¹ See *Bixler v. Comm’r*, 5 B.T.A. 1181 (1927) (failing to address the fact that the taxpayer’s family was in Mobile and that the taxpayer returned there for work in 1923).

⁹² See Ovsak, *supra* note 23, at 440 (describing problems with the “principal place of business” rule).

⁹³ See Evelyn Addante, *Air Travel Market Segments: A New England Case Study*, E-C026 TRANSP. RES. CIRCULAR 307, 309–11, 318 (2001), available at <http://onlinepubs.trb.org/Onlinepubs/circulars/ec026/ec026.pdf> (finding that “[m]en from family households who are traveling on business account for almost one-third of the resident-based air travel market from New England;” whereas business trips by women from a family household “account[] for 18 percent of commercial air trips” in the New England region).

⁹⁴ See Sam Gould & Larry E. Penley, *A Study of the Correlates of the Willingness to Relocate*, 28 ACAD. MGMT. J. 472, 472–73 (1985) (finding that length of age, job involvement, and time in area were negatively associated with the willingness to relocate).

⁹⁵ *Id.* at 473; see also U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2009, at 1 tbl.C3 (2009), available at <http://www.census.gov/population/www/socdemo/hh-fam.html> (finding that 66.8% of children under the age of eighteen live with both married parents).

⁹⁶ Tom Van Riper, *The Cost of Being Married Versus Being Single*, FORBES.COM, July 25, 2006, http://www.forbes.com/2006/07/25/singles-marriage-money-cx_tvr_06singles_0725costs.html.

then sell before moving.⁹⁷ Despite sometimes acknowledging the inequities that flow from this rule, courts have for the most part adopted a rule where the taxpayer's principal place of business is considered "home" and as a result consistently denied the deductions for married couples.⁹⁸

B. The "Overnight Requirement" Substantially Limits the Benefits of § 162(a)(2) for Married Taxpayers

The Supreme Court has added a requirement that a taxpayer must be away from home *overnight* to receive the § 162(a)(2) deduction.⁹⁹ In *Correll*, the taxpayer was a traveling salesman who left his place of residence early in the morning for work and returned in time for dinner with his family,¹⁰⁰ and he was denied the deduction because the taxpayer had not been away overnight.¹⁰¹ After *Correll*, a taxpayer is unable to deduct § 162(a)(2) expenses if he returns home at night, regardless of how far he travels each day. However, the taxpayer who travels the same distance but spends the night in a hotel can deduct personal expenses under § 162(a)(2).¹⁰²

Married taxpayers are particularly affected by this limitation because they are more likely to make daily long distance commutes than single taxpayers.¹⁰³ While a single taxpayer tends to be freer to travel overnight, a married taxpayer will often increase his daily commute to return home to his family at

⁹⁷ See Andrew Oswald, Theory of Homes and Jobs 1 (Sept. 18, 1997) (unpublished manuscript, on file with author) (finding that homeowners in Britain are less likely to move to find a new job and that homeownership therefore can lead to higher unemployment rates).

⁹⁸ See, e.g., *Comm'r v. Flowers*, 326 U.S. 465, 475 (1946) (Rutledge, J., dissenting) (noting that the taxpayer had worked in Jackson for thirty years, paid taxes and voted, sent his children to school, owned a house that he had built, and established a law firm).

⁹⁹ *United States v. Correll*, 389 U.S. 299, 304–05 (1967).

¹⁰⁰ *Id.* at 300.

¹⁰¹ *Id.* at 302–07.

¹⁰² Although the taxpayer who returns to his place of residence on a daily basis does not incur additional lodging expenses, he incurs the same meal and commuting costs as the taxpayer who spends the night in a hotel. However, the taxpayer who returns to his place of residence on a daily basis is unable to deduct such costs. See *James v. United States*, 308 F.2d 204, 206–07 (9th Cir. 1962). For an explanation of the difference between non-deductible commuting expenses and § 162(a)(2) travel expenses, see Tsilly Dagan, *Commuting*, 26 VA. TAX REV. 185, 190–92 (2006).

¹⁰³ See Heather Hofmeister & Detlev Lueck, Who Works Where, and How Does That Affect Family Life? The Impact of Work Location on Family Outcomes in Germany and the United States 9 (unpublished manuscript presented at the 2007 annual meeting of the American Sociological Association in New York, New York) (on file with author) ("Married men's commutes are longer than single men's commutes even when income is the same, which suggests that the long commute of married men implies a choice to commute longer in exchange for better residential options, perhaps as a family lifestyle strategy.").

night and help out with household tasks.¹⁰⁴ The overnight requirement makes it more difficult for families to spend time together because it creates a strong financial incentive for a taxpayer to stay away from his place of residence overnight.¹⁰⁵ Furthermore, the overnight requirement is inappropriate because it injects a time element into a provision that is primarily concerned with geography, i.e., where the taxpayer is.¹⁰⁶ Modern transportation provides an efficient means of traveling long distances in a short amount of time—a taxpayer can fly across the country in the morning, attend a business meeting, and return in time for dinner with his family.¹⁰⁷ A married taxpayer is more likely to take advantage of such an option but then is unable to deduct § 162(a)(2) expenses because of the overnight requirement. The Court in *Correll* acknowledged that the overnight requirement was an arbitrary rule, but ignored the plight of married taxpayers in the interests of simplifying the administration of § 162(a)(2).¹⁰⁸

C. The “Temporary” Exception Is Unrealistic for Families in Today’s Economy

In *Peurifoy*, the Supreme Court recognized an exception to the principal place of business rule when a taxpayer’s employment is “temporary,” because it is unreasonable to expect a taxpayer to uproot his family for a job that is neither permanent nor long-term.¹⁰⁹ However, the majority of married couples cannot take advantage of this exception because of the “business reason” rule created by the First Circuit in *Hantzis v. Commissioner* and the one-year limitation imposed by the statute.

In *Hantzis*, the First Circuit limited the temporary exception to situations where the taxpayer had a business reason for maintaining his place of residence away from his place of business.¹¹⁰ In *Hantzis*, the taxpayer resided in Boston, Massachusetts, with her husband.¹¹¹ She attended Harvard Law

¹⁰⁴ *Id.*

¹⁰⁵ See *Correll*, 389 U.S. at 299 (denying § 162(a)(2) deductions to a taxpayer who attempted to return daily to his place of residence).

¹⁰⁶ *Id.* at 307 (Douglas, J., dissenting).

¹⁰⁷ See Gerhardt, *supra* note 9, at 1 (“The advent of very efficient means of public transportation allows businessmen to travel great distances as part of their normal business operations.”).

¹⁰⁸ See *Correll*, 389 U.S. at 303 (“Any rule in this area must make some rather arbitrary distinctions . . .”).

¹⁰⁹ *Andrews v. Comm’r*, 931 F.2d 132, 137 (1st Cir. 1991) (citing *Peurifoy v. Comm’r*, 358 U.S. 59 (1958)).

¹¹⁰ *Hantzis v. Comm’r*, 638 F.2d 248 (1st Cir. 1981).

¹¹¹ *Id.* at 249.

School, and her husband was employed as a faculty member at Northeastern University.¹¹² During her second year of law school, she unsuccessfully tried to obtain employment in Boston for the following summer.¹¹³ Instead, she worked for ten weeks as a legal assistant in New York City, while her husband taught summer classes in Boston and remained in their family residence.¹¹⁴ She returned to their shared home in Boston after only ten weeks.¹¹⁵ After acknowledging the temporary exception, the court found her "tax home" was New York City because she had no business reason to maintain her residence in Boston, and therefore disallowed the deduction.¹¹⁶

Although a majority of courts have adopted the First Circuit's reasoning,¹¹⁷ the *Hantzis* decision is unrealistic for married couples. A spouse, like the taxpayer in *Hantzis*, will generally first search for job opportunities close to home before considering to work farther away.¹¹⁸ Regardless of how temporary the position might be, if a taxpayer is forced to work away from home, he will not be able to deduct expenses if he lacks a "business connection" to his place of residence.¹¹⁹ While a taxpayer's willingness to be geographically mobile gives him more job flexibility and reduces his potential for unemployment, a taxpayer should not have to move his family each time a new opportunity arises just to save duplicative living expenses.¹²⁰ This is especially true when the length of employment is uncertain and the taxpayer soon may change jobs again.¹²¹

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 255–56

¹¹⁷ *E.g.*, *Wilbert v. Comm'r*, 553 F.3d 544, 549 (7th Cir. 2009); *Henderson v. Comm'r*, 143 F.3d 497, 499–500 (9th Cir. 1998); *Andrews v. Comm'r*, 931 F.2d 132, 136–37 (1st Cir. 1991); *Yeates v. Comm'r*, 873 F.2d 1159, 1160–61 (8th Cir. 1989); *Koepke v. Comm'r*, No. 21111-05S, 2008 WL 5100850, at *4 (T.C. Dec. 4, 2008).

¹¹⁸ *See Hantzis*, 638 F.2d at 249, 255 (describing how taxpayer first attempted to obtain a job in Boston near her place of residence but failed and had to look in other cities); *Yeates*, 873 F.2d at 1160 (describing taxpayer who repeatedly tried to find a job near his place of residence).

¹¹⁹ *Hantzis*, 638 F.2d at 249, 255 (describing taxpayer who was only away from her residence for one summer).

¹²⁰ *See* Michael Luo, *For Growing Ranks of the White-Collar Jobless, Support with a Touch of the Spur*, N.Y. TIMES, Jan. 25, 2009, at A16 (describing the plight of an unemployed former manager who drove seven hours to another city for a job fair because his family's savings were rapidly dwindling).

¹²¹ *See Koepke*, 2008 WL 5100850, at *3–4 (denying the deduction although "[t]he reality of petitioner's situation was that he did not know how long he would be in any of the cities in which he worked or where he would go next").

The *Hantzis* decision is particularly harmful to families when one spouse becomes unemployed.¹²² Unemployment rates have soared recently and taxpayers have struggled to find job opportunities.¹²³ The average working taxpayer may have to accept whatever position is available, regardless of whether the job has long-term potential.¹²⁴ For example, in *Wilbert v. Commissioner*, a married taxpayer was laid off from his job in Minneapolis and found temporary employment in three different cities throughout the year.¹²⁵ While working, the taxpayer maintained his family residence in Minneapolis where his wife and children remained.¹²⁶ Applying *Hantzis*, the court denied him the benefit of the deduction because he no longer had a “business reason” for maintaining his place of residence in Minneapolis.¹²⁷

Unfortunately and not surprisingly, the couple in *Wilbert* is not alone—many married taxpayers find themselves in similar economic positions and are denied the deduction based on the *Hantzis* holding.¹²⁸ The decision in *Hantzis* destroys the one exception that still allowed married taxpayers to deduct duplicative travel expenses. The “business reason” rule is unreasonable, unrealistic, and inequitable in expecting the married taxpayer to relocate each time one spouse finds new work, regardless of financial ability.¹²⁹

¹²² See, e.g., *Wilbert*, 553 F.3d at 545–50 (explaining that a taxpayer lost his job near his place of residence and was unable to receive the deduction when he could only find temporary work in bigger cities); *Bogue v. Comm’r*, No. 24574-05, 2007 WL 1712639, at *4 (T.C. June 14, 2007) (same); *Farran v. Comm’r*, No. 20434-05, 2007 WL 1712715, at *4 (T.C. June 14, 2007) (same); *Riley v. Comm’r*, No. 21124-05, 2007 WL 1712775, at *4 (T.C. June 14, 2007) (same); *Stockwell v. Comm’r*, No. 21954-05, 2007 WL 1702608, at *3–4 (T.C. June 13, 2007) (same); see also Roberta F. Mann, *On the Road Again: How Tax Policy Drives Transportation Choice*, 24 VA. TAX REV. 587, 607 (2005) (“Workforce development and transportation policies are inexorably linked.” (quoting Angela Glover Blackwell, *Promoting Equitable Development*, 34 IND. L. REV. 1273, 1279 (2001))).

¹²³ Luo, *supra* note 120 (noting that white-collar unemployment rose to 4.6% in December 2008, up from 3% in 2007, and that blue collar unemployment rose to 11.3%).

¹²⁴ See *id.* (describing a former professional who shoveled snow when he could not find employment elsewhere).

¹²⁵ *Wilbert*, 553 F.3d at 546.

¹²⁶ *Id.*

¹²⁷ *Id.* at 548–49.

¹²⁸ See cases cited *supra* note 122.

¹²⁹ See Christopher W. Schoen, Note, *The Family Savings Account: A Practical Tax Incentive to Stimulate Personal Savings Rates*, 4 HOFSTRA PROP. L.J. 103, 104 (1990) (“For example, due to general inflation during the post-war period, many young families can no longer afford a house in major metropolitan areas.”).

D. *The Limited Availability of § 162(a)(2) for Married Taxpayers After Flowers*

After *Flowers*, a taxpayer who maintains a place of residence in one place and works in another is prevented from deducting § 162(a)(2) expenses because the decision to work away from home is characterized as “personal.”¹³⁰ The “personal-versus-business” analysis is flawed in two ways.¹³¹ First, the personal-versus-business distinction is the wrong inquiry in § 162(a)(2) cases. Section 162(a)(2) allows a taxpayer to deduct what is otherwise a non-deductible *personal* expense, such as lodging and meals.¹³² Such costs should be deductible because Congress created an exception under § 162(a)(2) to the general rule that personal, living, and family costs are *not* deductible.¹³³ By labeling a decision as “personal,” courts overlook the fact that a taxpayer who qualifies for § 162(a)(2) can deduct expenses that are personal, such as lodging and meals.¹³⁴ Stated another way, after *Flowers*, taxpayers are unable to deduct *personal* expenses under § 162(a)(2) because the expenses are characterized as *personal*. Such circular logic undoubtedly helps courts decide when a taxpayer’s expenses are deductible under § 162(a)(2) quickly, but certainly not fairly.¹³⁵

Secondly, the personal-versus-business distinction is particularly harmful to married taxpayers because it assumes that a taxpayer has only two personalities—one business, the other personal.¹³⁶ While the former is concerned exclusively with the taxpayer’s profit-seeking motive, the latter

¹³⁰ See *supra* Part I.B (discussing the *Flowers* opinion).

¹³¹ The personal-versus-business distinction has been discussed in other contexts. See Dagan, *supra* note 102 (arguing that the personal-versus-business distinction is inadequate in the context of commuting expenses); Marie Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307 (1998) (examining the personal-versus-business distinction as applied to child care and suggesting that the anti-subordination principle may prove useful).

¹³² Jay Katz, *The Deductibility of Educational Costs: Why Does Congress Allow the IRS to Take Your Education So Personally?*, 17 VA. TAX REV. 1, 9 (1997) (“Occasionally, the Code and the regulations do allow a deduction for some personal expenses if they also meet the requirements for a trade or business deduction under section 162(a).”).

¹³³ See *supra* notes 8–13 and accompanying text.

¹³⁴ See *supra* notes 8–13 and accompanying text.

¹³⁵ See Dagan, *supra* note 102, at 199 (“The seemingly technical business–personal distinction does not encompass the full range (and the nuances) of the normative considerations involved, and hence, needs to be substituted by more subtle devices.”).

¹³⁶ See William D. Popkin, *The Taxpayer’s Third Personality: Comments on Redlark v. Commissioner*, 72 IND. L.J. 41, 44 (1996) (finding that the personal-versus-business distinction is stretched to its limits in certain contexts such as commuting expenses).

focuses exclusively on the taxpayer's pleasure-seeking motive.¹³⁷ Courts automatically label a taxpayer's choice to live in one place and work in another as a decision fueled by the taxpayer's pleasure-seeking motive because they assume that a rational taxpayer would live closer to work to avoid incurring additional expenses.¹³⁸ Although the distinction has a "mechanically reassuring surface attraction," this rigid two-personality approach is inappropriate in the case of married taxpayers.¹³⁹ The distinction is based on the notion of an archetypal single male taxpayer who can always act in his own best interest.¹⁴⁰ However, the married taxpayer is constrained because he generally seeks the *family's* best interest, not just his own.¹⁴¹ Relevant to the § 162(a)(2) deduction, a married taxpayer chooses the locale of home and of work "to maximize utility for the household, not for the individual."¹⁴² Factors such as a spouse's occupation or a community that meets the family needs play an important role in location decisions.¹⁴³ Courts too quickly label the decision by married taxpayers to live and work in two different places as a non-deductible "personal" choice, regardless of the circumstances.¹⁴⁴

¹³⁷ See, e.g., *United States v. Gilmore*, 372 U.S. 39, 48 (1963) (characterizing an expense as business versus personal depends on the whether the "claim arises in connection with the taxpayer's profit-seeking activities" (emphasis added)).

¹³⁸ See, e.g., *Andrews v. Comm'r*, 931 F.2d 132, 138 (1st Cir. 1991) ("The guiding policy must be that the taxpayer is reasonably expected to locate his 'home,' for tax purposes, at his 'major post of duty' so as to minimize the amount of business travel away from home that is required; a decision to do otherwise is motivated not by business necessity but by personal considerations, and should not give rise to greater business travel deductions."); see also *Ovsak*, *supra* note 23, at 440 ("The [principal place of business rule] assumes that an employee will locate the employee's residence as close as possible to his or her workplace.").

¹³⁹ See *Ovsak*, *supra* note 23, at 440 ("That assumption [that an employee can live close to work] becomes complicated, however, when the employee cannot locate his or her residence near the workplace, such as where the employee's work-site is physically situated or restricted in such a way that the employee is literally precluded from living in close proximity to the work-site."); *Popkin*, *supra* note 136, at 43–45 (arguing that taxpayers have a third personality concerned with group redistribution of wealth).

¹⁴⁰ See Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 *YALE L.J.* 595, 653 (1993) (arguing that women can only effectively enter the work force when they begin to act like men).

¹⁴¹ Li Li Swain & Steven Garasky, *Migration Decisions of Dual-earner Families: An Application of Multilevel Modeling*, 28 *J. FAM. ECON. ISSUES* 151, 167 (2007) (concluding that "a family's decision to move is affected by many economic and non-economic factors").

¹⁴² Lueck & Hofmeister, *supra* note 103, at 4.

¹⁴³ See John T. Schuring, *Detroit's Renaissance Zones: The Economics of Tax Incentives in Metropolitan Location Decisions, the Results of the Zones to Date, and Thoughts on the Future*, 83 *U. DET. MERCY L. REV.* 329, 349 (2006) (stating that a taxpayer's choice of location includes non-economic factors such as "the quality of educational opportunities, crime, access to cultural resources, and overall municipal services").

¹⁴⁴ See *Lynch*, *supra* note 15, at 777 ("This evolution [of § 162(a)(2) case law] has entailed a rigid presumption that when spouses work in two places they do so as a matter of personal choice, whatever the facts may be.").

E. The § 162(a)(2) Marriage Penalty Should Be Rejected Because Married Taxpayers Are the Intended Beneficiaries of § 162(a)(2)

Congress provided the § 162(a)(2) deduction to ease the burden of the taxpayer who must travel for work and to encourage taxpayers to do business.¹⁴⁵ A taxpayer who travels for business is burdened because he maintains his place of residence where he incurs one set of non-deductible living expenses and works at another place where he incurs substantial and duplicative living expenses.¹⁴⁶ A married taxpayer, in particular, would appear to benefit from the deduction because he is more likely to maintain a place of residence where he incurs substantial, continuous, and duplicative living expenses while traveling.¹⁴⁷ Indeed, § 162(a)(2) provided significant relief to a married taxpayer prior to the emergence of the marriage penalty.¹⁴⁸ In creating the § 162(a)(2) marriage penalty,¹⁴⁹ courts have overlooked the fact that the provision exists as a “measure of justice” for the taxpayer who travels for

¹⁴⁵ See, e.g., *Comm’r v. Flowers*, 326 U.S. 465, 478 (1946) (Rutledge, J., dissenting) (“The only stated purpose, and it is clearly stated, not in words of art, is to relieve the tax burden when one is away from home on business.”); *Schurer v. Comm’r*, 3 T.C. 544, 546 (1944) (noting that § 162(a)(2) will help commercial travelers).

¹⁴⁶ E.g., *In re Bechtelheimer*, 239 B.R. 616, 621 (Bankr. M.D. Fla. 1999); see also *Brown v. Comm’r*, 13 B.T.A. 832, 834 (1928) (“Congress undoubtedly intended that the taxpayer’s personal expenditures in maintaining his usual place of abode should not be deducted, but that all expenditures made by the taxpayer in addition to those amounts if incurred in carrying on a trade or business should be deducted in determining net income.”); *supra* note 11 and accompanying text.

¹⁴⁷ See *Van Riper*, *supra* note 96 (“Newly married couples also tend to purchase a house or condo within a couple of years. This allows them to accrue equity—a positive thing—but also forces them to incur big expenses, like household maintenance, homeowners and life insurance, and furniture.”).

¹⁴⁸ Compare *Wallace v. Comm’r*, 144 F.2d 407, 411 (9th Cir. 1944) (wife who maintained marital residence in San Francisco obtained deduction for expenses incurred while working in Los Angeles), and *Stairwalt v. Comm’r*, 11 T.C.M. (CCH) 902 (1952) (wife who maintained marital residence in New York City and worked in Wilmington, Delaware obtained deduction), with *Comm’r v. Flowers*, 326 U.S. 465, 473 (1946) (taxpayer who maintained personal residence in Jackson, Mississippi, and worked in Mobile, Alabama, was denied deduction because expenses were “incurred solely as the result of the taxpayer’s desire to maintain a home in Jackson while working in Mobile”). Compare *Schurer*, 3 T.C. at 546–7 (husband who maintained marital residence in Pittsburgh and worked temporarily in different cities obtained deduction), and *Dennett v. Comm’r*, 7 B.T.A. 1173, 1173–75 (1927) (wife who maintained marital residence in Washington, D.C. and worked temporarily in Seattle obtained deduction), with *Hantzis v. Comm’r*, 638 F.2d 248, 255 (1st Cir. 1981) (wife who maintained marital residence in Boston and worked one summer in New York City was denied deduction because she had “no business ties to Boston that would bring her within the temporary employment doctrine”).

¹⁴⁹ See, e.g., *York v. Comm’r*, 160 F.2d 385 (D.C. Cir. 1947) (disallowing deduction for taxpayer who relocated and moved his family as soon as possible); *Hammond v. Comm’r*, 20 T.C. 285, 287–88 (1953) (disallowing deduction where both spouses worked in different cities); *Johnson v. Comm’r*, 8 T.C. 303, 308–09 (1947) (disallowing deduction for taxpayer who was promised by his employer that he would be able to return home the following year).

business so that he will not be taxed on costs he incurs to produce his income.¹⁵⁰ In light of the high costs associated with marriage,¹⁵¹ it is particularly egregious when married couples are unable to obtain the benefit of § 162(a)(2). While a single taxpayer often saves nearly five percent of his pay, married taxpayers often spend all of their monthly income on living expenses.¹⁵² Because of the § 162(a)(2) marriage penalty, married taxpayers continue to incur duplicative living expenses while traveling away from their place of residence, but they are unable to obtain a much-needed and much-deserved deduction.

III. THE PRIMARY VICTIMS OF THE § 162(A)(2) MARRIAGE PENALTY

Federal taxation is a “self-executing, nation-wide delivery system for behavioral change.”¹⁵³ Policy makers routinely use taxes to encourage taxpayers to engage in certain “socially desirable” activities—such as deductions for charitable contributions and exemptions for earnings on personal savings.¹⁵⁴ On the state level, legislatures frequently levy taxes to discourage taxpayers from purchasing “socially proscribed” goods and services, such as alcohol, tobacco, and, most recently, sugared beverages.¹⁵⁵ The imposition of these taxes likely has the desired effect of altering the behavior of taxpayers—that is, the taxpayer will make more charitable contributions or purchase less alcohol.¹⁵⁶ However, sometimes the real effect of a tax is clear only in its application, when certain unexpected consequences emerge. Regardless of their intended effects, taxes inevitably shape behavior,

¹⁵⁰ *Schurer*, 3 T.C. at 546.

¹⁵¹ See Van Riper, *supra* note 96 (finding that married couples are more likely to incur substantial expenses, like household maintenance, property taxes, and homeowners’ insurance, and single taxpayers who own a home stand to benefit more than married couples because single taxpayers have a lower standard deduction and can obtain the benefit of itemized deductions like mortgage interest and property taxes). “Once children enter the picture, married couples are really in financial trouble: The costs to raise and educate children are staggering.” *Id.* Married couples with children can spend three times more on monthly living costs than what the childless couple spends. *Id.*

¹⁵² *Id.*; cf. RICHARD FRY & D’VERA COHN, PEW RESEARCH CENTER, WOMEN, MEN AND THE NEW ECONOMICS OF MARRIAGE 1 (2010) (discussing the economic benefits of marriage).

¹⁵³ Mann, *supra* note 122, at 589–90.

¹⁵⁴ E.g., Schoen, *supra* note 129, at 106.

¹⁵⁵ E.g., Anemona Hartocollis, *City’s Health Commissioner, in a Medical Journal Article, Calls for a Tax on Soda*, N.Y. TIMES, Apr. 9, 2009, at A22 (citing Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 NEW ENG. J. MED. 1599 (2009)).

¹⁵⁶ R. Elder et al., *The Effectiveness of Tax Policy Interventions for Reducing Excessive Alcohol Consumption and Related Harms*, 38 AM. J. PREVENTIVE MED. 217, 217 (2010) (concluding that there is “strong evidence that raising alcohol excise taxes is an effective strategy for reducing excessive alcohol consumption and related harms”).

and their power to impact the character of everyday life cannot be overlooked.¹⁵⁷ It would be a dangerous mistake to blindly apply § 162(a)(2) because “deductions invoke the fundamental issues of tax policy.”¹⁵⁸ However, the courts and the IRS have repeatedly made this very mistake by restricting the availability of § 162(a)(2) without considering the implications of their decisions.¹⁵⁹ As a result, certain unintended and undesirable consequences have emerged and the two primary victims are dual wage earners and female taxpayers.¹⁶⁰

A. *Courts' Denials of § 162(a)(2) Deductions Creates an Untenable Catch-22 For Dual Wage Earners*

For dual wage earners, relocating the family is not just a matter of inconvenience; rather, one spouse may be required to quit his or her job, potentially causing the family a significant loss of income.¹⁶¹ Recall the married couple in *Hantzis*, where the husband continued to work in Boston, the couple's place of residence, while his wife, unable to find work in Boston, worked in New York for one summer.¹⁶² Despite her permanent return to Boston immediately thereafter, the court determined that the wife's principal place of business was in New York and denied the § 162(a)(2) deduction on this basis.¹⁶³ The court treated *her* choice not to relocate to New York as purely personal and disregarded the husband's employment position in Boston,¹⁶⁴ thereby encouraging married taxpayers to behave in a way that is unrealistic, inappropriate, and undesirable.

Although the § 162(a)(2) marriage penalty unfairly denies the deduction to single-earner couples, these taxpayers at the very least are able to avoid the

¹⁵⁷ See, e.g., McCaffery, *supra* note 16, at 988–1035 (providing “a positive description of the adverse effects on work and family structure generated by current tax law”).

¹⁵⁸ Dagan, *supra* note 102, at 244.

¹⁵⁹ See, e.g., Mann, *supra* note 122, at 590 (“The federal tax system influences urban transportation choices by failing to account for negative externality costs, and in some instances, actually subsidizing choices that result in significant environmental and social cost.”); McCaffery, *supra* note 16, at 1059 (arguing that the interaction of “tax law and real-world conditions pushes towards a traditional, gendered division of labor”).

¹⁶⁰ See Lynch, *supra* note 15, at 772 (noting that in cases where the husband and wife work in different places but maintain a place of residence together, the court's denial of the deduction is “[p]erhaps the most galling and high-handed application” of § 162(a)(2)).

¹⁶¹ See *id.*

¹⁶² *Hantzis v. Comm'r*, 638 F.2d 248, 249 (1st Cir. 1981).

¹⁶³ *Id.* at 255–56.

¹⁶⁴ See *id.* at 257 (“Her expenses associated with maintaining her New York residence arose from personal interests that led her to maintain two residences rather than a single residence close to her work.”).

costs of maintaining two homes.¹⁶⁵ Dual wage earners, however, face an untenable choice: both spouses can keep their jobs but continue to incur additional travel and duplicative living expenses, or one spouse can quit his or her job and the couple can relocate. By imposing the § 162(a)(2) marriage penalty, courts encourage a more traditional view of the family—one where the male is the sole wage earner—despite the fact that “more families have two earners for the family to achieve an acceptable living standard.”¹⁶⁶

B. Female Taxpayers Are The Primary Victims of the § 162(a)(2) Marriage Penalty

The § 162(a)(2) marriage penalty creates a disincentive for women in single-earner households to even enter the workforce¹⁶⁷ because women are significantly more likely to be the secondary wage earners in a marriage.¹⁶⁸ In comparison to single women, married women are much more sensitive to tax cuts and tax raises—cut their tax rates, they get jobs, but raise their taxes, they stay home.¹⁶⁹ A married woman is less likely to work if her potential wages do not exceed the cost of increased taxes and the costs of childcare services, housekeeping, and non-deductible work expenses, such as § 162(a)(2) expenses.¹⁷⁰

Even when the wife joins the workforce, the § 162(a)(2) marriage penalty creates a disincentive for the wife to remain in the workforce. In cases where the husband travels, a wife may lose her job because the family is more likely

¹⁶⁵ See *supra* Part II.A.

¹⁶⁶ Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 66 (1993); see also Steven Greenhouse, *Back to the Grind*, N.Y. TIMES, Sept. 19, 2009, at B1 (arguing that the recession is driving highly-educated women who had left work to stay at home with their children to return to the workplace).

¹⁶⁷ See McCaffery, *supra* note 16, at 994 (“[M]arried women are at the margins of the workforce—in terms of wages, power, and costs—and the tax laws contribute to this marginalization by putting the wife’s income at the margins of the family’s.”).

¹⁶⁸ See, e.g., *id.* (“Men are more than five times more likely to be the single earner in single-earner households.”). However, married women are increasingly earning the title of the primary bread winner. See, e.g., FRY & COHN, *supra* note 152, at 2 (“[O]nly 4% of husbands had wives who brought home more income than they did in 1970, a share that rose to 22% in 2007 . . .”).

¹⁶⁹ See, e.g., U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2009) [hereinafter DATABOOK] (“Unmarried mothers have higher participation rates [in the labor force] than married mothers. In 2008, 76 percent of unmarried mothers were in the labor force, compared with 69 percent of married mothers.”); Virginia Postrel, *The U.S. Tax System Is Discouraging Married Women from Working*, N.Y. TIMES, Nov. 2, 2000, at C2 (arguing that the relationship between taxes and labor-force participation is strongest for married women).

¹⁷⁰ Davis, *supra* note 16, at 210.

to relocate to the *husband's* principal place of business to avoid duplicative living expenses.¹⁷¹ Even if the family does not relocate, the additional costs of the husband's travel may nevertheless outweigh the value of the wife's income and she may be encouraged to quit her job.¹⁷² On the other hand, even if the wife travels, the family is less likely to relocate to *her* place of business because her gains from opportunities rarely outweigh her husband's losses from moving.¹⁷³ And if the family does not relocate, she may have to quit her job because the *Hantzis* and *Flowers* decisions prohibit her from receiving any deduction under § 162(a)(2).¹⁷⁴ Lastly, a working wife is less likely to meet the overnight requirement in *Correll* than her working husband. To fulfill her household duties, she is more likely to travel long distances during the day and return to her personal residence at night,¹⁷⁵ and consequently not qualify for the deduction.¹⁷⁶

In sum, the § 162(a)(2) marriage penalty creates a disincentive for women to enter into and remain in the work force, thereby encouraging a more traditional view of the family where the husband is the single wage earner and the wife remains at home.¹⁷⁷ Permitting the tax code to encourage this traditional view of the family is not appropriate because married women have become a significant part of the workforce, driven by both personal and economic reasons.¹⁷⁸ Moreover, an increasing number of women are self-employed¹⁷⁹ and would therefore benefit directly from the deduction if not for

¹⁷¹ See William T. Bielby & Denise D. Bielby, *I Will Follow Him: Family Ties, Gender-Role Beliefs, and Reluctance to Relocate for a Better Job*, 97 AM. J. SOC. 1241, 1243 (1992) (“[T]he labor market is structured such that husbands’ gains from opportunities elsewhere tend to exceed wives’ losses from moving, so tied movers are disproportionately female.”).

¹⁷² See Davis, *supra* note 16, at 210 (“A taxpayer will enter the labor force only if it is to his or her economic advantage.”).

¹⁷³ See Bielby & Bielby, *supra* note 171, at 1243.

¹⁷⁴ See *supra* Part IIC–D.

¹⁷⁵ See Carol J. Gaumer et al., *Enhancing Organizational Competitiveness: Causes and Effects of Stress on Women*, 21 J. WORKPLACE BEHAV. HEALTH 31, 33 (2005) (noting that women assume seventy percent of all household responsibilities).

¹⁷⁶ See *supra* Part IIB.

¹⁷⁷ See McCaffery, *supra* note 16, at 1059 (arguing that interaction of “tax law and real-world conditions pushes towards a traditional, gendered division of labor”).

¹⁷⁸ See, e.g., U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, NEWS: EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2008, at 2, available at http://www.bls.gov/news.release/archives/famee_05272009.pdf (concluding that in 2008, the husband and wife were both employed in 51.4% of married-couple families and in 62.1% of married-couple families with children); Greenhouse, *supra* note 166 (arguing that the recession is driving highly-educated women who had left work to stay at home with their children to return to the workplace); McCaffery, *supra* note 140, at 601 (“[A] massive number of women, especially married women, have entered the paid labor force.”).

¹⁷⁹ DATABOOK, *supra* note 169, at 3.

the § 162(a)(2) marriage penalty. Women already face substantial hurdles in entering and remaining in the work force, making the § 162(a)(2) marriage penalty even more unacceptable. The wage gap—which still exists for married women and is detrimental to their ability to further their careers—is one such hurdle.¹⁸⁰ Another obstacle is the “marriage penalty” that exists in the progressive tax structure, making a married woman’s entry into the workforce more expensive.¹⁸¹ Additionally, the Earned Income Tax Credit creates its own “marriage penalty” that encourages more single-earner families than dual wage earners.¹⁸² Lastly, the failure to tax imputed income also contributes to a bias against labor-force participation by secondary earners.¹⁸³ In light of married women’s economic and social circumstances, the § 162(a)(2) marriage penalty is egregious.

IV. THE REMEDY

[T]o judicially innovate a meaning of “home” as the taxpayer’s “place of business . . . ,” would, we think, operate to thwart the obvious purpose of Congress to tax *net* income.¹⁸⁴

This Comment illustrates the existence of the § 162(a)(2) marriage penalty and demonstrates the need for reform. In this Part, this Comment proposes a statutory adoption of a special provision for married couples, whereby “home” is defined as a taxpayer’s “place of residence.” A constitutional challenge based on the application of § 162(a)(2) will likely fail because the Supreme Court has rejected similar challenges to other tax provisions.¹⁸⁵ Federal legislation is therefore a more appropriate vehicle for change than the Supreme Court because, where notions of fairness and equity are implicated, the Court

¹⁸⁰ See, e.g., McCaffery, *supra* note 140, at 600 (“Almost all of the existing wage gap is between married men and ever-married women; remove them from the analysis, and women and men receive virtually equal pay.”).

¹⁸¹ See *supra* note 16 and accompanying text.

¹⁸² See, e.g., McCaffery, *supra* note 16, at 995.

¹⁸³ See e.g., *id.* at 1002–03 (“Virtually all of the services that the spouse who stays at home performs constitute untaxed imputed income. . . . By performing these services herself, the wife obtains a tax benefit for the family: it is precisely as though she were receiving a discount of her marginal tax rate.”).

¹⁸⁴ *Wallace v. Comm’r*, 144 F.2d 407, 411 (9th Cir. 1944) (emphasis in original).

¹⁸⁵ See *Leathers v. Medlock*, 499 U.S. 439, 451 (1991) (“Inherent in the power to tax is the power to discriminate in taxation.”); Leo P. Martinez, *The Trouble with Taxes: Fairness, Tax Policy, and the Constitution*, 31 HASTINGS CONST. L.Q. 413, 427–28 (2004) (commenting that in the area of taxation, “[t]he Equal Protection Clause, the Privileges and Immunities Clause, the dormant Commerce Clause, and other constitutional doctrines have had minimal effect”).

traditionally has “toss[ed] the ball back to Congress for further play.”¹⁸⁶ This section argues that the place of residence definition is the appropriate solution for the following reasons: (1) it reduces the § 162(a)(2) marriage penalty while retaining certain limits on the deduction; (2) Congress has defined “home” as place of residence for other groups of taxpayers based on their unique characteristics; and (3) Congress has a strong interest in supporting both families and working women.¹⁸⁷

A. *The Adoption of “Home” as Place of Residence Will Significantly Decrease the Magnitude of the § 162(a)(2) Marriage Penalty*

Under the place of residence definition—instead of the principal place of business rule—married couples will not be sanctioned by courts for refusing to relocate their families each time a new job opportunity arises.¹⁸⁸ Instead, a married taxpayer will be able to deduct expenses under § 162(a)(2) while traveling away from his personal residence for business purposes. The personal-versus-business distinction will not punish a decision not to relocate that is made in the best interest of the family.¹⁸⁹ By defining “home” in its ordinary way, Congress can avoid inequitable outcomes like *Hantzis* and *Wilbert*, which relied on unrealistic expectations of a taxpayer’s ability to relocate for a new or temporary job.¹⁹⁰ Under the proposed statutory change, a dual-earner couple would not have to decide which spouse’s income is more important because both husband and wife could maintain their occupations.¹⁹¹ Married women also stand to benefit from the change because the potential for § 162(a)(2) gender bias is reduced.¹⁹² Thus, under the place of residence definition, a married woman would not be as likely to have to follow her

¹⁸⁶ Martinez, *supra* note 185, at 445–46 (arguing further that “the Supreme Court has been reluctant to incorporate the notion of fairness in its review of taxation”); *see also* Katz, *supra* note 132, at 91–92 (arguing that although education expenses are treated unfairly under the Tax Code, courts have “consistently upheld the validity of these regulations, making it unlikely that any court will declare them void”).

¹⁸⁷ Cf. Gerhardt, *supra* note 9, at 4 (arguing that defining “home” as “place of residence” is inconsistent with the goals of the statute).

¹⁸⁸ *See supra* Part II.A (arguing that the adoption of the principal-place-of-business rule is particularly harmful to married taxpayers who are not able to relocate).

¹⁸⁹ *See supra* Part II.D (demonstrating that *Flowers* substantially limited the availability of § 162(a)(2) for married taxpayers by focusing on an inappropriate personal-versus-business distinction).

¹⁹⁰ *See supra* Part II.C (discussing why the temporary exception applied by the courts is based on assumptions that are unrealistic for families in today’s economy).

¹⁹¹ *See supra* Part III.A (explaining why the courts’ denials of § 162(a)(2) for dual wage earners is particularly unjust because it creates an untenable catch-22).

¹⁹² *See supra* Part II.B (arguing that female taxpayers are the primary victims of the § 162(a)(2) marriage penalty).

husband to his job location, even where he is the primary wage earner. Moreover, this solution remains true to the words of the statute and to Congress's stated desire to alleviate the burden on the taxpayer whose business requires travel.¹⁹³

The proposed change is limited in its potential for abuse because married taxpayers still are subject to both the temporary and the overnight requirements.¹⁹⁴ Although not every married taxpayer will obtain the deduction, the proposed change will help to significantly decrease the existing marriage penalty.¹⁹⁵ This resolution represents a compromise between married taxpayers who deserve the deduction and the IRS and courts who want to limit the availability of a deduction of otherwise non-deductible expenses. Additionally, Congress generally prefers "piecemeal and limited changes" to the Tax Code as opposed to complete statutory overhauls that can cost billions of dollars in lost revenues.¹⁹⁶ The potential for abuse is also limited because married taxpayers likely will not make a decision to maintain two homes *solely* to qualify for the deduction: Taxpayers who receive the deduction will continue to incur the expenses of maintaining two homes and the more intangible cost of being separated from one's spouse and children.

B. Congress Has Adopted the Place of Residence Rule for Other Groups of Taxpayers

This Comment's proposal to create a statutory exception for a group of similarly situated taxpayers is not unprecedented. In the case of a taxpayer who has no principal place of business, such as a salesperson or a construction

¹⁹³ See *supra* Part II.E (arguing that the § 162(a)(2) marriage penalty should be rejected because married taxpayers are the intended beneficiaries of § 162(a)(2)).

¹⁹⁴ One potential concern is that the overnight requirement may be too restrictive for a married woman who tend to undertake more daily commutes. However, the overnight requirement will not be too restrictive because a married woman generally works close to her place of residence and travels significantly less than her husband. The husband is more likely travel; however, both taxpayers will benefit from the deduction. See BUREAU OF TRANSP. STATISTICS, U.S. DEP'T OF TRANSP., TRANSPORTATION STATISTICS ANNUAL REPORT 76 (2005), available at http://www.bts.gov/publications/transportation_statistics_annual_report/2005/html/chapter_02/long_distance_travel_by_women.html (noting that men make almost 8 out of every 10 of long-distance business trips and long distance business travel constitutes 21% of males' long-distance trips compared with 9% for females).

¹⁹⁵ A review conducted for this Comment examined thirty-three case decisions from 1927 to 2008 in which married taxpayers were denied the deduction and concluded that married taxpayers would have obtained the deduction in the majority of these cases (eighteen cases) under the place of residence rule.

¹⁹⁶ See Katz, *supra* note 132, at 91-95 (arguing that educational expenses should be deductible but complete overhaul of the statute is unlikely because substantial deductions would then be available to taxpayers).

worker, courts define "home" as the taxpayer's place of residence.¹⁹⁷ Courts created this exception because it would be unreasonable to expect a taxpayer who moves from one job to the next to relocate his place of residence each time the job location changes.¹⁹⁸ To receive the benefit of the exception, the traveling taxpayer must prove that he incurs substantial, duplicative, and continuous expenses at place of residence when he is traveling away from that residence.¹⁹⁹ Second, as part of the Military Family Tax Relief Act of 2003, Congress added a new subsection to § 162.²⁰⁰ Under § 162(p), a member of the armed forces is considered "away from home" under § 162(a)(2) when he is traveling away from his *place of residence* in connection with his service.²⁰¹ Congress reasoned that the principal place of business definition was inappropriate because of the unique travel demands and financial challenges of military taxpayers.²⁰² Third, although § 162(a) deductions are generally not available to persons whose jobs require them to travel or relocate for a period of over one year, Congress carved out an exception for federal employees participating in federal criminal investigations,²⁰³ presumably because such

¹⁹⁷ See *Leach v. Comm'r*, 12 T.C. 20, 21 (1949) (allowing deduction for a construction worker who maintained a place of residence in Florence, Alabama, but traveled forty-nine weeks during the year); *Gustafson v. Comm'r*, 3 T.C. 998, 999–1000 (1944), *nonacq. in result*, I.R.S. Announcement, 1973-2 C.B. 1, 1973 WL 157513 (allowing deduction for a salesman who claimed that his residence was with his married sister in Greenville, Iowa, and spent fifty-two weeks traveling for business); see also *supra* note 43 and accompanying text.

¹⁹⁸ See *Andrews v. Comm'r*, 931 F.2d 132, 137 (1st Cir. 1991) (explaining that, with regard to itinerant and temporary workers, "[t]he courts and the Commissioner have agreed that a taxpayer cannot be expected to relocate her primary residence to a place of temporary employment").

¹⁹⁹ E.g., *In re Bechtelheimer*, 239 B.R. 616, 622 (Bankr. M.D. Fla. 1999) (citing *James v. United States*, 308 F.2d 204, 207 (9th Cir. 1962)).

²⁰⁰ Military Family Tax Relief Act of 2003, 26 U.S.C. §§ 101–140 (2006). The Act also provides members of the Armed Forces with tax breaks for death benefits, sale of a principal residence, and education costs. *Id.* §§ 102, 121, 127.

²⁰¹ 26 U.S.C. § 162(p) (2006). The statute reads as follows:

For purposes of subsection (a)(2), in the case of an individual who performs services as a member of a reserve component of the Armed Forces of the United States at any time during the taxable year, such individual shall be deemed to be away from home in the pursuit of a trade or business for any period during which such individual is away from home in connection with such service.

Id.

²⁰² 149 CONG. REC. H10364-02, H10370 (daily ed. Nov. 5, 2003) (statement of Sen. Cardin) ("[Congress] should recognize the fact that [military families] have additional expenses that should be treated fairly in our tax code, and . . . I hope the provisions in this bill are a starting point, not an ending point for dealing with these tax issues. So we can try to provide some appropriate relief to our military families.").

²⁰³ 26 U.S.C. § 162(a) (2006) provides, in relevant part:

For purposes of paragraph (2) [which allows a taxpayer to deduct traveling expenses incurred while away from home in the pursuit of a trade or business], the taxpayer shall not be treated as

taxpayers travel constantly for work, and it would be unreasonable to expect them to relocate each time the primary location of their jobs changed. Lastly, the Tax Code specifically defines “home” for members of Congress as *place of residence* because such taxpayers must reside in their home districts and travel to Washington, D.C. for a significant portion of their time.²⁰⁴ Arguably, married couples are as constrained as many of these taxpayers who have been granted specific exceptions. As in the case of a salesperson or construction worker, it is unreasonable to require a married taxpayer to “carry his home on his back regardless of the fact that he maintains his family at an abode which meets all accepted definitions of ‘home.’”²⁰⁵ Like a member of Congress who is unable to relocate, a secondary wage earner may be unable to move her family to where she works because that would require the primary wage earner to quit his job.²⁰⁶ A non-military married taxpayer may experience financial difficulties similar to those faced by a military family, as did the husband in *Wilbert* who lost his job and then could not afford to move his family each time he switched temporary jobs.²⁰⁷ However, such strained reasoning is unnecessary—the existing exceptions are relevant because they demonstrate the willingness of Congress and the courts to consider the unique characteristics of a group of taxpayers when § 162(a)(2) is being interpreted unreasonably. The adoption of “home” as place of residence is equally appropriate for married taxpayers because it is more equitable and reasonable in light of the unique characteristics of their demographic.²⁰⁸

being temporarily away from home during any period of employment if such period exceeds 1 year. The preceding sentence shall not apply to any Federal employee during any period for which such employee is certified by the Attorney General (or the designee thereof) as traveling on behalf of the United States in temporary duty status to investigate or prosecute, or provide support services for the investigation or prosecution of, a Federal crime.

²⁰⁴ 26 U.S.C. § 162(a) also provides:

For purposes of the preceding sentence [which allows a taxpayer to deduct traveling expenses incurred while away from home in the pursuit of a trade or business], the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of \$3,000.

²⁰⁵ *Peurifoy v. Comm’r*, 358 U.S. 59, 62 (1958) (Douglas, J., dissenting).

²⁰⁶ *See Hantzis v. Comm’r*, 638 F.2d 248, 249 (1st Cir. 1981) (denying taxpayer deduction for travel expenses that she incurred while working in New York for ten weeks on the grounds that her husband, the primary wage earner, was located in Boston).

²⁰⁷ *See supra* notes 120–29 and accompanying text.

²⁰⁸ *See supra* Part II.A–D (arguing that courts and the IRS have created a § 162(a)(2) marriage penalty because a married taxpayer is more likely to be constrained in decision making).

C. The Adoption of "Home" as Place of Residence Comports with Congress's Interest in Promoting Working Families and Encouraging Women to Work

Congress has demonstrated its interest in promoting working families and encouraging women to work by frequently enacting laws to benefit these two groups. For example, under the Equal Pay Act of 1963, Congress protected female employees by abolishing wage discrimination based on sex.²⁰⁹ Under the Family and Medical Leave Act of 1993, Congress protected working families by allowing a qualified employee to take job-protected leave, in part "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."²¹⁰ In its findings, Congress recognized that the number of families in which both parents work has increased significantly, and "due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men."²¹¹ Most recently, Congress passed the American Recovery and Reinvestment Act of 2009, which includes three personal tax measures aimed at supporting working families: (1) The "Making Work Pay" Tax Credit reduces taxes for working families; (2) an increase in the Earned Income Tax Credit reduces the "EITC marriage penalty;" and (3) an increase in the Child and Dependent Care Tax Credit helps taxpayers with child care expenses.²¹²

Under the place of residence definition, married taxpayers would save costs and avoid relocating their families each time a new job opportunity arose. Married women would also benefit from the change because the potential for the § 162(a)(2) gender bias would be reduced. Congress can continue to support working families by adopting place of residence as "home."

²⁰⁹ Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006).

²¹⁰ Family and Medical Leave Act of 1993, 29 U.S.C. § 2601(b)(1) (2006).

²¹¹ 29 U.S.C. § 2601(a) (2006).

²¹² American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat 115 (2009). The "Making Work Pay" tax credit will provide up to \$500 per person, or \$1,000 per working family, and will completely eliminate income taxes for ten million Americans. BarackObama.com, Barack Obama's Comprehensive Tax Plan, http://www.barackobama.com/pdf/taxes/Factsheet_Tax_Plan_FINAL.pdf (last visited Jan. 27, 2010). The Child and Dependent Care Tax Credit allows low-income families to receive up to a fifty-percent credit for their child care expenses. *Id.*

CONCLUSION

The failure of the Supreme Court to clarify when a taxpayer is considered “away from home” for purposes of § 162(a)(2) has resulted in a marriage penalty that prevents married taxpayers from receiving an earned deduction. While “[i]t is tempting to conclude that fairness is not relevant to taxation[,] . . . this would contradict the wide acceptance [that] fairness has correctly received in the formulation of tax policy.”²¹³ The marriage penalty created by increasingly narrow interpretations of § 162(a)(2) and the resulting gender bias are unacceptable. Congress legislated in 1921 to relieve the burden on the traveling taxpayer, and Congress must now clarify the statute to provide relief for the intended beneficiaries of the deduction.

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²¹³ Martinez, *supra* note 185, at 445.

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