Louisiana Law Review

Volume 78
Number 2 *Spring 2018*

Article 8

3-26-2018

Negating the Cost of "I Do": Ending the United States Tax Code's Family Penalty Through Permissive Joint Filing

Christine D. Allie

Negating the Cost of "I Do": Ending the United States Tax Code's Family Penalty Through Permissive Joint Filing

Christine D. Allie[*]

In June 2016, Republicans in the House of Representatives announced their vision for a simplified tax code built for economic growth in a 35 page policy paper released as part of a six part series.[1] In November 2016, Republican Donald Trump was elected as the 45th President of the United States, which, along with the elections of a Republican-controlled House and Senate, allowed for significant changes to the United States' tax structure to become law on December 22, 2017.[2] Though Congress purports to strive for simplicity, support for families, fairness, and progressivity, these changes fell short of meaningful progress in moving toward these goals. This Article argues that such fairness and support for families may only be expressed through a code that eliminates the family tax penalty created by application of the Head of Households filing status and the mandated filing status based on marriage. To support the family, the tax code must end its use of marital status as a measure of economic circumstances where it penalizes the family.

---

* Assistant Professor of Law, Delaware Law School. I am grateful for my husband, Stuart, and newborn daughter, Clare Rose (July 14, 2016), who have inspired this paper. Thanks also to the 2017 Junior Tax Workshop participants and the Honorable Aida Wasserstein for comments on earlier drafts.

1. "A Better Way" is a series of six policy papers on Poverty, National Security, The Economy, The Constitution, Health Care, and Tax Reform available at the Speaker of the U.S. House of Representative's website https://abetterway.speaker.gov/, which are presented as the GOP's vision for a confident America, at home and abroad. *See A Better Way*, SPEAKER OF THE HOUSE OF REPRESENTATIVES, https://abetterway.speaker.gov/ (last visited Jan. 13, 2018) [https://perma.cc/Q443-LZHH]. The introduction of a new tax code has been a persistent initiative for recent Congresses, with Congressmen regularly citing its complexity, having grown from 26,000 pages in 1986 to about 70,000 pages today.

2. Donald Trump secured 304 electoral votes to Hilary Clinton's 227, with 270 electoral votes needed to win. The 2016 General Election formed a 115th United States Congress with 52 Republican senators, out of 100 total senators, and 241 Republican Representatives in the U.S. House of Representatives, out of 435 total Representatives, with 218 seats needed for control. FEDERAL ELECTIONS 2016, FED. ELECTION COMM'N (Dec. 2017). The changes to the tax structure were enacted as Pub. L. No. 115-97, 131 Stat. 2054 (2017).

TABLE OF CONTENTS

INTRODUCTION

That ubiquitous and seemingly amiable query of "what do you do?" when encountering new acquaintances tends to lead to an awkward moment for many tax practitioners. Upon divulging their field, accountants and tax attorneys likely are responded to with stiff smiles lined with a smidge of pity; though, those persons called to the profession know that they work in a dynamic area of practice that should be met with envy rather than pity. The study of a nation's tax system is quite remarkable in considering that nation's values—where that system places the burden of taxation indicates who it believes should contribute financially to the well-being of the nation. Conversely, when a party receives a tax deduction or a tax credit[3] for certain expenditures or actions, the country is indicating its support for those expenditures or actions. Through the tax code, the American citizenry purports to support children, home ownership, environmentally friendly initiatives, health insurance, and much more.[4]

---

3. Tax credits provide a dollar-for-dollar reduction of a taxpayer's income tax liability. In other words, a $100 tax credit reduces the taxpayer's tax liability by $100. On the other hand, tax deductions reduce a taxpayer's taxable income and, as a result, only reduce the taxpayer's tax liability by an amount equal to the amount of the tax deduction, multiplied by the taxpayer's marginal tax rate. Thus, a $100 tax deduction reduces the income of a taxpayer in the 25% marginal tax bracket by $25. These examples illustrate two points. First, a tax credit always is worth more than a dollar-equivalent tax deduction because the deduction reduces the tax liability by only a percent of the deduction amount, unless the taxpayer is subject to a 100% marginal tax rate. Second, the benefit provided by a tax deduction increases as the taxpayer's marginal tax rate increases; the tax benefit associated with a tax credit does not. For example, a taxpayer in the 25% marginal tax bracket receives a $25 tax benefit—that is, reduction in tax liability—from a $100 tax deduction, while a taxpayer in a 33% tax bracket receives a $33 tax benefit from the same deduction. Axiomatically, those taxpayers who earn more benefit more from an identical tax deduction. *See, e.g.*, Alvin C. Warren, Jr., *The Relationship between a Credit and a Deduction for the Foreign Taxes of a Multinational Corporation* (Harvard Pub. Law, Working Paper No. 14-23, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442306 [https://perma.cc/ED92-WT92].

4. Children and childcare are supported through myriad Internal Revenue Code provisions including the exemption for expenses for dependent care, § 21, the Child Tax Credit, § 24, and dependent care assistance programs, § 129. Home ownership is subsidized through the Qualified Residence Mortgage Interest Deduction, § 163(h)(3). Green initiatives are supported by the energy credit, § 48, a credit for nonbusiness energy property expenditures, § 25C, and the Residential Energy Efficient Property Credit, § 25D. Health insurance is supported by the exclusion of the value of such insurance provided by an employer to an employee from the employee's gross income under § 106, as well as through the refundable

Keeping these national values in mind, deductions and credits that provide greater value to an unmarried couple than to a dual income, wedded pair earning the same amount are tough to reconcile. There is an inherent conflict with state-mandated filing statuses[5] and phase-outs[6] that

---

credit for coverage under a qualified health plan, § 36B. *See* I.R.C. §§ 21, 24, 25C, 25D, 36B, 48, 106, 129, 163(h)(3) (2012).

5. A taxpayer's "filing status" is the mechanism that the Internal Revenue Code uses to determine a taxpayer's filing requirements, standard deduction, eligibility for certain credits and deductions, and, ultimately, tax liability, by determining which tax rate schedule the taxpayer must use. There are five filing statuses: (1) Single; (2) Married Filing Jointly; (3) Married Filing Separately; (4) Head of Household; and (5) Qualifying Widow(er) with Dependent Child. *See IRS Tax Tip 2011-09*, TAXING SUBJECTS (Jan. 13, 2011), https://taxingsubjects.com/our-blog/taxnews/irs-tax-tip-2011-09/ [https://perma.cc/96UF-5TQZ]. A taxpayer's filing status results from the taxpayer's marital status and family situation, that is, whether or not the taxpayer has dependents. *Id*; *see also* IRS, PUBLICATION 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION 6 (2015), https://www.irs.gov/pub/irs-prior/p501--2015.pdf [https://perma.cc/UCC9-ABWE].

6. A "phase-out" refers to a situation in the tax code in which the value of a tax benefit—a deduction or credit—is reduced as the taxpayer's income rises. Phase-outs occur because of congressional preferences to target tax benefits towards middle and lower-income households and, additionally, to limit the loss of revenue resulting from the tax deduction or credit. Phase-outs reduce tax benefits at different rates depending on the particular code provision to which they relate. Many phase-out provisions reduce the underlying benefit—the deduction or credit—at a constant rate over an income range. *See, e.g.*, I.R.C. § 25 (providing for a reduction of the American Opportunity Tax Credit ratably over a $10,000 range); *see also id.* § 23 (reducing the adoption tax credit over a $40,000 income range). Some phase-outs, however, reduce the underlying tax benefit by a specified amount for each fixed increment of income. *See, e.g.*, § 24 (decreasing the amount of the child tax credit available to a taxpayer by $50 for each $1,000, or part thereof, of income above the phase-out threshold). Phase-outs with this characteristic reduce the underlying tax benefit by the same amount—in the case of the child tax credit, by $50—regardless of whether the taxpayer just crosses the offending threshold or significantly exceeds that threshold. Thus, despite exceeding the threshold for the child tax credit by a single dollar, a taxpayer will see the credit reduced by $50—the same result that would have occurred if the threshold had been exceeded by $999. Phase-outs not only reduce tax benefits received by higher income taxpayers—they also increase these taxpayers' effective marginal tax rates. *See* CONG. BUDGET OFF., EFFECTIVE MARGINAL TAX RATES FOR LOW AND MODERATE INCOME WORKERS (Nov. 2012); *see also* MICHAEL SCHUYLER, INST. FOR REAS. ON THE ECON. OF TAX'N, ECONOMIC POLICY BULLETIN NO. 83, PHASE-OUTS INCREASE TAX RATES AND TAX COMPLEXITY (Mar. 2001); Robert J. Peroni, *Reform in the Use of Phase-Outs and Floors in the Individual Income Tax System*, 91 TAX NOTES 1415 (Supp. May 28,

penalize the traditional family unit, blessed by the state's seal of matrimony, in favor of similarly situated families that eschew such government constructs. The tax system is one of progressive rates,[7] formed from values of horizontal and vertical equity,[8] and consists of numerous tax provisions that purportedly aim to reduce the overall tax liability for those caring for dependents.[9] Although most of those provisions were premised on the intention of supporting the family, Congress's recognition that unmarried persons form bonds and maintain responsibility for dependents has led to changes to the tax code. These changes have had the unintended consequence of potentially penalizing dual income-earning couples with kids ("DWIKs") through higher tax liabilities.[10]

2001); Alan D. Viard, *The Basic Economics of Pease and PEP*, 146 TAX NOTES 805 (Feb. 9, 2015).

7. A progressive tax structure is one in which an individual or family's tax rate increases as income increases. The United States federal income tax law achieves progressivity through the use of tax rate tables that divide a taxpayer's income into different brackets. As the taxpayer's income rises into a higher tax bracket, the portion of income that falls into that bracket is taxed at the higher rate, with the remaining amount taxed in the lower tax bracket(s). *See* I.R.C. § 1.

8. The principle of "horizontal equity" refers to the notion that similarly situated individuals should be taxed similarly. "Vertical equity" refers to the idea that the greater the taxpayer's means as measured by income, the greater the share of the overall income tax burden the taxpayer should bear. *See generally* David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE LAW & POL'Y REV. 43 (2006); Henry Ordower, *Horizontal and Vertical Equity in Taxation as Constitutional Principles: Germany and the United States Contrasted*, 7 FLA. TAX REV. 259 (2006); *Horizontal Equity*, WG&L TAX DICTIONARY (2014); *Vertical Equity*, WG&L TAX DICTIONARY (2014).

9. *See, e.g.*, the Child and Dependent Care Credit, § 21; Child Tax Credit, § 24; Hope and Lifetime Learning Credits, § 25A; Dependent Exemptions, § 151(b)–(c).

10. As used herein, the term "DWIK" refers to a dual income-earning married couple with kids. *See Life Style Acronyms*, EUREKA: THE 21ST-CENTURY GUIDE TO KNOWLEDGE, http://www.eurekaencyclopedia.com/index.php/Category:Life-Style_Acronyms (last visited Sept. 29, 2017) [https://perma.cc/NNF6-HNJZ]. It has long been recognized that

> [m]arriage complicates the design of a fair and progressive income tax. Once it acknowledges marriage, a tax regime must determine whether to treat the married couple as a taxpaying unit or whether each individual spouse must pay taxes separately. A fair tax system should include marriage neutrality, income pooling, and progressive tax rates; unfortunately, as Professor Boris Bittker famously illustrated, these principles conflict with each other, so, in designing a marriage tax, Congress cannot achieve all three goals.

The nation's tax laws have gone through numerous changes since the early twentieth century's conception of the income tax, which was assessed originally *per individual*—adding the filing statuses of Married Individuals Filing Joint Returns in 1948[11] and Heads of Households in 1951[12] to ameliorate certain perceived inequities. Social construction and customs regarding marriage and, particularly, the states' definitions of marriage in the United States, however, have gone through profound adjustments in the years since the conception of such filing statuses. Therefore, it is vital to reconsider whether the consequences of a mandatory "married" filing status—whether filing jointly or separately—reflects current policy goals and societal values.

This Article examines the current role of the mandatory married filing status as a family penalty—specifically to DWIKs—present in the tax code. This Article considers the rationale of the current system through its development and whether its original goals have resulted in changed consequences in which the state's "marriage" status potentially becomes discretionary for many taxpayers.[13] The Article concludes with the determination that developments in marriage mandate that a married filing

---

Samuel D. Brunson, *Taxing Polygamy*, 91 WASH. U.L. REV. 113, 118 n.21 (2013) (citing Samuel D. Brunson, *Grown-Up Income Shifting: Yesterday's Kiddie Tax Is Not Enough*, 59 U. KAN. L. REV. 457, 468 (2011)); *see also* Jane M. Fraser, *The Marriage Tax,* 32 MGMT. SCI. 831, 831 (1986); Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1395–96 (1975).

11. The ability for a married couple to file a joint tax return resulted from the enactment, over presidential veto, of the Revenue Act of 1948. Revenue Act of 1948, Pub. L. No. 80-471, 62 Stat. 110.

12. The Revenue Act of 1951 introduced the Head of Household status into the Internal Revenue Code. Revenue Act of 1951, Pub L. No. 82-183, 65 Stat. 452.

13. Though researchers differ on their findings of whether the Earned Income Tax Credit ("EITC"), in particular, has an effect on marriage rates, the perspective presented herein does not turn on whether such family penalties reduce marriage rates. Instead, the framing of this permissive joint filing conclusion is rooted in establishing a system of taxation that addresses the equity and justice claims of those parents espoused by the state. *See* C.M. Herbst, *The Impact of the Earned Income Tax Credit on Marriage and Divorce: Evidence from Flow Data*, 30 POPUL. RES. POL'Y REV. 101, 124 (2011) (concluding that increases in the Earned Income Tax Credit are associated with reductions in new marriages). *But cf.* Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 559–64 (1995) (considering, instead, that this potential marriage disincentive may not translate into behavior, that is, divorce or failure to marry based on the tax outcome, due to psychological, social, and economic factors that influence decisions to marry, as well as the taxpayers' understanding of the terms of the program).

status must remain permissive joint filing to achieve the horizontal equity goals upon which the tax system is founded. This system would discard the "Married Individuals Filing Separate Returns" filing status in favor of allowing such individuals to use the "Unmarried Individuals" or the "Heads of Households" filing status as an alternative to joint filing.[14]

Although such a fundamental change to our tax structure certainly would raise distributive and revenue concerns as an autonomous revision, such secondary effects must be addressed through other means, such as higher marginal tax rates and effective anti-poverty or income redistribution provisions. A revised version of the code must base its structure on modern values and goals and consider efficient mechanisms to achieve those ends. This proposal should not be studied discretely but rather as the foundation of a fiscal system that respects and supports the individual while showing that same respect and support to individuals who choose a conventional family structure.

Part I of this Article examines the historical underpinnings for the current construction of the code. In examining the purpose of its details and the operation of its terms, this Article questions whether those purposes are fulfilled by the application of the current code and whether those values reflect today's values and goals. Part II reviews the 1951 and 1969 reforms, and reactions to those reforms, which converted the code from pro-family to a structure that penalizes marriage for those with and without children. Part III focuses on three particular provisions that affect tax liability by marriage or by children within and without a marriage unit for the true effect of potential marriage and family penalties to be confronted. Finally, Part IV concludes that adherence to mandatory marriage status filing to achieve any version of equity is an incompetent pursuit. Mandatory filing based on nuptials is as unacceptable as mandatory filing devoid of the recognition of the family unit as a tax unit. To avoid this "family penalty," income splitting and separate filing both must be available.

I. THE INDIVIDUAL INCOME TAX WAS INTRODUCED AS PRO-FAMILY AND PRO-MARRIAGE

A marriage penalty occurs when a married couple must pay more in taxes than if each spouse filed as an unmarried taxpayer.[15] A marriage

14. An individual is a head of household if she is not married at the close of her taxable year, is not a surviving spouse, and maintains as her home a household of a qualifying child or a qualifying dependent. I.R.C. § 2(b).

15. Richard B. Malamud, *Allocation of the Joint Return Marriage Penalty and Bonus*, 15 VA. TAX REV. 489, 491 (1995-1996).

bonus occurs when a married couple pays less in taxes by filing a joint return.[16] A married couple would be harmed by their status as married when a dual income couple has a particularly low income and would thus phase out, or begin to phase out, of low income credits and other anti-poverty benefits that would be available to one or both spouses if he or she filed as unmarried individuals.[17] A married couple also would be harmed by such a status when both members of the dual income couple had substantial income, as, consequently, more of their income would be subjected to a greater marginal rate than if they filed individually. In addition to increased marginal rates, this married couple may face increased phase-outs of deductions and credits and also may face penalties enacted to serve against high income individuals. As joint filing thresholds often are not double that of unmarried income thresholds, individuals not targeted as high income earners may become high income earners through marriage without any change to their earnings.

A. In the Beginning, There Was Only Tax Filing Per Individual

In 1901, Guy C. Earl and his wife Ella F. Earl entered into a written contract in which they agreed

> that any property either of us now has or may hereafter receive or acquire (of any and every kind) in any way, either by earnings (including salaries, fees, etc.) or any rights by contract or otherwise during the existence of our marriage, or which we or either of us may receive by gift, bequest, devise or inheritance, and all the proceeds, issues and profits of any and all such property shall be treated and considered and hereby is declared to be

---

16. *Id.*

17. See Robert Cherry, *Improving Efficiency and Equity of Child-Related Federal Tax Policies*, 27 E. ECON. J. 309, 309–10 (2001), for a discussion of the marriage penalty's very high marginal effect faced by poor female household heads when, once married, they lose eligibility for food stamps, housing, child care subsidies, welfare benefits, and the reduction of the EITC and other child-related federal tax benefits. Though many of these benefits, such as food stamps, housing, and childcare subsidies, are welfare-based, there are also anti-poverty benefits of the Revenue Code, such as the EITC, the Dependent Care Credit under I.R.C. § 21, and the additional child tax credit under § 24(d), that also are reduced or eliminated when a joint filing status increases household income over a certain threshold that would not be implicated when the couple lives together unmarried. See discussion *infra* Part III.A., for a detailed application of the Earned Income Tax Credit that begins to phase out at about $24,000 for a married couple with three or more children but not until about $36,000 for a similar unmarried couple.

> received, held, taken and owned by us as joint tenants and not otherwise with the right of survivorship.[18]

Tax planning did not motivate this agreement between husband and wife.[19] In fact, the United States Supreme Court ruled that the income tax was unconstitutional six years prior; Congress did not reintroduce the income tax until more than a decade after Mr. and Mrs. Earl signed this contract.[20] Rather, the married couple intended this agreement to be a substitute for a will that would pass property directly from Guy to Ella in the event of his death—without having the property go through probate.[21]

In *Earl v. Commissioner*, the government challenged whether income earned by Guy in 1920 and 1921 was properly disclosed by the couple when they reported half of such amount on Guy's income tax return and the other half on Ella's tax return.[22] Though the Supreme Court famously found that the entire salary must be taxed to Guy in determining that the taxing act could "no doubt . . . tax salaries to those who earned them," the Earls appreciated that the application of the relevant revenue acts would confer an expense in singularly reporting the income over the individuals each reporting half.[23]

During the years in question, United States' tax law provided for taxes to be levied progressively—*per individual*—which, for the Earls, meant a greater tax liability because Guy was required to report all of the income

---

18. Earl v. Comm'r, 30 F.2d 898, 898 (9th Cir. 1929), *rev'g* Earl v. Comm'r, 10 B.T.A. 723 (Feb. 14, 1928), *rev. sub. nom.* Lucas v. Earl, 281 U.S. 111 (1929).

19. *See* Patricia A. Cain, *The Story of* Earl*: How Echoes (and Metaphors) From the Past Continue to Shape the Assignment of Income Doctrine*, *in* TAX STORIES: AN IN-DEPTH LOOK AT TEN LEADING FEDERAL INCOME TAX CASES 275, 313–19 (Paul L. Caron ed., 2003).

20. *Pollock v. Farmers' Loan & Tr. Co*., 157 U.S. 429 (1895), found that the Constitution prohibited a federal income tax. The Sixteenth Amendment, U.S. CONST. amend. XVI, was adopted in 1913, allowing for federal income taxes. The Revenue Act of 1913, Pub. L. No. 63-16, § 2, 38 Stat. 114, 166, was the first to impose an income tax following the adoption of the Sixteenth Amendment.

21. *See* Cain, *supra* note 19, at 313–16.

22. *Earl*, 10 B.T.A. at 723–24.

23. *Lucas*, 281 U.S. at 114. The Revenue Act of 1921, for instance, assessed a Normal Tax of eight percent, with an allowance of four percent on the first $4,000 reported per individual as well as a graduated income tax that would levy Earl's earnings with a nine percent marginal rate surtax if reported singularly and a two percent marginal rate surtax if each reported half the income. *See* Revenue Act of 1921, Pub. L. No. 67-98, §§ 210, 211, 42 Stat. 227, 233.

on his return.[24] In the Earls' case, the Court concluded that salaries are taxed to those who earn them.[25] In 1930, the Supreme Court applied *Earl*'s holding in *Poe v. Seaborn*.[26] The Seaborns resided in a state with community property laws that provided that community property interests are presently vested in the spouse—rather than vesting in the spouse at death.[27] The Seaborns filed returns on such a *per individual* case called for in the applicable Revenue Act of 1926, each reporting half of the earnings from the husband's salary and from the other property held in the husband's name only.[28] Here, the Supreme Court found, in contrast to the Earls' case, that due to state law dictating that earnings are never the property of the spouse performing the work, but rather that of the community, the husband and wife were entitled to file separate returns with each spouse treating half of the community income as his or her respective income.[29] The Court concluded that although this determination would vary the incidence and operation of the tax depending on the state's property laws, it was not an unconstitutional interpretation.[30]

---

24. The first income tax effective after the ratification of the Sixteenth Amendment, U.S. CONST. amend. XVI, which provided that "Congress shall have power to lay and collect taxes on incomes . . . without apportionment among the several States . . .," referred to a normal tax assessed on "every citizen of the United States" and "to every person residing in the United States." This income tax also assessed an additional tax on "every individual." Revenue Act of 1913 § 2. The Revenue Act of 1921 called, simply, for both a normal tax and a surtax imposed "upon the net income of every individual." Revenue Act of 1921 §§ 210, 211. The language had been the same in each act since the Revenue Act of 1919, Pub. L. No. 65-254, 40 Stat. 1057. A progressive income tax system requires that initial income is taxed at a lower rate than subsequent income. *See* Harry Kalven, Jr. & Walter Blum, *The Uneasy Case for Progressive Taxation*, 19 U. CHI. L. REV. 417, 419 (1952).

25. *Earl*, 10 B.T.A. at 724–25.

26. Poe v. Seaborn, 282 U.S. 101 (1930).

27. *Id.* at 113. These taxpayers were Washington state residents where the spouse's interest in community property is presently vested—as opposed to California state community property law where the spouse's interest in community property was, at that time, an expected contingency on the spouse's death. *Id.*

28. *Id.*

29. *Id.* at 118.

30. *Id*. at 117–18. The Court was responding to an argument made pursuant to U.S. CONST. art. I, § 8 cl. 1, which provides that "all Duties, Imposts and Excises shall be uniform throughout the United States." There is no lack of uniformity, however, because differences in state law may bring a person within or without the category designated by Congress as taxable. *See* U.S. CONST. art. I, § 8 cl. 1. A taxing statute does not fall short of the prescribed uniformity because its operation and incidence may be affected by differences in state laws. Phillips v. Comm'r, 283 U.S. 589, 602 (1931).

The Court's decision in *Seaborn* means that spouses in community property states received the functional equivalent of income splitting because the collective earnings of the couple were split and taxed half to each spouse. By allowing income splitting, the Court's decision permitted a married couple in a community property state to receive double benefits of a progressive income tax schedule. A married couple with only a single income earner received a "marriage bonus" because the income earned by a single member of the couple would be divided among two returns, allowing more of that income to fall in the lower graduated tax brackets. Though, when both individuals in a married couple earned similar incomes, they were taxed similarly to unmarried individuals or married individuals in non-community property states. The status of the law at this time meant then that there were two forms of horizontal inequality or violations of marriage neutrality.[31] First, in community property states, two married individuals could pay fewer taxes than two unmarried individuals with comparable incomes because the income of the married couple would be divided over two tax returns. Second, a married couple in a community property state could have a lower tax liability than a married couple in a common law property state.[32]

B. Introducing Income Splitting to the Tax Code

The simplest answer to the *Seaborn* complication would have been to implement a legislative fix that would discard state community property rules for federal tax purposes. The Revenue Act of 1948, however, attempted to eliminate these inequities and create geographic uniformity by allowing all married couples—both in common law and in community property states—to file a joint return and pay twice the tax that a single

31. Marriage neutrality proponents argue against the treatment of married couples as a singular unit and maintain that married and unmarried couples should be subject to equal tax burdens. *See, e.g.*, Yair Listokin, *Taxation and Marriage: A Reappraisal*, 67 TAX LAW REV. 185 *passim* (2014).

32. Whether a state is a community property state is a matter of state law. Several states have statutes that provide that each spouse has a present, vested, one-half ownership interest in marital property. *See* ARIZ. REV. STAT. ANN. § 25-211(A) (2017); CAL. FAM. CODE § 751 (West 2017); IDAHO CODE § 32-906(1) (2017); LA. CIV. CODE art. 2336 (2017); NEV. REV. STAT. § 123.225(1) (2017); N.M. STAT ANN. § 40-3-12 (2017); TEX. FAM. CODE ANN. § 3.002 (West 2017); WASH. REV. CODE § 26.16.030 (2017); WIS. STAT. § 766.31(3) (2017). In common law property states, spouses have similar rights and interests in each other's property at divorce or death. For a comparison of the two regimes, see Susan Kalinka, *Taxation of Community Income: It is Time for Congress to Override* Poe v. Seaborn, 58 LA. L. REV. 73, 80–84 (1997).

individual would pay on half of the couple's total taxable income. This change was classified as a "tax-equalization" feature and "designed to produce uniform treatment for residents of common law property and community property States."[33] That statute provided that "[i]n the case of a joint return of husband and wife . . . the combined normal tax and surtax . . . shall be twice the combined normal tax and surtax that would be determined if the net income and the applicable credits against net income . . . were reduced by one-half.[34]" This calculation ensures that a tax is assessed on half of the aggregate income of the married couple at the same rate that tax is assessed on an unmarried taxpayer. That liability is doubled so that the married taxpayer essentially is income splitting as if each taxpayer is earning half of the income and is assessed a tax at the lower rates available to lower income individuals. The standard deduction limit available to joint return filers, however, remained equal to that of the standard deduction limit available to the unmarried filer when "in the case of a separate return by a married individual, the standard deduction shall be [half of that limit]."[35] Thus, although the income tax brackets may have allowed for a tax equal to the amount taxed if each spouse had earned half of the income and filed as an individual, because certain deductions were not doubled, there continued to be a potential marriage penalty.

This 1948 change calmed what had become a rush of states to enact community property law reforms for their married residents to have access to the marriage bonus while making the marriage bonus more pronounced when contrasting with unmarried persons.[36] With income splitting available

33. H.R. REP. NO. 80-1274, pt.1 (1948). For an alternate tax system, consider states in the United States utilizing only one progressive tax table that may be applied to a married couple filing either jointly on their combined income or individually on their separate income. *See, e.g.*, MONT. CODE ANN. § 15-30-2103 (2017).

34. Revenue Act of 1948, Pub. L. No. 80-471, § 301, 62 Stat. 110, 114.

35. *Id*. § 302(a).

36. This excerpt from a House Report describes Congressional concerns that led to the 1948 change in how married couples were taxed:

> Recently, however, a number of States have shifted from the common law to the community property system. In these cases, benefits under the Federal income tax which residents of the State would obtain under the community property system were largely responsible for the abandonment of common law. . . . The geographical differences in the impact of the individual income tax resulting from the fact that 12 States use community property raises a serious problem, but the fact which makes action at the present session imperative is the potential rapid extension of community property to a large number of other common law States. . . . If the necessary action is not taken, there will be a flood of ill-advised State legislation intended to produce the same results, but

to all married persons in the country, the focus turned to the comparative effect on single people who paid higher income taxes than married couples at the same income levels.[37] The defense to this result was that single persons at the time generally were not considered to maintain a household with the attendant costs of lawn care, snow removal, mending leaky pipes, or replacing spent appliances. Singles, instead, were thought of as a mass of childless persons tucked away in individual rented apartments, or rooms, either rented or within homes belonging to and maintained by his or her relations. Thus, the income splitting allowance for married couples was in furtherance of addressing the additional expenses of maintaining such a household.[38] When an unmarried person did maintain a household and support dependents, however, he was at some tax disadvantage vis-à-vis the married couple. An unmarried person, for instance, may have been obliged to maintain a household with multiple dependents with attendant costs far greater than those of a married person with only one dependent, that is, a spouse, yet the unmarried person would not be permitted to use the more generous income splitting available to the married couple.

II. THE 1951 AND 1969 PURPORTED HORIZONTAL EQUITY REFORMS TO THE CODE DILUTED THE STATUS OF THE WIFE AND THE MOTHER

The 1951 and 1969 reforms attempted to recognize living situations and their attendant costs outside of those envisioned in earlier versions of the code.[39] The introduction of the Head of Household ("HOH") filing status acknowledged that the costs in maintaining children and other such dependents were not exclusive to married couples.[40] The 1969 change, which addressed the "singles penalty" then found in the code, similarly addressed unmarried individuals but now recognized that a single individual may maintain a household rather than renting a room or living

> doing so in a manner which has most unfortunate consequences, not only for the taxpayers involved, but also for all the persons who must use or administer the property laws of the States which rush into the community property system.

H.R. REP. NO. 80-1274, pt. VIII (1948).

37. See discussion *infra* Part II.

38. STAFF OF J. COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, at 222 (J. Comm. Print. 1970) [hereinafter GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969].

39. *See* Revenue Act of 1951, Pub. L. No. 82-183, 65 Stat. 452, 480–83; Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 678–82.

40. *See* discussion *infra* Part.II.A.

within a household financed by a married couple.[41] Although increased tax relief for unmarried parents and equitable recognition for bachelors and bachelorettes choosing suburban communities over small city lodgings are legitimate concerns, each of these new and more generous statuses *not* applied to the married couple diluted the recognition of the non-working or lower earning spouse's non-economic contributions to the economic income of the married unit. As the bracket for the head of household or the unmarried, childless individual is expanded, both the non-economic contributions of the childless spouse to the economic income as well as the non-economic contributions of the mother lose tax bracket value *vis-à-vis* the unmarried taxpayer.

A. The 1951 Addition of the Head of Household Filing Status Introduced the "Family Penalty"

In 1951, a HOH filing status was enacted that allowed single people furnishing over half of the cost of maintaining a household to have approximately half of the income splitting benefits given to married filers as long as that household was the principal place of abode of a child, grandchild, or any other dependent of the taxpayer.[42] This filing status and attendant tax schedule created the first instance of a penalty for married couples when they have children, examined herein as the "family penalty."[43] Whereas previously a married couple was entitled to such a tax status that allowed for a doubling of tax brackets from that of their alternate, single status, the HOH filing status provided for changed circumstances in which the married bracket was no longer twice the unmarried bracket when a dependent was present.[44] Under this new

---

41. *See* discussion *infra* Part.II.B.

42. Revenue Act of 1951 § 301. The percent tax difference between head of household and married couples ranged from 50% for lower income earners to 48.1% for higher income earners. STAFF OF J. COMM. ON INTERNAL REV. TAX'N, 82ND CONG., SUMMARY OF THE PROVISIONS OF THE REVENUE ACT OF 1951 AS AGREED TO BY THE CONFEREES 6 tbl. 5 (Comm. Print 1951) [hereinafter SUMMARY OF THE PROVISIONS OF THE REVENUE ACT OF 1951]. An individual was considered a Head of Household if "such individual is not married . . . and maintains as his home a household which constitutes . . . the principal place of abode, as a member of such household," a dependent, child, step-child, or descendent of a child where the individual furnishes over half of the cost of maintaining the household. Revenue Act of 1951 § 301.

43. *See* Revenue Act of 1951 § 301; SUMMARY OF THE PROVISIONS OF THE REVENUE ACT OF 1951, *supra* note 42, at 6 tbl.5.

44. *Compare* Revenue Act of 1951 § 301, *with* Revenue Act of 1948, Pub. L. No. 80-471, § 301, 62 Stat. 110, 114 (1948).

enactment, when two married persons are to become three, which often follows marriage, they remain under merely the married tax brackets.[45] Yet when two unmarried people sharing a household add a dependent to their fold, collectively they become entitled to one unmarried tax bracket and one HOH bracket that, again, is approximately one and a half times a single bracket.[46]

Increasing the bracket width for an HOH to greater than that of a single person—or to less than half of that of a married couple—diluted the place of the wife and mother in the family.[47] Though true today, it was even more so the case in 1951 that the wife was the secondary income earner and primary non-economic contributor to the family.[48] Without an HOH filing status, the addition of the wife or mother to the 1951 tax return would have allowed for income tax to be paid based on the premise that the reported income is the earnings of two persons. This position fully recognized the wife or mother's contributions to the family by the work she did in the home to allow the primary or sole income earner to bring that economic contribution to the family. By extending half of that recognition, as demonstrated through income splitting, to an HOH filer,

45. First comes love, then comes marriage, then comes baby in the baby carriage. The addition of a dependent did increase dependent exemptions for both married and HOH taxpayers through 2017; however, the 2017 tax reform act reduced the value of those exemptions to zero beginning in tax year 2018. Pub. L. No. 115-97, § 11041 (2017). The effects of the HOH filing status are not limited to applicable income tax rates found in I.R.C. § 1. For instance, in 1990, the "Pease Limitation" was added to the code. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11103, 104 Stat. 1388, 406–07. The Pease Limitation provides for a reduction of up to 80% of itemized deductions otherwise allowable for the taxable year for a taxpayer with an adjusted gross income ("AGI") over a certain "applicable amount." Omnibus Budget Reconciliation Act § 11103; *see also* I.R.C. § 68 (2012). This "applicable amount" and "threshold amount" varies with taxpayer filing status, allowing for such a reduction on itemized deductions for a person with a Head of Household filing status with an applicable amount midway between that applicable amount applied to a taxpayer filing as an unmarried individual and that of a taxpayer filing a joint return. Omnibus Budget Reconciliation § 11103. *But see* American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313, 2316–17 (2013) (extending the benefit of an increased applicable amount to the HOH filing status in determining the applicability of the Pease Limitation some 23 years later).

46. *See* Revenue Act of 1951 § 301.

47. *See id.*; *see also* SUMMARY OF THE PROVISIONS OF THE REVENUE ACT OF 1951, *supra* note 42, at 6.

48. *See infra* note 181.

the enactment of the HOH filing status has reduced that value of the wife and mother by that same half.

To add insult to increased tax liability injury, in considering a marriage-like living situation in which a couple shares a household and has a child but is not considered married for tax filing purposes, the HOH filing status is up for grabs between the two.[49] Therefore, when a couple remains unmarried they are able to shift the tax benefits of children to the higher earning individual. Provisions like the larger tax bracket available to the HOH filer may be applied to the spouse with the higher marginal tax rate, thus increasing the collective benefit for the couple.[50]

Further, benefits that may phase out with high incomes that may not be available to the married joint filer may remain accessible to an unmarried pair. In the event that both the married and the unmarried couple have the same collective income per couple, but in the unmarried household one of the two has an income low enough to qualify for certain credits related to children, the married couple is further penalized. This family penalty exists as to the married family as against the unmarried family only when both individuals in a couple are adequately employed and earning income. When, instead, one member of the couple is earning substantially less or nothing at all, only the married couple generally would be able to take advantage of income splitting in order to achieve a lower tax liability.[51] Therefore, Congress's attempt to provide horizontal equity for the unmarried person supporting a household and its dependents had resulted in this married family penalty and violation of the principle of marriage neutrality.[52]

---

49. When the child has a principal place of abode with more than one taxpayer and one taxpayer is a parent, the child shall be the qualifying child of the taxpayer who is a parent of the individual. I.R.C. § 152(c)(4). If, however, both parents attempt to claim the otherwise qualifying child, the child is treated as the qualifying child of the parent with the highest adjusted gross income. § 152(c)(4)(B)(ii).

50. See *id.* § 1(a)–(c), and the relevant Revenue Procedure for adjusted for inflation brackets, to compare the HOH filing status bracket coupled with an Unmarried Individual filing status bracket with the Married Filing Jointly filing status income tax bracket.

51. Generally, when the income division between the spouses is at least 80% / 20%, a marriage bonus may occur. This split may not be correct in the case of the Earned Income Tax Credit. *See id.* § 32.

52. For an in-depth discussion on the principle of marriage neutrality, see James M. Puckett, *Rethinking Tax Priorities: Marriage Neutrality, Children, and Contemporary Families*, 78 U. CIN. L. REV. 1409 (2010).

B. The 1969 Amendments Addressed the "Singles Penalty" by Adding More Complexity to the Code

The 1948 and 1951 changes to tax filing status and the application of tax rates were attempts first to create equity between married couples in community property law states and married couples in common law states and second to extend some degree of that resulting benefit to taxpayers who supported dependents. The debate surrounding amendments made to the code in 1969 focused instead on unmarried persons without dependents and the comparative "singles penalty" that occurred as a result of those earlier changes.[53] In fact, the universal married income splitting allowance created in 1948 also created a marriage bonus that was as much as 42.1% when considering tax liability of like income earners in which one couple is married and one couple is not.[54] Generally, such a bonus occurs by comparing a married couple wherein one spouse does not work outside the home to an unmarried person. Though both income-earning individuals may have the same income, the married individual's income is subject to income splitting where each spouse is taxed as though they have earned half that income. When applied to the progressive income tax rate schedule, the married income earner is able to access the lower rates for more of his income. This system may provide a result in which the unmarried person is paying as much as 42.1% more in income tax liability than the married earner on the same amount of earnings.[55] Though HOHs were entitled from 1951 to a liability halfway between a single taxpayer's liability and a married taxpayer's liability, the potential extreme marriage bonus served to highlight the sizable tax penalty that resulted from remaining single without dependents.

---

53. GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, *supra* note 38, at 222–24. The committee discussed that

> [u]nder prior law, the tax rates imposed on single persons were quite heavy relative to those imposed on married couples at the same income level: at some income levels a single person's tax was as much as 42.1 percent higher than the tax paid on a joint return with the same amount of taxable income. The Congress believed that some difference between the rate of tax paid by single persons and joint returns was appropriate to reflect the additional living expenses of married taxpayers but that the prior law differential of as much as 42 percent (the result of income splitting) could not be justified on this basis.

Id. at 222.

54. *Id.* at 222, 224 tbl.5. This penalty was greatest at taxable incomes of $28,000 and was reduced with taxable incomes both higher and lower. *Id.*

55. *Id.* at 222.

In considering those individuals that fell within the unmarried taxpayer status, it seems that earlier considerations contemplated a bachelor with moderate expenses, as separate from a married person.[56] A bachelor was thought to be living with family or in a simple residence.[57] A United States House of Representatives proposal in the 1969 tax reform effort, however, allowed for a rate structure that somewhat alleviated that "singles penalty" for mature individuals—ages 35 and over—allowing them the use of the intermediate tax rate schedule provided for individuals that had qualified as HOHs since 1951.[58] A summary report of that proposal, prepared by the Joint Committee on Internal Revenue Taxation and the Committee on Finance, acknowledged that the age of 35 was arbitrary and this standard thereby would treat considerably different economic situations the same.[59] The summary also went on to concede that equity for single persons could be achieved by ending income splitting for married persons rather than manipulating the rate schedules for single persons to attempt to achieve some weak version of this equality.[60]

In the final version of the 1969 reforms, 35 failed to signify some sort of tax maturity and entitlement to reduced tax liability.[61] Instead, the

56. STAFF OF J. COMM. ON INTERNAL REVENUE TAX'N AND COMMITTEE ON FINANCE, 91ST CONG., SUMMARY OF H.R. 13270, THE TAX REFORM ACT OF 1969 (AS PASSED BY THE HOUSE OF REPRESENTATIVES) 103 (J. Comm. Print 1969) [hereinafter SUMMARY OF H.R. 13270, THE TAX REFORM ACT OF 1969]. The committee explained:

> [T]his treatment places unduly heavy tax burdens on mature single individuals, widows and widowers. Such individuals more often than not have to incur the expense of maintaining a household; and in any event, it is maintained, they should receive some income splitting in order to be treated fairly compared with married couples. Moreover, for widows and widowers present law is said to be harsh in that it withdraws all the benefits of income splitting after their spouse dies despite the fact that they may continue to have relatively heavy living expenses.

Id.

57. *See id.*

58. *Id.* at 104.

59. *Id.*

60. *Id.* The subjective analysis, that is, the "weak version of this equality," is provided by this author and not the staffs of the listed committees, though the report does state that repealing income splitting is a "more favorable result for the Treasury" and that selecting an arbitrary age to receive more favorable tax treatment will result in different economic situations receiving the same tax treatment and similar incomes taxed differently. *Id.*

61. The Senate Finance Committee explained in its report that there was a basic issue of too great a tax difference between married and single taxpayers that was not limited to those over a certain age. The Committee also explained, however, that

singles penalty was alleviated for the unwedded as a whole by enacting a new rate schedule for all unmarried taxpayers.[62] The final bill worked to reduce the singles penalty so that an unmarried individual's tax liability would be no more than 20% above a married person's tax liability while also providing that the HOH benefit was repositioned to halfway between the new unmarried liability and the married liability.[63] The obvious final element to preserve this repositioning of the potential tax liability differential between unmarried and married individuals was to fix the Married Filing Separately tax brackets at equal to the prior Unmarried Individual brackets that were equal to half of the Married Filing Jointly brackets.[64] Without such a measure, the initiatives of previous reforms would have been for naught, as with individual income tax brackets available that were greater than half the married filing jointly brackets, dual earning married couples and married couples in community property states again would be able to reduce their tax liability by choosing an individual filing over a joint filing. That possibility would result in the perpetuation of the singles penalty.

---

there is good reason for preserving some tax differential between single persons and HOHs who maintain a household for a dependent. These considerations led to the changes found in the enacted legislation. *See* S. REP. NO. 91-552 (1969).

62. *See id.*

63. The highest singles penalty of 20% would be reached at a taxable income of $24,000 under the new tax rate schedules provided in the 1969 Act and decreased gradually as taxable income rises where a 10.9% tax penalty is possible with a $200,000 taxable income; the penalty similarly decreases as taxable income decreases with a potential 3.6% penalty possible at a taxable income of $1,000. These ends of taxable income liability differentials are similar to the prior law—13.1% possible singles tax penalty with taxable income of $200,000 and 3.6% at $1,000 of taxable income. The focus and the result of the reforms were to limit the height of the penalty, reducing its potential from 42.1% to 20%. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487, 678–82; GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, *supra* note 38, at 222, 224 tbl.5 (Comm. Print 1970); *see also* S. REP. NO. 91-552, at 260–62.

64. "[I]t is justified on the grounds that although a married couple has greater living expenses than a single person and hence should pay less tax, the couple's living expenses are likely to be less than those of two single persons and therefore the couple's tax should be higher than that of two single persons." Tax Reform Act of 1969 § 803; GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, *supra* note 38, at 223.

C. Legal Challenges to the Marriage Penalty Demonstrate New Attitudes Toward Marriage

The changes that led to the marriage and family penalties at that time did not go without challenge. In 1975 and 1976, James O. Druker, a United States Attorney and later a District Attorney for the state of New York, and his wife Joan, who was employed as a computer programmer, made constitutional challenges to the federal tax penalty that fell on two-income married couples.[65] The Drukers filed their federal income tax returns for each year as "Married individuals filing separate returns"; they applied the tax tables due to "Unmarried individuals," however, in determining their individual tax liabilities.[66] They attached letters to each return explaining that "they were applying the tax tables for single persons because they believed that the income tax structure unfairly discriminates against working married couples in violation of the equal protection clause of the fourteenth amendment."[67]

The United States Court of Appeals for the Second Circuit relied on conclusions reached in similar cases that asserted an infringement on the right to marry. The court found that the adverse effect of the marriage penalty is "indirect" because, although it may weigh on the decision to marry, it does not obstruct or prevent marriage, leaving the decision to the individuals.[68] The court concluded that Congress's choice to adhere to

65. Druker v. Comm'r., 697 F.2d 46, 47 (2d Cir. 1982); see also Kellems v. Comm'r, 58 T.C. 556 (1972), *aff'd per curiam*, 474 F.2d 1399 (2d Cir. 1973), *cert. denied*, 414 U.S. 831 (1973); Faraco v. Comm'r, 261 F.2d 387 (4th Cir. 1958), *cert. denied*, 359 U.S. 925 (1959), for cases in which constitutional challenges to the singles penalty were raised and uniformly rejected.

66. *Druker*, 697 F.2d at 48.

67. *Id.* Constitutional challenges to the singles penalty similarly were rejected. *See, e.g.*, *Kellems*, 58 T.C. 556 (stating the rational basis standard is satisfied by Congress's goals of geographic equalization of taxpayers as between community and non-community states and the recognition of the greater financial burdens of married persons than single persons and enacted such scheme consonant with taxation based on the ability to pay); *Faraco*, 261 F.2d 387 (finding classification of taxpayers according to marital status not unreasonable and much reason in creating geographic equalization amongst married couples in a case where the husband died on December 26, 1953 and widow claimed unconstitutional arbitrary and unreasonable discrimination in preventing single persons from using the split income device available to married persons in relation to her 1954 return).

68. The court considered *Califano v. Jobst*, 434 U.S. 47, 54 (1977), and found the fact that marriage resulted in the termination of social security benefits to be an "indirect" effect, leaving the ultimate decision to marry to the individual; and, additionally, found that the law in question was not an attempt to interfere with

principles of horizontal equity in taxing married couples equally was a constitutionally valid decision and thus what the Drukers called the marriage penalty deprived them of no constitutional right.[69] Though the Drukers attempted to challenge the negative tax treatment of marriage directly, another couple focused their avoidance of the marriage penalty on the Internal Revenue Code's position that whether an individual is married shall be made as of the close of the taxable year.[70]

In *Boyter v. C.I.R.*, a couple used divorce to avoid the marriage penalty when David and Angela Boyter's dissolution scheme for the years 1975 and 1976 involved an end-of-the-year trip to the Caribbean for an offshore divorce followed by remarriage to one another in the new year.[71] Following the Commissioner of the Internal Revenue's application of the "sham transaction doctrine," the Boyters remained unmarried in future years to ensure access to their preferential tax brackets.[72] Similarly, in *Druker*, James Druker stated at argument that having failed so far in the courts, he and his wife also divorced to solve their tax problem.[73] In each case, the couples continued to live together after divorce; indeed, Angela Boyter

---

the individual's freedom to marry. Later, in *Zablocki v. Redhail*, 434 U.S. 374, 387 & n.12 (1978), the court found a Wisconsin statute that required any resident with out-of-custody minor issue to receive court permission to marry *was* a direct legal obstacle in the path of persons desiring to get married, which absolutely prevented some from getting married.

69. *Druker*, 697 F.2d at 51.

70. Generally, the determination of whether an individual is married shall be made as of the close of his taxable year, and an individual legally separated from his spouse under a decree of divorce shall not be considered as married. I.R.C. § 7703(a) (2012).

71. Boyter v. Comm'r, 668 F.2d 1382 (4th Cir. 1981). In 1975, the couple traveled to Haiti and secured a divorce under such law on December 8, 1975 and then remarried in Maryland on January 9, 1976. In November of 1976, the Boyters travelled to the Dominican Republic and obtained a divorce decree on November 22, 1976 and remarried in Maryland on February 10, 1977. Rev. Rul. 76-255, 1976-2 C.B. 40.

72. The sham transaction argument was not addressed by the lower court. *See Boyter*, 74 T.C. at 993 & n.4. That court instead concluded that Maryland would not recognize the foreign divorces as valid because the foreign courts lacked subject matter jurisdiction over the divorce proceedings and, for that reason, did not reach the Boyters' other arguments. S*ee id*. In contrast, the appellate court found that the sham transaction doctrine could be applied to married taxpayers who divorced solely to avoid the marriage penalty and the tax laws and then remarry and remanded the case to the Tax Court to determine whether the divorces were shams and should be disregarded for federal income tax purposes. *Boyter*, 668 F.2d at 1387–88.

73. *Druker*, 697 F.2d at 50.

testified that she did not intend to separate physically from David and that they would continue to live together, share finances, and that the "sole reason for her obtaining the divorce was 'because the tax laws . . . caused [them] to pay a penalty for being married.'"[74] The sentiment and conclusions in these lower court decisions were similarly reflected in a contemporaneous Supreme Court decision.

In *Califano v. Jobst*, the United States Supreme Court in 1977 explained that "[b]oth tradition and common experience support the conclusion that marriage is an event which marks an important change in economic status."[75] These changes historically have focused on the premise that a married couple would be able to reduce living expenses through cohabitation and the untaxed imputed income of the household chores of the wife.[76] The 1951 legislative remarks in implementing the HOH filing status and the 1977 remarks by the Supreme Court in *Jobst* indicate a conception of marriage as indicative of a shared household and resources and, also, where those who are unmarried do not share a household or resources.[77] Although such a perception may have been well-founded and generally applicable in the 50s through the 70s, it is certainly less so today.[78] If marriage is no longer a dependable indicator of economic status, the ability to manipulate filing status, and therefore the attendant benefits and penalties, has the result of inherent horizontal inequity in the filing status itself.

D. The Limited Reintroduction of Income Splitting

Following a short flirtation with a secondary earner deduction introduced in the Economic Recovery Tax Act of 1981 and repealed by the Tax Reform Act of 1986, Congress settled on structural changes to

---

74. *Id.*; *see also Boyter*, 668 F.2d at 1384 n.2.

75. Califano v. Jobst, 434 U.S. 47, 53 (1977).

76. GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1969, *supra* note 38, at 222. See Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 362–63 (1994), for a discussion of untaxed imputed income generated by the non-working wife.

77. SUMMARY OF THE PROVISIONS OF THE REVENUE ACT OF 1951, *supra* note 42, at 6; *Califano*, 434 U.S. at 53.

78. Research shows that marriage rates overall have declined, and cohabitation without marriage is on the rise. In 2016, the number of adults in the United States cohabiting was about 18 million, up 29% since just 2007. *See, e.g.*, Renee Stepler, *Number of U.S. adults cohabiting with a partner continues to rise, especially among those 50 and older*, PEW RES. CTR. (Apr. 6, 2017), http://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/ [https://perma.cc/Q5KX-XGYH].

reduce the marriage penalty.[79] The 1986 Act sought to relieve low income families of any federal income tax liability through increasing the personal exemption, the standard deduction, and providing further for the Earned Income Credit.[80] These increases meant that the beginning point of income tax liability was higher than the estimated poverty level in 1988 for all families.[81]

In the Economic Growth and Tax Relief Reconciliation Act ("EGTRRA") of 2001, Congress made further attempts to ameliorate the marriage tax penalty.[82] Along with increasing the standard deduction for a couple that elects to file as Married Filing Jointly ("MFJ") to twice that of the unmarried individual standard deduction, that legislation also increased the size of the 15% regular income tax rate bracket for a married couple filing a joint return to twice the size of the corresponding rate bracket for an unmarried individual filing a single return.[83] This change reversed the effect of the 1969 legislation that sought to address the "singles penalty" for married taxpayers with taxable income up to the top of the 25% marginal rate bracket.[84]

---

79. The Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 103, 95 Stat. 172, 187 established the "Deduction for Two-Earner Married Couples" under a new § 221, while the Tax Reform Act of 1986, Pub. L. No. 99-514, § 131, 100 Stat. 2085, 2113 repealed the provision.

80. The Earned Income Tax Credit was added to the code through the Tax Reduction Act of 1975, Pub. L. No. 94-12, §43, 89 Stat. 30, but was increased through a 1986 reform.

81. STAFF OF JOINT COMM. ON TAX'N, 100TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 15 (Comm. Print 1987).

82. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.

83. *Id.* at 53–54; *see also* STAFF OF J. COMM. ON TAX'N, 107TH CONG., GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS 25–28 (Comm. Print 2003) [hereinafter GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS]. This legislation made a third advancement in pursuit of marriage penalty relief through various changes to the Earned Income Credit. GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS, *supra*; *see also* I.R.C. § 32 (2012).

84. For 2016, MFJ taxpayers with taxable income over $75,300, but not over $151,900, have a marginal tax rate of 25%; this rate is equal to Unmarried Individuals with half such taxable income. For Unmarried Individuals, however, the 25% marginal rate extends to taxable income not over $91,150, an amount in excess of half of the top taxable income an MFJ taxpayer. Rev. Proc. 2015-53, 2015-44 I.R.B. 615. See Tracey M. Roberts, *Brackets: A Historical Perspective*, 108 NW. U. L. REV. 925 (2014), for a comprehensive consideration of tax brackets over the past century.

Although this change provided some marriage penalty relief, it failed to provide sufficient family penalty relief. If two unmarried taxpayers without qualifying dependents married and each spouse had a top marginal rate of up to 25%, the couple did not suffer from a marriage penalty with regard to tax rates on taxable income and may have even experienced a marriage bonus. When either or both taxpayers had children, however, the comparison of twice the Unmarried applicable marginal rate against the MFJ applicable marginal tax rate is a logical fallacy. In this instance, one, instead, must compare the HOH applicable rate plus the Unmarried rates to the MFJ rates or, when both may have had qualified individually for the HOH rates, twice the HOH rates are compared to the MFJ rates.[85] As the HOH taxable income bracket earnings are placed between the Unmarried and the MFJ earnings allowable to earn a particular tax rate, this attempt at offering marriage penalty relief failed to address family penalty relief in any meaningful way.

Additionally, this 2001 congressional attempt at marriage penalty relief for some failed to address the fundamental marriage and/or family penalty issue then present in the structure of the individual income tax. The extension of the 15% rate bracket for the Married taxpayer to twice that of the corresponding rate bracket for an Unmarried taxpayer essentially reintroduced income splitting for these taxpayers and made permissive joint filing unnecessary for Two-Income No Children ("TINCs") couples under a certain income level.[86] In drafting that legislation, Congress expressed "concern[] about the inequity that arises when two working single individuals marry and experience a tax increase solely by reason of their marriage."[87] The legislative history reveals the intent behind these changes, stating that

> [a]ny attempt to address the marriage tax penalty involves the

85. See I.R.C. § 1(a)–(c), and the relevant Revenue Procedure for adjusted for inflation brackets, to compare the effects of the applicable filing statuses on the family penalty.

86. For 2016, this income level is $151,900 for married couples. *See* Rev. Proc. 2015-53, 2015-44 I.R.B. 615. A 28% marginal tax rate begins for Married Individuals Filing Joint Returns if taxable income is over $151,900. For Unmarried Individuals, the 28% rate does not begin until taxable income is over $91,150. Note, though, that for income levels near poverty levels or lower, or twice such poverty level if married, there still may exist a significant marriage penalty in accessing welfare or welfare-type programs like the Earned Income Credit, discussed *infra* Part III.A.

87. STAFF OF THE J. COMM. ON TAX'N, 108TH CONGRESS, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 108TH CONGRESS 7 (J. Comm. Print 2005).

> balancing of several competing principles, including equal tax treatment of married couples with equal incomes, the determination of equitable relative tax burdens of single individuals and married couples with equal incomes, and the goal of simplicity in compliance and administration.[88]

Although the changes made by this law may have done well to provide more equal tax treatments of married couples to unmarried couples, that movement toward equity was only true for couples with incomes within a certain range who were unencumbered with children.

The 2017 tax reform, which took effect in 2018, made the biggest step forward to eliminate the marriage penalty found in the tax brackets. From January 1, 2018, the applicable tax rates only penalized married taxpayers as against Unmarried Individuals who are not Heads of Households, with taxable income over $600,000.[89] That reform also addressed family penalty relief, allowing for some additional benefit to unmarried individuals with dependents but only for those with taxable income not over $51,800.[90] Although this change failed to provide universal relief, it is a great step forward in supporting the family. This 2017 modification of the code, however, will expire beginning in 2026 without Congressional action.[91]

In addition to reducing both the marriage and family penalties, the 2017 bill doubled the child tax credit for that same period through 2025.[92] The bill also eliminated, through 2025, the child tax credit marriage penalty and raised the phase-out threshold from $75,000 for single individuals or HOHs and $110,000 for married individuals filing joint returns to $200,000 and $400,000, respectively.[93] It is imperative that Congress acts to make these changes permanent to prevent those severe family penalties present in the code prior to January 1, 2018 from reemerging.

---

88. H. R. REP. NO. 107-29, at 6 (2001).
89. Pub. L. No. 115-97, § 11001(a).
90. *Id.*
91. *Id.*
92. The Child Tax Credit was doubled to $2,000 in the 2017 act. *Id.* § 11022(a).The 2001 EGTRRA similarly doubled the Child Tax Credit from $500 to $1,000. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 201, 115 Stat. 38, 45.
93. Pub. L. No. 115-97, § 11022(a).

III. THE CODE'S AVERSION TO MARRIAGE: A CONCRETE DISCUSSION OF CONGRESS'S ATTACK ON MARRIAGE

Though the smaller tax brackets allotted for married persons over the tax brackets available for two single persons commonly have been the center of the marriage penalty debate, the family penalty is much more expansive.[94] First, the family penalty considers, instead, the tax liability of married joint filers as compared to the sum of income tax calculated using one HOH tax bracket and one unmarried tax bracket for a couple with like household income. For instance, consider a married couple with at least one child in which each spouse has a taxable income of $80,000 and was paying federal income taxes in 2016. The married couple would have had a marriage penalty calculated against each spouse utilizing § 1(c) rates for unmarried individuals but would have a family penalty calculated against one spouse utilizing § 1(b) rates for HOH's and one spouse utilizing § 1(c) rates for unmarried individuals. This can be illustrated in the following way:

Married Filing Joint Return Tax Liability:	$31,785.50[95]
HOH + Unmarried Individuals Tax Liability:	$30,068.00[96]

Thus, one can see that mandated joint filing status in 2016 would have resulted in a $1,717 penalty—although because of separate phase-out thresholds for a smorgasbord of deductions, credits, and penalty devices, as well as the ability to shift deductions to the filer with the higher marginal tax rate, the penalty could have been significantly greater.[97]

---

94. *See, e.g.*, Margaret Ryznar, *To Work, or Not to Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921, 926–30 (2009); Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006); Wendy C. Gerzog, *The Marriage Penalty: The Working Couple's Dilemma*, 47 FORDHAM L. REV. 27 (1978); Bittker, *supra* note 10.

95. Rev. Proc. 2015-53, 2015-44 I.R.B. 615 (setting forth inflation-adjusted tax code items for 2016). The Revenue Procedure shows adjustments to the tax rate tables under § 1 for Table 1—§ 1(a)—Married Individuals Filing Joint Returns to calculate tax if taxable income is over $151,900 but not over $231,450 as $29,517.50 plus 28% of the excess over $151,900. This calculation assumes no credits. *Id.*

96. *Id*. The inflation adjustment for 2016 shows for Table 2—§ 1(b)—Heads of Households to calculate tax if taxable income is over $50,400 but not over $130,150 as $6,897.50 plus 25% of the excess over $50,400 and shows for Table 3—§ 1(c)—Unmarried Individuals to calculate tax if taxable income is over $37,650 but not over $91,150 as $5,183.75 plus 25% of the excess over $37,650. This calculation assumes no credits. *Id.* tbls.2, 3.

97. *See* discussion *infra* Part IV.A.

An analysis of the Earned Income Credit, the Premium Tax Credit, and the Mortgage Interest Deduction shows that the code's bias against marriage is the result of specific statutory provisions and not simply the longstanding bias that had been inherent in the tax rate tables.

A. Beyond the Brackets: The Family Penalty and the Earned Income Tax Credit

The refundable Earned Income Tax Credit ("EITC"), which is available to low income taxpayers, is worth up to $6,269 for those with three or more children but begins to phase out when an unmarried taxpayer's earned income reaches $18,190 for the year 2016.[98] That same credit for a married family with three or more children filing a joint return will trigger the phase-out threshold when the married couple's joint earned income is only $5,550 more than the unmarried filer.[99] Moreover, the amount of the credit in relation to the number of children is not a multiple, that is, for two children the credit may be as much as $5,572, but a taxpayer with four children would only be able to receive $6,269 on one return.[100] This combination of elements seems to allow for multiple points of manipulation with regard to a married versus an unmarried couple.[101] For

98. Tax Reduction Act of 1975, Pub. L. No. 94-12, § 204, 89 Stat. 26, 30. The EITC is a refundable credit, meaning that it may provide taxpayers with a refund to the extent that the credit reduces his or her tax liability below zero. *Id*.; *see also* I.R.C. § 32 (2012).

99. These phase-out thresholds and limits adjust for inflation and are reported for the then current year in the applicable Revenue Procedure. In the case of an individual who is married, the taxpayer may only claim the Earned Income Credit if a joint return is filed. *See* § 32(d).

100. Note that the number of qualifying children that increase the amount of the credit differentiates between zero, one, two, and three or more, and that although two individuals, each with two children, would be able to receive a maximum credit of $5,572, a married couple would be entitled only to the $6,269 credit available to a taxpayer with three or more qualifying children. *See* § 32(b).

101. The provision for the Earned Income Credit incorporates portions of the rule for claiming a personal exemption for a dependent to define a "qualifying child" of the taxpayer. § 32(c)(3)(A). That applicable portion of the rule allows either parent to claim a child when the child has the same principal place of abode for more than one-half of the taxable year as both parents and otherwise qualifies as a "qualifying child" for both parents. *Id.* § 152(c)(4) (setting forth a special rule relating to two or more who can claim the same qualifying child); *see also* GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS, *supra* note 83, at 33 (explaining the 2002 change in tie-breaking law when both parents claim the child and the parents do not file a joint return

instance, in 2016, in a three-child family in which one spouse is the primary earner for the family making as little as $36,000 and the other spouse works part time earning $18,000, the married taxpayers would not be entitled to any EITC while an unmarried couple of comparable income could be entitled to $6,269 in a fully refundable credit.[102] The extreme limits of this family penalty would result when each individual earned about $18,000 and would be able to receive the maximum amount of credit, together $12,538, though that married couple would be limited to a measly $581 through the EITC.[103] This would create a nearly $12,000 family penalty for a married couple with earned income of just over $36,000.

Married Filing Joint Return EITC Eligibility:	$581.00[104]
HOH + HOH Filers EITC Eligibility:	$12,538.00[105]

together, then the child is considered a qualifying child of the parent with the highest adjusted gross income—this tie-breaking rule, though, is *where both parents claim the child*).

102. For 2016, a taxpayer is able to receive a $6,269 credit with three or more qualifying children when he earns at least $13,930, though, an unmarried taxpayer must not have an adjusted gross income of more than $18,190 to receive the full credit; a married taxpayer may not receive any credit when adjusted gross income on his joint return reaches $53,505. *See* Rev. Proc. 2015-53, § 3.06, 1015-44 I.R.B. 615.

103. This calculation assumes six children in order for the couple to each receive the $6,269 credit value for three or more children. This credit value penalty was calculated assuming that each spouse earns an amount equal to the threshold phase-out for a single person or HOH of $18,190. Filing as Unmarried, they would be entitled to the twice the maximum credit for a taxpayer, but filing as married they would only be entitled to one $6,269 credit. That one $6,269 credit would be reduced by 45% of which their earned income exceeds the threshold phase-out amount for joint filers ($36,380-$23,740 = $12,640; 45% x $12,640 = $5,688; $6269-$5,688 = $581). See § 32(b), for the phase-out percentage for three or more qualifying children, and see Rev. Proc. 2015-53, 2015-44 I.R.B. 615, for 2016 adjusted-for-inflation amounts for maximum amount of credit and phase-out thresholds.

104. Rev. Proc. 2015-53, 2015-44 I.R.B. 615, which sets forth inflation-adjusted tax code items for 2016, shows adjustments to the tax rate tables under § 1 for Table 1—§ 1(a)—Married Individuals Filing Joint Returns to calculate tax if taxable income is over $151,900 but not over $231,450 as $29,517.50 plus 28% of the excess over $151,900. This assumes no credits. *Id.*

105. The inflation adjustment for 2016 shows for Table 2—§ 1(b)—Heads of Households to calculate tax if taxable income is over $50,400 but not over $130,150 as $6,897.50 plus 25% of the excess over $50,400 and shows for Table 3—§ 1(c)—Unmarried Individuals to calculate tax if taxable income is over

The EITC, as introduced in 1975, required eligibility to be based on joint income in the case of a married couple but allowed for no additional earnings in reaching the phase-out threshold over that of an unmarried person.[106] That 1975 credit also differed because it was a credit uniquely designed for those with children, requiring that an eligible individual maintain a household for that individual and a child of that individual.[107] The Senate explained the purpose in creating the Earned Income Credit in that

> the most significant objective . . . should be to assist in encouraging people to obtain employment, reducing the unemployment rate and reducing the welfare rolls and that importantly, Federal welfare programs apply primarily to married couples with dependent children and it is in this area where this program can be most effective in reducing any tax disincentive to work.[108]

The EITC in its initial iteration focused on remediating the expenses in providing for a child in a very low income household without regard to the number of incomes affecting the earnings.[109] The focus in that first iteration of the EITC was on the dependent child and the resources available to support him.[110] Thus, it was logical to consider only household income in calculating the credit. In 1975, as today, marital status was

---

$37,650 but not over $91,150 as $5,183.75 plus 25% of the excess over $37,650. This assumes no credits. *Id*. tbls.2, 3.

106. That 1975 law allowed for a credit to be taken as against $4,000 of earned income to any taxpayer with married taxpayers' phase-out threshold calculated based on joint income and unmarried individuals' phase-out threshold based on only their income, which would amount to $17,907 in 2016 dollars. The 2016 credit is allowed against up to $13,930 for three or more children but only up to $9,920 for one child. Tax Reduction Act of 1975, Pub. L. No. 94-12, § 204(a), 89 Stat. 26, 30; *see also* Rev. Proc. 2015-53, § 3.06, 2015-44 I.R.B. 615.

107. *See* Tax Reduction Act of 1975 § 204(a). The House version of the bill did not require the taxpayer to maintain a household with a child and as such provided, instead, for special rules for individuals under 18 years old and for individuals employed by a family relative. *See also* S. REP. NO. 94-36, at 34–35 (1975).

108. *See* S. REP. NO. 94-36, at 38 (internal quotation marks omitted).

109. *See* Dennis J. Ventry, Jr., *The Collision of Tax and Welfare Politics: The Political History of the Earned Income Tax Credit, 1969-99*, 53 NAT'L TAX J. 983, 995–96 (2000).

110. *Id*.; *see also* Tax Reduction Act of 1975 § 204.

utilized to represent household composition, assuming that a co-habitating couple with a dependent child was married.[111]

The current version of the credit has expanded to individuals without children, however, though in a much more limited amount.[112] For instance, the credit is worth as much as $6,269 for a household with three or more children but is limited to $506 for a household without any qualifying children.[113] The current version of the credit also has allowed for that slightly higher phase-out threshold for married filers since 2002 as an attempt for that threshold amount to represent earnings that encompass that second earner.[114] The result, though, of the current formation of the EITC is that a couple with a joint income of about $36,000 could face a tax penalty of nearly $12,000 per year after hearing those wedding bells.[115]

---

111. *See* David T. Ellwood, *The Impact of the Earned Income Tax Credit and Social Policy Reforms on Work, Marriage, and Living Arrangements*, 53 NAT'L TAX J. 1063 (2000).

112. The original 1975 credit allowed for a refundable credit equal to ten percent on earned income to a certain amount—$4,000—when, at the time, the social security tax rate on employees was 5.85%. *See supra* note 106. Though the 1975 Earned Income Credit was only available to households with qualifying children, the 2016 credit for individuals without qualifying children is 7.65%, which is equal to current payroll taxes. This credit percentage rises to 45% in the case of an eligible individual with three or more qualifying children. I.R.C. § 32(b)(1) (2012).

113. Rev. Proc. 2015-53, § 3.06, 2015-44 I.R.B. 615. The credit percentage for a taxpayer with three or more qualifying children is 45%, but the credit percentage for a taxpayer with no qualifying children is equal to 7.65%, the employee share of payroll taxes. § 32(b)(1).

114. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38; GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS, *supra* note 83, at 28–34. Through the Economic Growth and Tax Relief Reconciliation Act legislation, Congress identified the issue that the earned income amount penalized some taxpayers who would receive a smaller Earned Income Credit if married than if not married. A separate phase-out threshold for married couples was available since that 2001 legislation, then allowing for the beginning and ending of the Earned Income Credit phase-out to increase by $1,000 for a married couple filing a joint return for taxable years beginning in 2002, 2003, and 2004; increasing to $2,000 for taxable years beginning in 2005, 2006, and 2007; and to $3,000 in a taxable year beginning after 2007 and then adjusted annually for inflation after 2008. GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 107TH CONGRESS, *supra* note 83, at 28–34.

115. *See supra* notes100–101.

B. The Premium Tax Credit's Impact on the Family Penalty

The Premium Tax Credit ("PTC"), which subsidizes health insurance premiums for low income families, became law by act of Congress on March 23, 2010 as part of the Affordable Care Act.[116] The credit is available to low and middle income taxpayers that purchase health insurance on health care exchanges and allows such taxpayers to receive advance payment of a refundable credit to pay for the cost of their monthly health insurance premiums.[117]

The amount of the PTC that a taxpayer may receive is based on a taxpayer's household income.[118] The "household income" used to determine the amount of the PTC is equal to the aggregate adjusted gross income of the taxpayer plus the income of all other individuals for which the taxpayer is allowed a personal exemption.[119] The aggregate income amount must not exceed 400% of the poverty line for a family of the size involved.[120] Thus, the PTC that a taxpayer may receive is reduced as household income increases, as impacted by a marriage-based filing status.[121]

The 2016 Poverty Guidelines, issued by the United States Department of Health and Human Services ("HHS"), set the poverty line at $11,880 for a single-person household, an amount that increases by an average of $4,150 as each person is added to the household.[122] Thereby, the PTC is

---

116. Patient Protection and Affordable Care Act ("ACA"), Pub. L. No. 111-148, § 1401, 124 Stat. 119, 213 (2010). The PTC applies to taxable years ending after December 31, 2013. § 1401(e).

117. The ACA provides that tax credits shall be allowed for any applicable taxpayer if the taxpayer has enrolled in an insurance plan through "an Exchange established by the State under 1311 of the [ACA]." § 1401(c)(2). *King v. Burwell*, 576 U.S. _(2015) (6-3), 135 S. Ct. 2480, however, determined that such PTCs are available to individuals in States that have a Federal Exchange and not a State Exchange. *But see King*, 135 S. Ct. at 2496 (Scalia, J., dissenting) (finding such a determination "quite absurd," one that "goes beyond giving words bizarre meanings," using "jiggery-pokery" to interpret the law in line with "the overriding principle of the present Court: The Affordable Care Act must be saved").

118. 26 C.F.R. 1.36B-2(b)(1) (2017).

119. *Id.*

120. "Poverty line" has the meaning given that term in § 2110(c)(5) of the Social Security Act. 42 U.S.C. § 1397jj(c)(5) (2012); I.R.C. § 36B(c)(1)(A) (2012).

121. If the taxpayer is married at the close of the taxable year, the taxpayer is eligible for the PTC only if the taxpayer and the taxpayer's spouse file a joint return for the taxable year. *See* § 36B(c)(1)(C).

122. This value is applicable for the 48 contiguous states and the District of Columbia; separate Poverty Guidelines for Alaska are issued in the Update in

available to households with fairly generous income levels, phasing out only for married parents with six dependent children with an adjusted gross income over $163,560 in 2016.[123] Though such a family would be entitled to a very small PTC, the value of the credit is maximized for a family of eight when the adjusted gross income is less than $54,383.[124]

The credit effectively limits the cost of health insurance purchased on an exchange to a percentage of household income for individuals with a household income of up to 400% of the poverty line.[125] For instance, in 2016, eligible taxpayers with household income of less than 133% of the poverty line were limited to paying 2.03% of their monthly income towards their monthly premium, with the PTC covering the remainder.[126] The monthly premium upon which the credit is based, however, is that of the applicable second lowest cost silver plan available in the individual market in the rating area in which the taxpayer resides ("Benchmark Plan")—even if this is not the plan that the taxpayer has purchased.[127]

---

which the poverty line for a household of one is $14,840, increasing by $5,180–$5,200 per additional person in the household. Annual Update of the HHS Poverty Guidelines, 81 Fed. Reg. 4036, 4036–4037 (Jan. 25, 2016).

123. The PTC uses a modified adjusted gross income ("MAGI") to calculate household income in determining PTC amount. That MAGI is equal to adjusted gross income plus any amount excluded from gross income under § 911, increased by any amount of interest received or accrued that is exempt from tax and by an amount equal to the portion of the taxpayer's social security benefits not included in gross income under I.R.C. § 86. *See* § 36B(d)(2)(B).

124. The HHS Poverty Guidelines allow for $40,890 for a household of eight while the PTC begins to phase out at 133% of the poverty line, or $54,383. § 36B(b)(3)(A)(i). For 2016, the PTC is equal to the difference between 2.03% to 9.66% of the taxpayer's MAGI and the premium for the applicable second lowest cost silver plan, Rev. Proc. 2014-62, 2014-50 I.R.B. 948, as prescribed by § 36B(b)(3)(A)(i) and 26 C.F.R. 1.36B-3T(g) (2017).

125. *See* 26 C.F.R. 1.36B-2(b)(1) (2017).

126. These "premium percentages" are indexed in the case of taxable years beginning in any calendar year after 2014 to reflect the excess of the rate of premium growth over the rate of income growth, with the given numbers those applicable for 2016 via Revenue Procedure 2014-62.

127. The PTC is the lesser of the monthly premium or the excess of the monthly premium for the second lowest silver plan with respect to the taxpayer over the product of the applicable percentage and the taxpayer's household income for the taxable year. Thus, a taxpayer may pay less than the applicable percentage of her household income towards her premium if she were to purchase a lower cost health plan—for instance, if she purchases the lowest cost silver plan; or may pay more than the applicable percentage of her household income if she were to purchase a higher cost health plan—for instance, if she purchases the third lowest cost silver plan. *See* § 36B(b).

Taxpayers with household income of up to 400% of the poverty line are limited to paying 9.66% of their monthly income towards their monthly premium based on the Benchmark Plan in 2016.[128]

For example, in Washington, D.C., individual health insurance is offered through that government's exchange, DC Health Link.[129] The exchange's website offers a list of the cost of the monthly premium by age for that government's Benchmark Plan.[130] For the couple with six dependent children that was considered in the previous section of this Article, the premium without the PTC could cost as much as $2,140 per month.[131] If the couple were married and each spouse earned $82,000 annually, he or she would receive no PTC, but if either spouse were unmarried, he or she could receive as much as $754 each month or $9,054 per year.[132] If, instead, one parent of the unmarried couple earned $48,850

---

128. *See id*. In the case of household income from 300% to 400% expressed as a percent of the poverty line, the initial premium percentage for 2014 was 9.5% and is indexed as explained, *supra* note 121, so that for 2016 those taxpayers may receive a refundable tax credit for the difference between 9.5% of household income over the applicable second lowest silver plan of the individual market in the rating area in which the taxpayer resides. *See id*.

129. Chapter 31D of the Washington, D.C. Code implements the elements of the Affordable Care Act to create its health benefit exchange. *See* D.C. CODE § 31-3171.01 (2017).

130. For the D.C. exchange, DC Health Link, the Benchmark Plan is the Kaiser Permanent DC Silver 2750/20%/HSA/Dental/Ped Dental HMO. *See* the table showing applicable monthly premiums, DC HEALTH LINK, 2016 SECOND LOWEST COST SILVER PLAN COSTS 1 tbl.1 (2016), https://dchealthlink.com/sites/default/files/v2/pdf/2016_SLCSP_Listing.pdf [https://perma.cc/6DCV-Y7ZU].

131. This calculation uses that DC Health Link table. *See id.* The calculation assumes that the six dependent children covered under the parent's or parents' plan are between 21 and 23 and then would have a monthly premium of $178.41 each and that the parents are each 61 and above with a premium of $535.22. ($178.41 x 6 + $535.22 x 2 = $2,140.90).

132. The PTC is not available when household income exceeds 400% of the poverty line for a family of the size involved. The poverty line for a family of eight is $40,890, *see supra* note 124, where $163,560 would be 400% of that value. A household income of $82,000 x 2 = $164,000 would put this household's income over the threshold for receiving the PTC. If unmarried, though, each parent separately would be considered for this credit. One parent could file as an Unmarried Individual with no dependents and that parent would not qualify for a PTC. *See* § 36B(c)(1)(A). The other parent, though, could claim all of the children on her return and qualify for a generous PTC. *Id.* Thus, that parent who filed as an Unmarried Individual would be responsible for the full $535.22 monthly cost in purchasing the Benchmark Plan, and the other parent would be limited to paying about 7.23% of her household income toward the $1,605.68 premium for

and the other earned at least $115,000, the PTC would increase to about $1,523 per month or about $18,276 per year; though married, the couple still would receive no credit.[133] Thus, the annual marriage penalty for this recently enacted tax credit is significant:

Married Earnings of $82,000 each:	$9,054
Married Earnings of $48,850/$115,000:	$18,276

Furthermore, as these PTCs are paid by the government to the issuer of the health plan on a monthly basis to reduce the premium charged to the insured for each period, this monthly $754 or $1,523 is an important piece of each family's monthly spending, rather than a "windfall-esque" credit claimed with the taxpayer's tax return filing.[134] Though the EITC has the ability to create a similarly substantial marriage penalty for low income households, this credit expands a hefty marriage penalty to substantially

herself and six 21 to 23-year-old children. ($178.41 x 6 + $535.22 = $1,605.68). That would result in a monthly $754.52 PTC. ($1,605.68 - 7.23% of $82,000/12 = $754.52). *See id.*

133. To be eligible for the PTC, a taxpayer generally must have household income that equals or exceeds 100% of the poverty line. *Id.* The poverty line for a household of seven is $36,730 in 2016; $48,850.90 is 133% of the poverty line for a family of that size. *Id*. The premium percentage, which is the percentage of monthly household income required to pay into the cost of the monthly premium of the Benchmark Plan, is lowest when household income is less than 133% of the poverty line. § 36B(b)(3)(A)(i). That percentage for 2016 is 2.03%. Rev. Proc. 2014-62, § 2.01, 2014-50 I.R.B. 948. The unmarried couple would have a monthly PTC equal to the Benchmark Plan cost of $1,605.68 over 2.03% of 1/12 of the annual income of $48,850—$1,523.04. Once the household income exceeds 400% of the poverty line for this family of eight, or $163,560, they become ineligible for the PTC. § 36B(c)(1)(A). Note that though the example utilizes applicable Benchmark Plan rates for Washington, D.C. and valid PTC premium percentages based on the relevant poverty line at 100% to 133%, Washington, D.C. has expanded its Medicaid program to parents to 216% of the applicable poverty line and to adults to 210% of the applicable poverty line. Thus, though this family may be eligible for Medicaid coverage, this example demonstrates the inherent bias against marriage in the PTC calculation if they purchased insurance on the Exchange. MEDICAID AND CHIP PAYMENT AND ACCESS COMM'N, MACSTATS: MEDICAID AND CHIP DATA BOOK 94 ex.35 (Dec. 2016).

134. The Affordable Care Act prescribes for advanced determinations and payment of premium tax credits and cost-sharing reductions. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1412, 124 Stat. 119, 231–32 (2010).

higher income families and a substantially greater percentage of American taxpayers.[135]

C. The Mortgage Interest Deduction's Marriage Disincentive

On August 7, 2015, the Ninth Circuit Court of Appeals provided another reason for remaining single when it determined that unmarried co-owners of real property were entitled to utilize the home Mortgage Interest Deduction on a per taxpayer basis.[136] The Internal Revenue Service followed *Voss v. Commissioner* with an Action on Decision ("AOD") to acquiesce in August of 2016.[137] A return filed under the status of "Married Filing Jointly" is considered one taxpayer, just as a return filed as "Unmarried" or "HOH." The home Mortgage Interest Deduction provision of the code allows for a deduction of interest paid on up to $1 million of qualified residence interest in 2018.[138]

The American tax system is a progressive system, meaning that the higher an individual's taxable income, the higher the tax rate applied to those last dollars earned—with marginal tax rates ranging from 10% to 37% in 2018.[139] Thus, the value of a deduction to a taxpayer generally is considered to be the amount of the deduction multiplied by that taxpayer's marginal tax rate.[140] Considering the married taxpayer couple and the unmarried committed couple, both with $2 million of qualified residence interest and a mortgage interest rate of seven percent, the tax savings disparity is quite dramatic.[141] The married couple would pay seven percent

135. *See* discussion *supra* Part III; *see also* DEP'T OF HEALTH AND HUMAN SERVS., ASPE DATA POINT: ABOUT 2.5 MILLION PEOPLE WHO CURRENTLY BUY COVERAGE OFF-MARKETPLACE MAY BE ELIGIBLE FOR ACA SUBSIDIES (Oct. 4, 2016), https://aspe.hhs.gov/system/files/pdf/208306/OffMarketplaceSubsidyeligible.pdf [https://perma.cc/V9XX-YK8D]. This publication estimates that 11.9 million consumers are eligible for Premium Tax Credits. *Id.* at 2.

136. Voss v. Comm'r., 796 F.3d 1051, 1053 (9th Cir. 2015), *acq.*, IRS Announcement 2016-02, 2016-31 I.R.B. 193 (Aug. 1, 2016).

137. IRS Announcement 2016-25, 2016-31 I.R.B. 193 (Aug. 1, 2016).

138. I.R.C. § 163(h)(3). The 2017 tax reform law reduced the limitation to $750,000 and disallowed home equity indebtedness as qualified indebtedness for indebtedness generally incurred after December 15, 2017. The $1 million limitation remains applicable through 2025 for prior incurred debt. Pub. L. No. 115-97, § 11043(a).

139. I.R.C. § 1.

140. *See id.* §§ 1, 63.

141. The Freddie Mac Primary Mortgage Market Survey®, Monthly Average Commitment Rate and Points On 30-Year Fixed-Rate Mortgages Since 1971 is a survey of lenders on the rates and points for their most popular mortgage products

of $2 million, or $140,000, in interest on their mortgages but would be limited to deducting interest on only $1 million of mortgages, or $70,000. The unmarried committed couple according to *Voss* and the AOD, though, would have twice that limit and may deduct interest paid on up to $2 million of mortgages, or the full $140,000.[142] If all parties were subject to the highest marginal rate, that may amount to a tax savings of as much as $25,900 for the married couple and a tax savings of as much as $51,800 for the committed couple.[143]

This value may be made up of two separate residences per taxpayer—the principal residence and one other residence; thus, for a married couple, they are limited to two residences, but an unmarried couple potentially could deduct the interest on four separate residences.[144] A residence may include a boat, vacation home, or *pied-à-terre* that otherwise satisfies the use definition that requires that sleeping space, a toilet, and cooking facilities be present.[145] That use definition makes clear that the code essentially is allowing for deductible interest on one "bonus" residence that may be a recreational vehicle or watercraft.[146] For a couple that may have separate principal residences when, perhaps, their careers are in different cities, they may be subject to concomitant high cost real estate markets. For instance, the median price of a two-bedroom apartment in Midtown Manhattan was over $3 million in the first quarter of 2016 while

---

based on first-lien prime conventional conforming home purchase mortgages with a loan-to-value of 80%. This survey shows that average rates plus points have ranged from just over nine and a half to just under three and a half since 2000. This calculation does not take into account the Pease Limitation found in IRC § 68 that may reduce allowable itemized deductions of up to 80% of itemized deductions otherwise allowable for such taxable year. *30 Year Fixed-Rate Mortgages Since 1971*, FREDDIE MAC, http://www.freddiemac.com/pmms/pmms30.html (last visited Aug. 31, 2017) [https://perma.cc/M8NN-SW25].

142. Voss v. Comm'r., 796 F.3d 1051, 1053 (9th Cir. 2015), *acq.*, IRS Announcement 2016-02, 2016-31 I.R.B. 193 (Aug. 1, 2016).

143. The highest marginal rate for both married and unmarried taxpayers for 2018 is 37%. § 1.

144. *Id.* §§ 163(h)(4)(A)(i), 280A(d).

145. Treas. Reg. § 1.163-10T(p)(3)(ii) (1987) requires the determination of whether a property is a residence be based on all of the facts and circumstances, including good faith of the taxpayer and explains that a "residence generally includes a house, condominium, mobile home, boat, or house trailer, that contains sleeping space and toilet and cooking facilities." § 280A(d) requires that the taxpayer use the dwelling unit as a residence for either more than 14 days per year or for more than ten percent of the number of days in the year in which the unit is rented at a fair rental, whichever is greater. § 280A(d).

146. Treas. Reg. § 1.163-10T(p)(3)(ii); §§ 163(h)(4)(A)(i), 280A(d).

a two-bedroom condo cost over $2 million for a moderately priced residence in a central San Francisco neighborhood.[147] In such a case, a married couple filing under the married filing jointly status would be placed at a disadvantage to unmarried committed couples because the married couple would be limited to two residences although the unmarried committed couple could use the interest paid on both city apartments in computing their deduction as well as up to two additional residences.

D. Certain Tax Credits and Deductions Further the Anti-Family Structure of the Tax Code

The EITC is an anti-poverty credit that largely affects individuals with very low income.[148] The mechanism aims to support children in households with low earned income, and, historically, marriage was a strong indicator of the economic resources of a household. On the other hand, the Mortgage Interest Deduction's penalty begins only when the mortgage or mortgages exceed $1 million or there are more than two homes attached to the mortgages. Both the EITC and the Mortgage Interest Deduction's social objectives of lifting children out of poverty and of putting quite high upper limits on subsidizations of home ownership contain inherent family penalties through the over-generalization of the economic consequences of marriage.

This resultant family penalty arguably may be tolerated, even with the objective of horizontal equity between married and unmarried couples, because the functions of the provisions are akin more to mechanisms to effectuate such social objectives rather than to determine a taxpayer's "fair share." The Premium Tax Credit, though, is a code provision that affects a wide spectrum of middle-class American taxpayers. Although universal health insurance is likewise an important social goal, Americans have left healthcare as a consumption choice, an aspect that is apparent even in the

---

147. The *Corcoran Report: 1Q16 Manhattan*, CORCORAN GRP. REAL ESTATE 17 (2016), http://media.corcoran.com/pdf/reports/2016_Q1/Manhattan_Q12016.pdf [https://perma.cc/8GHW-XMGQ]; *San Francisco Neighborhood Home Price Tables*, PARAGON REAL ESTATE GRP., https://www.paragon-re.com/trend/current-sf-home-value-tables-by-neighborhood (last updated Oct. 2017) [https://perma.cc/23TS-83ZC].

148. The availability of the EITC is dependent on the earned income of the taxpayer, the taxpayer's filing status, and the number of dependents that a taxpayer claims. *See* I.R.C. § 32. For instance, in 2017 the EITC was available to Unmarried Individuals without dependents with earned income under $15,010 and to MFJ taxpayers with three or more children with earned income up to $53,930. Rev. Proc. 2016-55, § 3.05, I.R.B. 2016-45.

ACA given the range of coverages available that qualify as "minimum essential coverage."[149] Due to the PTC's function as an advanced monthly payment against a mandatory purchase, the direct and prominent effect on household finances has extended the family penalty unnecessarily and highlighted state-sanctioned marriage as a costly expense.[150]

IV. Permissive Joint Filing Will Allow for Necessary Support of the Family

A. Defining Permissive Joint Filing

The Internal Revenue Code of 1939 contained all statutes relating exclusively to internal revenue in force at that time, derived from 164 separate enactments of Congress.[151] It contained 33 separate marginal tax rates and one filing status.[152] The Internal Revenue Code of 1954 contained 24 income tax brackets and three filing statuses and the Internal Revenue Code of 1986 contained 15 brackets and four filing statuses.[153] The current code, the Internal Revenue Act of 1986, as amended in 2017, similarly contains four filing statuses, though the number of marginal tax rates has been reduced to seven.[154]

The current federal income tax scheme allows for four separate filing statuses for taxpayers.[155] HOHs and Unmarried Individuals are available to those not married, and Married Individuals Filing Joint Returns and Married Individuals Filing Separate Returns are the two options available to married couples.[156] Under the current law, spouses have the option of

149. The ACA allows for a variety of health care coverage options that qualify for "essential minimum coverage" under the Act. *See* Patient Protection and Affordable Care Act, Pub. L. 111-148, § 1501, 124 Stat. 248; I.R.C. § 5000A(f).

150. In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), the Court held that although the individual mandate exceeded Congress's power under the Commerce Clause, reading the "penalty" as a tax was a permissible interpretation of the law and such a "tax" for failing to engage in the commercial action of purchasing minimum essential coverage is within Congress's taxing powers. But see Pub. L. No. 115-97, § 11081, which eliminates the penalty for months beginning after December 31, 2018.

151. Internal Revenue Code of 1939, 76 Cong. ch. 2, Preface, 53 Stat. 1 (1939).

152. *See id.*

153. Internal Revenue Code of 1954, Pub. L. No. 83-591, § 1, 68A Stat. 5, 5–6; Tax Reform Act of 1986, Pub. L. No. 99-514, § 101, 100 Stat. 2085, 2096–99.

154. I.R.C. § 1.

155. § 1(e) provides for a fifth status, "Estates and Trusts," though that status is not available to an individual, whether married or unmarried.

156. § 1(a)–(d).

filing jointly or separately.[157] Generally, when filing separately, spouses receive reductions in allowances and phase-outs equal to half of that which would be permitted if the two were filing jointly, though some credits become unavailable when spouses file separately.[158] Married couples have the freedom, however, to make an election to file under one filing status in one year with no binding effect on filing status for any other taxable year.[159] As such, spouses may choose to change their filing status in each year without requiring the consent of the Commissioner of Revenue, which tends to be required for other similar changes.[160]

As shown throughout this Article, married taxpayers with a marginal rate of 25% or higher may face a higher tax liability than they would if they remained or became unmarried.[161] Code provisions, such as the EITC,

---

157. *See id.* § 6013.

158. O.D. 968, 5 CUM. BULL. 195 (1921). Note, though, that many provisions that allow for a deduction or credit, or limitations on such, are halved for those choosing a Married Filing Separately status. See the tax tables for each listed in § 1(a) and (d), for which marginal rate brackets are reduced by half for those married persons filing separately; see also I.R.C. § 1411, for the Unearned Income Medicare Contribution when, in the case of a married taxpayer filing a separate return, the threshold amount for which the contribution applies is one-half of the dollar amount in the case of which is applicable to a taxpayer making a joint return; and I.R.C. § 163(h)(3)(B), providing that qualified residence interest is limited to interest on an amount not exceeding $1 million for a taxpayer or $500,000 in the case of a married individual filing a separate return until 2026—reduced to $750,000 and $375,000, respectively, for indebtedness incurred after December 15, 2017 and on all indebtedness beginning after December 31, 2025. Other benefits are not available for married couples that file separately. *See* I.R.C. § 23(f)(1) (stating that married couples must file joint returns to qualify for the adoption expenses credit); *see also* I.R.C. § 25A(g)(6) (stating that no credit is available for married individuals filing separate returns for the Hope Scholarship Credit or the Lifetime Learning Credit); I.R.C. § 21(e) (stating that married couples must file joint returns to utilize the dependent care credit).

159. An individual's filing status may change from year to year; there is no requirement to maintain a filing status once one is selected. *See* § 1; Treas. Reg. § 1.1-1 (as amended 2008).

160. For instance, if a corporation elects to be taxed as an S-corporation under I.R.C. § 1362 and then terminates such election, in order for that corporation to reelect S-corporation status before the fifth taxable year, the corporation requires consent from the Secretary of the Treasury. *See* § 1362(g); *see also id.* § 446(e) (stating that to change the method of accounting used to compute his income tax, a taxpayer must secure the consent of the Secretary of the Treasury).

161. Note, in particular, the rate changes enacted through the American Taxpayer Relief Act of 2012, which reintroduced the marginal tax rate of 39.6% for MFJ taxable income in excess of $450,000, $425,000 in the case of an HOH

the PTC, and the Mortgage Interest Deduction, may allow for substantially greater tax relief to individuals with similar income levels but different marital statuses.[162] In other words, married individuals without children are prejudiced as compared to two unmarried individuals filing as such, and some married individuals with children are disadvantaged compared to an unmarried couple with children—a couple who is afforded the benefit of one unmarried status and one HOH filing status.[163]

The cumulative effect of these marital penalties creates the potential for an immense family penalty in an era in which marriage rates have declined and cohabitation rates have risen.[164] This change in the composition of American households alone requires a reconsideration of the foundations of a tax system that utilizes marriage status as an indicator of the economic resources available to a taxpayer's family. Instead, developments in the practice of marriage mandate that a married filing status must be left as permissive joint filing to achieve the horizontal equity goals upon which the tax system is founded. A permissive joint filing regime would discard

---

filer, and $400,000 in the case of an Unmarried Individual filer; and the Patient Protection and Affordable Care Act, Pub. L. 111-148, § 9015, 124 Stat. 119, 870 (2010), which places a Medicare Surtax on net investment income in excess of a taxpayer's modified adjusted gross income above $250,000 for MFJ and in excess of $200,000 for individuals. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313, 2316 (2013). Though it may be plausible that such code provisions have little effect on marriage choices, it is irrelevant for this argument. The proposition here is that the design of our new code should be based in pro-family, marriage neutral terms and so then, a structure that penalizes marriage but does not actually result in marriage aversions remains one that fails marriage neutrality. *See, e.g.*, Alstott, *supra* note 13, at 559–61.

162. *See* discussion *supra* Part III. Note, additionally, the Patient Protection and Affordable Care Act § 9015, which places a Medicare Surtax on net investment income in excess of a taxpayer's modified adjusted gross income above $250,000 for MFJ and in excess of $200,000 for individuals. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101, 126 Stat. 2313, 2316 (2013).

163. *See supra* note 159.

164. Lawrence W. Waggoner, *Marriage is on the Decline and Cohabitation is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L. Q. 215, 215–24 (2016). From 2000 to 2010, the percent of unmarried couple households in the United States in relation to all households has increased 1.4% from 5.2% to 6.6% or from about 5.5 million households to about 7.75 million households. During the same decade, the percent of married households decreased from 51.7% of all households in 2000 to 48.4% of all households in 2010. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, 2010 CENSUS BRIEFS: HOUSEHOLDS AND FAMILIES 5 tbl.2 (Apr. 2012). Note that these 2010 Census statistics were calculated when same-sex partners could not be considered married under federal law.

the Married Individuals Filing Separate Returns filing status in favor of allowing such individuals to use the Unmarried Individuals or the HOH filing status as an alternative to joint filing.[165]

B. Permissive Joint Filing, the Marriage Bonus, and a Win for Gender Equality

Though the focus of this analysis and proposal certainly is to address the significant family penalty that may be imposed by using a married filing status, whether MFJ or Married Filing Separately, the benefits that may accrue from the MFJ filing status are equally important to the argument for permissive joint filing. When one spouse earns more than the other spouse, aggregating income affords the higher earning spouse benefits from wider tax brackets, essentially utilizing lower rates that the secondary earner or non-earner does not exhaust due to his low income.[166] Filing together also may result in a bonus when one spouse's losses can offset income or gains of the other spouse.[167]

The introduction of joint filing in the American tax system followed from state community property laws, such as those discussed in *Seaborn*, in which the earnings of one spouse are treated as earnings of the marriage rather that of the individual.[168] In 1859, the Supreme Court of California described the state's community property regime in declaring that the "statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and

165. See Margaret Ryznar, *A Practical Solution to the Marriage Penalty*, 44 PEPP. L. REV. 647, 683 (2017), for an alternative. Professor Ryznar proposes an additional filing status for only two-income married couples that earn an amount within a particular percentage of each other, offering double the rates of single filers and thus accommodating both incomes. *Id.*

166. The reduction of the marriage penalty for most married couples through revised tax brackets essentially returned income splitting to married couples, effective after 2017. Pub. L. No. 115-97, § 11001(a).

167. I.R.C. § 1.6013-4(b) (2012) provides that in a joint filing, tax liability is computed upon aggregate income and aggregate deductions. *See* S. REP. NO. 80-1013, at 53 (1948) (although there are two taxpayers, there is only one net income). Capital losses sustained by one spouse may offset gains by the other. Helvering v. Janney, 311 U.S. 189, 194–95 (1940). Net operating losses sustained by one spouse may offset income of another spouse. Calvin v. United States, 235 F. Supp. 594, 598 (D. Colo. 1964). In computing the net income on a joint return, their combined charitable contributions are deductible from their aggregate gross income up to 15% of the aggregate net income. Taft v. Helvering, 311 U.S. 195, 196 (1940).

168. *See* discussion of Poe v. Seaborn, 282 U.S. 101 (1930) *supra* Part I.A.

possessing an equal right to succeed to the property after dissolution."[169] The recognition of a married woman as a separate juridical entity from her husband allows a wife to own property and recognizes her equal contribution through her own acts on behalf of the family to earning such marital property acquisitions.[170] By allowing for the use of wider tax brackets for a single income married couple even when no children are present, the code recognizes the value of the non-earning spouse in generating the earnings of the other spouse.[171]

For instance, the 2017 changes to the code that increased the size of the regular income tax bracket for most married couples filing a joint return now preserves an equal tax bracket allocation for that non-earner to the primary earner.[172] This allocation is in addition to any provision for other types of dependents, such as children.[173] In enacting such a

169. Hisquierdo v. Hisquierdo, 439 U.S. 572, 577 (1979) (quoting Meyer v. Kinzer, 12 Cal. 247, 251 (1859)); *see also In re* Marriage of Valli, 324 P.3d 274, 283 (2014) (Chin, J., concurring) (citing this *Meyer v. Kinzer* language for reliance on interpretation of "substantially similar" language in CAL. FAM. CODE § 760 (West 2014), a law at issue in that case).

170. *See, e.g.*, Boggs v. Boggs, 82 F.3d 90, 96 (5th Cir. 1996), *rev'd on other grounds*, 520 U.S. 833 (1997) ("The use of a community property system represents Louisiana's recognition of the value a spouse, though non-employed, contributes to a marriage."). "Rather than viewing a married couple as distinct individuals acquiring property for their own benefit, the community property system acknowledges a married couple as an economic unit. . . . [A]ll income earned by either spouse or property purchased with those earnings is marital property." Deborah H. Bell, *Family Law at the Turn of the Century*, 71 MISS. L.J. 781, 791 (2002).

171. The number of community property states has not expanded in the fashion it appeared to be heading at the time joint filing with income splitting was introduced in 1948. There are now nine community property states—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin—and one state, Alaska, which offers an optional community property regime. ARIZ. REV. STAT. ANN. § 25-211(A) (2017); CAL. FAM. CODE § 751 (West 2017); IDAHO CODE § 32-906(1) (2017); LA. CIV. CODE art. 2336 (2017); NEV. REV. STAT. § 123.225(1) (2017); N.M. STAT. ANN. § 40-3-12 (2017); TEX. FAM. CODE ANN. § 3.002 (2017); WASH. REV. CODE § 26.16.030 (2017); WIS. STAT. § 766.31(3) (2017); ALASKA STAT. § 34.77.020 (2017). Alaska's optional community property system would not be recognized for federal income tax reporting purposes. *See* Comm'r v. Harmon, 323 U.S. 44, 45–46 (1944) (not recognizing for federal income tax purposes a similar Oklahoma statute allowing spouses to elect a community property system).

172. Pub. L. No. 115-97, § 11001(a).

173. Additional allocations for dependents may be provided through the Child Tax Credit, § 24, the EITC, § 32, and others. *See, e.g.*, I.R.C. §§ 24, 32 (2012).

legislative change in 2017, Congress recognized that the non-earner, usually the wife, should be given demonstrable value in the family through the code. This permissive joint filing proposal extends that value recognition to all spouses, asserting that the marriage bonus is the result of a just application of income tax to earnings that each spouse has contributed to its acquisition through his own industry as determined by the family as a unit. The potential of tax benefits accruing to a married couple over an unmarried couple from a non-earning spouse are beneficial to the concept of the family as a unit and are necessary for the recognition of the non-earning spouse as an individual and a taxpayer as apart from a dependent of a taxpayer. Addressing equity concerns must be paramount in the design of a contemporary tax code despite the negative comparative distributive effects perceived in the current code.

C. Permissive Joint Filing is American

An income tax system has a primary objective of raising monies to operate the government, which may provide for services at a range of degrees.[174] That degree may evolve over time and in response to economic, social, and political changes experienced by the citizenry. The organization of whom, what, and how much to tax in the United States is derived from various principles: horizontal equity, or taxing those with like incomes and circumstances similarly; vertical equity, or taxing those with greater means at higher percentages; economic efficiency and growth; and redistribution.[175] The hierarchy of these principles has varied in each principle's rank in response to historical circumstances and economic success or struggle, with the primacy of vertical equity in the 1940s and 1950s giving way to valuing economic efficiency as the nation approached the turn of the century.[176]

If a family for purposes of the "family penalty" is composed of a married couple with at least one dependent, then the family penalty began no later than in 1951 with the addition of the HOH filing status. Before

---

174. Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX. L. REV. 1, 3 (2006).

175. Elkins, *supra* note 8.

176. Dennis J. Ventry, Jr., *Equity Versus Efficiency and the U.S. Tax System in Historical Perspective*, *in* TAX JUSTICE: THE ONGOING DEBATE 25, 25–49 (Joseph J. Thorndike & Dennis J. Ventry, Jr. eds., 2002). In this chapter, Ventry traces the post-World War II era decline in tax reform focused on vertical equity's effects on social and economic justice in favor of a movement toward considering deviations from horizontal equity and its effect on efficiency and economic growth. *Id.*

this change, the original taxpayer as the individual shifted to universal married income splitting in 1948.[177] Though it seems that the 1948 change was a horizontal, equity-based response to the ability of those in some community property states to report half of the community income as individuals, Congress similarly could have resolved the problem by mandating that community property laws were not applied for purposes of calculating federal income tax.[178] Congress's election to provide for income splitting allowed for equality among the spouses because all income earned by the married couple was treated as income earned half by each spouse.[179]

This treatment of a couple's joint income as belonging to both equally at a time when the bulk of the income was exclusively earned and managed by the husband was an important step forward for women, indicating the independence and contribution to the household of the wife and mother in 1948.[180] Though this progressive and feministic reflection on property and income rights was an indirect result of the passage of similarly intended community property regimes in only a few states, the individual assessment of the wife and the mother was a forward-thinking application of the revenue system, which is a very real device for measuring national values.[181]

---

177. *See* discussion *supra* Part I.B.

178. Such a "legislative fix" would be necessary under a permissive joint filing regime to dodge the rush of states to a community property regime in order to benefit from precisely the conflict between common law and community property law states that arose pre-1948. *See supra* note 36.

179. *Poe v. Seaborn* explained the community property law that the Court was addressing in that "the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, of both." Poe v. Seaborn, 282 U.S. 101, 111 (1930).

180. H.R. REP. NO. 80-1274, at 24 (1948), predicted the "flood of ill-advised State legislation" enacting community property regimes that would result if income splitting was not permitted nationally, demonstrating that States were ready to extend these community property rights regimes that would have provided directly for such property rights to women. That they moved instead to enact equal access of married couples to income splitting through the tax code should not be viewed as an indication of a nation of States that were not ready to extend such rights through such state regimes but that the rash implementation of these complicated schemes had led to, and would lead to greater, complications that could be avoided with the 1948 code reforms that were established. *Id.*

181. The assertion that the wife and mother is the second or lesser earner in a family is both generally understood and statistically proven. *See* U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, MARITAL STATUS—PEOPLE 18 YEARS OLD AND OVER BY MEDIAN INCOME AND SEX, ALL RACES tbl. P-13 (2016). This 1974 data reports a median income of $3,260 for married women with income and

The 1951 addition of the HOH filing status assuredly reflected a shift in the national understanding of individual responsibilities and the taxpayer's obligation to support those responsibilities for unmarried individuals burdened with a dependent, but what of the addition of the HOH status's symbolic nature to the wife and the mother? There are certainly expenses for the HOH filer over and above the Unmarried filer, though tax brackets had never before represented dependents, who instead were accounted for through deductions and credits.[182] The 1951 change essentially counted a dependent child as half a spouse as represented by the width of a tax bracket while reducing the mother by that same half as symbolized by her added value to the family when considering income tax rates on taxable income. Where greater income generally was earned by the father of this unit, the income splitting initiated by *Seaborn* in 1930 and extended nationally through the 1948 reforms reflected an equity in ownership of the family purse for the wife and mother.[183] The changes in 1951 and 1969, then, though purportedly attempting to extend a measure of horizontal equity to single persons with varied responsibilities, must have represented a reverse of shift in ownership of income to *he* who earned it.

The more direct penalization of the married family occurred in 1969. When Congress repositioned the Unmarrieds' liabilities to no greater than 20% of the married income tax liability while freezing the liabilities of those married but filing separately at the former singles rates, it also meant that Congress shifted that former "singles penalty" to a similar marriage penalty that could apply to penalize the traditional family.[184] Now, the penalty extended to wedded couples without children, further reducing the value of the wife.

---

a median income of $10,683 for married men with income. Men are reported to have a median income 3.28 times that of working spouses. When the spouse is present, nearly 47.5 million of those men had income in that year while only nearly 30 million married women had income. 1.58 times as many men had their own income as compared to married women. The differential in median income since 1974, though mostly steadily declining, reached a low of men having a median income of 1.78 times that of women with earnings in 2009 and 1.07 times as many men with their own income as married women, when the spouse was present, in 1994. (Data is provided through 2015.) *Id.*

182. *See, e.g.*, Personal Exemption, I.R.C. § 151 (2012), EITC, *id.* § 32, and Child Tax Credit, *id.* § 24.

183. United States Census Bureau data beginning in 1974 demonstrates the common understanding that men earned more than women both then and now and that, in a marriage where both spouses are present, more women than men do not have earned income. *See* U.S. CENSUS BUREAU, *supra* note 181.

184. *See* Tax Reform Act of 1969, Pub. L. No. 91-172, § 803, 83 Stat. 487, 681–82.

Notably, the summary of the Tax Reform Act of 1969 passed by the House of Representatives, which allowed certain dependent-less single people access to more generous HOH filing brackets, remarked that a provision reducing tax liability for singles is adverse to marriage because two individuals eligible for this lower liability may be responsible for a higher combined liability as a result of marriage.[185] The Joint Committee's summary continued by stating its perception that "there is some question whether marriage is significantly affected by such tax considerations."[186] That question, which was dismissed in 1969, may not be dismissed so easily today.

More recently, the 1981 Congress's secondary earner deduction purported to respond to concerns about the marriage tax penalty while retaining taxation on married couples jointly.[187] The focus during this reform was on the high effective marginal tax rate on the second earner's income in a joint filing and its adverse effect on a second earner's decision to work.[188] The secondary earner deduction allowed for a deduction of ten percent on up to $30,000 of income earned by the spouse with lower earnings on a joint return.[189] Though this feeble attempt at addressing rampant penalties for the laboring wife was a short-lived code inclusion, its meager and indirect offering is an unsatisfactory path to creating the achievable equality and fairness that is proposed by this Article in the form of a new code structure.[190] Though the 2017 tax reform has made great strides toward reducing the marriage and family penalty, Permissive Joint Filing allows for full respect of the secondary earner's income as income earned by an individual; that earner's income is entitled to its own, separate, progressive taxation.

Several tax provisions relating to taxation of the family provide varied tax benefits to two individuals on the basis of whether they are legally married. Many of these tax provisions operate to allow varied treatment based on marital status to allow for administration of the code while others assume the

---

185. SUMMARY OF H.R. 13270, THE TAX REFORM ACT OF 1969, *supra* note 56, at 104.

186. *Id*.

187. STAFF OF J. COMM. ON TAX'N, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, at 33–37 (1981).

188. *Id.* at 34.

189. Economic Tax Recovery Act of 1981, Pub. L. No. 97-34, § 103, 95 Stat. 172, 187, added § 221 of the Internal Revenue Code that provided for "Deduction for Two-Earner Married Couples." For tax years beginning in 1982, the applicable percentage was five percent. *Id.*

190. Introducing secondary earner incentives while retaining joint filing will never achieve marriage neutrality. *See, e.g.*, Listokin, *supra* note 31, at 201–02.

result of horizontal equity based on an economies of scale premise.[191] A third category of detrimental provisions that prey asymmetrically on these wedded procreators are meant simply to punish earned income generally, despite falling disproportionately on the value of maternal compensation to the family purse.[192]

Proposals to alleviate such results include making child care costs a deductible business expense, increasing the child care credit, and increasing and expanding the dependent care assistance programs. Allowing for child care costs expended to engage in employment to function as a deductible expense preserves America's strong held value of a parent's right to direct the upbringing of his child.[193] Limiting the value of such a deduction to either the earned income of the lower earning spouse, as the child care credit provides, or to tack on a modest two-percent floor by classifying the deduction as a miscellaneous itemized deduction layers a value of arguable economic efficiency to such a tax expenditure.

Congress has revised the EITC's potentially severe family penalty for very low income families since its 1975 enactment. The addition of a separate phase-out threshold for married families introduced through the 2001 legislation and effective in 2002, attempted to reduce the marriage penalty by increasing the phase-out threshold and completed phase-out

---

191. For instance, the Mortgage Interest Deduction, I.R.C. § 163(h)(3), allows for a deduction of mortgage interest on up to two homes per taxpayer either as an individual if unmarried, or as a couple if married. The implication is that either such unit of taxpayer is afforded two homes, discounting the situation in which married taxpayers may keep separate households for purposes of careers. Also consider the uniform $10,000 limitation, applicable to married and unmarried, alike, on deducting state and local taxes. Pub. L. No. 115-97, § 11042(a) (to be codified at I.R.C. § 163).

192. Thresholds for tax surcharges like the Medicare surtax, *id.* § 1411, are applied to unmarried individuals at significantly more than half the threshold applied to a married couple. For instance, the tax is imposed on the excess net investment income of an unmarried individual on income over a $200,000 threshold but on the excess net investment income of an unmarried individual on income over a $250,000 threshold. § 1411(b).

193. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." (citing Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Stanley v. Illinois, 405 U.S. 645, 651 (1972); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Parham v. J.R., 442 U.S. 584, 602 (1979); Santosky v. Kramer, 455 U.S. 745, 753 (1982))).

income amounts by a mere $1,000.[194] That amount in 2016 allows for a $5,520 differential, the difference between $18,110 and $23,630, permitting that a married couple faces a penalty with regard to receiving the full credit amount once adjusted gross income exceeds $23,630, but that an unmarried couple of equivalent income could potentially avoid a penalty with $36,220 of that same type of income.[195]

CONCLUSION

In 1948, Congress amended the basis for collecting income tax on two married individuals in a way that respected each individual's contributions to the collective earnings.[196] It did so by recognizing marriage as a strong basis for determining household income while honoring each spouse's role in the creation of that pecuniary wealth.[197] Subsequent Congressional revisions to American tax law have led it away from reflecting the value America places on family and on the individual.

The 2017 tax reform provided for important revisions to the code, which reduced marriage and family penalties. The next important code revision must be to eliminate such penalties while preserving bonuses that support and value families by allowing permissive joint filing. Permissive joint filing is the right solution for a contemporary society.

---

194. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 303, 115 Stat. 38, 55.

195. Note also that the second element of Earned Income Credit eligibility is a limit on investment income that is not increased for a married couple over an unmarried couple but would be allowed for each taxpayer in an unmarried couple. For 2016, the excessive investment income limit is $3,400. Rev. Proc. 2015-53, § 3.06, 2015-44 I.R.B. 615.

196. Though the Revenue Act of 1913, Pub. L. No. 63-16, § 2, 38 Stat. 114, 166, was the first to impose an income tax following the ratification of the Sixteenth Amendment, U.S. CONST. amend. XVI, and the Revenue Act of 1918, Pub. L. No. 65-254, § 223, 40 Stat. 1057, 1074, first provided for calculating income tax liability jointly; the Revenue Act of 1948, Pub. L. No. 80-471, § 301, 62 Stat. 110, 114, first allowed effective income splitting for married persons filing jointly—giving them twice the tax bracket allowance allowed to an unmarried person. The joint return election currently is found in I.R.C. § 6013.

197. *See* Revenue Act of 1948, Pub. L. No. 80-471, § 301, 62 Stat. 110, 114 (1948); *see also* discussion *supra* Part I.B.