A Practical Solution to the Marriage Penalty

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Abstract

In the federal income tax code, there is a marriage penalty resulting from tax brackets that do not double upon marriage. This marriage penalty persists despite universal condemnation of it, penalizing a significant portion of married women who work and many same-sex couples.

This Article proposes a novel way to deal with this marriage penalty by creating a filing status for dual-income couples that earn an amount within a particular percentage of each other. This filing status would be the same as the current married filing status, except it would double the rates of single filers by accommodating two incomes.

This approach represents a break from the status quo of only separating single taxpayers from married ones, which fails to consider that in reality there are two types of married couples: one- and two-income. This proposed solution differs from previous ones that require married couples to file as single individuals and that ignore marital status. Adding another filing status for two-income married couples is a practical solution to the marriage penalty that causes the least upheaval to the general legal framework because it continues to treat spouses as a single economic unit.

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I. INTRODUCTION

An age-old problem has resurfaced in the new context of same-sex marriage: the marriage penalty created by the lack of double income tax brackets upon marriage.[1] Same-sex marriage resulted in the largest expansion of people impacted by the marriage penalty since the mass entrance of women into the labor market,[2] renewing interest in eliminating the marriage penalty.[3]

Conventional wisdom holds that married couples benefit from a bonus in the tax code. However, it is primarily one-income couples who benefit from marriage under the tax law.[4] Many of the remaining couples must pay more in taxes than they would have paid had they remained single because tax brackets for married couples are not double the single-filer rates.[5] The result is that the tax code discourages dual-income married couples.[6]

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1. *See* United States v. Windsor, 133 S.Ct. 2675, 2682 (2013); Obergefell v. Hodges, 135 S.Ct. 2584, 2608 (2015).

2. Anthony C. Infanti, *The Moonscape of Tax Equality:* Windsor *and Beyond*, 108 NW. U. L. REV. 1115, 1117 (2013) (analyzing the tax consequences of *Windsor*); *see also Characteristics of Same Sex Households: 2015*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/samesex/index.html [https://perma.cc/296M-755Y] (last visited Apr. 4, 2017) (showing that same-sex couples on average earn more than married opposite-sex couples and are more likely to have dual-income spouses).

3. Lily Kahng predicts "based on demographic statistics and other sociological and economic research relating to income levels, wealth holdings, child rearing, and employment patterns, that women in same-sex marriages will be less likely than other married people to enjoy significant marriage tax benefits, and more likely to incur substantial marriage tax burdens." Lily Kahng, *The Not-So-Merry Wives of* Windsor*: The Taxation of Women in Same-Sex Marriages*, 101 CORNELL L. REV. 325, 328 (2015).

4. *See infra* notes 5–6 and accompanying text.

5. *See, e.g.*, Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469, 1479 (1997).

6. Lawrence Zelenak, *For Better and Worse: The Differing Income Tax Treatments of Marriage at Different Income Levels*, 93 N.C. L. REV. 783, 783 (2015) [hereinafter Zelenak, *For Better and Worse*]. The numbers of working women and nonworking women are roughly equal. U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE, A DATABOOK (Mar. 2013), https://www.bls.gov/cps/wlf-databook-2012.pdf [https://perma.cc/N2ZA-VXUK] ("Women's labor force participation rate peaked at 60.0[%] in 1999."). In 1996, twenty-one million couples paid marriage penalties, totaling $29 billion. CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 1 (June 1997), https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/marriage.pdf [https://perma.cc/S5GU-WRAP]. Meanwhile, twenty-five million married couples benefited from $33 billion worth of tax reductions by virtue of being married—an average of approximately $1,300 per couple. *Id.* at 27–36.

The marriage penalty is highly problematic in a society like the United States that wants to encourage marriage[7] and paid employment.[8] Both goals are hindered by the current marriage penalty,[9] which may contribute to the record number of people not participating in the workforce in recent years,[10] especially women.[11]

Republicans and Democrats all recognize the problem with the marriage penalty.[12] Commentators have also written against the marriage penalty, offering various solutions.[13] Although many of them have argued for the

7. *See infra* Part II.B.2.

8. *See infra* Part II.B.1. *See also* Ralph Waldo Emerson, *Self-Reliance*, *in* ESSAYS 37, 47 (Boston: James Munroe & Co. 1847) ("But do your work, and I shall know you. Do your work, and you shall reinforce yourself."); Jonathan Barry Forman, *Making America Work: Alfred P. Murrah Professorship Inaugural Lecture*, 60 OKLA. L. REV. 53, 54 (2007) ("Work. Hard work! And plenty of it. That's what has made the United States into the world's foremost economic superpower.").

9. *See infra* Part II.

10. *Overview of BLS Statistics on Unemployment*, U.S. DEP'T LAB.: BUREAU LAB. STAT., https://www.bls.gov/bls/unemployment.htm [https://perma.cc/2WMD-PYVX] (last modified Dec. 16, 2013).

11. Ali Meyer, *Record 56,167,000 Women Not in Labor Force; Participation Rate Matches 27-Year Low*, CNS NEWS (May 8, 2015, 10:14 AM), http://cnsnews.com/news/article/ali-meyer/record-56167000-women-not-labor-force-participation-rate-matches-27-year-low [https://perma.cc/F53F-QFPY].

12. "Additionally, petitioners' concern about the 'marriage penalty' is currently a matter which is being considered by members of Congress." Fa'Asamala v. Comm'r, T.C. 1998-137 (1998) (citing Marriage Tax Elimination Act, H.R. 2456, 105th Cong., 1st Sess. sec. 2 (1997); Marriage Penalty Relief Act, H.R. 2593, 105th Cong., 1st Sess. sec. 2 (1997)); *see also* Calmes v. U.S., 926 F. Supp. 582, 593 (N.D. Texas 1996) ("The Court believes that this is a classic example of the right hand not knowing (or caring) what the left hand is doing. The President and Congress extol the virtues of marriage and the family, debate per-child tax credits and laud the demise of the marriage-penalty present in the tax code, while the agency itself attempts to have its Texas community property cake and eat it too."). While proposed bills in the late 1990s and early 2000s offered such relief, they were vetoed by the President for different reasons. Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 2 (2000) [hereinafter Zelenak, *Doing Something About Marriage Penalties*]; *see also Tax Reform that Will Make America Great Again*, DONALD J. TRUMP, https://perma.cc/62US-HP2R (proposing doubling tax rates upon marriage for all taxpayers).

13. *See* Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, 65 U. CIN. L. REV. 787, 787 (1997) (considering the marriage penalty for African American families); Lora Cicconi, Comment, *Competing Goals Amidst the "Opt-Out" Revolution: An Examination of Gender-Based Tax Reform in Light of New Data on Female Labor Supply*, 42 GONZ. L. REV. 257, 260 (2006–2007) (discussing the impact of the marriage penalty on women's issues); Richard L. Elbert, Comment, *Love, God, and Country: Religious Freedom and the Marriage Penalty Tax*, 5 SETON HALL CONST. L.J. 1171, 1174–85 (1995) (outlining the background of the penalty); Edward J. McCaffery, *Where's the Sex in Fiscal Sociology? Taxation and Gender in Comparative Perspective*, UNIV. S. CAL. CTR.

abandonment of taxation based on marital status,[14] this Article is the first to propose adding another tax bracket for couples with two-income earners.[15]

Adding another tax bracket may seem controversial due to the perception that it complicates an already complex tax system.[16] Furthermore, it treats one-income earner marriages differently from two-income earner marriages by offering them different taxation rates.[17] However, these are not, in fact, significant complications and, importantly, this Article's proposal is consistent with the usual treatment of the family as one economic unit.

Indeed, the current income tax code need not be different from other areas of law that treat the family as a single economic unit. However, it should recognize that there are in fact two different types of families today—those with two incomes and those with one. While this creates a marriage penalty under the current tax code, the solution is not to stop treating the family as one economic unit; instead, it can be to distinguish between these two types of families with an additional tax bracket.

Accordingly, Part II of this Article begins by analyzing the marriage

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IN LAW, ECON. & ORG., Paper No. C07-12 6 (2008), http://ssrn.com/abstract=1020360 [https://perma.cc/P39U-WNKE] (considering taxation's impact on women from a comparative perspective); Robert S. McIntyre & Michael J. McIntyre, *Fixing the "Marriage Penalty" Problem*, 33 VAL. U. L. REV. 907, 922 (1999) (suggesting ways to alleviate the penalty).

14. *See, e.g.*, Kahng, *supra* note 3; Shari Motro, *A New "I DO": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1543 (2006) (proposing "that Congress unbundle the presumption of economic unity for income tax purposes from the institution of marriage by devising a new criterion for income splitting"); *see also infra* Part IV.A and note 18.

15. A previous article framed the exact legal issue and offered general solutions to the marriage penalty in the tax code. Margaret Ryznar, *To Work, or Not to Work? The Immortal Tax Disincentives for Married Women*, 13 LEWIS & CLARK L. REV. 921 (2009) [hereinafter Ryznar, *To Work, or Not to Work*].

16. *See, e.g.*, Stephanie Hunter McMahon, *What Innocent Spouse Relief Says About Wives and the Rest of Us*, 37 HARV. J. L. & GENDER 141, 162 (2014) ("[T]he tax system is complicated, and many people rely on accountants or software to prepare their returns."); *see also* Robin Cooper Feldman, *Consumption Taxes and the Theory of General and Individual Taxation*, 21 VA. TAX REV. 293, 330 (2002) ("Everyone agrees that the current income tax system is horribly complicated."). While there are currently several filing statuses and this Article proposes adding another one, it is relatively simple to figure out which filing status a person should take; the IRS even offers an online test. *See What Is My Filing Status?*, IRS, http://www.irs.gov/uac/What-is-My-Filing-Status%3F [https://perma.cc/84HS-557T] (last visited Mar. 9, 2017).

17. *See, e.g.*, *Spouse Income Calculator*, BANKRATE, http://www.bankrate.com/calculators/smart-spending/spouse-income-calculator-tool.aspx [https://perma.cc/WDB3-7RQW] (last visited Mar. 9, 2017).

penalty and its consequences. In Part III, this Article shows why a commonly proposed solution—the abandonment of taxation based on marital status[18]—would be a greater departure from current law than the solution proposed by Part IV of this Article, which is to create an additional tax bracket for married couples who are two-income earners. This provides legislators the opportunity to alleviate the marriage penalty in the taxation system without significant changes to the general legal framework that treats spouses as a single economic unit, which may finally alleviate the marriage penalty that has thus far eluded reform efforts. This Article concludes that such an additional tax bracket would be the most practical and consistent solution to the persistent problem of the marriage penalty, building and elaborating upon a previous article.[19]

II. THE MARRIAGE PENALTY

The federal income tax code has disadvantages for secondary income earners.[20] These disadvantages disproportionately affect the many married

18. *See, e.g.*, Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1, 3 (1980) ("[A] marriage-neutral income tax system, under which all individuals file separate returns under a single rate schedule, is the most defensible position in the long run."); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 108 (1993) ("The joint return ought to be abolished. A system that treats each person as a separate taxable unit is more equitable, more consistent with basic tax principles, more efficient, and ultimately better able to accomplish social family goals."); Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 757 (2013) ("Joint filing based on formal marriage is particularly ill-suited to the new patterns of marriage and child-rearing. In the mid-twentieth century, the prevalence, homogeneity, and exclusivity of formal marriage made it a convenient and perfectly sound proxy for family. Today, however, joint filing is not a plausible way of attempting to protect freedom or promote collective welfare."). *See also infra* Part IV.A.

19. *See* Ryznar, *To Work, or Not to Work*, *supra* note 15 (outlining the legal issues and offering general solutions to the marriage penalty in the tax code).

20. This Article limits its analysis to the federal tax code's disincentives for working women that are created by the lack of double income tax brackets, with the many other sources of marriage penalties in the tax code being beyond its scope. For example, "Congress has introduced new sources of marriage penalties into the Code. . . . Congress recently has become fond of imposing hidden taxes in the form of phaseouts denying various tax benefits to high income taxpayers." Zelenak, *Doing Something About Marriage Penalties*, *supra* note 12, at 8. Additionally, as discussed extensively in the literature, the earned income credit that reduces a taxpayer's bill also suffers from the marriage penalty: "If a low-income working couple decided to marry, their combined income would rise to $25,000, which would result in an estimated financial loss of $1,900 in annual EITC benefits." Bret Bogenschneider & Karen Bogenschneider, *An Evidence-Based*

women who are secondary income earners due to their lower earnings compared to their husbands, which make their wages more discretionary.[21]

Among the disadvantages for secondary income earners is the marriage penalty resulting from the current structure of the tax brackets. The marriage penalty is clearly recognizable in the federal income taxation system, although Congress never intended or justified it when writing the Internal Revenue Code. Also discernible are the concrete consequences of the marriage penalty, including the disincentives for married women to participate in the labor force and for couples to marry. These disincentives raise issues of fairness, toward which the tax system strives.

A. The Phenomenon

In 2000, Americans paid marriage penalties totaling $30.0 billion, while others received marriage bonuses totaling $28.5 billion.[22] The numbers were similar a few years earlier in 1996—21 million married couples paid, on average, $1,400 of additional taxes by filing jointly, with total marriage penalties amounting to $29 billion. In contrast, 25 million married couples received $33 billion in tax reductions because they were married—on average, $1,300 per couple.[23]

As a simple example, imagine a woman has a taxable income today of $80,000 and a man has a taxable income of $100,000. If they were living together but not married, she would pay $15,771 in taxes while he would pay $21,036 in taxes. In total, the couple would pay $36,807 in federal income taxes as single (nonmarried) individuals living together in one household. If the couple decided to marry, then the man and woman would switch from being single filers to married filers, and they would pay $37,385 in taxes on their combined taxable income of $180,000. This is an

Approach to Family in Tax Policy, 51 GONZ. L. REV. 283, 310 (2015). Disability laws are one example of non-tax penalties on marriage. *See* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1390 (2009).

21. "The gender wage gap is evident across many professional and management occupations." Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 25 (2010). *See also infra* Part II.B.1; notes 37–38.

22. Janet Holtzblatt & Robert Rebelein, *Measuring the Effect of the EITC on Marriage Penalties and Bonuses*, 53 NAT'L TAX J. 1107, 1117 (2000).

23. CONG. BUDGET OFFICE, *For Better or for Worse: Marriage and the Federal Income Tax* 27–36 (1997), http://www.cbo.gov/ftpdocs/0xx/doc7/marriage.pdf [https://perma.cc/QA65-SVRP].

additional federal income tax of over $500 per year compared to their tax liability before their marriage, even though nothing has changed except their marital status.[24]

In this hypothetical marriage, the wife's income is the secondary income because it is less than her husband's. If she stops earning an income during the marriage, however, then the couple would pay only $16,542 on his $100,000 taxable income, nearly $5,000 lower than he paid as a single filer. In other words, the wife's departure from the work force would not only spare them the marriage penalty, but also earn them a marriage bonus.

This results from a combination of the joint tax return and the progressive tax-rate structure, both characteristic of the American income taxation system.[25] Incomes are taxed at a higher rate at each successive bracket,[26] but the amount of income that prompts every tax bracket for the married schedule is not double the single schedule, a discrepancy that starts at the 25% rate and creates the marriage penalty:[27]

2016 TAX RATE	SINGLE FILERS	MARRIED FILERS
10%	Up to **$9,275**	Up to **$18,550***
15%	**$9,276** to **$37,650**	**$18,551** to **$75,300**
25%	**$37,651** to $91,150	**$75,301** to $151,900
28%	$91,151 to $190,150	$151,901 to $231,450
33%	$190,151 to $413,350	$231,451 to $413,350
35%	$413,351 to $415,050	$413,351 to $466,950
39.6%	$415,051 or more	$466,951 or more

*Amounts on the married schedule that are double the amounts on the single schedule are **bolded**.

24. This tax scenario has been simplified for illustration purposes. For the maximum marriage bonuses and penalties at differing income levels, see Zelenak, *For Better and Worse*, *supra* note 6, at 789 tbl.1.

25. *See infra* note 29 and accompanying text on income stacking. *See also* Victoria J. Haneman, *The Collision of Student Loan Debt and Joint Marital Taxation*, 35 VA. TAX REV. 223, 238 (2016).

26. *See* I.R.C. §1 (2015).

27. The 2016 marginal dollar triggering each successive tax bracket can be found in the notes following I.R.C. §1 (Supp. 2016). There are other sources of marriage penalties and bonuses in the federal income tax code as well, which are not considered in depth by this Article. *See supra* note 20.

In addition, the higher tax rates for a secondary income are due to the income stacking that adds it to the primary income.[28] Accordingly, the secondary wage earner's income is taxed at a higher rate than the primary wage earner's—the natural result of a progressive taxation system—but, problematically, each spouse has a smaller tax bracket than if he or she had remained single.

The marriage penalty peaks for spouses who earn equal incomes because the tax brackets for married couples are not double those of single filers. If a woman makes an amount of money equal to her husband, although she is technically no longer the secondary income earner, she suffers the marriage penalty the most. This is because equal-earning couples double their income upon marriage, and only double tax brackets would make their decision to marry tax neutral.

Thus, the marriage penalty increases the tax liability of any two-income-earning married people when they combine their income and the tax brackets do not accommodate their two earnings.[29] Filing separately is, on average, not advantageous because fewer credits and deductions are available, and the tax brackets are narrower than those of single filers.[30]

As the tax court describes it:

> A married couple filing a joint return are taxed on their total combined income and, as for all taxpayers, the marginal tax rate increases as total income increases. Reflecting income splitting enacted in 1948, the rate schedule for married couples filing jointly is somewhat lower than it is for single persons. Consequently, if one partner of the marriage produces all or most of the income, he or she pays less tax than if single. However, if both spouses work,

28. "Commentators commonly confuse the marriage penalty and the stacking effect." Zelenak, *Doing Something About Marriage Penalties*, *supra* note 12, at 21.

29. Note the difference between the marriage penalty caused by the lack of double taxation rates and the income stacking effect. Kevin M. Walsh, *The Marriage Penalty: How Income Stacking Affects the Secondary Earner's Decision to Work*, 39 SETON HALL LEGIS. J. 83, 86 (2015) ("For example, consider a situation in which a husband and wife each earn $100,000 and file jointly. Together, their taxable income is $200,000, and their tax liability is $57,528.50 on their 2014 joint tax return. However, if they could file as unmarried individuals, they each would have a tax liability of $26,522. The difference between these tax liabilities means that the couple faces a marriage penalty of $4,484.50 when jointly filing as married individuals instead of filing as unmarried individuals.").

30. I.R.C. § 1.

> the second income is piled on the first, and is thus in a higher marginal tax bracket than if it stood alone. Because the higher tax bracket can more than negate the lower rate schedule for couples filing jointly, when two people who earn somewhat comparable salaries decide to marry, they unhappily discover that their total tax bill is higher than it was before they were wed.[31]

This marriage penalty has been viewed as unfair in a tax system that strives for fairness.[32]

The tax bonus is created by the same phenomenon because, although not double, the tax brackets are still larger for married people than single people.[33] Therefore, if one spouse does not earn any income or a significant income, the other spouse benefits from the larger tax brackets. In other words, in one-income or significantly unequal two-income earner households, the tax brackets have increased upon marriage, but not the amount of income, creating the marriage bonus.

The marriage penalty resulted from Congress's search for fair tax brackets for married and single people in the 1960's. An initial tension among taxpayers arose between singles and married couples under the 1948 Revenue Act, which introduced the income splitting approach that allowed spouses to pay what they would have paid in taxes had each spouse earned one-half of the combined income.[34] However, singles could not take advantage of this type of provision.[35] After additional tax reform to address

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31. Boyter v. Comm'r, 74 T.C. 989, 991–92 (1980).
> We should add that if they continue to file separate returns, they can no longer use the rates applicable to single individuals, but must use still another schedule with higher rates applicable to married individuals filing separate returns. Undoubtedly, all this confusion is a bit bewildering to the average citizen who may assume that simple justice and administrative convenience would be best served by taxing income to the individual who earns it pursuant to one rate schedule uniformly applicable to all. Indeed, this was the rule for a considerable period of time after the income tax was enacted, and a substantial effort was made to prevent its erosion.

Id. at 992 n.1.

32. *Id.*; *see also infra* Part II.B.3.

33. *See supra* note 27 and accompanying text.

34. *See* Motro, *supra* note 14, at 1564.

35. *Id.*
> Note that under the 1948-style system, equal-earner spouses enjoyed no advantage (or disadvantage) relative to their unmarried counterparts. . . . After the 1948 reform, singles' rights advocates felt that the marriage bonus associated with pure income splitting

fairness to single filers, Congress narrowed the tax brackets for married couples from double the single filer's rates to larger-than-single rates but not double, creating the marriage penalty.[36]

However, fairness across tax filing statuses was being debated and changed at a time when not only fewer women worked, but also when their salaries were far lower in comparison to men's.[37] Since the 1960s, when women entered the labor force in large numbers, married couples have more evenly divided into two-income earners and one-income earners.[38] The recognition of same-sex marriage has further increased the number of two-income households.

Secondary income earners are also affected by the tax credits or deductions that have income limits, above which their benefits phase out before disappearing entirely.[39] In many cases, combining two incomes suffices to phase out beneficial tax breaks, even if neither income alone would have done so.[40] Additional marriage penalties exist throughout the federal income tax code, such as those introduced by the Affordable Care

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> unfairly discriminated against unmarried taxpayers. To address this concern, in 1969, Congress replaced 'pure income splitting' with a new system that reduced the marriage bonus and inadvertently created a marriage penalty. . . . Instead of taxing married couples using a schedule with rate brackets twice as large as those contained in the individual schedule—as was the case between 1948 and 1969—married taxpayers would now be taxed based on a schedule with rate brackets less than twice as large as those making up the individual schedule.

Id.

36. *Id.* at 1531.

37. In 1969, women earned 59¢ for every $1 men made; in 2007, women earned 77¢ for every $1. *Historical Income Tables: People*, U.S. CENSUS BUREAU, tbl.P-40, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-people.html [https://perma.cc/23Y2-FV45] (last updated Sept. 13, 2016). In 1969, the average female joint-filer reported earnings of $3,429, in comparison to $24,110 in 1999. ELLEN YAU, KURT GURKA, & PETER SAILER, COMPARING SALARIES AND WAGES OF WOMEN SHOWN ON FORMS W-2 TO THOSE OF MEN, 1969–1999, 278–79 tbl.1. (2003), http://www.irs.gov/pub/irs-soi/99inw2wm.pdf [https://perma.cc/MMP5-VW62].

38. In 1967, 34,391,000 women made some kind of earnings, compared with 74,295,000 women in 2007. *Historical Income Tables: People*, *supra* note 37, at tbl.P-40; *see also* YAU ET AL., *supra* note 37.

39. *How Do Phaseouts of Tax Provisions Affect Taxpayers?*, TAX POL'Y CTR., http://www.taxpolicycenter.org/briefing-book/how-do-phase-outs-tax-benefits-affect-taxpayers [https://perma.cc/45HS-9S6H] (last visited Apr. 5, 2017).

40. *Id.*

Act.[41]

Recognizing the problems with the marriage penalty, Congress changed the tax law in 2001 to address the marriage penalty by doubling the single filer rates for married couples, but only for the lowest income tax brackets.[42] The marriage penalty remains for people in the remainder tax brackets unless they avoid marrying or working as a secondary income earner.

B. The Problem

Whether through financial incentives or penalties, tax drives people's behavior.[43] In particular, there are two behaviors that the marriage penalty discourages: women from working and people from marrying. This challenges the notion of fairness and neutrality in the tax code.[44]

1. Disincentivizing Women from Working

The marriage penalty is a distortion for married women in the labor force.[45] The tax effect is neutral on its face: if a woman earns more than her husband, then she is the primary income earner, and her husband faces the tax disincentive to work.[46] However, the current reality is that the marriage

41. Zelenak, *For Better and Worse*, *supra* note 6, at 802.

42. *See, e.g.*, Ryznar, *To Work, or Not to Work*, *supra* note 15, at 922 n.5 (citing Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat 38, 54 (2001)) ("The Economic Growth and Tax Relief Reconciliation Act of 2001 added Section 1(f)(8) to the Internal Revenue Code, which expanded some of the lower tax brackets of married filers to double those of single filers.").

43. A classic example is the charitable deduction. *See, e.g.*, Patrick E. Tolan, Jr., *Compromising the Safety Net: How Limiting Tax Deductions for High-Income Donors Could Undermine Charitable Organizations*, 46 SUFFOLK U. L. REV. 329, 329 (2013) (noting the importance of the charitable deduction to giving). For a background on tax incentives for corporations, see Margaret Ryznar & Karen Woody, *A Framework on Mandating Versus Incentivizing Corporate Social Responsibility*, 98 MARQUETTE L. REV. 1667, 1681 (2015).

44. *A Nasty Brown Mess*, ECONOMIST 14 (Apr. 30 2009), http://www.economist.com/node/13576151 ("Jean-Baptiste Colbert, Louis XIV's finance minister, famously said that the art of taxation was like plucking a goose; the aim was to get the most feathers with the least hissing. But tax policy should aim to do more than smother protest: it should also seek to raise the most money with the least distortion to economic activity."). *See also infra* note 123.

45. "A tax is economically neutral if it does not affect economic decisions (except by reducing real income or wealth)." Charles E. McLure, Jr., *Where Tax Reform Went Astray*, 31 VILL. L. REV. 1619, 1624 (1986).

46. The wife out-earns the husband in about 25% of married couples. U.S. DEP'T OF LABOR:

penalty mostly impacts women, who remain the secondary income earner and are therefore more sensitive to tax consequences.[47]

The resulting cycle is that women will continue to remain secondary income earners as long as their labor is rewarded at lower rates due to the marriage tax penalty and lower wages.[48] If incentivized to leave the job market, women will not build up the human capital to become the primary income earners in their families. In sum, the current federal tax code holds certain disadvantages for all secondary income earners—disadvantages that disproportionately affect married women, who are often the secondary and thus the discretionary income earners.[49]

While recent media headlines that 40% of breadwinners are women suggest that the marriage penalty is not impacting women, many of these households with a female breadwinner do not have a husband present. In

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BUREAU OF LABOR STATISTICS, CHARTING THE U.S. LABOR MARKET IN 2006, Chart 6-5 (2007), http://www.bls.gov/cps/labor2006/chartbook.pdf [https://perma.cc/JYA7-4KVX]. More men than women lost jobs in the economic recession beginning in 2007, but men recovered jobs more quickly. Deborah L. Jacobs, '*Mancession' Fades as More Men than Women Find Jobs*, FORBES (Dec. 6, 2011, 3:58 PM), http://www.forbes.com/sites/deborahljacobs/2011/12/06/economic-recovery-is-gender-biased-study-suggests/. *But see* Ronald Mincy, Monique Jethwani, & Serena Klempin, *What the Recession Did to American Fathers*, ATLANTIC (Jan 6, 2015), http://www.theatlantic.com/business/archive/2015/01/what-the-recession-did-to-american-fathers/384226/ [https://perma.cc/Y5FH-DX3F].

47. *See, e.g.*, Deborah A. Widiss, *Changing the Marriage Equatio*n, 89 WASH. U. L. REV. 721, 727, 749 (2012) ("For different-sex couples, gender norms work together with substantive marriage law to encourage specialization. . . . Federal tax law, likewise, encourages such specialization. It imposes a 'marriage penalty' on many married couples who earn relatively comparable amounts—those couples pay more than they would pay collectively if they were able to file individual returns—and provides a 'marriage bonus' for couples with a significant disparity in earnings.").

48. In 2007, women earned 77.8¢ for every $1 men earned. *Historical Income Tables: People*, *supra* note 37, at tbl.P-40. This trend continues today. Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Apr. 3, 2107), http://www.pewresearch.org/fact-tank/2017/04/03/gender-pay-gap-facts/ [https://perma.cc/2YKL-AZLS]. For a summary of the labor market challenges facing mothers, see Stephen Benard, In Paik, & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1360 (2008).

49. "By placing a financial premium on having the 'lesser-earning spouse' (usually the wife, as a statistical matter) stay at home, it could be argued that the Internal Revenue Code harbors a sexist judgment about the 'proper' role of women in marriage." Women Involved in Farm Econ. v. U.S. Dep't of Agric., 876 F.2d 994, 1005 n.10 (D.C. Cir. 1989); *see also* Janet G. Stotsky, *How Tax Systems Treat Men and Women Differently*, FIN. & DEV. 30 (Mar. 1997), http://www.imf.org/external/pubs/ft/fandd/1997/03/pdf/stotsky.pdf [https://perma.cc/F264-VUAX]. *But see* Erik M. Jensen, *Jonathan Barry Forman, Making America Work*, 5 PITT. TAX REV. 165, 170 n.16 (2008) (book review) (suggesting that the tax code is indifferent to whether the husband or wife is the primary wage-earner but that social expectations may be less so).

those households with both a husband and wife, the number of women breadwinners is far lower.[50] In fact, many married women do not participate in the labor force at all.[51]

The lower after-tax earnings of many married women[52] is exasperated by childcare, which is one of the highest costs for working families and minimally addressed by the federal income tax code.[53] In *Smith v. Commissioner*,[54] for example, the tax court held that no deduction is available for childcare because "[t]he wife's services as custodian of the home and protector of its children are ordinarily rendered without monetary compensation. There results no taxable income from the performance of this service and the correlative expenditure is personal and not susceptible of deduction."[55]

In *Smith*, the tax court implicitly compared two-income earner couples with children to those without and found it unfair to favor those households with children.[56] The result may have been different if the court had made the comparison to single parents who must incur childcare expenses to enter the labor force.[57] However, even when childcare expenses are paid to earn a

50. For example, in one study, women with MBA degrees reduced their labor supply much more upon having children if they had higher-earning husbands. Marianne Bertrand, Claudia Goldin, & Lawrence F. Katz, *Dynamics of the Gender Gap for Young Professionals in the Corporate and Financial Sectors* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 14681, 2009), http://www.nber.org/papers/w14681.pdf [https://perma.cc/88NZ-H2WF]; *see infra* note 52.

51. In approximately 22.4% of all married couples, solely the husband works. *America's Families and Living Arrangements: 2006*, U.S. CENSUS BUREAU, tbl.FG2 (2006), http://www.census.gov/population/www/socdemo/hh-fam/cps2006.html [https://perma.cc/3568-DNWA]. When couples earn $100,000 or more annually, only the husband works in 19% of couples. *Id.* When couples report $30,000 to $39,000 in annual earnings, 28.4% have only the husband working. *Id.* These numbers differ by year.

52. The reasons for the gender pay inequity are varied.

> Women too often encounter the argument that pay disparity is the outcome of market forces, not sex discrimination. Salary differentials are attributed to individual pay demands, bargaining effectiveness, external counteroffers, and prior salaries. These are just a few examples of market justifications that employers raise to explain why similar workers performing the same job are compensated differently.

Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807, 807 (2010).

53. Shannon Weeks McCormack, *Overtaxing the Working Family: Uncle Sam and the Childcare Squeeze*, 114 MICH. L. REV. 559, 561 (2016).

54. Smith v. Comm'r, 40 B.T.A. 1038, 1039 (1939), *aff'd*, 113 F.2d 114 (2d Cir. 1940).

55. *Id*.

56. *Id.*

57. *See* Ryznar, *To Work, or Not to Work*, *supra* note 15, at 937–38.

salary, the tax code continues to treat them as personal expenses.

There is, however, a childcare credit offered by Internal Revenue Code Section 21 for taxpayers who incur employment-related expenses to be employed, but it is subject to various limitations.[58] Essentially, taxpayers earning over $43,000 may take a tax credit up to 20% of their childcare expenses.[59]

Section 129 of the Internal Revenue Code also provides relief for those taxpayers whose employers have a dependent-care assistance program. This code provision excludes from an employee's gross income the amounts paid or incurred by the employer, up to $5,000, for dependent care assistance provided to the employee.[60] However, not all employers offer such a qualified program, and childcare costs often exceed the tax code benefits.[61]

Such tax laws may contribute to women's lower earnings, complicated by career interruptions after they become parents.[62] Maternity leave programs are more popular, lengthier, and with more benefits than paternity leave programs.[63] This, like the marriage penalty, encourages women to

58. I.R.C. § 21 (2006).

59. *Id.*

60. I.R.C. § 129. However, parents may have a tax-planning choice between this dependent-care assistance program and the childcare credit under I.R.C. § 21. WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 480 (15th ed. 2009).

61. *See, e.g.*, Drew Desilver, *Rising Cost of Child Care May Help Explain Recent Increase in Stay-at-Home Moms* (Apr. 8, 2014), http://www.pewresearch.org/fact-tank/2014/04/08/rising-cost-of-child-care-may-help-explain-increase-in-stay-at-home-moms/ [https://perma.cc/4YQE-AWUK].

62. *See, e.g.*, Marianne Bertrand et al., *supra* note 50 ("The careers of MBAs, who graduated between 1990 and 2006 from a top U.S. business school, are studied to understand how career dynamics differ by gender. Although male and female MBAs have nearly identical (labor) incomes at the outset of their careers, their earnings soon diverge, with the male annual earnings advantage reaching almost 60 log points at ten to 16 years after MBA completion. We identify three proximate reasons for the large and rising gender gap in earnings: differences in training prior to MBA graduation; differences in career interruptions; and differences in weekly hours. These three determinants can explain the bulk of gender differences in earnings across the years following MBA completion. The presence of children is the main contributor to the lesser job experience, greater career discontinuity and shorter work hours for female MBAs. Some MBA mothers, especially those with well-off spouses, slow down in the labor market within a few years following their first birth. Disparities in the productive characteristics of male and female MBAs are small, but the pecuniary penalties from shorter hours and any job discontinuity are enormous for MBAs.").

63. *See, e.g.*, Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 730–31 (2003) (summarizing the workplace expectation that women bear the burden of caring for the family); Johnson v. Univ. of Iowa, 408 F. Supp. 2d 728, 743–44 (S.D. Iowa 2004), *aff'd*, 431 F.3d 325 (8th Cir. 2005) (determining that an employer's differential treatment of biological fathers and mothers was justified

limit their paid work compared to men.[64]

However, the current tax policy does not distinguish between married mothers and married women generally, which may contribute to the reason that both groups abstain from paid work at similar rates.[65] Indeed, many married women are discouraged from the labor force by the marriage penalty.[66]

If the goal of the marriage penalty and bonus were to incentivize and subsidize parental child care, then a more narrowly tailored tax benefit could be created, rather than equally penalizing all working married women or grouping them together.[67] For the purposes of this discussion, therefore, taxpayers can be divided into two groups: those with minor children and those without.[68] Society may choose to view each group differently.[69] Specifically, society may want to encourage, support, and subsidize parents to spend more time with their children. No such societal aims exist for married people without minor children. Therefore, there is no child-oriented reason for the law's uniform discouragement of all married women from the labor force. The tax law should remain neutral, particularly when there are a significant number of married women without minor children, and many women want to keep their careers after marrying or having children.[70]

Furthermore, many married women use their income for the welfare of

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when work leave was characterized as being for disability related to pregnancy, not for caregiving). *But see* Steven E. Rhoads & Christopher H. Rhoads, *Gender Roles and Infant/Toddler Care: Male and Female Professors on the Tenure Track*, J. SOC., 6(1) EVOLUTIONARY, & CULTURAL PSYCHOL. 13, 14 (2012) http://psycnet.apa.org/journals/ebs/6/1/13.pdf [https://perma.cc/3VYG-DQSR] (suggesting that paternity leave for professors should be reevaluated when men use their leave to focus on their academic work, which disadvantages their female colleagues who use their leave to focus on caregiving).

64. Ryznar, *To Work, or Not to Work*, *supra* note 15, at 925.

65. *Id.* at 936.

66. *Id.* at 936–37 (citing *America's Families and Living Arrangements: 2006*, *supra* note 51) ("Specifically, in recent years, out of 26,469,000 married couple family units with their own children under the age of eighteen, 7,923,000 couples belong to a household wherein only the husband is in the labor force (29.9%). However, of the 33,059,000 couples without their own children under eighteen, 5,421,000 couples have only the husband in the labor force (16.4%). The difference between the participation of married women in the labor force between these two groups of family units—those with minor children and those without—is only 13.5%.").

67. *Id.* at 936.

68. *Id.*

69. *Id.*

70. *Id.*

their children,[71] such as paying for private schooling or extracurricular activities. Many households need two incomes to afford even the necessities.[72] A marriage penalty worsens their economic situation.

Finally, a marriage penalty that discourages married women from paid work makes them more financially vulnerable in the event of a divorce, an important point given the high divorce rate in the United States.[73] Following a divorce, many women must run their households on a significantly reduced income.[74] This financial vulnerability results from career breaks that lower human capital, to which the marriage penalty contributes.[75]

The question arises whether the marriage penalty incentivizes women's decreased participation in the labor force, or whether the prevalence of a certain type of household results in the tax structure. The answer becomes clearer after looking at the history of the tax structure—it has not changed

71. *Id.* at 939.

72. McCormack, *supra* note 53, at 560–61.

> The economic plight of the working family is worsening. This cry has been made in the recent campaign speeches of many political candidates, by lawmakers on both sides of the aisle, and by the President of the United States in more than one State of the Union Address. The White House recently hosted a daylong summit devoted to the struggles today's working families face, which are also chronicled in books, op-ed pieces, and proposals for legislative reform. And current data that confirm there are good reasons to be concerned about the working family's continuing ability to 'make ends meet,' let alone thrive.

Id.

73. *See Divorce Rates*, AMS. FOR DIVORCE REFORM, http://www.divorcereform.org/rates.html [https://perma.cc/2HKE-JNKN], (last visited Mar. 29, 2017); *see also* Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 47, 62 (2014) ("While marriage rates have been declining, divorce rates have remained relatively high—with current estimates of the divorce rate ranging between forty and fifty percent."); Margaret Berger Strickland, Comment, *What's Mine Is Mine: Reserving the Fruits of Separate Property Without Notice to the Unsuspecting Spouse*, 51 LOY. L. REV. 989, 990 (2005) (citing CTRS. FOR DISEASE CONTROL & PREVENTION, *Births, Marriages, Divorces, and Deaths: Provisional Data for 2003*, 52 NAT'L VITAL STAT. REP. 22 (June 10, 2004), http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_22.pdf [https://perma.cc/HD7B-MHHJ]) ("[T]he marriage rate in 2003 was 7.5 per 1,000 total population, but at the same time, the divorce rate was 3.8 per 1,000 total population. Thus, in 2003, for every two marriages, there was a divorce."); *see also infra* Part II.B.2.

74. Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J. L. & GENDER 171, 200–01 (2013). In 1993, the mean income for divorced American mothers was $17,859, while for divorced fathers it was $31,034. Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 6 (1995).

75. *See supra* notes 48–50 and accompanying text. Additionally, many states do not allow lifelong alimony and instead limit it by time or circumstances. *See, e.g.*, IND. CODE § 31-15-7-2 (2016).

even though many women have entered the work force in recent decades.[76] Thus, the tax system does not reflect the recent changes in labor force composition.[77]

Yet, women's participation in the labor force is in line with public policy. For example, President Obama signed the Lilly Ledbetter Fair Pay Act in his first month in office.[78] He also signed an executive order forming the White House Council on Women and Girls.[79] Finally, in a speech to the people of Kenya, President Obama urged the country to draw on the talents of girls and women:

> To continue down this path of progress, it will be vital for Kenya to recognize that no country can achieve its full potential unless it draws on the talents of all its people—and that must include the half of Kenyans—maybe a little more than half—who are women and girls.[80]

For similar reasons, the International Monetary Fund (IMF) has expressed concern regarding gender equity in the United States based on its tax system.[81] Indeed, commentators including the IMF have noted that a more neutral tax system would further engage women in the American economy.[82]

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76. There were 34,391,000 working women in 1967, and 74,295,000 in 2007. *Historical Income Tables: People*, *supra* note 37, at tbl.P-41; *see also* YAU ET AL., *supra* note 37. In 1969, the average female joint filer reported earnings of $3,429, as opposed to $24,110 in 1999. *Id.* *See also supra* notes 37–38 and accompanying text.

77. *See, e.g.*, Kerry A. Ryan, *Human Capital and Transfer Taxation*, 62 OKLA. L. REV. 223, 268–69 (2010) (discussing the wealth transfer tax and finding "[t]here is seemingly a contradiction between society's 'functional' view of the family 'as one of the social institutions that help[s] secure economic security for its members' and society's decision to tax the provision of such security").

78. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. §2000a (2009)).

79. Exec. Order No. 13,506, 74 Fed. Reg. 11,271 (Mar. 11, 2009).

80. *Remarks by President Obama to the Kenyan People*, U.S. EMBASSY IN KENYA (July 26, 2015), https://ke.usembassy.gov/remarks-by-president-obama-to-the-kenyan-people/ [https://perma.cc/9LGB-JG6E].

81. *See, e.g.*, Anna Yukhananov, *IMF Warns of Slow Progress Achieving Gender Equality*, REUTERS (Sept. 23, 2013, 3:02 PM), http://www.reuters.com/article/us-imf-gender-idUSBRE98M11Q20130923 [https://perma.cc/SSX5-7GHM]; Stotsky, *supra* note 49.

82. Jane H. Leuthold, *Income Splitting and Women's Labor-Force Participation*, 38 INDUS. & LAB. RELS. REV. 98, 98–105 (Oct. 1984), http://www.jstor.org/stable/2523803?seq=1#page_scan_tab_contents [https://perma.cc/CHS9-MP75] ("The results of a probit estimation show that the elimination of income splitting would probably increase significantly the labor-force

In sum, the marriage penalty is a problem if women are to make undistorted choices regarding their participation in the labor force. The only way to avoid the reach of the marriage penalty is to not marry in the first place, which undercuts another important public policy in the United States—that couples marry.

2. Disincentivizing People from Marrying

It is indisputable that public policy supports marriage,[83] as explained in the U.S. Supreme Court decision finding same-sex marriage bans unconstitutional.[84] The marriage penalty undermines this public policy. Indeed, marriage rates have been decreasing except in one category: same-sex marriage.[85] For those who do marry, there is a high divorce rate.[86] Furthermore, there is a high nonmarital birth rate. The number of nonmarital births is approaching the number of marital births—over 40% of children are born to unmarried parents.[87]

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participation of married women."). For a history of income splitting in the United States, see ANTHONY C. INFANTI, CONTROVERSIES IN TAX LAW: A MATTER OF PERSPECTIVE (2015). *See also supra* Part II.

83. 52 Am. Jur. 2d Marriage § 3 (2015).

> Public policy favors the institution of marriage; indeed, in view of the importance of marriage as a social institution, and the benefits accruing therefrom, it is favored by public policy and the law. The state has a vital interest in the marriage relation, and it is the public policy to foster and promote the marriage relationship or institution of marriage, and encourage the permanency and continuity of a marriage and to look with disfavor upon its dissolution. The public policy relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage parties to live together and to prevent separation. In fact, the preservation or protection of the marital relationship is a public policy in some states. Thus, a marriage will, if possible, be upheld as valid, and public policy looks unfavorably on restraints to marriage.

Id.

84. Obergefell v. Hodges, 135 S.Ct. 2584, 2601 (2015) ("[T]his Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order.").

85. *See, e.g.*, Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 430 (2017). *See generally* Theodore P. Seto, *The Unintended Tax Advantages of Gay Marriage*, 65 WASH. & LEE L. REV. 1529 (2008).

86. *See* AMS. FOR DIVORCE REFORM, *supra* note 73.

87. CTRS. FOR DISEASE CONTROL & PREVENTION, BIRTHS: FINAL DATA FOR 2010, 61 NAT'L VITAL STAT. REP. 1 (Aug. 28, 2012), http://www.cdc.gov/nchs/data/nvsr/nvsr61/nvsr61_01.pdf [https://perma.cc/TY3U-D5MZ]. This figure marked a decrease in children born out of wedlock for the second consecutive year; the number of births to unmarried parents had a peak at 1,726,566 in 2008. *Id.*

The alternative to, or even substitute for, marriage has been cohabitation—romantic partners living together without marrying. Couples choose to cohabitate instead of marry for various reasons, such as insufficient finances,[88] preferences to avoid the cultural and legal implications of marriage,[89] or simply the lack of desire to marry.[90]

Cohabitation has become socially accepted and almost normalized in the United States. In 2010, 7.5 million heterosexual couples cohabited, versus fewer than 500,000 in 1960.[91] Cohabitation has become a substitute for marriage in parts of Europe,[92] and the United States may very well encounter this trend.[93]

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88. Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J. L. & FAM. STUD. 1, 11 (2007).

> Qualitative research reveals that marriage, although much revered in lower-income communities, is seen by many as appropriate only when a couple's economic situation is secure, a situation that may not happen quickly for some groups, if ever. Interviews with working- and lower-middle-class cohabitants suggest that they believe marriage should not occur until financial stability has been reached, including not only the resources for a large wedding but perhaps also for home ownership.

Id.; *see also* Spencer Rand, *The Real Marriage Penalty: How Welfare Law Discourages Marriage Despite Public Policy Statements to the Contrary—And What Can Be Done About It*, 18 UDC L. REV. 93, 93 (2015) ("Couples regularly complain about marriage penalties, discovering that the tax consequences of marrying make the cost of marriage prohibitive.").

89. Anna Stępień-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75, 75 (2016).

90. Katherine C. Gordon, Note, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245, 245 (1999).

91. Rose M. Kreider, Increase in Opposite-Sex Cohabiting Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS) 1 (Sept. 15, 2010) (unpublished) (on file with the Housing and Household Economic Statistics Division, U.S. Bureau of the Census), http://www.census.gov/population/www/socdemo/Inc-Opp-sex-2009-to-2010.pdf [https://perma.cc/H4VS-3YLH]; Bowman, *supra* note 88, at 7. Between 2000 and 2010 alone, there was a 41% increase in unmarried couple households. Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 55 (2015).

92. "[I]ncreasingly cohabitation is being proposed not as a testing ground for marriage, but as a functional substitute for it. The trend in family law and scholarship in Europe and Canada is to treat married and cohabiting couples similarly, or even identically." Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 403 (2004).

93. "In this country, the American Law Institute [ALI] recently proposed that, at least when it comes to the law of dissolution, couples who have been living together for a substantial period of time should be treated the same as married couples." *Id.* at 404.

The alternative of cohabitation to marriage undermines one of the justifications for the marriage penalty retrospectively put forward—that when couples marry, they save money and offset the marriage penalty by setting up one household instead of two.[94] Since the time that this justification was offered in the early 1970s, society's acceptance of cohabitation makes it financially more sensible for many dual income earners to live together in one household without marrying.[95]

Societal acceptance of cohabitation means that it has become an option to avoid the marriage penalty.[96] One study has shown that more cohabiting couples would be penalized by the marriage penalty than would receive the marriage bonus. Based on 2007 tax data, Emily Lin and Patricia Tong determined that 48% of cohabiting couples would have faced marriage penalties of an average of $1,657, while 38% would have received bonuses averaging $914. Finally, 15% of cohabiting couples would have received neither a penalty nor a bonus.[97] Thus, more cohabiting couples would be penalized upon marriage than not, providing them an incentive to continue cohabitating instead of marrying. In a society that wants to encourage marriage, the tax law should not work counterproductively.

The marriage penalty not only incentivizes cohabitation, but also separation and divorce. For example, one couple stopped holding themselves out as married after realizing they were paying a marriage tax penalty of over $5,000 per year.[98] According to the husband,

> A tax penalty of this magnitude was totally unanticipated . . . . Because of the complexity of [the tax] rules, the magnitude of the "marriage tax penalty" could only be discovered by running alternative scenarios through sophisticated tax preparation software, which the parties did not do. Had the parties computed the tax

94. For background on the origins of this argument, see Zelenak, *Doing Something About Marriage Penalties*, *supra* note 12, at 9 (describing retrospective rationalizations of the marriage penalty by U.S. government officials).

95. *See* Brinig & Nock, *supra* note 92, at 435.

96. "When cohabitation was not a socially available counterfactual to marriage, neither marriage penalties nor bonuses were likely to have much visceral impact." Zelenak, *For Better and Worse*, *supra* note 6, at 792.

97. Emily Y. Lin & Patricia K. Tong, *Marriage and Taxes: What Can We Learn from Tax Returns Filed by Cohabiting Couples?*, 65 NAT'L TAX J. 807, 809 (2012).

98. *See* McCarty v. United States, 2004 WL 325603, at *1 (D.N.J. Jan. 29, 2004).

> consequences of their "marriage" ahead of time, they would never have participated in the "wedding ceremony" on Fiji.[99]

Other couples have divorced and remarried each other to circumvent the marriage tax penalty. For example, one married couple traveled to Haiti in 1975 to divorce "on the ground of incompatibility of character, notwithstanding that the parties occupied the same hotel room prior to and immediately after the granting of the decree."[100] They remarried in Maryland in January 1976 and that same November traveled to the Dominican Republic to divorce "on the ground of 'incompatibilities of temperaments existing between (the parties) that has made life together unbearable.'"[101] They remarried in February 1977.[102] The Fourth Circuit allowed for the possibility of applying to them "the sham transaction doctrine [that] has been applied primarily with respect to the tax consequences of commercial transactions."[103]

Instead of divorcing, some married couples have litigated the marriage penalty in federal courts.[104] These courts have recognized the marriage penalty as a burden on marriage, but not an unconstitutional one:

> The additional tax liability suffered by two-income couples who cannot avail themselves of the rates for single persons is an indirect burden on the exercise of the right to marry. It is suffered not for marrying but for marrying one in a particular income group. This does not rise to the level of an 'impermissible' interference with the

99. *Id.*

100. United States v. Taylor, 2001 WL 1636505, at *6 (D. Minn. Oct. 24, 2001) (citing Boyter v. Comm'r, 668 F.2d 1382, 1384 (4th Cir. 1981)); Boyter v. Comm'r, 668 F.2d 1382, 1384 (4th Cir. 1981).

101. Boyter, 668 F.2d at 1384.

102. *Id.*

103. *Id.* at 1387.

104. *See, e.g.*, Crouch v. Comm'r, T.C. Memo. 1990-309 ("In support of their argument, they cite the case of [Druker v. Comm'r, 77 T.C. 867 (1981), *aff'd in part and rev'd in part*, 697 F.2d 46 (2d Cir. 1982)], in which we held that the taxpayers, husband and wife, should not be penalized under section 6653(a), even though they intentionally applied the rate of tax applicable to single persons on their 1975 and 1976 returns in an effort to litigate the constitutionality of the 'marriage penalty.' In that case, however, we emphasized that the taxpayers' position was neither frivolous nor meritless despite the fact that it had been rejected in two other cases. . . . In addition, it is not clear that the decisions in the two other cases had become final prior to the time the taxpayers filed their 1975 and 1976 returns.").

> enjoyment of a fundamental right. . . . [T]he elevated tax burden might in fact dissuade some couples from entering into matrimony, but does not present an insuperable barrier to marriage.[105]

The Second Circuit also suggested that the marriage penalty had an adverse effect on marriage, but nonetheless concluded that the adverse effect, "like the effect of the termination of social security benefits in Jobst, is merely 'indirect'; while it may to some extent weight the choice whether to marry, it leaves the ultimate decision to the individual."[106]

The Second Circuit reasoned:

> [O]nce one decides that the tax laws may separately classify couples who are married and those who are unmarried, the tax laws may treat them differently; and while the tax laws fairly consistently prefer the state of marriage to other such arrangements, anomalies exist, such as the marriage tax penalty, which are not for that reason deemed irrational and unconstitutional.[107]

Similarly, the Seventh Circuit noted, "[T]he inequities asserted to inhere in the 'marriage penalty,' whatever may be their persuasiveness as arguments for legislative change, do not rise to the level of constitutional violations of appellants' rights."[108]

However, just because a burden on marriage is constitutional does not mean that it is sound public policy.[109] As one court noted, "The social and

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105. Mapes v. United States, 576 F.2d 896, 901 (Fed. Cir. 1978), *cert. denied*, 439 U.S. 1046 (1978). For this reason, the Court declined to apply strict scrutiny. *Id.*

> From this line of cases, we have abstracted a general rule that we will find "direct and substantial burdens only where a large portion of those affected by the rule are absolutely or largely prevented from marrying, or where those affected by the rule are absolutely or largely prevented from marrying a large portion of the otherwise eligible population of spouses."

Summers v. First State Bank, 352 F.3d 1030, 1040 (6th Cir. 2003) (quoting Vaughn v. Lawrenceburg Power Sys., 269 F.3d 703, 710 (6th Cir. 2001)).

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

107. Jankowski–Burczyk v. INS, 291 F.3d 172, 177 (2d Cir. 2002). Courts have upheld different tax rates for married and single taxpayers. *See, e.g.*, Johnson v. United States, 422 F. Supp. 958, 975 (N.D. Ind. 1976).

108. Barter v. United States, 550 F.2d 1239, 1240 (7th Cir. 1977).

109. However, it is not entirely clear that an equal protection constitutional argument would fail. Although family members' rights may vary according to law, these distinctions must "serve

cultural forces of our time already place a great strain on the stability of the family and the institution of marriage. The IRS, with the force, resources and staying power of the federal government, does not need to join the fray."[110]

3. Fairness of the Tax System

Finally, a problem with the marriage penalty is that it undermines the fairness of the tax code. According to the Tax Court, "Whether or not the marriage penalty is unfair is an issue this Court cannot address. That question must be answered by Congress."[111]

Indeed, Congress should reexamine the fairness of the marriage penalty given that fairness is a goal of the tax system.[112] This is especially important given that the tax penalty inadvertently resulted from the tax law,[113] and any future tax rate increase exasperates it.

The marriage penalty is similar to the Alternative Minimum Tax (AMT) because it is a vestige from a previous time that aimed to produce fair results under different circumstances. The AMT originated to prevent the top income earners from avoiding taxes through the regular deduction and credit system.[114] However, due to the AMT's lack of indexation, this alternative

important governmental objectives and must be substantially related to achievement of those objectives." Caban v. Mohammed, 441 U.S. 380, 388 (1979) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976)). "Applying this logic to the legal disincentives for married women to work may be difficult, but warrants some attention." *See* Ryznar, *To Work, or Not to Work*, *supra* note 15, at 941–42.

110. Calmes v. United States, 926 F. Supp. 582, 593 (N.D. Texas 1996).

111. Hall v. Comm'r, T.C. Memo. 1986-72 (1986).

112. Presidents have also strived for fairness in the tax law. *See, e.g.*, *Barack Obama's Comprehensive Tax Plan*, HALEBOBB, http://halebobb.com/Obama/Factsheet_Tax_Plan_FINAL.pdf [https://perma.cc/PEU5-UE4W] (last visited Mar. 30, 2017) ("Barack Obama's tax plan delivers broad-based tax relief to middle class families and cuts taxes for small businesses and companies that create jobs in America, while restoring fairness to our tax code and returning to fiscal responsibility."); *Tax Reform that Will Make America Great Again*, *supra* note 12 ("For those Americans who will still pay the income tax, the tax rates will go from the current seven brackets to four simpler, fairer brackets that eliminate the marriage penalty and the AMT while providing the lowest tax rate since before World War II.").

113. "Congress has never offered any justification for the differing tax treatments of marriage at different income levels." Zelenak, *For Better and Worse*, *supra* note 6, at 783; *see also* Nancy J. Knauer, *Critical Tax Policy: A Pathway to Reform?*, 9 N.W. J.L. & SOC. POL'Y 206, 208 (2014).

114. *See Alternative Minimum Tax*, IRS, https://www.irs.gov/taxtopics/tc556.html [https://perma.cc/NR7Q-EV6F] (last updated Feb. 21, 2017).

taxation system has now reached many people in the middle class, preventing them from using certain deductions and credits.[115] Thus, a system perceived as fair when introduced became less so due to its expansion to unintended taxpayers.[116]

Similarly, the lack of double taxation brackets for married two-income earners may have been fairer when women worked and earned less.[117] Under these historical circumstances, taxation rates would not need to double at marriage to avoid the tax penalty as they do now, given women's increased earning power and presence in the labor force.

Problematically, the "[AMT] features parameters sharply tilted toward marriage penalties" in a time when the AMT is relevant to more and more families.[118] Thus, the AMT triggers additional unfavorable tax consequences for increasing numbers of two-income earner married couples.

Generally, the meaning of fairness may be grey or dependent on ideology.[119] In tax, however, there are some guideposts in the search for fairness.[120] For example, two aspects of fairness in tax include, first,

115. Linda M. Beale, *Congress Fiddles While Middle America Burns: Amending the AMT (and Regular Tax)*, 6 FLA. TAX REV. 811, 813–14 (2004).

116. *See, e.g.*, Leonard E. Burman, *A Blueprint for Tax Reform and Health Reform*, 28 VA. TAX REV. 287, 288 (2008) ("[U]nder current law, the reach of the individual alternative minimum tax (AMT), a pointlessly complicated and unfair element of the current code, is scheduled to mushroom, hitting thirty-two million taxpayers by 2010, up from four million in 2007.").

117. *See, e.g.*, Zelenak, *Doing Something About Marriage Penalties*, *supra* note 12, at 7 ("In the beginning, couples with incomes so nearly equal as to produce marriage penalties were in the distinct minority. According to Treasury, in 1972 only about 20% of married couples suffered a marriage penalty as a result of the 1969 Act. The problem has become more acute since then, due to both demographic and tax law changes. In 1969, each spouse earned at least one-third of the couple's earnings in only 17% of marriages of working age couples; by 1995 that had doubled to 34%. As the prevalence of couples with close-to-equal incomes has increased, so has the prevalence of marriage penalties.").

118. Zelenak, *For Better and Worse*, *supra* note 6, at 801. For background on the AMT, see Michael D. Kim, Comment, *The Downward Creep: An Overview of the AMT and Its Expansion to the Middle Class*, 6 DEPAUL BUS. & COM. L.J. 451, 461 (2008).

119. For example, the field of family law is certainly no stranger to greyness. In fact, the two major inquiries when a marriage ends relate to the division of property and child-related matters. The latter is governed by the ambiguous "child's best interests," while the former is governed by "fairness." Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2006 (2014). "[S]cholars and lawmakers have recognized that litigating under open-ended, amorphous standards [in family law] is unpredictable." *Id.*

120. Reginald Mombrun, *Let's Protect Our Economy and Democracy from Paris Hilton: The Case for Keeping the Estate Tax*, 33 OHIO N.U. L. REV. 61, 83–84 (2007).

horizontal equity—that similarly situated individuals should be treated the same[121]—and second, vertical equity—that the tax treatment of differently situated persons should be fair—a form of distributive justice.[122]

The marriage penalty poses challenges to both horizontal and vertical equity because a secondary income earner is paying more tax than if she had remained single.[123] Also problematically, marriage is discouraged or encouraged based on the couple's income level because the tax brackets for married taxpayers have been doubled at the lower tax rates, with the bonus mostly benefitting the middle class and the penalties affecting higher-income couples.[124] Until Congress doubled the single filer brackets for the lowest tax brackets, the marriage penalty also impacted lower-income married couples.[125] However, it is not clear why any groups of people should be affected by marriage penalties.[126]

Another related tax goal is neutrality.[127] Thus, the aim of marriage-

121. Brian Galle, *Tax Fairness*, 65 WASH. & LEE L. REV. 1323, 1324–25 (2008).

122. *Id.*

123. *But see* Women Involved in Farm Econ. v. U.S. Dep't of Agric., 876 F.2d 994, 1005 n.10 (D.C. Cir. 1989) ("[T]he Code's treatment of married couples has customarily been perceived as ensuring horizontal equity between married couples, see [Druker v. Comm'r., 697 F.2d 46, 50 (2d Cir. 1982)]; this principle, of course, is rooted in the notion that a marital household is a distinct economic unit.").

124. *See* Zelenak, *For Better and Worse*, *supra* note 6. "[T]here should be a rebuttable presumption that the balance between penalties and bonuses—however that balance is struck—should be approximately the same at all income levels. This contrasts sharply with the current mix of anti-marriage (at the bottom and top) and pro-marriage (in the middle) policies." *Id.* at 816. "Advocates contend, for example, that eliminating the so-called marriage penalties—policies that create an incentive for low-income couples not to marry and, further, to live apart—will help stabilize families." Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 220–21 (2015). Research has also shown that the marriage penalty also affects different races variously. *See, e.g.*, Brown, *supra* note 13.

125. *See supra* Part II.A.

126. Zelenak, *For Better and Worse*, *supra* note 6, at 791.

> Part III considers whether there is any plausible policy justification for mostly penalizing marriage for working class couples, while overwhelmingly rewarding marriage for the middle class and mostly penalizing marriage for the upper class. The task requires some imagination, given that Congress has never attempted to justify these disparate treatments. After considering some reasons why legislative tax policy toward marriage might vary by income level, Part III concludes that the particular differences embodied in the current income tax structure are difficult or impossible to defend.

Id.

127. *See, e.g.*, Hayes Holderness, *Taxing Privacy*, 21 GEO. J. ON POVERTY L. & POL'Y 1, 7 (2013) ("Therefore, the practical goal of the principle of neutrality is to reduce the effect of taxes on

penalty reform must be to eliminate the disincentives for married women to engage in paid labor, with the tax code being neutral on their decisions.

In sum, the marriage penalty is the result of a federal tax code that treats the family as a single economic unit that files taxes jointly—which is the approach of non-tax law as well—but does not double the tax brackets upon marriage.[128] This suggests that to minimize disruption to the general legal framework on families, the solution to the marriage penalty should continue treating married couples as a single economic unit.

III. THE FAMILY AS AN ECONOMIC UNIT

The family is a fundamental economic unit, resulting from the public policy choice to allow couples to make their own financial arrangements and become one economic unit upon marriage. Indeed, the law is replete with examples of the family as an economic unit.[129]

Thus, while a solution to the marriage penalty might be to take marriage out of the federal income tax code by abandoning the marital filing status,[130] the law's frequent treatment of the family as a single economic unit poses an obstacle. This convention is no clearer than in family law, a review of which illustrates that prioritizing consistency with the remainder of the legal framework recommends a solution to the marriage penalty that continues to treat the married couple as one economic unit.[131] Indeed, there are many benefits of such consistency.[132]

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economic decision making as much as possible."); David J. DePippo, Comment, *I'll Take My Sin Taxes Unwrapped and Maximized, with a Side of Inelasticity, Please*, 36 U. RICH. L. REV. 543, 559 (2002) (noting the goal of economic efficiency through neutral tax policies).

128. For Congress's rationale for certain tax policy decisions, see Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 806–21 (2008).

129. *See, e.g.*, Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 421 (2009) (noting the treatment of the family as a single unit in intestacy laws); Elizabeth Feeley, *Property Sale Between Ex-Spouses Qualified for Nonrecognition Treatment*, 97 PRAC. TAX STRATEGIES 90, *2 (Aug. 2016) (noting the treatment of the family as a single economic unit in tax law); Benjamin Shmueli, *Tort Litigation Between Spouses: Let's Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 195, 205 (2010) (noting the treatment of the family as a single economic unit in torts law).

130. *See supra* Part II and *infra* Part IV.

131. *See infra* Parts III.A–B.

132. *See infra* Part III.B.

A. The Legal Framework on Family

The concept of one spousal economic unit is clear in several family law examples. These include the duty to support one's spouse, the doctrine of necessaries, and the principles governing matrimonial property.[133] Additionally, divorce laws often treat marriage as a partnership. Each of these examples is considered in turn.

The nonintervention doctrine prevents courts from adjudicating issues arising in intact marriages.[134] An important exception is the doctrine of necessaries, which allows courts to intervene if the earning spouse is not paying for the expenses incurred by the nonearning spouse for any items needed by the family.[135] The spouses' means, social position, and circumstances usually determine necessity.[136] Both doctrines, however, treat the spouses as a self-supporting single economic unit.

Another example of spousal autonomy is the premarital and postmarital agreements that permit couples to organize the financial terms not only of their potential divorce, but also of their marriage.[137] The courts would not enforce premarital agreements in the United States until the 1970's, but couples now have freedom of contract in this realm.[138] Although couples may be limited to contracting on issues related to their children, they enjoy significantly more freedom on issues of property.[139] They only must ensure

133. *See* Margaret Ryznar, *Underwriting Credit Cards, Overwriting Congress, and Rewriting Family Law: The Treatment of Household Income in Consumer Lending*, 86 ST. JOHN'S L. REV. 911, 931 (2012) [hereinafter Ryznar, *Underwriting Credit Cards*].

134. *See* Elaine M. Chiu, *That Guy's a Batterer!: A Scarlet Letter Approach to Domestic Violence in the Information Age*, 44 FAM. L.Q. 255, 286 (2010).

135. "Under the doctrine [of necessaries], a husband was liable to a third party for any necessaries that the third party provided for his wife." Connor v. Sw. Fla. Reg'l Med. Ctr., Inc., 668 So. 2d 175, 175–76 (Fla. 1995).

136. The courts look to the couple's standard of living to determine what qualifies as a necessity. Sheryl L. Scheible, *Defining 'Support' Under Bankruptcy Law: Revitalization of the 'Necessaries' Doctrine*, 41 VAND. L. REV. 1, 8 (1988).

137. *See, e.g.*, Elizabeth R. Carter, *Rethinking Premarital Agreements: A Collaborative Approach*, 46 N.M. L. REV. 354, 355 (2016) ("Perhaps more importantly, premarital agreements may actually prevent divorce by prompting a couple to better define and communicate their expectations at the outset of the marriage.").

138. *See* Linda J. Ravdin, *Premarital Agreements and the Migratory Same-Sex Couple*, 48 FAM. L.Q. 397, 398 (2014).

139. However, this may be changing. "The [Uniform Premarital and Marital Agreements] Act implies that there can be guidance within prenups and midnups on future child support for existing

the absence of duress, involuntariness, or unconscionability in their agreements. Additionally, often neither of them can resort to public assistance after divorce,[140] a public policy choice that reinforces the idea of marriage as a single economic unit.

When the family as an economic unit has failed, the state often intervenes. For instance, child support "[has] progressed from private, to state, then to federal remedies."[141] The government's role in child support has increased as more children have become reliant on child support due to rising divorce and out-of-wedlock birth rates.[142] When parents fail to financially support their children, public assistance substitutes.[143] To enforce the family as an economic unit, Congress started to legislate in family law in the twentieth century despite the field's usual position in the state domain.[144]

For example, Congress amended the Aid to Families with Dependent Children program in 1950 to mandate that state welfare agencies alert enforcement officials when children receive benefits after their parents

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and future children." Jeffrey A. Parness, *Parentage Prenups and Midnups*, 31 GA. ST. U. L. REV. 343, 346 (2015).

140. *See* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 153 (1993) ("The solicitude for divorced women manifested in the evolving law of spousal maintenance contrasts starkly with the U.P.A.A.'s policy of contractual autonomy. The U.P.A.A.'s 'public welfare' exception to the enforceability of premarital agreements affecting spousal support looks only to absolute need and ignores other modern justifications for spousal maintenance."). *See also* IND. CODE § 31-11-3-8(b) (2016).

141. WALTER WADLINGTON & RAYMOND C. O'BRIEN, FAMILY LAW IN PERSPECTIVE 129 (3d ed. 2012).

142. Divorce breaks the private safety net provided by the family, with the most significant consequences on women and children. *See, e.g.*, Joanna L. Grossman, *Family Law's Loose Canon*, 93 TEX. L. REV. 681, 686 (2015) (reviewing JILL ELAINE HASDAY, FAMILY LAW REIMAGINED (2014)) ("Most studies have shown that divorce imposes harsher economic consequences on women and children than on men."). *See also supra* notes 74–75 and accompanying text.

143. Laura W. Morgan, *The Federalization of Child Support: A Shift in the Ruling Paradigm: Child Support as Outside the Contours of "Family Law*,*"* 16 J. AM. ACAD. MATRIMONIAL L. 195 (1999).

144. *See, e.g.*, Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, 1997 U. ILL. L. REV. 695, 696–97 (1997). *But see* Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1764 (2005) (noting that family law is currently in the domain of the states, but that, historically, the federal government was not limited in this way); Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 197–99 (1999) (arguing that there is no foundation for the view that family law belongs in the state domain).

abandon them.[145] Under the Act, state officials could locate the children's parents and enforce their child support obligations.[146] In addition, custodial parents must assign their child-support right to the state in exchange for public assistance, facilitating enforcement actions against the non-payor parent.[147] The state's enforcement of child support illustrates the family's function as a single economic unit in society.

Prosecutors have become aggressive in their enforcement of the family as an economic unit.[148] Child support enforcement techniques range from suspension of recreational licenses and the loss of a work permit, to criminal prosecution and incarceration.[149] The United States Supreme Court recently considered whether indigent parents facing imprisonment for failure to pay child support should receive state-appointed counsel,[150] concluding that due process did not require it.[151]

Much of family law addresses the distribution of property among family members, particularly to protect children.[152] The law therefore offers family members certain rights and privileges, such as ensuring that the family's resources are used to support the family members, and treating the married

145. HOUSE COMM. WAYS & MEANS, *Section 8: Child Support Enforcement Program*, *in* 2004 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON THE PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 8-2 (2004).

146. *Id.* at 8-5.

147. "TANF recipients must assign their rights to collect child support to the state. The state then initiates proceedings to establish parentage, if not already determined, and enter a child support order against the noncustodial parent even if the custodial parent would prefer not to do so." Stacy Brustin & Lisa Vollendorf, *Paved with Good Intentions: Unintended Consequences of Federal Proposals to Integrate Child Support and Parenting Time*, 48 IND. L. REV. 803, 805 (2015).

148. *See, e.g.*, Ann Cammett, *Expanding Collateral Sanctions: The Hidden Costs of Aggressive Child Support Enforcement Against Incarcerated Parents*, 13 GEO. J. ON POVERTY L. & POL'Y 313, 315 (2006).

149. *See, e.g.*, Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1000 (2006); *see also* Margaret Campbell Haynes & Peter S. Feliceangeli, *Child Support in the Year 2000*, 3 DEL. L. REV. 65, 89 (2000); Elizabeth Warren, *The New Economy and the Unraveling Social Safety Net: The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401, 410 & n.27 (2004).

150. Turner v. Rogers, 131 S. Ct. 2507 (2011).

151. *Id.* at 2512. However, the state must ensure "a fundamentally fair determination of the critical incarcerated-related question" of whether the debtor parent is able to fulfill his or her support obligations.

152. *See, e.g.*, Morgan *supra* note 143 at 196 (citing child support as an area of family law that the federal government has addressed).

couple as one economic unit.[153]

While limits on the legal protection of children exist—often at the child's age of majority—even these are blurred by the importance of the family's function as an economic unit. For example, several states enforce parental economic support for adult children seeking a college education if the parents are divorced or unmarried.[154] These laws vary by state, requiring different levels of parental involvement.[155] While a few states have statutes permitting postsecondary support, other states have judicial precedent allowing it.[156] The principle underlying postsecondary support availability is to require parents to support their adult children financially, reinforcing the economic family unit even after the parents separate and the child reaches an age of majority.

Indeed, prompting these postsecondary education awards is the perception that family support erodes for children upon their parents' divorce. Thus, postsecondary educational support helps to equalize the economic situations of children of separated parents and those of married parents.[157] There are no postsecondary education laws for children of intact families because the law assumes that the private safety net is secure in those families, which function as one economic unit without any intervention from the state.[158]

At divorce, there is often a discussion of the family's standard of living

153. *See, e.g.*, Jana B. Singer, *Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 HARV. J. ON LEGIS. 43, 79 (1993) (noting that the distinctions between property and alimony awards have blurred).

154. *See, e.g.*, COLO. REV. STAT. § 14-10-115 (2013); IND. CODE § 31-16-6-2 (2016); IOWA CODE § 598.21(f) (2013); MO. REV. STAT. § 432.340 (2013); *see also* Emily A. Evans, *A Jurisprudence Clarified or "McLeod-ed"?: The Real Constitutional Implications of Court-Mandated Postsecondary Educational Support*, 64 S.C. L. REV. 995, 995–97 (2013).

155. Some postsecondary educational support laws consider a parent's financial ability to pay and the child's academic ability to enroll in college, some ignore a parent's role in choosing the college, and some provide parents access to the child's college transcripts. Anna Stepień-Sporek & Margaret Ryznar, *Child Support for Adult Children*, 30 QUINNIPIAC L. REV. 359, 365–68 (2012).

156. For an analysis of postsecondary education support laws, see Madeline Marzano-Lesnevich & Scott Adam Laterra, *Child Support and College: What Is the Correct Result?*, 22 J. AM. ACAD. MATRIMONIAL L. 335, 339–73 (2009).

157. Childers v. Childers, 575 P.2d 201, 209 (Wash. 1978).

158. During marriage, the courts generally do not intervene. The doctrine of necessaries is an exception. Under the doctrine of necessaries, the courts look to the couple's standard of living to determine what qualifies as a necessity. *See supra* notes 134–36.

before and after the marriage, reflecting the family as an economic unit.[159] Children should have their reasonable needs provided by the noncustodial parent, often ensured by the child support guidelines of each state, prompted by federal law.[160] However, children have less claim to a parent's property or income than a spouse, who presumably contributed to that property. In this way, divorce law privileges the spouse.[161] For divorcing couples, the pre-divorce standard of living can be a factor in determining the amount of alimony due in certain states.[162]

These are only a few examples of the legal treatment of spouses as a single economic unit in family law. Other areas of law are similarly replete with examples of married couples being treated as an economic unit.

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159. *See infra* note 162. *But see* Kelly Bedard & Olivier Deschênes, *Sex Preferences, Marital Dissolution, and the Economic Status of Women*, 40 J. HUM. RESOURCES 411, 413 (2005) (arguing that divorced women live in households with more income per person than never-divorced women); *see also* Margaret F. Brinig, *Contracting Around No-Fault Divorce*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 275, 277 (F.H. Buckley ed., 1999) ("A great deal of research suggests that children of parents who divorce will be worse off in the vast majority of cases. Children may lose out for a number of reasons. They will be poorer than those of intact families . . . ."). Furthermore, at least one study has supported the view that divorced parents contribute less to their children's education. Dan Huitink, Note, *Forced Financial Aid: Two Arguments as to Why Iowa's Law Authorizing Courts to Order Divorced Parents to Pay Postsecondary-Education Subsidies Is Unconstitutional*, 93 IOWA L. REV. 1423, 1426–27 (2008) (citing *What Can You Do if Your Parents Can't Help Pay for School?*, FINAID, http://www.finaid.org/otheraid/parentsrefuse.phtml [https://perma.cc/QU2E-2G4E] (last visited Apr. 7, 2017); JUDITH S. WALLERSTEIN, JULIA M. LEWIS, & SANDRA BLAKESLEE, THE UNEXPECTED LEGACY OF DIVORCE: A 25 YEAR LANDMARK STUDY (2001)) (highlighting a study that showed that 29% of children with divorced parents received parental support for college expenses versus 88% of children from intact families).

160. *See* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 58 (2016); *see also White v. Marciano*, 235 Cal. Rptr. 779, 781–782 (Ct. App. 1987) (internal citations omitted) ("Generally, children are entitled to be supported in a style and condition consonant with the position in society of their parents. A parent's duty of support does not end with the furnishing of mere necessities if the parent is able to afford more. Support must be reasonable under the circumstances. How much 'more,' i.e., what amount is 'reasonable' is defined in relation to a child's 'needs' and varies with the circumstances of the parties.").

161. Trusts and estates law also privileges the spouse, allowing disinheritance of children but not of a surviving spouse. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 511 (9th ed. 2013).

162. *See, e.g.*, Denise Lanuto, Comment, *Is* Crews v. Crews *Destined to Be the Next* Circle Chevrolet*?*, 32 SETON HALL L. REV. 837, 837 (2003) ("In *Crews v. Crews*, the supreme court [of New Jersey] ordered the lower courts to make specific findings on marital standard of living in all divorce cases where alimony is an issue, whether the issue is contested or uncontested."). On the contrary, child support is usually determined by the state's child support guidelines. *See supra* note 160 and accompanying text.

For example, the Board of Governors of the Federal Reserve (Board) promulgated a rule several years ago to implement the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act).[163] The rule required card issuers to rely on a person's independent income and not on the household's income when extending credit.[164] This "ability to pay" rule not only impacted the young adults whom the CARD Act aimed to protect, but also non-income earning spouses, whom it prevented from opening a sole-account credit card.[165] The rule thus represented a break from the usual treatment of married couples as a single economic unit, and it was not well received.[166] Indeed, one person delivered to the Consumer Financial Protection Bureau (CFPB) over 30,000 signatures petitioning against the rule.[167] The CFPB finally changed the interpretation of the rule to allow non-income-earning spouses to again rely on their spouses' incomes when applying for a sole-account credit card.[168]

Accordingly, the notion of the spousal economic unit pervades the family law and other legal fields. If consistency is to be maintained, this frequent legal treatment of the family as one economic unit recommends a solution to the marriage penalty that does not abandon the taxpayer's marital status.

B. The Benefits of Consistency

Given family law's treatment of the married couple as a single economic unit, it is important to consider the marriage penalty solution's consistency with family law. The reason is twofold: internal consistency within the law is desirable in itself, and consistency may facilitate the implementation of a solution to the marriage penalty after many other solutions have failed.

Government regulates the family because it is the smallest and most

163. *See* Ryznar, *Underwriting Credit Cards*, *supra* note 133, at 922.

164. *Id.* at 924.

165. *Id.* at 926.

166. *Id.*; *Truth in Lending (Regulation Z)*, FED. REG. (May 3, 2013), https://www.federalregister.gov/documents/2013/05/03/2013-10429/truth-in-lending-regulation-z [https://perma.cc/U7BL-VMYX].

167. Blake Ellis, *Stay-at-Home Mom Fights New Credit Card Rule*, CNNMONEY (May 16, 2012), http://money.cnn.com/2012/05/16/pf/credit-cards-stay-at-home-moms/index.htm [https://perma.cc/V5X2-8G97].

168. *See Truth in Lending (Regulation Z)*, *supra* note 166.

foundational unit of society.[169] Two areas of law regulating the family are tax law and family law,[170] and the distinction between families and singles in both areas has a long history because society regulates the family more than individuals.[171]

Problematically, a divergent tax and family law fails to reflect people's expectations, which decreases the law's predictability.[172] An internally inconsistent legal framework is harder for people to predict and follow.[173]

Additionally, a marriage tax penalty solution that is consistent with the family law's treatment of married couples as one economic unit minimizes disruption to the general framework and is thus easier for Congress to enact into law. While major overhauls to the federal income taxation system have been urged,[174] the more dramatic the proposals, the less likely they will muster the political support needed to become law.[175] Indeed, the historical failures of major tax reform—including more drastic solutions to the marriage penalty—suggest it is difficult to break with the general legal framework, and a break is not necessary to alleviate the marriage penalty.

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169. *See supra* Part III.

170. *See, e.g.*, Carl Scheider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497–500 (1992) (describing the nature of family law); Ryznar & Woody, *supra* note 43 (describing the nature of tax law).

171. *See supra* Part III (noting that unmarried couples are not regulated).

172. *See, e.g.*, William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1459 (2006) ("For most people in many realms of life, predictability is best furthered by laws that track ordinary social expectations, and that will often be an informal legality.").

173. *See id.*

174. "While many economists agree that a complete overhaul of the tax system would be best, it is not politically feasible to enact such an overhaul overnight." Charles C. Engel, II, Note, *Revisiting the Value Added Tax: A Clear Solution to the Murky United States Corporate Tax Structure*, 22 IND. INT'L & COMP. L. REV. 347, 376 (2012).

175. *See, e.g.*, Cathy Hwang, *The New Corporate Migration: Tax Diversion Through Inversion*, 80 BROOK. L. REV. 807, 836–37 (2015) ("And while comprehensive tax-system overhauls . . . have been proposed in the United States and may work in theory, they may be too politically fraught to be practicable or realistic."); Richard L. Doernberg & Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 MINN. L. REV. 913, 913 (1987) ("'Tax reform.' The very words arouse a range of emotions, from evangelical zeal to hopeless despair to bemused resignation. Whatever the response, tax reform has been part of our politics since Congress enacted the first modern federal personal income tax in 1913. Volumes have been written on the problems of the tax system and on what tax reform should accomplish. Still more has been written on the failures of the reform process.").

IV. HOW DO YOU SOLVE A PROBLEM LIKE THE MARRIAGE PENALTY?

If the goal is to encourage paid work and marriage, there are several possible solutions to the marriage penalty. Of those previously offered, many require no longer treating the married couple as a single economic unit.[176] For example, an optional separate filing proposal became popular in the 1990s, which would have required comparing tax liability under several filing statuses and selecting the most favorable one.[177]

However, a shift to single filing may be too dramatic to garner sufficient political support because of its inconsistency with the remaining legal framework.[178] Thus, to avoid inconsistencies and minimize disruption to the general legal framework, a new solution is needed, one that does not break from the law's general treatment of the household as a single economic unit. This Part offers this type of solution and notes its limitations.

A. Previous Proposals

Past proposals and scholarship tended to focus on moving married couples to single filing status and ignoring marital status for tax reasons.[179] These discussions, however, were inconsistent with the greater legal framework treating spouses as a single economic unit[180] and required major overhauls to the system that may have slowed down their implementation.[181]

For example, a solution to the marriage penalty that was close to implementation was optional separate filing, with identical bills on the topic

176. "Marriage penalties and bonuses would both disappear, of course, if the United States abandoned joint returns for married couples, thereby renouncing the goal of equal tax on equal-income married couples. Along with a number of tax commentators, I have long urged exactly that." Zelenak, *For Better and Worse*, *supra* note 6, at 817 (citing Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 757 (2013)); *see* Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1993)); *see also supra* note 18.

177. *See* Zelenak, *Doing Something About Marriage Penalties*, *supra* note 12, at 11 (describing the proposal and its drawbacks).

178. *See supra* Part III.B.

179. *See, e.g.*, *supra* notes 18 and 176.

180. *See supra* Part III.A.

181. *See supra* Part III.B.

introduced in the House and in the Senate in 1997.[182] Under optional separate filing, married couples would calculate their tax liability under the single-filer schedule and the married-filer schedule, and then select the option with a lesser tax liability.[183] If the couple chooses separate filing, however, both spouses would have to file as single taxpayers.[184]

Although optional separate filing perfectly targets the marriage penalty and even addresses income stacking, there are some concerns regarding it, such as the administrative complexity of calculating a couple's tax liability several ways and of assigning income and deductions between spouses.[185] Additionally, this approach does not treat the spouses as a single unit, as the general legal framework does.[186] It would thus take significant political support to take this approach.[187]

Even though the treatment of the family as a single economic unit causes the marriage penalty, the solution does not need to abandon taxation based on marital status. It can instead simply reflect that there are one- and two-income families.

B. A New Solution to the Marriage Penalty

While there are many differences among marriages,[188] for purposes of the marriage penalty problem, there are two types of marriages: one- and two-income.[189] Recognizing this difference leads to a marriage penalty solution that allows the continued treatment of spouses as a single economic unit.[190]

182. Zelenak, *Doing Something About Marriage Penalties*, *supra* note 12, at 11.

183. *Id.*

184. *Id.*

185. *See id.* at 12.

186. *See id.* at 17–19; *see supra* Part III.B.

187. *See, e.g.*, Megan Filoon, *New York State of Mind: How the Marriage Equality Act Foreshadows the Repeal of DOMA and the Potential Tax Consequences for Same-Sex Couples*, 10 RUTGERS J.L. & PUB. POL'Y 31, 61 (2013) (noting that traditionalists would not want to eliminate the distinction between married families and others, which prevents a tax system overhaul).

188. *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 63 (2000) (plurality opinion) ("The demographic changes of the past century make it difficult to speak of an average American family.").

189. Zelenak, *Doing Something About Marriage Penalties*, *supra* note 12, at 14.

190. *But see id.* at 3 ("Be forewarned, however, that there really is no solution; there are only different ways of moving the problem around. The income tax treatment of marriage invites comparisons among three groups of taxpayers: one-earner married couples, two-earner married

This solution is to create another tax filing status for only two-income earning married couples, which would be identical to the present married-filer status, except that it would have tax brackets double those of single filers.[191] Currently, there are four filing statuses based on a person's marital status on the last day of the calendar year: (1) single filers, (2) married filing jointly, (3) married filing separately, and (4) head of household.[192] Under this proposal, a fifth filing status and set of tax brackets would be added—the two-income earner married couple bracket. This would allow continued treatment of families as a single unit under the tax code while alleviating the marriage penalty.

However, doubling the tax rates for all two-income earning married couples creates an even bigger marriage bonus for couples who do not have two significant incomes.[193] For example, under tax brackets that are double those of single filers, if one spouse earns $200,000 and the other earns $1,000, they would benefit from a sizeable marriage bonus.[194]

Thus, there ought to be a second rule under this proposal: the double taxation rates must be reserved for two-income earning couples, both of whom must earn a non-nominal amount. To avoid one spouse working a nominal job to attain the double brackets for a higher-income earner spouse, spouses should make some minimum percentage of each other's income to qualify for the double brackets, which could be set according to preferred public policy goals.[195] The intent behind this rule is to identify true two-

couples, and unmarried taxpayers. In a system with progressive marginal rates, any tax recognition of marriage will give rise to a plausible complaint by one of the groups that it is being treated unfairly compared to one of the other groups."). Another proposal treating two-income married couples differently from one-income married couples would be to provide two-income married couples with a deduction to offset their tax penalty. *See, e.g.*, Michael B. Adamson, Note, *Earned Income Tax Credit: Path Dependence and the Blessing of Undertheorization*, 65 DUKE L.J. 1439, 1469 (2016).

191. To minimize the marriage bonus in order to preserve revenue and avoid distortions, this proposal differs from those that would double the tax brackets for all married couples, even one-income earning couples. *See supra* Part II.

192. *Determining Your Correct Filing Status*, IRS (Feb. 13, 2013), https://www.irs.gov/uac/newsroom/determining-your-correct-filing-status [https://perma.cc/BGM3-TFFL].

193. Ryznar, *To Work, or Not to Work*, *supra* note 15, at 929.

194. *See id.* at 943.

195. For example, in a different context, Professor Nock defines equally dependent spouses "as those who earn no less than 40% of total family earnings." Steven L. Nock, *The Marriages of Equally Dependent Spouses*, 22 J. FAM. ISSUES 755, 759 (2001). To maximize relief from the marriage penalty, perhaps the qualifier should be that spouses earn within 30% of each other's

income earner households to avoid benefitting one-income-earner households with a sizeable marriage bonus at the expense of other taxpayers.[196] This targets the marriage penalty without creating a marriage bonus, and taxpayers would thus sort themselves under the following brackets:[197]

2016 TAX RATE	SINGLE FILERS	MARRIED FILERS 1-Income Earning*	MARRIED FILERS 2-Income Earning
10%	Up to **$9,275**	Up to **$18,550****	Up to **$18,550**
15%	**$9,276** to **$37,650**	**$18,551** to **$75,300**	**$18,551** to **$75,300**
25%	**$37,651** to **$91,150**	**$75,301** to $151,900	**$75,301** to **$182,300**
28%	**$91,151** to **$190,150**	$151,901 to $231,450	**$182,302** to **$380,300**
33%	**$190,151** to **$413,350**	$231,451 to $413,350	**$380,302** to **$826,700**
35%	**$413,351** to **$415,050**	$413,351 to $466,950	**$826,702** to **$830,100**
39.6%	**$415,051** or more	$466,951 or more	**$830,102**

* This is the current married-filer schedule.

Amounts on the married schedules that are double the amounts on the single schedule are **bolded.

It is true that these rules will no longer produce equal taxes on equal-income married couples because they depend on whether the couple has one

income or that they suffer a marriage penalty; however, public policy will dictate this choice. *See also supra* note 117.

196. Otherwise, as one commentator noted, "Any choice will cause primary-earner couples, two-earner couples, or single taxpayers to benefit relative to the others through the shifting of tax burdens. In other words, there were, and remain, relative economic losers for each choice." Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do with Joint Tax Filing*, 11 NEV. L.J. 718, 722 (2011).

197. *See supra* note 27 and accompanying text.

or two income-earners.[198] However, there are two different categories of married couples and the filing statuses should reflect it.[199] If the public policy choice is to either (1) penalize working married women and marriage, or (2) treat two different groups of marriages differently when they are different, then the latter option causes the least distortion in the federal taxation system.[200]

Under this proposal, income stacking continues—the secondary wage earner's income is taxed at a higher rate than the primary wage earner's income.[201] However, this is an effect of the progressive tax system: if a household acquires more money, it is responsible for a greater tax liability.[202] To change income stacking would require married couples to file as separate taxpayers, which would prompt inconsistency with the general legal framework and thereby risk political stalemate.[203]

There is also a cliff effect in this proposal, as in many tax provisions, because if the secondary income earner does not earn enough money to qualify for the double brackets, the couple is not able to benefit from them.[204] In this case, however, the regular tax brackets for married couples

198. See the discussion of horizontal equity in Part II.B.3 above. While solutions to the marriage penalty may face criticisms, such as that they relieve the tax burden of higher income people or a select subgroup of married couples, fairness requires consideration of potential solutions to the marriage penalty. *See supra* Part II.B.3. *See generally* Zelenak, *Doing Something About Marriage Penalties*, *supra* note 12, at 11–19 (noting criticisms of marriage penalty relief). "Of course, the distribution of relief is simply a reflection of the distribution of current marriage penalties." Zelenak, *Doing Something About Marriage Penalties*, *supra* note 12, at 13.

199. *But see* Zelanek, *For Better and Worse*, *supra* note 6, at 784 ("As a matter of simple arithmetic, it is impossible for a tax system to feature simultaneously (1) progressive marginal tax rates, (2) joint filing by married couples (in the service of producing equal taxes on equal-income married couples), and (3) marriage neutrality (that is, no tax marriage penalties or bonuses). If the legislature insists on the first two features, as Congress has for many decades, then the third desideratum is unachievable. . . . Although a legislature committed to the first two goals must violate marriage neutrality, the legislature has a great deal of freedom to determine whether, and to what extent, to skew the neutrality violations toward either marriage penalties or marriage bonuses."). Lawmakers already have shown concern for the marriage penalty. *See supra* Part I.

200. *See supra* Part III.

201. *Cf.* Zelenak, *Doing Something About Marriage Penalties*, *supra* note 12, at 19–21.

202. *See* I.R.C. § 1 (2015).

203. *See supra* Part III.

204. For the prevalence and costs of cliff effects in federal income taxation, see Manoj Viswanathan, *The Hidden Costs of Cliff Effects in the Internal Revenue Code*, 164 U. PA. L. REV. 931, 933 (2016) ("The Internal Revenue Code contains many credits, deductions, exclusions, and other benefits that apply when a taxpayer satisfies a certain numerical criterion, but that immediately

soften the cliff effect because these couples are accommodated by the current tax brackets that enlarge despite not doubling.[205] Indeed, the current tax brackets accommodate some increase in income upon marriage, but not significant or double increases.[206] Thus, where the current tax brackets stop accommodating a couple's two incomes, this proposal would step in to accommodate both incomes.

As a result, under this proposal, there is one remaining public policy choice to make—whether to use the current tax rates for married couples as the rates for one-income married filers, despite the resulting marriage bonus for some.[207] It is important to identify the public policy reason for maintaining a marriage bonus for one-income earners, such as softening the cliff effect of implementing double tax rates only for the spouses who earn an income within a certain amount of each other.[208] In other words, keeping current marriage-filer rates for one-income earner households could catch those households who do not qualify for the two-income earner brackets, when the secondary income earner does not earn a high enough percentage of the primary income earner's amount to trigger the double brackets. Another reason to keep the current tax brackets in addition to the proposed double brackets may be to support parental care for children.[209] However, not all non-income-earning women are mothers of minor children, and many working married women are.[210]

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vanish once this triggering criterion is no longer met. As a result, two taxpayers in nearly identical economic situations can face considerably different federal tax liabilities depending on which side of the triggering criterion they happen to fall. The 'cliff effects' attached to these tax provisions can drastically affect taxpayer behavior and undermine what these provisions are intended to accomplish. The magnitude of this issue is significant: cliff effects, in one form or another, are attached to various federal tax expenditures totaling hundreds of billions of dollars."). "Regulation requires drawing lines to determine to whom or what the regulation applies. This line drawing does not, however, mandate stark differences in treatment between those sitting closely to either side of the line." *Id.* at 939.

205. *See supra* Part II.A.

206. *See supra* note 27 and accompanying text.

207. *See generally* Ryznar, *To Work, or Not to Work*, *supra* note 15, at 928 (explaining the resulting marriage bonus for one-income marriages).

208. *See supra* notes 195, 204, and accompanying text.

209. *See supra* notes 52–66 and accompanying text.

210. "Among married-couple families [with and without children], both the husband and wife were employed in 48.0 percent of families . . . . Among married-couple families with children, . . . 61.1 percent had both parents employed." *Employment Characteristics of Families Summary*, U.S. BUREAU LAB. STAT. (Apr. 2016), http://www.bls.gov/news.release/famee.nr0.htm [https://perma.

In difficult economic times, a revenue-neutral proposal promises to carry more political power.[211] Thus, it is important to underscore that eliminating the marriage penalty may be revenue neutral if married women—no longer disincentivized to engage in paid work—reenter or remain in the labor force, thereby generating taxable income.[212]

In sum, because the alleviation of the marriage penalty aggravates the marriage bonus and vice versa, the question has always been which one to target.[213] Adding an additional bracket for those most affected helps address the marriage penalty,[214] and this proposed solution separates the marriage bonus from the marriage penalty by doubling the tax brackets of single filer brackets, but only for those married couples with two non-nominal incomes.[215] This solution is politically feasible because it minimizes disruption to the general framework by continuing to treat spouses as one economic unit.[216]

Given the complexity of the marriage penalty and the nuances of the federal income tax system, all solutions to the marriage penalty have their limitations. The question is which limitations to accept and which public policy choices to make.[217] To date, Congress has shifted tax rates, brackets, and filing statuses—but never successfully.[218] In fact, as one court noted, "the perplexities of shaping a legislative scheme [that] distributes the incidence of the personal income tax equitably between married and single

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cc/D7YH-HVQP]; *see also supra* Part II.B.

211. *See, e.g.*, Akari Atoyama-Little, Note, *Taxing Single Mothers: A Critical Look at the Tax Code*, 88 N.Y.U. L. REV. 2146, 2175 (discussing one state's efforts to make a state tax break revenue neutral).

212. *See generally supra* note 127 and accompanying text (noting tax law's goal of neutrality).

213. *See supra* Part II.

214. *See supra* text accompanying note 191.

215. *See supra* notes 195–99 and accompanying text.

216. *See supra* Part III.

217. For example, a utilitarian approach may be taken. "Utilitarian theory focuses on maximizing the greatest good for the greatest number and is often translated into economic terms as creating the most economically efficient system." Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159, 176 (2005).

218. *See supra* Part II; Raymond v. United States, 355 F.3d 107, 111 n.7 (2d Cir. 2004) (citing WILLIAM A. KLEIN ET AL., FEDERAL INCOME TAXATION 667–71 (12th ed. 2000)) ("Congress first permitted 'income splitting' between married couples in 1948, . . . [and] this initially created a 'marriage bonus'—and corresponding 'singles penalty'—and . . . a subsequent adjustment to the rate structure eliminat[ing] the singles penalty, but creat[ing] the current 'marriage penalty.'").

taxpayers have confounded Congress for many years."[219] However, doubling the tax brackets for dual-income marriages offers a practical solution to address the persistent marriage penalty.

V. CONCLUSION

In the current tax system, there is a marriage penalty for many two-income-earning couples and a bonus for one-income-earning couples.[220] Although there are proposals to abandon taxation based on marital status, they represent a dramatic departure from the law's usual treatment of married couples as one economic unit.[221] A more consistent approach is to create another tax bracket in recognition of the fact that there are one- and two-income married couples.[222]

The reality of these two types of marriages should be reflected in the federal taxation system. Currently, these two groups of married couples are treated the same, with the tax code distinguishing between single and married taxpayers instead.[223] However, this facilitates the marriage penalty and fails to reflect changing demographics and women's increased participation in the labor force.[224] A society that wants to encourage marriage as well as employment should alleviate the marriage penalty, and the most practical way to do so is by doubling the brackets for two-income earner marriages.[225]

A solution to the marriage penalty should not only alleviate the disincentives to marriage and paid work, but also treat the family as a single economic unit to minimize disruption to the legal framework.[226] While hinging a solution on single filing requires a reimagining of family law,[227]

219. Pierce v. Comm'r, 41 T.C.M. (CCH) 580 (T.C. 1980), *aff'd*, 688 F.2d 823 (3d Cir. 1982). "While the equity of devising such a tax structure may be difficult to discern, the current law on the issue is not." Rinier v. United States, No. CIV. 92-1594, 1992 WL 330402, at *1 (D.N.J. Aug. 21, 1992), *aff'd*, 995 F.2d 218 (3d Cir. 1993).

220. *See supra* Part II.

221. *See supra* Part IV.

222. *See supra* Part IV.B.

223. *See supra* Part II.

224. *See supra* Part II.

225. *See supra* Part IV.

226. *See supra* Parts III–IV.

227. For an excellent discussion on reimagining family law, see JILL ELAINE HASDAY, FAMILY LAW REIMAGINED (2014).

adding another filing status that applies to two-income earning couples remains consistent with the general legal framework and alleviates the marriage penalty problem in a politically feasible way.

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