
LAWRENCE ZELENAK

I. INTRODUCTION

Many married two-earner couples pay more federal income tax than they would if they were not married. In 1996, more than 21 million married couples paid a total of $29 billion in income tax marriage penalties—an average of nearly $1,400 per couple. The couples subject to the marriage tax are not consoled by the fact that other couples enjoy tax marriage bonuses. In 1996, 25 million married couples had their income tax liabilities reduced by $33 billion—an average of about $1,300 per couple—by reason of being married. Expressing indignation with tax marriage penalties, House Republicans declared doing something about them to be their top tax goal for 1998, and late in 1998, the House passed a bill that would have reduced marriage penalties. Although the Senate did not act on the House-passed bill, marriage penalty relief remained a Republican legislative priority in 1999, and in August of 1999, both the House and the Senate voted in favor of a tax bill that included several forms of marriage penalty re-

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1 Congressional Budget Office, For Better or Worse: Marriage and the Federal Income Tax 1 (1997) [hereinafter CBO Study]. The CBO's estimate necessarily is based on a number of assumptions, some of which are debatable. For a critique of one such assumption, the effect of which is to overstate marriage penalties for couples with two or more children, see note 267.
2 CBO Study, note 1.
5 This was evidenced early in 1999 by an anti-marriage penalty bill introduced by Rep. Jerry Weller with the co-sponsorship of a majority of the members of the House. H.R. 6, 106th Cong. §§ 2, 3 (1999) (allowing married taxpayers a standard deduction twice as large, and rate brackets twice as wide, as those for single taxpayers).

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lief. President Clinton's veto of the legislation was inspired by the size of the overall tax reductions in the bill, not by opposition to the concept of marriage penalty relief. There is, in fact, widespread Democratic support for some form of marriage penalty relief. The marriage penalty relief story in 2000 was a virtual replay of 1999. Congress sent the President legislation closely resembling the 1999 bill. Again, the President vetoed the legislation, complaining that it was "poorly targeted toward delivering marriage penalty relief," because less than one-half of its revenue cost would have been devoted to marriage penalty reductions.

It seems likely, then, that some form of marriage penalty relief eventually will become law. Deciding on the best form of relief, however, is not a simple task. Legislative options are many. Some would remove all tax marriage penalties, while others would offer only limited relief. Each solution creates new problems, in terms of revenue loss, complexity, or perceived unfairness to one or another group of taxpayers (single taxpayers in one case, one-earner couples in another).

This Article considers what might be done to lessen or eliminate marriage penalties, under the assumption that marital status will continue to have income tax significance in at least some situations, and that the income tax will continue to feature progressive marginal rates. Although mandatory separate returns for all taxpayers would eliminate all marriage penalties (and all marriage bonuses), that does

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8 See, e.g., Daniel Patrick Moynihan & J. Robert Kerrey, Democratic Alternative to Chairman's Mark, 1999 TNT 140-56, July 22, 1999, available in LEXIS, TNT File (describing a tax cut proposal by the Senate Finance Committee Democrats that included three forms of marriage penalty relief: an increase in the joint return standard deduction, a modification of the earned income tax credit, and a two-earner deduction); Katherine M. Stimmel & Mark Felsenthal, House Approves $792 Billion Tax Cut Bill by Near Party Line Vote, Rejects Alternatives, Daily Tax Rep. (BNA), July 23, 1999, at GG-1 (describing a $250 billion tax cut substitute bill offered by Rep. Rangel on behalf of the House Democrats; like the Republican bill, the Democratic substitute provided for elimination of marriage penalties created by the standard deduction).


not seem to be a political possibility in the near future.\textsuperscript{11} Of the many bills recently introduced in Congress to lessen or eliminate tax marriage penalties, none takes the mandatory separate return approach.\textsuperscript{12} A single-rate tax system also would eliminate all marriage penalties (and bonuses), but it too does not appear politically feasible, at least in the short term. Even the so-called flat tax is not a true single-rate tax, because of its large exemption amount, which functions as a zerorate tax bracket.\textsuperscript{13}

Assuming a tax system in which marital status is irrelevant and a true single-rate system are both out of the question, the major options for marriage penalty relief are: optional separate filing, a return to the 1948 system of large marriage bonuses but no marriage penalties, intermediate filing based on spousal income-splitting agreements, and various forms of targeted partial relief. The targeted relief could be aimed at low income couples (by reforming the earned income tax credit), at middle income couples (by reforming the standard deduction, the lowest rate bracket, or both), or at higher income couples (by restoring the two-earner deduction). This Article examines the strengths and weaknesses of each approach. Rather than drawing firm policy conclusions, the goal is to identify the effects of each approach, and the values one would have to hold for that approach to be attractive. Armed with that information, the reader can decide what, if anything, Congress should do about marriage penalties.

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 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. Tax reform can relocate the complaints, but it cannot eliminate them.

\textsuperscript{11} I previously wrote in support of mandatory separate filing, and I believe it is a serious political possibility in the longer run. See Lawrence Zelenak, Marriage and the Income Tax, 67 S. Cal. L. Rev. 339 (1994) (hereinafter Marriage).

\textsuperscript{12} But see H.R. 2292, 105th Cong. § 320 (1997) (Rep. Portman, sponsor); S. 1696, 105th Cong. § 320 (1997) (Sens. Kerrey and Grassley, sponsors). Each bill calls on the Secretary of the Treasury and the Comptroller General to conduct studies on the treatment of each taxpayer (husband and wife) as a separate filing unit. In each case, the separate filing study is a small point in a much larger bill dealing with restructuring of the Internal Revenue Service and various tax reform issues.

\textsuperscript{13} See Robert E. Hall & Alvin Rabushka, The Flat Tax 59 (2d ed. 1995) (proposing a zero rate of tax on the first $25,500 of earned income for a family of four).
II. Why Are There Marriage Penalties?

Before evaluating the possibilities for reform, one must understand why tax marriage penalties (and bonuses) exist. This Section explains their existence from a historical perspective.

A. An Unfortunate Side Effect of Incompatible Goals

If all taxpayers filed separate returns reporting their own income, regardless of marital status, the mere fact of marriage would have no tax consequences.14 There would be neither marriage penalties nor bonuses. Since 1948, however, marriage has had major income tax consequences in the United States.15 In that year Congress enacted a joint return system, under which spouses combined their incomes on one return and paid twice the tax a single person would owe on one-half the income.16 In the then-typical case of a one-earner couple, the effect was a substantial tax reduction that resulted from shifting one-half of the husband’s income from his higher tax brackets to the wife’s unused lower brackets. In the unusual case of an equal income two-earner couple, the change in the law had no effect on their tax liability. Their income had been divided evenly between them, even without the benefit of joint return income splitting. Thus, the original version of joint returns provided large marriage bonuses for one-earner couples, smaller bonuses for two-earner couples with unequal divisions of income, and no bonus for equal income couples. It did not impose marriage penalties on anyone.

Although one effect of the 1948 legislation was the achievement of couples neutrality—that is, equal tax burdens on equal income couples, regardless of the distribution of income between husband and wife—that was not the legislative purpose. Rather, the Act was a delayed response to geographic discrimination between husbands in separate property states and those in community property states.17 In

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14 More precisely, it would have no tax consequences if Congress legislatively overruled Poe v. Seaborn, 282 U.S. 101 (1930) (holding, as a matter of statutory interpretation, that one-half of a husband’s earnings in a community property state were taxable to the wife). See IRC § 66 (overruling Poe v. Seaborn in certain circumstances).

15 Among the 27 member nations of the Organization for Economic Cooperation and Development (OECD), the United States is in the distinct minority in this respect. In 19 of those countries income taxes are imposed separately on spouses. CBO Study, note 1, at 59-60 app. A.


17 This story has been told often and well. More complete versions of the tale can be found in Michael J. Graetz, The Decline (and Fall?) of the Income Tax 29-40 (1997); Edward J. McCaffery, Taxing Women 11-48 (1997); Boris I. Bittker, Federal Income Taxation and the Family, 27 Stan. L. Rev. 1389, 1399-1414 (1975); Carolyn C. Jones, Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s, 6 Law & Hist. Rev. 259 (1988).
1930, the Supreme Court decided, in *Lucas v. Earl*, that a husband's earned income was all taxable to the husband despite a contract between the spouses making one-half of his earnings the property of the wife. The wife's half of the husband's earnings thus was stacked on top of the husband's share, and taxed in his high rate brackets. Had the Court given tax effect to the contract, the wife's share would not have been stacked on top of any other income, and so would have been taxed in the wife's low brackets.

Later in 1930 the Supreme Court decided, in *Poe v. Seaborn*, that the income shifting that could not be accomplished by agreement in a separate property jurisdiction was accomplished automatically—by operation of law—in a community property state. As a result of the two decisions, the tax on any given amount of income of a husband with a nonearning wife was significantly higher in a separate property state than in a community property state. The 1948 legislation was designed to end this difference and to forestall "the impetuous enactment of community-property legislation" in separate property states.

Despite the overwhelming evidence that the original joint return was an accident of history rather than a principled enactment of couples neutrality, in the years since 1948 couples neutrality has become the standard justification for joint returns. Commentators explain that a separate return system is unacceptable because it would impose different tax burdens on equal income couples, depending on the income distribution between the spouses in each marriage.

The 1948 Act was the first time Congress legislated major income tax consequences for marriage. Under the 1948 Act, the tax effect of marriage could be only favorable. The introduction of tax marriage penalties usually is traced to 1969. Under the 1948 system, a married worker with a nonearning spouse had a much lower tax liability than an equal income single person. Unmarried people viewed this as a

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18 281 U.S. 111 (1930).
21 Bittker, note 17, at 1438 (describing a legislative proposal for mandatory separate filing by spouses as "nothing less than astonishing," because it would abandon the principle of "equality in taxes between married couples with the same income"); Michael J. McIntyre & Oliver Oldman, Taxation of the Family in a Comprehensive and Simplified Income Tax, 90 Harv. L. Rev. 1573, 1590 (1977).
singles penalty, and in 1969 Congress responded to their complaints with singles tax relief. From 1948 to 1969, the rate brackets for single taxpayers had been one-half as wide as those for joint returns. The 1969 Act widened the brackets for singles to 60% of the joint return widths. This change decreased singles penalties, but it also created marriage penalties. A husband and wife with equal earnings now paid more tax than if they were cohabiting out of wedlock.

This new marriage penalty was not the result of a legislative determination that marriage should be discouraged or punished. Rather, it was an unfortunate by-product of the pursuit of other policy goals. As a matter of arithmetic, it is simply impossible to have a tax system that simultaneously possesses (1) progressive marginal rates, (2) couples neutrality, and (3) marriage neutrality (that is, no marriage bonuses or penalties). A truly flat tax (with no exemption amount or zero bracket) can achieve couples neutrality and marriage neutrality at the sacrifice of progressivity. A separate return system can have progressive rates and marriage neutrality, at the sacrifice of couples neu-

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24 Although the 1969 legislation generally is described as having created the first marriage penalties, actually there were marriage penalties on some two-earner couples with children as early as the introduction of head of household tax status in 1951. Revenue Act of 1951, Pub. L. No. 82-183, § 301, 65 Stat. 452, 480. These penalties went unnoticed, however, for reasons discussed in text accompanying notes 273-74.
25 Suppose, for example, the lowest rate bracket applied to the first $10,000 of joint return taxable income. Under the 1969 approach, the lowest rate bracket would apply to the first $6,000 of income for a single taxpayer (other than a head of household). Two equal income single taxpayers would be entitled to have $12,000 (between them) taxed at the lowest rate. If they were married, however, only $10,000 of their combined income would qualify for the lowest rate.
26 Good demonstrations of the incompatibility of the three goals can be found in Tax Treatment of Single Persons and Married Persons Where Both Spouses Are Working, Hearings Before the House Ways and Means Committee, 92d Cong. 78-79 (1972) (statement of Edwin S. Cohen, Ass’t Treas. Sec’y) [hereinafter 1972 Hearings]; Staff of Joint Comm. on Tax’n, 96th Cong., The Income Tax Treatment of Married Couples and Single Persons 26 n.1 (Comm. Print 1980); Bittker, note 17, at 1395-96.
Here is one way of understanding the problem (loosely based on the Bittker explanation). Imagine two couples, A and B, and C and D. Each couple has the same combined income, but the incomes of A and B are equal, while C has a higher income than D. If the couples are unmarried, then under a progressive rate structure the combined tax liabilities of A and B will be less than those of C and D. (Imagine shifting income from A to B until the distribution of income between them matches the C-D distribution. Because of progressive marginal rates, the tax imposed on income shifted to B will be greater than the tax saved by shifting income away from A.) But now suppose the two couples are married. Couples neutrality requires that both couples have the same tax liability. Given that the couples did not have the same tax liability before marriage, achieving couples neutrality requires that marriage increase the taxes of A and B, or decrease the taxes of C and D, or both. Thus, if the system is to have progressive rates and couples neutrality, it cannot have marriage neutrality. It must have marriage penalties, marriage bonuses, or both.
27 Although a system with progressive marginal rates cannot have both versions of neutrality, a tax-and-transfer system with a flat tax and a universal cash grant (demgrunt)
trality. But if progressive marginal rates and couples neutrality are required, there must be marriage penalties, marriage bonuses, or both.

Between 1948 and 1969, the legislative choice was progressive rates, couples neutrality, and only marriage bonuses. In 1969, Congress mollified singles by reducing marriage bonuses, and in the process unavoidably created marriage penalties for some couples.28

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.29 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%.30 As the prevalence of couples with close-to-equal incomes has increased, so has the prevalence of marriage penalties.

In addition, Congress has introduced new sources of marriage penalties into the Code. The earned income tax credit (EITC), created in 197531 and greatly expanded in subsequent years, imposes large penalties—very large as a percentage of income—on low income two-earner couples.32 In 1993, Congress added new upper rate brackets of 36% and 39.6% that did not follow the pattern established in 1969 for the relationship between joint return and single taxpayer rate schedules.33 Instead of beginning at the expected 60% of the joint return income level, the unmarried taxpayer 36% bracket begins at 82% of the joint return level, and the 39.6% bracket begins at 100% of the joint return level.34 The result is especially heavy penalties for upper income two-earner couples.35 Viewed in isolation from the rest of the

would simultaneously possess couples neutrality, marriage neutrality, and progressive average rates. Such a system is discussed in text accompanying notes 290-93.

28 Following the 1969 legislation, there were a few attempts to justify marriage penalties as more than an unfortunate consequence of the pursuit of other goals. The unconvincing argument that marriage penalties are an appropriate response to the ability of two to live as cheaply as one is considered in text accompanying notes 45-53.


30 CBO Study, note 1, at 38.


32 These penalties are discussed in text accompanying notes 181-210.


34 The current beginning levels for the 36% bracket are $115,000 for unmarried taxpayers (other than heads of households) and $140,000 for joint returns. The 39.6% bracket begins at $250,000 in both cases. IRC § 1(a), (c). The annual inflation adjustments to these amounts do not change the relationship between the two rate schedules.

35 One commentator with high-level Treasury experience has suggested the increased marriage penalties for upper-income couples was accidental. Michael J. Graetz, Tax Policy at the Beginning of the Clinton Administration, 10 Yale J. on Reg. 361, 369 (1993).
rate structure, the 39.6% bracket imposes large marriage penalties and only marriage penalties; it never confers a marriage bonus.

Finally, Congress recently has become fond of imposing hidden taxes in the form of phaseouts denying various tax benefits to high income taxpayers. Benefits subject to phaseout include personal exemptions,\textsuperscript{36} 80% of itemized deductions,\textsuperscript{37} the exclusion of Social Security benefits,\textsuperscript{38} the child credit,\textsuperscript{39} and Hope scholarships.\textsuperscript{40} The designs of some phaseouts impose significant marriage penalties. To completely avoid marriage penalties, the threshold amount—that is, the income level at which the phaseout begins—should be twice as high for joint returns as for unmarried taxpayers. Of these five phaseouts, only that for the Hope scholarship is designed to avoid marriage penalties. The other four phaseouts impose marriage penalties that are more tilted than the basic rate structure.\textsuperscript{41}

As a result of these changes in society and in the law, an estimated 21 million couples (42% of all married couples) paid about $29 billion in marriage penalties in 1996.\textsuperscript{42} Although Congress has never passed tax legislation with the purpose of penalizing marriage, it has legislated with the knowledge that marriage penalties would be a side effect of tax rules it desired for other reasons.\textsuperscript{43} If imposing tax penalties on marriage were a tort, that state of mind would be enough to make the tort intentional.\textsuperscript{44} When Congress thus intentionally penalizes marriages to the tune of $29 billion a year, it is worth considering whether there might be a better way.

\textsuperscript{36} IRC § 151(d)(3).
\textsuperscript{37} IRC § 68.
\textsuperscript{38} IRC § 86.
\textsuperscript{39} IRC § 24(b).
\textsuperscript{40} IRC § 25A(d).
\textsuperscript{41} In the basic rate structure, the norm has been for the § 1(c) unmarried brackets to be 60% as wide as the § 1(a) joint return brackets. (The top two brackets, added in 1993, are an exception. See text accompanying notes 33-35.) The same is true of the standard deduction. IRC § 63(c)(2). But the corresponding percentages for the phaseout provisions are as follows: personal exemptions, 67%, IRC § 151(d)(3)(C)(i), (iii); itemized deductions, 100%, IRC § 68(b)(1); Social Security, 78%, IRC § 86(c)(1)(A), (B); and child credit, 68%, IRC 24(b)(2)(A), (B).
\textsuperscript{42} CBO Study, note 1, at 29-30. Even now, however, the net effect of the income tax is a marriage bonus. An estimated 25 million couples (51% of the total) enjoyed marriage bonuses of $33 billion in the same year. Id.
\textsuperscript{44} See, e.g., Garratt v. Dailey, 279 P.2d 1091 (Wash. 1955) (a classic case discussing this version of intentionality in tort).
B. Marital Economies of Living

In its General Explanation of the Tax Reform Act of 1969, the Staff of the Joint Committee on Taxation offered two justifications for taxing equal income spouses more heavily than if they were single. In addition to being a necessary by-product of singles penalty relief, the heavier tax was appropriate because a married "couple's living expenses are likely to be less than those of two single persons and therefore the couple's tax should be higher than that of two single persons." Assistant Secretary of the Treasury Edwin S. Cohen sounded the same theme in his 1972 testimony before the Ways and Means Committee: "If there is a 'penalty' on marriages, it occurs when two people having substantial separate incomes marry to maintain a single household, thus reducing their total living expenses and increasing their total ability to pay taxes." Taking into account the increased ability to pay arising from their new household economies of scale, there really is no marriage penalty.

This was literally an after-the-fact rationalization. Although it features prominently in the post-enactment justifications of the marriage penalty, it does not appear in any of the pre-enactment committee reports or in the hearings that preceded the Act. No one claimed that the tax on married couples should be increased to reflect their economies of sharing. Before enactment, the marriage penalty was nothing more than a side effect of reducing singles penalties. It is clear from the structure of the 1969 Act that it was not concerned with the economies of marital sharing. If Congress had made a considered judgment that tax liabilities should increase upon marriage to reflect new consumption economies, the Act should have imposed marriage penalties on all two-earner newlyweds. But it did not do so. In fact, it imposed marriage penalties on only about 20% of couples; even most two-earner couples were not penalized. Nor is there any indication—before or after enactment—of any connection between the size

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46 1972 Hearings, note 26, at 79.


48 According to Assistant Secretary Cohen, "Only about 20 percent of married couples have an earnings split that results in their paying more tax than they would pay as single persons." 1972 Hearings, note 26, at 75. Since each spouse had some earnings in 45% of all marriages, this meant that even most two-earner couples were not penalized. Id.
of the marriage penalties imposed in particular situations and the consumption efficiencies expected.

But perhaps the appeal to marital economies still can serve as a defensive argument—not that economies of sharing are a reason to impose marriage penalties, but merely that the economies may make penalties an acceptable side effect of the pursuit of other goals. Even in a limited defensive role, however, the argument has serious problems.

First, it depends on the far-from-obvious proposition that tax liabilities should be adjusted to reflect the different consumption efficiencies of different taxpayers; ceteris paribus, more efficient consumers should pay higher taxes. But if that is correct, why stop with marital economies? Why not try to determine everyone’s level of consumer surplus and tax it? Why not tax utility instead of income? The obvious answer is that consumption efficiencies, consumer surplus, and utility are too difficult to measure, and, in any event, do not closely correspond with ability to pay. As long as the tax system generally disregards consumption efficiencies, there is no reason to treat those efficiencies that result from marriage differently.

Basic philosophical questions aside, the factual premise for the marital economies argument did not hold even in 1969, let alone today. Even if no couples cohabited before marriage in 1969, it would not necessarily follow that marriage created new consumption economies. In many cases, one or both spouses lived with parents or with housemates before marriage. For those spouses, marriage may have resulted in a loss of consumption economies. A possible response is that sharing with housemates or parents is a burden, but sharing with a spouse is a joy. That would be an explicit defense of the marriage penalty as a tax on marital bliss. As such it seems offensive (in addition to being based on rather sweeping generalizations).

What little force the argument may have had three decades ago has been vitiated by social changes. The argument depends on the assumption that the proper comparison to the married couple living together is to their unmarried selves living apart. The entire analysis crumbles if the relevant comparison is to unmarried cohabitation. A marriage license does not make living any cheaper for those already


50 See Michael J. McIntyre, Commentary, in Taxing the Family 98, 100-01 (Rudolph G. Penner ed., 1983) (arguing that considering economies of scale in taxing the family would open a Pandora’s box of problems regarding taxation of the analogous benefits of consumer surplus).

51 1972 Hearings, note 26, at 149 (statement of Oscar S. Gray).
living together. When cohabitation is a viable alternative—as it may not have been in 1969,52 but as it is for millions today53—the appeal to economies of sharing completely misses the point of the marriage penalty complaint. When the standard formulation of the complaint is a comparison with the tax on cohabitants, it is ludicrous to defend the marriage penalty by citing economies of cohabitation.

III. So What to Do? Broad-Based Marriage Penalty Relief Proposals

A. Optional Separate Filing

The marriage penalty relief proposal receiving the most attention in 1997 was optional separate filing. Identical optional separate filing bills were introduced in the House and in the Senate.54 Under the Marriage Tax Elimination Act, a husband and wife would calculate both their joint return liability and their liabilities as separate filers, and would elect whichever filing status proved less expensive. This approach has the potential to eliminate marriage penalties completely.55 The 1997 proposals would not have had this effect, however, for two reasons. First, if the couple chose separate filing, both spouses

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52 There is no indication in the 1969 Bluebook that the possibility of unmarried cohabitation occurred to the Joint Committee Staff. 1969 Bluebook, note 45, at 223. Assistant Treasury Secretary Cohen mentioned it only as a half-joking aside, suggesting it was relevant only to the young: "Now the assumption breaks down if you assume that two single persons are living together in a single household, and they have not married, and this is a sort of penalty on marriage, and as someone has said, this may give the young people a reason for not getting married that their parents can understand." 1972 Hearings, note 26, at 91. Even Oscar S. Gray, a leading critic of the marriage penalty, did not consider important "the relative[ly] offbeat situation of a boy and girl living together in sin." Id. at 149. Notice the assumption that only young people—"a boy and girl"—could do such a thing.

53 The number of unmarried couples, defined as "two unrelated adults of the opposite sex sharing the same household," rose from 523,000 in 1970 to 4,130,000 in 1997, an almost eightfold increase. The increase was even more dramatic in the 25 to 44 age group—from 103,000 to 2,429,000. Unmarried couples with children under 15 increased from 196,000 to 1,470,000. Bureau of the Census, U.S. Commerce Dept't, Statistical Abstract of the United States 1996, 56 tbl. 61; Bureau of the Census, U.S. Commerce Dept't Statistical Abstract of the United States 1998, 60 tbl. 66.

54 H.R. 2456, 105th Cong. § 2 (1997); S. 1314, 105th Cong. § 2 (1997). A largely symbolic move in the direction of optional separate filing was featured in the proposed Contract With America Tax Relief Act, H.R. 1215, 104th Cong. § 102 (Version 1, Mar. 14, 1995). The bill would have created a "marriage penalty reduction credit," measured by the excess of joint return liability over the combined liabilities of the spouses if each had been able to file a separate return using the § 1(c) rate schedule. There were two major differences between the proposed credit and full optional separate filing. First, calculation of the marriage penalty for purposes of the credit took into account only earned income. Second, and more significantly, the credit was subject to a low ceiling of $145.

55 The CBO study describes optional separate filing as removing 100% of marriage penalties. CBO Study, note 1, at xviii summary tbl. 4, 55.
would have to file as single taxpayers under § 1(c);\textsuperscript{56} neither could take advantage of the more favorable rate schedule and the larger standard deduction for heads of households. If a married couple with children obtained a divorce and continued to live together, one spouse could file as a head of household and the other as a single taxpayer.\textsuperscript{57} Merely allowing them to file as two single taxpayers is not enough to eliminate the marriage penalty. In light of the special solicitude for couples with children exhibited by the sponsors of these bills,\textsuperscript{58} it is strange that they would propose a complete marriage penalty fix for childless couples, but only a partial fix for those with children. Second, the bills provided that “credits shall be determined . . . as if the spouses had filed a joint return.”\textsuperscript{59} Thus, the bills would have had no effect on the particularly severe marriage penalties created by the EITC.

Whether marriage penalty relief should take head of household provisions into account and whether relief should be extended to the EITC are difficult issues, which are not unique to optional filing proposals. Each issue is discussed in detail later in this Article.\textsuperscript{60} Putting those issues aside, optional filing is the approach of choice if the policy goal is to eliminate the marriage penalty while leaving the rest of the tax system unchanged. There are three other ways to eliminate all marriage penalties: mandatory separate filing, a return to 1948-style income splitting, and a truly flat tax. The effects of each of these, however, would extend far beyond the elimination of marriage penalties. Mandatory separate filing would affect the tax liability of virtually every couple in the country, a return to 1948 would greatly increase existing marriage bonuses, and a truly flat tax would radically alter the distribution of tax burdens across income classes.\textsuperscript{61}

Despite the precision with which optional filing attacks the marriage penalty, it is vulnerable to forceful attacks, for having unattractive distributional effects and for being philosophically incoherent.

\textsuperscript{56} H.R. 2456, note 54, § 2(a); S. 1314, note 54, § 2(a) (proposed IRC § 6013A(a)(2)).
\textsuperscript{57} For a discussion of the law on qualification for head of household status, see note 268.
\textsuperscript{59} H.R. 2456, note 54, § 2(a) (proposed IRC § 6013A(d)); S. 1314, note 54, § 2(a) (proposed IRC § 6013A(d)).
\textsuperscript{60} For a discussion of head of household provisions, see text accompanying notes 268-87. For a discussion of the EITC provisions, see text accompanying notes 181-210.
\textsuperscript{61} For a discussion of a flat tax-demogrant system, see text accompanying notes 291-94.
1. Distributional Objections

a. Relief Skewed to Higher Income Couples

The CBO has estimated that 64% of the $29 billion tax savings from full-fledged optional filing (that is, taking into account head of household status and the EITC) would go to couples with incomes above $50,000, and only 3% would go to couples with incomes below $20,000.\(^62\) Of course, the distribution of relief is simply a reflection of the distribution of current marriage penalties—64% of all current marriage penalties (by dollars) fall on couples with incomes over $50,000. Nevertheless, in the current political climate, it would be difficult or impossible to pass family-oriented tax relief with this sort of distributional effect.\(^63\)

When optional filing does not include relief from EITC marriage penalties, the distributional effects are even more difficult to defend. The Center on Budget Policy and Priorities has noted that under the 1997 optional filing bills, a couple with $300,000 income earned equally by the two spouses would be relieved of its entire marriage penalty of more than $7,500, while a couple with two full-time minimum wage earners would continue to suffer a $1,400 marriage penalty.\(^64\) A straightforward response to the distributional objection was

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\(^62\) CBO Study, note 1, at xviii summary tbl. 4. The CBO distribution estimates are for optional filing that includes EITC marriage penalty relief. The low income relief would be even less under the partial optional filing of the 1997 proposals.

\(^63\) The strong trend is for new high-profile tax benefits to be limited to middle income taxpayers through the use of phaseouts. Consider, for example, the phaseouts of the two most prominent benefits added by the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, 111 Stat. 788. The phaseout of the child tax credit begins at $110,000 for joint returns, and the phaseout of the Hope Scholarship credit begins at $80,000. IRC §§ 24(b)(2), 25A(d)(2).

The story of the Gramm amendment to the ill-fated tobacco bill suggests distributional concerns also will be important to marriage penalty relief legislation. Amend. 2638 to S. 1415, 105th Cong. (1997) [hereinafter Gramm Amendment]. The Senate passed the amendment to the bill, but ultimately defeated the bill. See David E. Rosenbaum, Senate Backs Use of Tax to Assist Couples, N.Y. Times, June 11, 1998, at A1; David E. Rosenbaum, Senate Drops Tobacco Bill with ’98 Revival Unlikely; Clinton Lashes Out at G.O.P., N.Y. Times, June 18, 1998, at A1. The amendment provided relief from the standard deduction aspect of the marriage penalty. That relief automatically is skewed to lower and middle income taxpayers, because few high income taxpayers claim the standard deduction. (The percentage of taxpayers claiming the standard deduction at various income levels is set forth in note 220.) But the Senate, by passing the Gramm amendment, decided the resulting distribution of tax savings was still too generous to higher income couples and denied all relief to couples with modified adjusted gross incomes above $50,000. (The technique used to deny benefits to higher income couples is criticized in Lawrence Zelenak, Gramm Marriage Penalty Fix Needs Some Fixing of Its Own, 79 Tax Notes 1515 (June 15, 1998) [hereinafter Gramm Penalty Fix]). If the Senate in that instance decided to deny any relief to couples with incomes above $50,000, it is not likely to approve a plan giving almost two-thirds of the tax savings to those same couples.

featured in a proposal offered in 2000 by Senator Moynihan. Under the Moynihan approach, the tax savings from separate filing would be phased out between $100,000 and $150,000 combined spousal AGI. While this makes the distributional effects of marriage penalty relief more attractive, it raises the question of why it is acceptable for the tax system to penalize the marriages of affluent two-earner couples when it is unacceptable to penalize other marriages.

b. Legislation Benefitting Only Two-Income Married Couples

In the analysis of winners and losers in the tax treatment of marriage, taxpayers divide into three interest groups: two-earner couples, one-earner couples, and unmarried taxpayers. The only beneficiaries of optional filing would be two-earner couples (and not even all of those). In one respect, this is perfectly reasonable since only a subset of two-earner couples suffers marriage penalties. It does not follow, however, that those who receive no new tax break will be satisfied. In good economic times it may be possible to finance tax relief for two-earner couples without increasing the tax liabilities of the other groups, but that may not be enough to quiet the one-earner couples and the singles. They will object that they have not received their share of the good-economy tax dividend, and that their percentage share of the total tax burden has increased. Once taxpayers have divided themselves into these three interest groups, there will be great political pressure not to limit tax cuts to just one group. The argument that each group should receive similar tax cuts treats the current distribution of the tax burden as correct without any compelling reason to do so, but that need not blunt the political force of the argument. And even if it may be politically possible to resist the complaints of unmarried taxpayers, it will not be easy to do the same for one-earner couples.

In fact, the leading proponents of optional filing in 1997 had second thoughts in 1998. In April 1998, they introduced new bills in both the House and the Senate, which would return to the 1948 approach by

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66 At least I do not think so. It is true that the 1948 Act followed the strategy of using good economic times to give a tax cut to members of one group (all married taxpayers), while leaving the taxes of another group (all singles) unchanged. See text accompanying notes 14-21. It is doubtful, however, whether a redistribution of tax burdens of that magnitude could be achieved again. First, the 1948 technique proved unstable; heads of households got their own corresponding tax break in 1951, and other singles got theirs in 1969. Second, the 1948 legislation put all married couples in the same favored camp. By contrast, optional filing puts one-earner couples—the darlings of many conservative politicians—in the disfavored camp.

67 That possibility is discussed in text accompanying notes 139-58.
giving married taxpayers full income-splitting relative to single taxpayers, with respect to the standard deduction and bracket widths, and they stayed with that approach in 1999. It had seemed a bit strange in 1997 that pro-family conservative politicians were introducing bills that would give tax relief only to two-earner couples, and that would result in many two-earner couples having lower taxes than equal income one-earner couples. In their zeal to eradicate the marriage penalty, they may not have noticed they were doing nothing for the traditional homemaking wife and breadwinning husband. Conservative commentators Allan C. Carlson and David Blankenhorn noticed, however. They wrote that “some good people in Washington [were] about to make a bad mistake” with optional separate filing: “[B]ecause it would reduce the tax burden on two-earner couples while leaving everyone else’s burden the same, it would further penalize parents who stay home.” They argued that a return to 1948 was a much better solution to the marriage penalty. Representative McIntosh responded with a defense of optional filing, but by April of 1998 he and his colleagues had been converted to the income-splitting cause.

In 1997, conservative lawmakers had compared two-earner married couples with two-earner couples living in sin, and so were eager to give the married couples tax relief. But by 1998 they realized their 1997 approach had favored two-earner couples over the breadwinner-homemaker model, and they moved to correct their mistake. It may be that the only way to garner sufficient support to pass marriage penalty relief is to reduce the tax burden on both two-earner and one-earner couples. If so, optional filing is not the solution.

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71 This is how things played out, on a smaller scale, with respect to the Gramm amendment, discussed in note 63. As passed by the Senate, the amendment expanded the standard deduction for all married couples with incomes below $30,000, regardless of whether they had one or two earners. Senator Daschle objected that this approach resulted in increased marriage bonuses for one-earner couples, but the Republican majority was not impressed. Ryan J. Donmoyer, Talks on Marriage Penalty Snuffed Out as Dems Make Own Proposal, 98 TNT 108-4, June 5, 1998, available in LEXIS, TNT File.
Optional filing reappeared in 1999 in the tax bill passed by the Senate in late July. S. 1429, note 6, § 201. An interesting aspect of the Senate bill was its serious effort to address the income and deduction allocation questions inherent in any separate filing system. For separately filing spouses, the bill would have allocated earned income to the earner, property income to the owner of the income-producing property, above-the-line deductions to the spouse with the related income, and itemized deductions and dependency exemptions in proportion to the spouses’ AGIs. Id. § 201(a).

A peculiar feature of S. 1429 was its giving married couples twice the standard deduction available to single taxpayers, in addition to providing for optional separate returns. Id. §§ 201 (optional separate returns), 209 (standard deduction). At least for couples without dependent children (to whom head of household status would not be available if unmarried), this is very strange. A couple facing a potential marriage penalty would exercise the separate return option, thus avoiding any marriage penalty. Given the separate return option, standard deduction “relief” for couples electing to file joint returns would serve only to create or increase marriage bonuses and not to decrease or eliminate penalties.

So what did the Senate think it was doing in combining these two forms of “relief”? The joint return standard deduction provision was not in the Finance Committee version of the bill. Rather, it was introduced as a floor amendment by Sen. Hutchison. Her justification for the provision was based entirely on phase-in timing: “The [Finance Committee] bill provides for marriage tax penalty relief in 2005. I applaud the committee for doing that. But I thought we should address it earlier.” 145 Cong. Rec. S9888 (daily ed. July 30, 1999). The phase-in of the bill’s standard deduction relief was to begin in 2001 under the Hutchison amendment. Amend. 1472 to S. 1429, 106th Cong. (1999). The same explanation of the amendment, as being designed merely to accelerate the beginning of relief, was given by cosponsor Sen. Ashcroft and by Finance Committee Chairman Roth (who spoke in favor of the amendment). Sen. Ashcroft described the amendment as “accelerat[ing] the time at which we begin to stop this very serious fault with the tax system.” 145 Cong. Rec. S9887 (daily ed. July 30 1999). Chairman Roth stated that, although the Finance Committee version of the bill “completely eliminates the [marriage] penalty,” he supported the Hutchison amendment because under it, “the tax relief is expedited.” Id. at S9888. (The Committee’s version, in fact, did not completely eliminate marriage penalties for couples with dependent children. See text accompanying notes 56-58.)

The floor debate suggests the Senate simply made a technical mistake in not realizing that standard deduction relief should be eliminated once the optional filing provision was in effect. One can construct an argument for allowing the two provisions to co-exist, but it is strained and unconvincing. Suppose the Finance Committee version of optional filing were in effect, without the Hutchison standard deduction amendment also being in effect. Imagine, then, a two-earner couple with children, with a joint return liability of $10,000, with optional separate return combined liability (with each spouse computing liability under § 1(c)) of $12,000, but with the potential to pay a combined tax of only $8,000 after a divorce, with one ex-spouse filing as a head of household. That couple is faced with a marriage penalty that the Senate version of optional filing would not address, but that an increased standard deduction could mitigate (if the couple did not itemize deductions). If the Senate had actually been concerned about this problem, however, the precisely targeted solution would have been to permit the use of head of household status in optional separate filing. Enlarging the joint return standard deduction, by contrast, would not eliminate marriage penalties for couples with children, and would benefit many couples (including childless couples) already enjoying marriage bonuses.
penalties, but then claims that allowing each spouse to file as a single taxpayer under § 1(c) is sufficient to eliminate all marriage penalties.\textsuperscript{74} Despite this rather surprising approval of optional separate filing by the Senate, the more conservative House Republicans held firm against this form of marriage penalty relief, and neither the original 1999 House bill nor the conference bill included any provision for optional separate filing.\textsuperscript{75} Optional separate filing was also missing from the vetoed marriage penalty relief legislation of 2000.\textsuperscript{76}

2. \textit{Philosophical Incoherence}

Both the optional filing proposal and the distributional objections to it take current law as the starting point. Optional filing is designed to eliminate the marriage penalty with the smallest possible change in existing law, and the objections compare optional filing with the distribution of tax burdens under existing law. By contrast, the incoherence objection looks simply at the optional filing system without regard to the prior state of the law. Viewed in this light, optional filing appears strange indeed.

Under optional filing, many couples will still file joint returns. The standard justification for joint returns is that married couples function as economic units. Under that view, two couples with equal incomes should pay equal taxes, regardless of how the earning of the incomes is distributed between the spouses in each marriage.\textsuperscript{77} Optional filing will result in equal tax on the two couples if both couples file joint returns. But if either couple (or both) files separate returns, the two

\textsuperscript{74} S. Rep. No. 106-120, at 3-4 (1999). Unlike the 1997 optional filing bills, the 1999 Senate bill included limited relief from EITC marriage penalties, but not through separate filing for EITC purposes. S. 1429, note 6, § 202 (discussed in text accompanying notes 199-201).

\textsuperscript{75} H.R. 2488 (House version), note 6; H.R. 2488 (conference version), note 6.

\textsuperscript{76} H.R. 4810, note 9.

\textsuperscript{77} McIntyre & Oldman, note 21, at 1590 ("Equal-income couples should pay equal taxes, since each member of the couple will benefit more or less equally from the total available income without regard to the source distribution.") (footnote omitted). This argument is controversial in several respects. Some commentators have questioned the assumption that spouses pool their incomes. Marjorie E. Kornhauser, Love, Money and the IRS: Family, Income-Sharing and the Joint Income Tax Return, 43 Hastings L.J. 63 (1993).

And even if spouses do pool their income, a one-earner couple arguably has greater ability to pay than an equal income two-earner couple, because of fewer nondeductible work-related expenses and greater imputed income from services. Zelenak, Marriage, note 11, at 362-63.

As a matter of historical record, the adoption of income-splitting joint returns in 1948 was due to a congressional desire to equalize the tax burdens on equal income husbands in separate property and community property states. Equal tax on equal income couples was an after-the-fact justification developed by academics years after 1948. Id. at 344-48. Two examples of the post-1948 academic commentary are cited in note 21. Nevertheless, it is now firmly ensconced as the rationale for joint returns.
couples generally would have different liabilities. This result makes optional joint filing philosophically incoherent. The purpose of joint filing is to impose equal tax on equal income couples, and optional joint filing defeats that purpose. Mandatory joint filing is coherent, as is mandatory separate filing, but optional filing makes little sense.

Predictably, pro-family commentators have criticized optional filing as creating a "homemaker penalty," because a couple with a full-time homemaker spouse often would pay more taxes than an equal income two-earner couple. Notice that this complaint is not based on a comparison with the law as it existed before separate filing. It is not a complaint that two-earner couples got a tax cut and one-earner couples did not. It simply argues that, regardless of what the law used to be, equal tax on equal income couples is a principle of tax equity, and it is violated by optional filing. Of course, homemaker penalty complaints could also be lodged against a mandatory separate return system. There is an important difference, however. Mandatory separate returns reflect a decision that ability to pay is best determined on an individual basis, not on a joint basis. Within that framework there is no reason to compare the total taxes paid by one husband and wife with the total taxes paid by another husband and wife. The merits of the framework are debatable, but within the framework the system is consistent. Optional filing, by contrast, hands its opponents the gun with which to shoot it. By simultaneously embracing and rejecting the principle of equal tax on equal income couples, it concedes the merits of the homemaker penalty accusation.

The incoherence of optional filing exemplifies the perils of incrementalism in tax reform. Viewed from a purely incremental perspective, as an ad hoc response to marriage penalties, optional filing appears attractive. It is far less sweeping in its effects than the other complete fixes to the marriage penalty problem—elimination of joint filing, elimination of progressive marginal rates, and a return to 1948. The difficulty is that this ad hoc solution leaves us with a tax system

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78 Sylvia Ann Hewlett & Cornel West, The War Against Parents: What We Can Do For America’s Beleaguered Moms and Dads 243 (1998). The same point is implicit in Carlson & Blankenhorn, note 69, but they do not have a catchy name for the alleged discrimination against traditional couples.

79 Actually, Hewlett and West seem to use the "homemaker penalty" tag to complain about both the absence of a tax cut for one-earner couples and the violation of couples neutrality. Hewlett & West, note 78, at 243. Nevertheless, a coherent objection can be made to homemaker penalties under optional separate filing, without reference to the prior state of the law.

80 In fact, complaints about homemaker penalties have recently been lodged against the Canadian separate return system. Sean Durkan, Caught Between Families It May Be Possible to Increase the Fairness with which the Government Taxes Single- and Dual-Income Families, But Pitting the Two Against Each Other Isn’t the Way to Go About It, Ottawa Sun, Mar. 15, 1999, at 14.
that no one would have designed from scratch. Starting from where we happen to find ourselves, optional filing is an easy place to reach; the only problem is that it is not a sensible place to be.

In short, once the decision has been made to abandon couples neutrality in order to fix the marriage penalty, a mandatory separate return system is a more coherent solution than optional filing. A defender of optional filing might argue that optional filing is simpler than mandatory separate returns for those couples who elect to file jointly. They do not have to deal with the difficulties of allocating income and deduction items that inevitably arise under separate returns. This defense is not very convincing, however, for two reasons. First, even optional filing would involve separate return allocation issues for millions of taxpayers. If allocation problems are really so severe as to make mandatory separate filing unacceptable, then they are also so severe as to rule out optional filing. Second, under optional filing, many couples would have to prepare tentative joint and separate returns, in order to determine which would result in lower taxes. For those couples, optional filing would be significantly more complicated than separate filing—even if in the end they filed joint returns.

There is another possible justification for optional filing—interesting but ultimately unconvincing—under which violations of couples neutrality would not make the system philosophically incoherent. Because this justification grows out of the analysis of marital sharing patterns developed below in connection with proposals to return to the 1948 tax treatment of marriage, the discussion of it is reserved for the next part of this Article.\footnote{See text accompanying notes 118-19.}

3. \textit{Optional Filing and the Stacking Effect}

In many marriages the wife is the marginal earner, in the sense that the husband’s job is a given, and the question is whether the wife should be a fulltime homemaker or take a paying job. Under a mandatory joint return system, the wife would view her earnings as stacked on top of the husband’s for tax purposes, so that even her first dollars of income would be taxed at high marginal rates. In light of this stacking effect, the wife may decide to stay home. Like the marriage penalty, the stacking effect is a phenomenon of joint returns, but it is not the same phenomenon. A properly designed return-to-1948 income splitting approach would eliminate marriage penalties while retaining joint returns; a couple would never pay more tax because of a marriage certificate. Even then, however, a wife on the margin between homemaking and paid work would view her first dollars of
earnings as taxed at a marginal rate determined by her husband’s income.

Commentators commonly confuse the marriage penalty and the stacking effect. For example, Bruce Bartlett of the National Center for Policy Analysis states that “the principal impact of the marriage penalty has been on wives, because they generally earn less than their husbands and thus are in effect taxed at their husbands’ marginal tax rate.”82 That is an effect of joint returns, but it is not an aspect of the marriage penalty.

Having defined the marriage penalty to include the stacking effect, Bartlett concludes that optional filing would be sufficient to eliminate all aspects of the marriage penalty, including the stacking effect.83 This is incorrect. It is obviously incorrect in situations where the spousal division of income is sufficiently uneven that the couple will continue to file joint returns if the wife takes a job. But it is also more subtly incorrect even if the wife’s job causes the couple to file separate returns. An example shows why.

Imagine a childless couple claiming the standard deduction.84 Husband earns $50,000, and Wife is deciding whether to take a job paying $30,000. Using 2000 inflation adjustments, their joint return liability if Wife does not take the job will be $5,557.50.85 If Wife takes the job, they could file a joint return and pay $13,073.50.86 Alternatively, they could file separate returns using the single taxpayer standard deduction and rate schedule. Husband’s tax would be $8,571.5087 and Wife’s

82 Bruce Bartlett, The Marriage Penalty: Origins, Effects and Solutions, 80 Tax Notes 1341, 1344 (Sept. 14, 1998). Even the excellent CBO study reflects confusion between the marriage penalty and the stacking effect: “One cause of marriage penalties is that the first dollar of taxable income of the lower-earning spouse is taxed at the marginal tax rate of the higher-earning spouse.” CBO Study, note 1, at 51. But this stacking of income existed even under a 1948 joint return system, despite the absence of marriage penalties.

83 Bartlett, note 82, at 1347. A similar statement appears in Jane G. Gravelle, The Marriage Penalty and Other Family Tax Issues: CRS Report For Congress, 98 TNT 162-11, Aug. 21, 1998, available in LEXIS, TNT File (stating that optional filing “would treat the second earner’s income as a separate taxable entity, with a substantial part of the income exempt”).

84 In real life, the wife is more likely to be on the margin between employment and homemaking if the couple has young children. Making the couple childless simplifies the illustration, however, without affecting the basic principles involved.

85 The 2000 inflation adjustments are set forth in Rev. Proc. 99-42, 1999-46 I.R.B. 568 (Nov. 15). After a $7,350 standard deduction and two $2,800 personal exemptions, their taxable income is $37,050, which under § 1(a) is taxed at 15%.

86 Their taxable income increases to $67,050, and under § 1(a) the tax is $13,073.50. All but $6,800 of the additional taxable income is taxed at 28%.

87 After a $4,400 standard deduction and a $2,800 personal exemption, Husband’s taxable income is $42,800, which under § 1(c) results in a tax of $8,571.50.
would be $3,420,88 for a total of $11,991.50. They, of course, will choose to file separately, thus avoiding the marriage penalty.

But will they also avoid the stacking effect? No. They would avoid the stacking effect if the tax cost of Wife's taking the job were simply her $3,420 separate return liability, but it is not. Rather, the tax burden on Wife's job is the difference between their combined separate return liability of $11,991.50 and the joint return liability of $5,557.50 if Wife does not work. That difference is $6,434, which amounts to an effective rate of 21.4% on $30,000—almost twice the 11.4% effective rate Wife would pay if she were single.89 That is a very significant stacking effect, despite the fact they elected to file separate returns.

Although the formal separate return liability on her earnings is only $3,420, the decision to file separately has an additional effect. It increases the tax on Husband's earnings by $3,014—from $5,557.50 under a joint return, to $8,571.50 using a separate return. That may be Husband's tax in form, but it is a result of Wife's job, and it should be viewed by the couple as a tax on her decision to work. The stacking effect may be harder to see than under mandatory joint returns, but it is still there.

The failure of optional filing to eliminate the stacking effect may not be of much political importance. Current rhetoric suggests that the political will is much stronger to fix the marriage penalty (properly understood) than to fix the stacking effect. Those who care about the stacking effect, however, should realize that optional returns do not solve the problem. The only complete solution is mandatory separate returns.90

B. A Return to 1948

In order to avoid the homemaker penalty, legislators who championed optional filing in 1997 later became advocates of mandatory joint returns, but with standard deductions and bracket widths twice those applicable to single taxpayers.91 This would mark a return to the 1948 income splitting system. There is a rather remarkable differ-

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88 After a $4,400 standard deduction and a $2,800 personal exemption, Wife's taxable income is $22,800, which under § 1(e) is taxed at 15%.
89 $3,420 tax/$30,000 earnings = 11.4%.
90 Even under mandatory separate returns, the stacking effect could survive in some situations, depending on the details of the system. Zelenak, Marriage, note 11, at 388. The two-earner deduction, discussed in text accompanying notes 243-67, would alleviate—but not eliminate—the stacking effect.
91 See note 68. Representative Gephardt also has introduced a bill that would give joint filers rate brackets twice as wide as those for single taxpayers (other than heads of households), and that would give joint filers twice the standard deduction of single filers. H.R. 3620, 105th Cong. (1998).
ence between 1948 and the new proposals, however. In 1948, this approach was sufficient to eliminate all marriage penalties. But the CBO estimates that grafting this approach onto current law would eliminate less than half—only 44%—of the dollar value of all marriage penalties.92 The explanation for this surprising estimate is that changes in the structure of the income tax since 1948 have created new sources of marriage penalties that a return to 1948 would not address. First, the proposals do not eliminate bracket width and standard deduction marriage penalties for couples with children. If those couples were not married, one spouse could claim head of household status. Twice the standard deduction for a single taxpayer still would be less than the combination of one head of household standard deduction and one single taxpayer standard deduction; the same goes for bracket widths. This was not a problem in 1948 because head of household status did not exist. Proponents of the plan have not explained why it is appropriate to grant more complete marriage penalty relief to childless couples than to those with children. It may be merely a technical error,93 or it may be driven by concern over the revenue cost of greater relief. Of course, one way of fixing marriage penalties caused by comparisons with head of household filing would be to eliminate special tax benefits for heads of households. That possibility is discussed later in this Article.94

The second reason a return to 1948 would not afford complete marriage penalty relief is that this approach has no effect on the marriage penalties built into the EITC.95 Like head of household status, the EITC did not exist in that simpler tax era. Finally, a return to 1948 would have no effect on the marriage penalties created by the many phaseout provisions scattered throughout today’s Code but unknown in 1948. Some of these penalties are quite significant, including those involved in the phaseouts of personal exemptions, of the income tax exclusion for Social Security benefits, of itemized deductions, and of the child tax credit.96

92 CBO Study, note 1, at xvii summary tbl. 4.
93 That is, the proponents of this approach may not have appreciated the contribution of head of household tax rules to the marriage penalty. That seems unlikely, however, since this aspect of the problem is described clearly in the 1997 CBO Study, note 1, at 28, and because the 1998 Gramm Amendment, note 63, recognized the marriage penalty effect of the head of household standard deduction.
94 See text accompanying notes 268-87.
95 Marriage penalties created by the EITC are discussed in text accompanying notes 181-210.
96 In order to avoid marriage penalties, joint return phaseouts should begin at twice the income level applicable to single taxpayers. Under current law, many joint return phaseouts begin far lower. See note 41. Some phaseouts involve an additional source of marriage penalties. The joint return personal exemption phaseout, for example, not only begins at too low a level, it also phases out exemptions too quickly once the phaseout has
Despite removing less than one-half of the dollar value of all marriage penalties, this approach costs almost as much as ending all marriage penalties via optional filing—$25 billion versus $29 billion. This is because a return to 1948 is very inefficient as a fix for marriage penalties. The CBO estimates that slightly more than one-half of the revenue loss (51%) would inure to the benefit of married couples already enjoying marriage bonuses under current law. Optional filing, by contrast, would result in no tax reduction for couples currently enjoying bonuses (they would elect to continue filing jointly, so their taxes would not change). The distributional effect of a return to 1948 strongly favors higher income couples. Of the $25 billion revenue loss, 87% would go to couples with incomes above $50,000; only 6% would go to couples making less than $20,000.

Three aspects of the proposed return to 1948 appear unattractive at first glance: the incompleteness of the marriage penalty relief, the large (and expensive) increase in existing bonuses, and the skewing of the benefits toward higher income couples. The first aspect could be changed; the proposals could be expanded to address marriage penalties arising from head of household status, phaseouts, and the EITC. This would involve, of course, even greater revenue loss, and even greater increases in existing bonuses. The other two aspects are inherent in moving from the current system to a system with marriage bo-

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began. In order to avoid all marriage penalties, the joint return phaseout range must be twice as large as the phaseout range for unmarried taxpayers (just as § 1 joint return rate brackets must be twice as wide as for unmarried taxpayers). Yet the phaseout range is the same—$122,500—for joint returns as for other returns. The combined effect of beginning the joint return phaseout too low and completing it too quickly is a substantial marriage penalty on equal income, high-earner couples. In 2000, the joint return personal exemption phaseout is completed at $315,900 AGI. But two unmarried equal earners would not have lost their entire personal exemptions until their combined AGI reached $502,900. Rev. Proc. 99-42, note 85, at § 3.09. For a comprehensive listing of marriage penalties caused by phaseout provisions, see AICPA, List of Code Provisions Causing Marriage Penalty, 98 TNT 31-52, Feb. 17, 1998, available in LEXIS, Fedtax Library, TNT File.

97 CBO Study, note 1, at xviii summary tbl. 4. The CBO estimates are not precisely applicable to H.R. 3734, note 68, and S. 1999, note 68. Although the relationship between joint return and single taxpayer bracket widths is the same in both the CBO simulation and in the bills, the bracket widths generally are somewhat greater in the bills than in the CBO simulation. This is particularly true at higher income levels. Under the bills, the 39.6% rate for joint returns would begin at taxable income of $556,900; the CBO assumed the rate would begin at $316,500. CBO, Study, note 1, at 48.

98 Id. at 50. An additional source of inefficiency would be the creation of marriage bonuses (as distinguished from the mere elimination of penalties) for couples currently not enjoying bonuses. The CBO estimates that 7% of the revenue loss would fall into that category. Id.

99 Id. at xviii summary tbl. 4.
nuses but no marriage penalties. The following Section explores the assumptions under which such a system would represent a principled approach to the taxation of married couples.

1. Justifying a Return to Full Marital Income Splitting

A return to 1948 (either as currently proposed, or in a "perfected" form that also would apply to phaseouts and the EITC, and that would take into account the head of household provisions) might be justified in one of four ways: (1) Under one possible definition of marriage penalties, a return to 1948 creates no marriage bonuses, but merely removes marriage penalties. (2) Tax liability should be based on who enjoys income rather than who earns it, and spousal enjoyment of income is perfectly shared in the typical marriage. (3) A tax subsidy for marriage is a good idea, and this is a good form for the subsidy to take. (4) Marriage penalties are unacceptable, and this method of eliminating penalties has major administrability advantages over the separate return alternatives. Each justification is considered below.

a. The McIntyre Definition of Marriage Penalties

In a recent article, Robert S. McIntyre and Michael J. McIntyre propose an unusual definition of marriage penalties. They note that a married couple has the option to obtain a divorce and have the higher income ex-spouse pay just enough alimony—deductible by the payor spouse and taxable to the payee spouse—as is necessary to equalize the post-divorce taxable incomes of the former spouses. They calculate marriage penalties relative to this divorce-and-alimony alternative. This unusual perspective results in dramatic differences from the standard analysis of marriage penalties and bonuses. Under the standard analysis, a one-earner couple enjoys a marriage bonus because their joint return liability under § 1(a) rates is lower than the tax the earner would pay under § 1(c) rates if the couple had never been married (or if the couple obtained a divorce, but there was no alimony). Under the McIntyre and McIntyre approach, by contrast, even the one-earner couple suffers a marriage penalty relative to the

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100 Including relief from EITC marriage penalties, however, would reduce the skewing of benefits toward high income taxpayers. The distributional effects of EITC marriage penalty relief are discussed in text accompanying note 176.


102 IRC § 71 (inclusion of alimony in gross income of the recipient), § 215 (deductibility of alimony by the payor).

103 McIntyre & McIntyre, note 101, at 911-12, 929.
divorce-and-alimony alternative. The tax nirvana of two equal taxable incomes, each taxed under § 1(c) rates, which under the standard analysis is an option only for couples who naturally (that is, without the benefit of the alimony tax rules) have equal incomes, is an option for all married couples under the McIntyre and McIntyre analysis. If a perfect splitting of income under § 1(c) rates is indeed an alternative available to all married couples, then all married couples—even one-earner couples—are marriage penalty victims. From this perspective, current law produces large marriage penalties and no marriage bonuses. A return to 1948 would merely give all couples the same results they could achieve currently under the divorce-and-alimony strategy. 104 Thus, it would remove all marriage penalties without creating any marriage bonuses. Far from being poorly targeted, it would be the perfect fix for the marriage penalty problem.

The problem with the McIntyre and McIntyre analysis is that, contrary to their professed goal of defining and fixing “what is perceived to be the marriage penalty problem,”105 they adopt a definition of the marriage penalty that is not consistent with common perceptions of the nature of the problem. They cite no one else—no scholar, no politician, no popular commentator—who defines the marriage penalty as they do. As they themselves note, the comprehensive CBO study of marriage penalties considers a long list of possible approaches to defining marriage penalties, but the divorce-and-alimony approach is not among them.106

There is a reason why no one else defines marriage penalties as McIntyre and McIntyre do. Any marriage penalty complaint is based on counterfactual analysis. It is a complaint that a husband and wife would be paying less tax if their lives were somehow different. Under the standard view of marriage penalties, a two-earner couple’s complaint is that the spouses could pay less tax simply by destroying their marriage license, without changing anything else about their lives together. This version of the marriage penalty complaint is powerful because the counterfactual is plausible—the spouses really could get divorced but otherwise go on as before, and hardly notice the difference.

The counterfactual required by the McIntyre and McIntyre analysis, however, involves a much more dramatic change. In order to be entitled to file as single taxpayers under § 1(c), and to take advantage of the income shifting alimony tax rules, the divorced spouses must live

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104 The McIntyre and McIntyre proposal is for a return to full income splitting for spouses, with the married and single rate schedules and standard deductions set at the levels necessary to make the change revenue neutral. Id. at 935-42.
105 Id. at 913.
106 Id. at 913 n.16 (citing CBO Study, note 1, at 27-29).
in separate households. The regulations specifically note that "a dwelling unit formerly shared by both spouses shall not be considered two separate households even if the spouses physically separate themselves within the dwelling unit." Under the McIntyre and McIntyre definition, a husband with $200,000 of income, married to a nonearning wife, would complain about his marriage penalty relative to the counterfactual of obtaining a divorce, moving out of the house (or his wife moving out), and paying $100,000 annually in alimony to an ex-spouse living in a different household. The current situation and the counterfactual are so different, and the complaint based on the comparison so unsympathetic, that no one (except McIntyre and McIntyre) has ever thought to make the complaint.

The choice of an appropriate counterfactual is a matter not of logic, but of experience. Logically, the divorce-and-alimony option is a possible counterfactual, but experience suggests that it is a counterfactual about which no one cares. It simply is not viewed as a reasonable alternative to marriage. It is not relevant to marriage penalty analysis because it has nontax consequences so tremendously different from those of marriage.

Even if the two-household counterfactual were more relevant, there is another problem with the McIntyre and McIntyre analysis. The divorce-and-alimony marriage penalty (such as it is) is a creature of the current tax treatment of alimony. That source of marriage penalties could be eliminated without returning to 1948, simply by repealing the alimony deduction and inclusion provisions. Some commentators have argued that repeal of the alimony provisions would be a good idea, for reasons distinct from marriage penalty concerns. A complete analysis would have to consider the relative merits of a return to 1948 and repeal of the alimony provisions, as fixes for marriage penal-

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107 I.R.C. § 71(b)(1)(C) provides that a payment from one ex-spouse to another cannot qualify as alimony if the ex-spouses are "members of the same household at the time such payment is made." The statute does not require spouses to live apart to qualify payments as alimony if they are not legally separated under a decree of divorce or separate maintenance and the payments are pursuant to a written separation agreement or a decree described in § 71(b)(2)(C). See I.R.C. § 71(b)(1)(C); Reg. § 1.71-1T(b), Q&A 9. This would not achieve the desired income splitting result, however, because in those situations the spouses are still married for filing status purposes. If they file separately, they will be relegated to the unfavorable rate structure of § 1(d).

108 Reg. § 1.71-1T(b), Q&A 9.

109 See, e.g., Donald H. Berman, The Alimony Deduction: Time to Slaughter the Sacred Cow, 5 Am. J. Tax Pol'y 49, 49 (1986) ("Since the law governing the deduction of payments to a former spouse is inequitable, complex and arbitrary, I argue that all payments to and from divorced taxpayers should be treated as nondeductible by the payor and not includible in the income of the recipient."); Lee A. Sheppard, Safe Harbor Divorce, 33 Tax Notes 531, 531 (Nov. 10, 1986) ("There does not appear to be any policy or philosophical ground that would require alimony to be deductible since other personal expenses are not deductible.").
ties created by the divorce-and-almony alternative available under current law. Yet McIntyre and McIntyre simply advocate the 1948 approach, without serious consideration of whether repeal of the alimony provisions might be a better solution.\footnote{10}

b. Perfect Marital Sharing of Income

The 1948 approach has the same effect as dividing marital income equally between husband and wife, with each then filing a separate return under the same rules applicable to single taxpayers.\footnote{11} In other words, the effect of the 1948 rules is to allow perfect (that is, 50-50) income splitting between spouses. This is a principled result if one subscribes to two beliefs. The first is that income should be taxed to the person who consumes (or otherwise enjoys) income rather than to the person who controls the income (by earning it, or by owning the income-producing property). The second belief is that spouses in the typical marriage share all income equally, regardless of who earns it.

The first belief is certainly defensible, but it does not fit well with the rest of the income tax system. If enjoyment of income is the key to identifying the proper taxpayer, then why—apart from joint returns—is tax liability imposed on the person who controls the income, rather than the person who consumes, when those are different people?\footnote{12} Taxation according to control rather than enjoyment is the general rule even within the nuclear family, except for spouses. The tax system could provide for income splitting between parents and their children, on the ground that much of the parents' income actually is enjoyed by the children.\footnote{13} (The splitting need not be equal; the system might assume an adult typically enjoys a larger share of a family's income than does a child.) The French income tax system does exactly that. It provides for family income splitting, with the bracket

\footnote{10} Repeal of the alimony deduction does receive a dismissive mention in a footnote. McIntyre & McIntyre, note 101, at 931 n.55.
\footnote{11} Although most proposals for a return to 1948 would combine spousal incomes and tax the aggregate under rate brackets twice as wide as the single taxpayer brackets, the Riley and Brownback proposals would split spousal income in half and tax one-half to each spouse at singles rates. H.R. 3104, note 68, and Amend. 3359 to S. 2312, note 69. This closely resembles the technique employed by the original 1948 legislation, described in text accompanying notes 14-21. Despite the functional equivalence of the two methods of returning to 1948, the Riley and Brownback approach may have a rhetorical advantage: By formally splitting income between the spouses, the approach more clearly reflects a belief that spouses share their incomes equally.
\footnote{12} The classic case for this proposition is, of course, Lucas v. Earl, 281 U.S. 111 (1930). The same principle is embodied in the income tax rule that gifts are neither deductable by the donor nor taxable to the recipient. IRC § 102(a) (excluding gifts and bequests from income).
\footnote{13} How such a system might be designed is described in Lawrence Zelenuk, Children and the Income Tax, 49 Tax L. Rev. 349, 373-79 (1994) [hereinafter Children].
widths applicable to a family’s income increasing as the size of the family increases.\textsuperscript{114} The effect is the same as allocating income among all the members of the family, with each member paying tax on his share according to his rate schedule. In the U.S. income tax system, dependency exemptions might be viewed as an allocation of subsistence level income to each child, with that income taxed at a zero rate. Splitting of above-subsistence income with children is not allowed, however, regardless of the extent to which the children have the enjoyment of the income.\textsuperscript{115} As long as income splitting with children is not allowed, it is difficult to understand why income splitting with spouses should be permitted. Of course, this is an argument against even the degree of spousal income splitting permitted under current law, but the force of the argument increases as the permitted splitting increases.

Putting aside the question of consistency, there remains a question as to what extent spouses typically share the enjoyment of marital income. In an earlier article, I reviewed the empirical literature on this question, and concluded that the evidence of pooled marital income consumption is quite strong.\textsuperscript{116} This does not mean, however, that it makes no difference to the spouses who earns the income. There is also strong evidence that the earner spouse in a one-earner marriage retains considerable control over how the income is used.\textsuperscript{117} Even if the result is technically shared consumption, it may be skewed toward the earner’s consumption preferences. A nonearning wife may share an earning husband’s ski vacation, but if it were up to her, they would have taken a cruise. In short, the enjoyment of income within a typical marriage is less skewed than the earning of the income, but there are still advantages to being the higher earner. If this is right, then the perfect income splitting involved in returning to 1948 is too generous. Some sort of partial income splitting would be more appropriate. This might serve as a justification for current law, although there is no particular reason to think the degree of income splitting afforded by current law is correct. The bigger problem with this justification is that it explains only why some income splitting might be allowed to one-earner couples. It does not explain why current law denies full income


\textsuperscript{115} There is one arguable exception. The wider tax rate brackets for heads of households (compared with other single taxpayers) can be understood as allowing a single taxpayer to split income (less than fully) with a first child. This interpretation is considered in text accompanying notes 282-86.

\textsuperscript{116} Zelenak, Marriage, note 11, at 353.

\textsuperscript{117} Id. at 355.
splitting to equal income, two-earner couples, despite the likelihood that they share equally in the enjoyment of marital income.

This line of analysis suggests an interesting possibility for a principled defense of optional filing. The defense would start with the idea that marital income splitting should be allowed based on shared enjoyment of income, and that the current joint return rates allow the appropriate amount of splitting when the earning of income is highly unequal. But if the earning of income is more nearly equal than the sharing assumed by the joint return rates, the enjoyment also will be more nearly equal, and the spouses should be allowed greater income splitting than under joint returns. That can be accomplished by allowing them to file separate returns, with each reporting his or her own income.

Consider the universe of married couples with combined incomes of $50,000, and with various distributions of earnings between husband and wife. Under current law, the tax on a couple at that income level is almost exactly the same as the combined tax on two single people, one earning $35,000 and the other earning $15,000.\textsuperscript{118} A joint return can be thought of as allowing a one-earner couple with $50,000 of income to treat the income as shared on a 70-30 basis. A joint return would allow the same 70-30 split for any $50,000 two-earner couple whose division of earnings was more uneven than 70-30. But any $50,000 couple whose division of earnings was more nearly even than 70-30 could be taxed according to that more even split by filing separate returns. The results could be defended as principled, despite the violation of couples neutrality, if they accurately reflected typical marital sharing patterns—if couples with divisions of earnings more uneven than 70-30 typically shared on a 70-30 basis, and if couples with more even divisions typically shared in accordance with their relative earnings.

Although an argument along these lines could be made by a proponent of optional filing, I have not seen it done, and difficulties with the argument are not hard to spot. When the marriage-neutral division of income is 70-30, the argument begins with the assumption that the earner in the typical one-earner marriage out-consumes the homemaking spouse by more than two to one. Whatever the merits of that assumption, it is not a promising starting point for a political argument. The argument also makes the odd assumption that the percent-

\textsuperscript{118} Using 2000 inflation adjustments set forth in Rev. Proc. 99-42, note 85, and assuming no children and no itemized deductions, the tax on a couple with $50,000 combined earnings would be $5,537.50. Still assuming no children and no itemized deductions, the tax on a single person earning $15,000 would be $1,170, and the tax on a single person earning $35,000 would be $4,371.50. The combined tax liability of $5,541.50 is almost identical with the joint return liability if the two were married.
age share of marital consumption of the lower earning spouse does not change as that spouse's share of earnings increases from zero to 30%, but that the percentage share of marital consumption does increase as the share of earnings rises above 30%. Another difficulty is that the marriage-neutral division of income is different at different levels of combined spousal income. Generally, the marriage-neutral division becomes more uneven as combined income increases. Thus, the argument assumes that marital sharing patterns in one-earner marriages vary with the level of income, with one-earner husbands becoming more grasping as their incomes increase. Whatever the empirical merits of that view, it is also a politically unpromising starting point. Given these difficulties, and the failure of any advocate of optional filing to attempt a defense along these lines, the argument is intriguing but not persuasive.

c. A Tax Subsidy for Marriage

The case for a return to 1948 based on perfect marital sharing has significant weaknesses—both conceptual and empirical—but a reasonable person might make the argument. As a matter of fact, however, theories of taxation based on control versus enjoyment, and beliefs about marital sharing patterns, have not featured prominently in the calls for a return to 1948 as the fix for marriage penalties. Rather, the standard argument is that a return to 1948 would constitute a tax subsidy for marriage, and that a subsidy is a good idea. Alan Carlson and David Blankenhorn argue for full marital income splitting on the ground that “[i]t would replace the marriage penalty with a financial incentive for marriage and an equally clear disincentive for divorce.” They defend increases in existing marriage bonuses for one-earner couples as “a modest encouragement to the unpaid work of parenthood and civil society.” In response to the objection that their proposal “constitutes a special benefit for marriage,” they write, “Well, of course it does; that’s the whole point.” Sylvia Ann Hewlett and Cornel West similarly argue for income splitting as a subsidy for marriage. They report, with apparent approval, that their opinion survey of parents found 65% were in favor of

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119 Bartlett, note 82, at 1349 tbl.2.
120 Carlson and Blankenhorn remark that “income splitting reflects the economic truth of marriage.” Carlson & Blankenhorn, note 69, at 16. This conflicts, however, with their primary argument that the “whole point” of income splitting is to provide “a special benefit for marriage.” Id.
121 Id. at 16.
122 Id. at 17.
123 Id.
"Creating a tax incentive for marriage, by taxing married couples less than two single people with the same income."\(^\text{124}\)

The subsidy argument has serious weaknesses. For starters, notice the huge concession implicit in the analysis: that separate returns are fair or neutral, and that the proposed marriage bonuses relative to separate returns are designed to further social policy goals, not to reflect ability to pay. Another problem is that the proponents do not adequately explain what the subsidy is supposed to accomplish. No one is so bold as to claim that the point is simply to throw billions of dollars at people whose lifestyle merits approval, but who would engage in the same behavior without the cash. The purpose, then, must be to change behavior, but in what way? If it is supposed to encourage couples to marry rather than cohabit, the problem is the evidence that tax rules have little effect on those decisions.\(^\text{125}\) The likely result is billions of dollars of revenue loss with almost no resulting change in marriage rates. The Center on Budget and Policy Priorities estimates that the additional marriages created by a return to 1948 would come at a revenue cost of about $380,000 per couple.\(^\text{126}\)

Or perhaps the major behavioral goal is to encourage traditional breadwinner-homemaker marriages. That is suggested by the structure of the "subsidy" inherent in full marital income splitting—no subsidy for equal earner couples, some subsidy for unequal earners, and the largest subsidies for one-earner couples. Income splitting is not really a subsidy for marriage per se; it is only a subsidy for marriages

\(^{124}\) Hewlett & West, note 78, at 263. Although 65% support sounds impressive, on a list of 18 pro-family policy options included in the survey, income splitting ranked only 15th in strength of support, and the percentage strongly favoring the proposal (36%) was almost matched by the percentage opposed (32%). And this is a survey of parents, not of the general adult population.

Hewlett and West give two reasons why income splitting is better than optional filing as a fix for the marriage penalty. Id. at 243. First, they are philosophically opposed to the "homemaker's penalty" implicit in optional filing. Second, they claim that too large a share of the benefits of optional filing would go to high income couples. Ironically, their second objection would be better aimed at their own income splitting proposal. According to the CBO study, couples with incomes over $50,000 would receive 64% of the benefit of optional filing, but 87% of the benefit of a return to 1948. CBO Study, note 1, at xviii summary tbl. 4.

\(^{125}\) James Alm & Leslie A. Whittington, Does the Income Tax Affect Marital Decisions? 48 Nat'l. Tax J. 365 (1995) (finding a small but statistically significant effect of the income tax on marriage rates); CBO Study, note 1, at 12-14 (reviewing the literature); David L. Sjoquist & Mary Beth Walker, The Marriage Tax and the Rate and Timing of Marriage, 48 Nat'l. Tax J. 547 (1995) (finding no tax effect on marriage rates, but also finding that tax may cause postponement of marriage from the end of one year to the beginning of the next); Leslie A. Whittington & James Alm, 'Til Death Do Us Part: The Effect of Income Taxation on Divorce, 32 J. Hum. Resources 388 (1997) (finding that the marriage penalty is a statistically significant predictor of divorce for women, although the effect is not large).

\(^{126}\) Center on Budget Policies and Priorities, note 64. The estimate is based on Alm & Whittington, note 125.
with unequal divisions of income. If the public understands this point, it is likely to reject the subsidy argument for joint returns; there is no national consensus that the government should promote the one-earner model of marriage over the two-earner model.\footnote{Zelenak, Marriage, note 11, at 368-71.}

The distribution of the subsidies from income splitting simply cannot be explained on any rational policy ground. Even under the dubious assumption that the government should subsidize one-earner couples, why should it throw only $2,000 at a couple where the husband earns $40,000, but over $17,000 at a couple where the husband earns $400,000?\footnote{Author's calculations based on rate brackets and standard deductions in H.R. 3734, note 68, and S. 1999, note 68. The calculations are for childless couples claiming the standard deduction, and reflect the complete phaseout of personal exemptions at $400,000. The exact numbers are a marriage bonus of $2,043.50 at $40,000 ($3,915 married liability versus $5,958.50 single), and a bonus of $17,395.30 at $400,000 ($117,755 married liability versus $135,150.30 single).} It is difficult to understand why the second marriage needs any tax subsidy at all; it certainly does not need more than eight times the subsidy of the first marriage.

Worse yet is the gap between the pro-parent and pro-children rhetoric of the income splitting proponents, and the failure of income splitting to target parents and children.\footnote{Hewlett and West propose income splitting in a book entitled The War Against Parents: What Can We Do For America's Beleaguered Moms and Dads, note 78, and other income splitting advocates also emphasize the benefits to parents and children. See, e.g., Carlson & Blankenhorn, note 69, at 16-17 (advocating income splitting as a way of decreasing "the share of the tax burden falling on married couples with children," and describing it as "a modest encouragement to the unpaid work of parenthood"). Similar statements from congressional proponents of a return to 1948 are quoted in note 58.} If the purpose of the subsidy is to help parents and children, why provide the same income splitting treatment for childless couples as for married parents? Why fully eliminate marriage penalties for childless couples, but not for parents?\footnote{As explained in text accompanying notes 91-92, a return to 1948 would not eliminate marriage penalties compared with the parents' option to cohabit and file one return as head of household under § 1(b) and one single taxpayer return under § 1(e).} Why provide the same subsidy regardless of the number of children in the family? And why deny any subsidy to one-parent families where the need for a subsidy is typically greatest? As Congress demonstrated when it enacted the child tax credit in 1997, it is no great trick to tie tax subsidies to the existence and number of children in a family.\footnote{IRC § 24 (Allowing a tax credit of $500 for each "qualifying child").} There are both philosophical and technical objections to the child tax credit, but at least it is well-targeted to families with children. In light of the practicality of such targeting, there is little merit in advocating a return to 1948 income splitting—available to childless couples and denied to single parents—as a pro-child proposal.
I can imagine a pro-child argument for limiting a new tax subsidy to two-parent families, although I have not seen it made. The argument would be that children do better in two-parent families, and that limiting the subsidy to such families would increase the percentage of children in two-parent families. Implicit in the argument is the idea that the benefit to children who gain two-parent families as a result of the tax incentive is greater than the detriment to those children who continue to live with one parent and receive no new subsidy. This is a classic sort of public policy problem—an incentive designed to changed behavior may have cruel effects on those left behind. I suspect the reason the argument has not been made in this context is that intuition strongly suggests the extent of changed behavior will be small, and the number of children left behind will be great. In any event, this argument does nothing to justify extending income splitting benefits to childless couples.

d. The Argument From Administrability

One might argue for a return to 1948 on the grounds that (1) tax marriage penalties are simply unacceptable, and (2) the competing solutions—optional or mandatory separate filing—are too complicated because they require allocation of various income and deduction items between spouses. But there are two problems. First, if marriage penalties are unacceptable, it makes no sense to advocate a plan that would leave 56% of all marriage penalties in place. Second, this argument implies that it is necessary to create billions of dollars of otherwise unmerited marriage bonuses simply to avoid the complexities of allocating tax return items between spouses. The allocation problems would have to be immense to justify that conclusion. Other countries have found separate returns feasible and in a previous article, I described workable rules for moving the U.S. income tax to a separate return system.

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132 The problem is most familiar in the welfare context. Time limits on eligibility for welfare may encourage some parents to find jobs, but denial of benefits to parents who do not find jobs may be devastating to their children. A similar problem arises in the feminist context: Policies designed to encourage women to break out of traditional gender roles may be damaging to women who do not change their behavior. This is discussed in detail in Anne L. Alstott, Tax Policy and Feminism: Competing Goals and Institutional Choices, 96 Colum. L. Rev. 2001, 222-26 (1996).

133 See text accompanying notes 91-96.

134 The CBO estimates that a return to 1948 would result in a $25 billion annual revenue loss, 51% of which would take the form of increased bonuses for couples currently receiving bonuses. CBO Study, note 1, at xviii summary tbl. 4.

135 Id. at 59-60 app. A.

136 Zelenak, Marriage, note 11, at 381-401.
e. Distinguishing the Marriage Penalty From the Stacking Effect

Despite the common confusion between the marriage penalty and the stacking effect, advocates of a return to 1948 generally have not claimed that their preferred solution to the marriage penalty would eliminate the stacking effect. This may be simply because they do not view elimination of the stacking effect as a selling point. Those who view a subsidy for one-earner couples as a good idea should have no objection to the stacking effect. If the stacking effect encourages wives to be homemakers, they would find that all to the good. In any event, they are right not to claim elimination of the stacking effect as a feature of their proposal. Despite the absence of marriage penalties under the 1948 version of joint returns, the system still stacked the income of the secondary earner on top of the income of the primary earner, and thereby discouraged wives from employment. In some cases, joint return bracket widening from a return to the 1948 system might reduce the bite of the stacking effect. For example, under current law, a husband’s earnings might cause the first dollars of a wife’s earnings to be taxed at 28%, but with bracket widening she might start out in the 15% bracket. Still, the stacking phenomenon would remain.

2. What About the Singles Penalty?

A reader familiar with the history of marriage penalties and bonuses will have noticed that the above objections to a return to 1948 do not include the objection that, in fact, led to the downfall of the 1948 system in 1969: Allowing perfect income splitting for married couples imposes singles penalties on the unmarried. As powerful as the singles penalty objection proved in 1969, today it seems both conceptually obscure and of limited political importance.

Just as complaints about marriage penalties are based on counterfactual analysis, so are claims of singles penalties. The standard version of the marriage penalty complaint has considerable force, both because the counterfactual is plausible and because the tax distinction seems perverse—a couple should not be punished for having a marriage license rather than (as President Carter was wont to say) living in sin.139

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137 See text accompanying notes 82-83.
138 An exception can be found in Bartlett, note 82, at 1345. Bartlett implies that the move in 1948 from separate returns to income splitting reduced marginal tax rates on wives. As explained in text accompanying notes 82-83, this is simply wrong.
139 See text accompanying notes 105-06.
140 Peter Goldman, Setting the Style, Newsweek, Feb. 21, 1977, at 14, 15 (President Carter urges bureaucrats “living in sin” to get married).
By contrast, the appropriate counterfactual on which to base claims of singles penalties is not so obvious. What, exactly, is the counterfactual relative to which the single person pays too much tax? The cleanest comparison—the one involving the smallest change from the taxpayer’s situation—would be between the actual taxes of an unmarried one-earner couple, and the lower taxes they would owe if they got married while changing nothing else. But the singles penalty is almost never described in those terms—at least for heterosexual couples—and the reason is clear. The response to such a complaint, from both Congress and the public, would be, “You can avoid the penalty simply by getting married, and we wish you would.” Claims of discrimination against “living in sin” simply do not carry much political weight. Complaints about this version of the singles penalty are more sympathetic coming from same-sex couples, who cannot avoid the penalty by getting married. A Congress that has gone on record as opposed to same-sex marriage, however, is not likely to grant relief in the near future.

The unmarried couple was not, however, the counterfactual used in making the singles penalty argument which partly succeeded in 1969, and in making the unsuccessful case for additional singles penalty relief in 1972. Instead, the complaint was made in two different ways. One version was that a single person paid much more tax than a married couple with the same amount of income. The Senate report accompanying the 1969 Act explained that reduction of the singles penalty was appropriate because, under pre-1969 law, “the tax rates imposed on single persons are too heavy relative to those imposed on married couples at the same income level; a single person’s tax is as much as 40.9 percent higher than the tax paid on a joint return with the same amount of taxable income.” Witnesses at a 1972 House Ways and Means Committee hearing identified the remaining singles

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141 Aside from complaints from same-sex couples unable to marry, the only statement of the singles penalty in these terms, of which I am aware, is this description by Michael Graetz of the effect of the 1948 legislation: “It meant that two single people often would pay significantly more tax than a married couple with the same total income.” Graetz, note 17, at 31. Graetz probably did not mean to imply, however, that the complaints against the 1948 system came from unmarried cohabitants. His own excellent description of the events leading up to the 1969 legislation indicates that cohabitants were not the complainants. Id. at 29-35. The best collection of complaints about singles penalties is the 1972 Hearings, note 26. In 255 pages of testimony and statements, no one complains about the singles penalty in terms of unmarried cohabitants.


penalty by making the same sort of comparison. The single person paid more tax than if he were two people.

The second counterfactual was subtly different. It compared the single person not with an equal income married couple, but with an equal income husband with a stay-at-home wife. Rep. Edward I. Koch, for example, explained that “[a] single taxpayer whose taxable income is $12,000 pays $2,630; if he were married and filing a joint return, he would pay $2,260.” Koch did not find it necessary to spell out the assumption that the taxpayer would be married to a wife with no income of her own. Senator Robert A. Packwood described the singles penalty the same way: “A single taxpayer having a taxable income of $8,000 pays $1,590 in Federal income taxes. By contrast, a married taxpayer having the same taxable income of $8,000 will pay only $1,380.” Note how he describes this as the tax liability of “a married taxpayer,” rather than as the joint liability of the spouses. The complaint is that a homemaking spouse is a kind of tax shelter.

Neither formulation of the singles penalty is as compelling as the standard version of the marriage penalty. The marriage penalty complaint requires imagining the absence of a marriage license. The singles penalty complaints are far more challenging; they require the creation of an imaginary person (in one version, the complainant imagines he is two people; in the other he imagines he has a wife). In their starkest form, the singles penalty complaints also depend on the unappealing premise that income used to support two adults should be taxed as heavily as income used to support just one adult. If one concedes that two persons should pay somewhat less tax than one person living on the same amount of income, the singles penalty argument is about shades of gray. How much less is too much less? That puts singles penalty complainants in a weaker rhetorical position than marriage penalty complainants, who can talk about absolutes—any extra tax on a married couple compared with equal income cohabitants is too much.

Singles penalty complainants might respond that the tax system should reflect the existence of an additional adult only by an additional personal exemption (and perhaps a larger standard deduction),

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146 Id. at 96 (statement of Rep. Edward I. Koch).

147 Id. at 118 (statement of Sen. Robert Packwood).

148 An earlier and more explicit formulation of this version of the singles penalty comes from the 1969 Tax Reform hearings: “I, as a single person, . . . pay approximately $4,200 more per year than my [equal-income married business] partner, . . . [and] my 15% higher tax bracket places me at a distinct disadvantage in investing my savings as compared to him.” 1969 Hearings, note 47, at 1996 (letter of Donn R. Huf, M.D.).
so that a single person and a married couple should pay exactly the same tax on the same taxable income. In other words, they could try to make the issue black and white by focusing on taxable income rather than on gross (or adjusted gross) income. But that is a distinction too subtle for public consumption. And even among experts, there is no consensus that a single person and a married couple should pay the same tax on the same taxable income; after all, the single person enjoys a substantially higher standard of living.

The moral would seem to be that singles penalty arguments are too weak—both on the merits and politically—to stand in the way of increasing singles penalties in order to provide marriage penalty relief. This raises the questions, however, of why the arguments were strong enough to result in pro-singles legislation in 1969, and why even after the 1969 Act, a bill to eliminate the remaining penalties had 157 co-sponsors in the House in 1972. Clearly, something has changed in the ensuing decades. In 1969, complaints about singles penalties were strong enough to bring about legislative relief, and in 1972, complaints about remaining penalties were almost strong enough to produce additional relief. Today, complaints about singles penalties are not merely less powerful; they are virtually nonexistent. A recent Nexis search of a large number of major newspapers and magazines over a two-year period found only 52 references to the singles penalty, compared to 3,948 references to the marriage penalty. What has changed since 1972 to make the singles penalty a nonissue? The change is not in the law; the basic relationship between the bracket widths for married and single taxpayers has remained the same since 1969. The change, then, must be in society. Two social changes come to mind.

149 In fact, the description of the singles penalty in the 1969 Senate Finance Committee Report is in terms of taxable income. S. Rep. No. 91-552, note 47, at 260, reprinted in 1969-3 C.B. 423, 588. Similarly, Marvin Chirelstein has suggested that the difference between a given amount of income supporting one versus two taxpayers “should be reflected in a higher standard deduction for couples and an additional personal exemption rather than by doubling the width of the tax brackets.” Marvin A. Chirelstein, Federal Income Taxation: A Law Student’s Guide to the Leading Cases and Concepts 228 (8th ed. 1997).

150 1972 Hearings, note 26, at 96-97 (statement of Rep. Edward I. Koch, listing co-sponsors of H.R. 850, 92d Cong. (1972)). This was mandatory separate return legislation, which was promoted as eliminating both singles penalties and marriage penalties for two-earner couples. Id. at 98. Notice, however, that mandatory separate returns eliminate only one version of the singles penalty. A single person would pay the same tax as a married person with the same taxable income, but the single person would pay more tax than a two-earner married couple with a combined taxable income equal to his.

151 The searches were conducted on March 18, 1999, using the CURNWS file. One search was for “single penalty” or “singles penalty” within 20 words of “tax,” and the other was for “marriage penalty” within 20 words of “tax.” Of the 52 singles penalty references, 17 were to the same syndicated column published in different newspapers: Ellen Goodman, Penalizing Love?, Boston Globe, June 11, 1998, at A23.
First, the complainants in 1969 (and 1972) had available to them a unique demographic argument that the victims of the singles penalty were involuntarily single. Both then and now, the social norm seems to be that people should be married most of their adult lives. Long-term singles may be looked upon as misfits, so that if the tax system penalizes those who choose to be single, most people may not mind, or may even approve. The complainants in 1969 hit upon a brilliant strategy for defusing that problem. They argued that World War II had created a husband shortage for a generation of women. These women were single through no fault and no choice of their own. They were the deserving single. It is perhaps surprising that this tactic succeeded as well as it did even in 1969. It is doubtful that most of the long-term single women in 1969 were involuntarily single as a result of the War, and the War would not have explained any of the long-term single men. But whatever force the argument had in 1969 was a temporary phenomenon. For all but the elderly, the argument that they are involuntary (and therefore deserving) war singles is simply unavailable today.

In addition to the absence today of nonretired war singles, the other important change is the demise of the one-earner couple as the dominant model of marriage. The version of the singles penalty that views a co-worker’s homemaking spouse as a tax shelter is persuasive only if homemaking spouses are the norm. That was the case when complaints of singles penalties received a hearing from Congress—in 1970.

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152 Short-term singles—at the beginning and end of their adult lives—are more socially acceptable, but tax penalties on them are not very important, precisely because they will not be single long. From a life cycle viewpoint, short-term singles would be more recipients of marriage bonuses than victims of singles penalties, under a return to 1948.

153 The leading spokeswomen for this position were Dorothy Shinder and Vivien Kellem. In 1969, Shinder asked the Ways and Means Committee, “But what about the single women? The war singles? Haven’t they suffered an even greater loss [than the war widows]? As of 1967, there were 2,721,000 never-married single women over the age of 35 years. Their ‘would be’ husbands were snatched from them before they ever had a chance to marry and derive a little happiness.” 1969 Hearings, note 47, at 1977 (statement of Dorothy Shinder). In addition to blaming the War, Shinder remarked that “the ever-increasing number of homosexuals have [sic] further depleted the supply of available men.” Id. Vivien Kellem sounded the same note three years later: “[I]s it a reasonable classification to penalize these women because there aren’t enough men to go around? What do you do if you can’t get a husband? Should you be taxed for that?” 1972 Hearings, note 26, at 6 (statement of Vivien Kellem). For additional fascinating background on the Kellem campaign, including her postal reenactment of the Boston Tea Party, see Graetz, note 17, at 32-33.

154 In the age group most affected by World War II—those between 45 and 54 in 1969—the Census Bureau estimated there were 11,981,000 women and 11,172,000 men. Bureau of the Census, U.S. Commerce Dept., Statistical Abstract of the United States 1970, 10 tbl. 8. It is not clear from an imbalance of such modest proportions (51.7% women and 48.3% men) that most single women would have been single due to a war-created shortage of men.
only about 40% of married women were in the labor force.\textsuperscript{155} Today, however, over 60% of wives are in the labor force.\textsuperscript{156} A single person's married co-worker probably has a working spouse, and marriage to a working spouse may well subject that co-worker to a tax penalty. Without the ability to appeal to a homemaking spouse as the social norm, much of the power of this version of the singles penalty is lost.

In short, singles penalty complaints were problematic at the best of times, and social changes over the past three decades have robbed the complaints of most of the force they once had. Having said that, I must add one qualification. The above discussion is concerned with the \textit{static} version of the singles penalty—the claim that under the law as it exists at a particular time, singles suffer a tax penalty for not being married. There is also a \textit{dynamic} version of the singles penalty, which considers who wins and who loses when the law is changed. It implicitly takes the current distribution of tax burdens between single and married persons as normative, and complains about any tax reform that increases singles' share of the burden.\textsuperscript{157} Despite the absence of a compelling case that the current distribution is correct, I suspect the dynamic version of the singles penalty complaint may have some force as an argument against a return to 1948. Interestingly, the most prominent recent statement of the singles penalty makes \textit{only} the dynamic version of the complaint. Columnist Ellen Goodman writes, "Get rid of the marriage penalty and you'll get a singles penalty. . . . The question now is whether we really want to \textit{re-create} penalties for, say, single heads of households."\textsuperscript{158} Notice she does not say that proposals for marriage penalty relief would \textit{increase existing} singles penalties. She is accepting of (or oblivious to) singles penalties under existing law, but she objects to the possibility of new penalties.

\section{Intermediate Filing}

Genuinely new ideas for marriage penalty relief are rare, but one appeared in a recent law review article by Henry E. Smith.\textsuperscript{159} Under Smith's proposal for "intermediate filing," each spouse would file a separate return, but spouses could select any splitting ratio for purposes of determining how much of their combined income to include

\textsuperscript{155} The exact figure is 40.8%. Bureau of the Census, U.S. Commerce Dep't, Statistical Abstract of the United States 1997, 404 tbl. 631.
\textsuperscript{156} The figure for 1996 was 61.1%. Id.
\textsuperscript{157} See text accompanying note 66.
\textsuperscript{158} Goodman, note 151, at A23 (emphasis added).
on the return of each spouse.\textsuperscript{160} For example, if a one-earner couple chose a 50-50 ratio, then one-half of the income of the earner spouse would be taxed to the nonearner spouse. The key to the proposal—and the reason not every one-earner couple would opt for the tax savings associated with 50-50 splitting—is that the chosen ratio also would govern the division of marital property (including human capital accumulated during the marriage) in case of divorce.\textsuperscript{161} The rationale is that the higher-income (or only income) spouse should gain the tax advantage of shifting income to his spouse only to the extent he is willing to shift control of the income-producing property, including human capital, to his spouse.\textsuperscript{162}

At first glance, the proposal is very attractive. The linkage of taxation to control of property is intuitively appealing, and the resulting distribution of tax liabilities would seemingly leave little room for complaint from the perspective of marriage penalties, homemaker penalties, or singles penalties. Marriage penalties would be virtually eliminated.\textsuperscript{163} As long as two-earner couples elected splitting ratios no more uneven than their actual divisions of income, they would not be subject to marriage penalties.\textsuperscript{164} The only remaining marriage penalties would be on those rare couples opting for a splitting ratio more

\textsuperscript{160} Id. at 151 (summarizing the proposal), 184-93 (describing the proposal in more detail).

\textsuperscript{161} Id. at 184. The resulting heavy influence of federal tax law on state marital property rights suggests a federalism-based objection to the proposal, but Smith argues that any federalism concerns would be addressed adequately by allowing each state to decide whether to "pass enabling legislation to give the self-assessed ratio from intermediate filing effect in [its] divorce law." Id. at 216. In the absence of such legislation, state residents would be unable to take advantage of income splitting (each spouse would have to report her own income on her own return), so the pressure on the states to pass enabling legislation would be great.

\textsuperscript{162} "[T]he countervailing incentives facing the higher-income spouse (to wish for a relatively even ratio for taxes but a less even one for divorce) force him into receiving the tax advantage only to the extent that he is willing to share ownership." Id. at 151. In one crucial respect (relating to human capital predating the marriage), the proposal is inconsistent with its own rationale. See text accompanying notes 167-70.

\textsuperscript{163} Smith offers an idiosyncratic definition of marriage penalty as "any increment in taxes for a married individual over what that person would owe as a single individual with the same income." Id. at 177 (emphasis added). The standard definition, of course, compares the combined tax liability of husband and wife with their combined tax liabilities as unmarried persons. All references to marriage penalties in the text are to the standard definition, not to Smith's.

\textsuperscript{164} The statement in the text must be qualified in one respect. If one spouse could file as a head of household if the couple were not married, and if head of household status is not available to either spouse if they are married, then marriage penalties would still exist for some couples choosing splitting ratios no more uneven than their actual divisions of income. Smith does not discuss the head of household provisions, so it is unclear what he would do about these residual marriage penalties. At one point he doubts the wisdom of extending intermediate filing to parental splitting of income with minor children, id. at 242-43, which suggests he might favor repeal of the head of household provisions.
uneven than their actual division of income, and for them the penalty could be viewed as a self-inflicted wound.\footnote{Smith notes that this might happen in a case where the spouses have equal incomes, but one spouse's income is all earned income, the other spouse's income is all from property, and the propertied spouse is unwilling to give the other spouse a right to one-half the property in case of divorce. Id. at 185-86. Under Smith's proposal, if the propertied spouse did agree to a 50-50 split, she would \textit{not} receive the right to one-half of the earning spouse's human capital on divorce, to the extent the human capital was not accumulated during the marriage. The proposal's treatment of human capital is discussed in text accompanying notes 167-70.} Any remaining homemaker penalties on one-earner couples also would be self-inflicted wounds, since a one-earner couple always could avoid paying more tax than a two-earner couple with the same combined income, simply by electing a 50-50 splitting ratio. The husband who refuses to share evenly with his nonearning spouse in case of divorce is in a weak position to complain that the income tax does not allow him to split his income 50-50 with his wife.\footnote{Another possible source of marriage penalties would be a change in the spousal division of income after the splitting ratio had been established. Suppose, for example, spouses agreed to a 70-30 ratio when they were a one-earner couple; if they were still saddled with that ratio after they became an equal income two-earner couple, there would be a marriage penalty. This would not be a problem under Smith's proposal, however, because he would always permit the spouses to adjust their splitting ratio in the direction of a more even division. Id. at 191.} Singles might still complain of a singles penalty, in the sense that the tax would be greater on the earnings of a single person than on the equal earnings of a married person, if the married person had a nonearning spouse and had agreed to a 50-50 split. That complaint can be answered in a principled way, however, by explaining that under intermediate filing, taxation is based on control of income, and that any persons—married or single—in control of the same amount of incomes will have the same tax liabilities.

Given all these virtues, it is unfortunate that the proposal has a problem that greatly reduces its attractiveness. Upon divorce, Smith would not apply a couple's chosen splitting ratio to all human capital, but only to human capital accrued during the marriage.\footnote{Smith persuasively suggests that couples should be considered similarly situated for tax purposes only if they have both the same combined income \textit{and} the same splitting ratio. Id. at 193.} Thus, income attributable to human capital brought into the marriage by a spouse is subject to splitting for income tax purposes, even though it is not subject to splitting for divorce purposes. This is inconsistent with the treatment of other property, which must be divided upon divorce according to the tax splitting ratio, regardless of whether it predates

\footnote{"Under intermediate filing, one would total the human capital \textit{built up during the marriage} and divide the fruits of it according to the prenegotiated ratio, which acts as a liquidated damages clause." Id. at 215 (emphasis added).}
the marriage. It is also inconsistent with the basic logic of the proposal, which is to tax income to the person with control over the source of the income. The proposal gives a spouse no control over earnings of the other spouse attributable to human capital predating the marriage, yet it permits up to one-half of those earnings to be taxed to the spouse with no control. This is not a small problem. Consider the common situation of a marriage in which one spouse earns all (or a vast majority) of the income, the only significant marital asset is human capital, and the earning spouse’s human capital (that is, earnings capacity) does not increase during the marriage. The earning spouse could agree to a 50-50 splitting ratio, realize all the tax benefits of splitting, and give up nothing significant in case of divorce—because the marriage has only one significant asset, and that asset is not subject to the splitting ratio upon divorce. The entire appeal of the proposal is based on the linkage of income tax treatment and divorce treatment, yet the linkage does not apply to what is probably the most significant asset in most marriages.

Would the problem be solved by a friendly amendment to Smith’s proposal, extending the application of the divorce splitting ratio to all human capital of the spouses, regardless of when the human capital accrued? Purely from a tax perspective, that would solve the problem; all splitting allowed for tax purposes then would be justified by the divorce effect of the splitting ratio. What would be reasonable from a tax perspective, however, might be a disaster from a family law perspective, in terms of both fairness and practicality. On the fairness question, there is no apparent reason why human capital predating the marriage should be shared in a divorce as a matter of course. Yet, this would be the effect on such human capital under the friendly amendment, for a couple electing any degree of splitting for tax purposes. An obvious response is that any fairness objection is mooted

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168 Id. at 151.

169 Louis Kaplow has argued persuasively for a view of human capital accrual under which accruals occur earlier than commonly supposed. Louis Kaplow, Human Capital Under an Ideal Income Tax, 80 Va. L. Rev. 1477, 1487-90 (1994). If, for example, it is clear that a person will go to law school and become a successful lawyer, it is appropriate to include the present value of her expected future income stream as a lawyer in that person’s human capital even though she has not yet earned her law degree. Under this view, the vast majority of human capital accruals would predate marriage.

170 As Smith documents, marital property law in the United States does not always provide for division upon divorce of human capital built up during the marriage. Smith, note 159, at 212. There has been no movement toward requiring the division of human capital brought into the marriage upon divorce. Presumably, the absence of such movement reflects a consensus that such a division would be unfair, at least in the absence of special circumstances (such as a wife’s failure to accumulate any human capital of her own, in reliance on her husband’s promise of perpetual support from the human capital he brought into the marriage).
by the fact that human capital would be split on divorce only to the extent the spouses voluntarily agreed to the division by selecting a splitting ratio. But there is a compelling—albeit somewhat paternalistic—answer to the response. Out of short-sightedness, excessive optimism about the future of their marriages, or pressure to subscribe to an ideal of marital sharing, many couples would choose a 50-50 ratio and its immediate tax benefits, without thinking about the fact that the ratio also would govern the division of all their human capital if there is a divorce. It does not seem fair to hold the spouses to an agreed division of human capital brought into the marriage, when the voluntariness of the agreement is so seriously compromised.\footnote{171}

Whatever one’s view on the fairness issue, the practical problems of applying the splitting ratio to all human capital would be immense. Lump sum payments frequently would be impossible. Imagine the divorce of a one-earner couple, where the splitting ratio is 50-50, the earning spouse can expect to earn \$100,000 annually for the next 20 years, and there are no other significant marital assets. At a discount rate of 5\%, the human capital is worth \$1,250,000, which means the earner spouse would owe the nonearner spouse a \$625,000 lump sum payment on divorce. The problem, of course, is that there is no way he could raise that much cash. There are no other significant assets to sell, and he cannot borrow nearly that much against his future earnings prospects. This may overstate the problem slightly because the nonearner spouse probably has some earnings potential despite her lack of previous labor force participation. If she could expect to earn \$30,000 annually for the next 20 years, she would have human capital of her own worth \$375,000 and would be entitled to a lump sum payment of only \$437,500 (which would leave each spouse with \$812,500 of value). It makes little difference, however, since the earning spouse still would be unable to raise that much cash.

In many cases, then, the only way to effectuate a split of all human capital would be to require annual divisions of income between exspouses, until they both retire. In the example, if one spouse earns \$100,000 each year after divorce and the other earns \$30,000, a 50-50 split would call for a \$35,000 annual payment. Until retirement, then, each ex-spouse would have an interest in the income of the other ex-spouse. There would be ongoing concern about hiding of income, about enforcement of payment obligations, and about the extent to which earnings were attributable to human capital accrued after the

\footnote{171 The same argument could be made with respect to the tax-induced division of financial capital brought into a marriage. It seems plausible, however, that those who bring significant financial capital into a marriage are financially sophisticated enough (or are sufficiently well-advised) that the tax law need not embody a paternalistic concern for their well-being.}
end of the marriage (and thus not subject to division). If divorcing spouses had opted for the best tax results while married (as a great many surely would have done), and a lump sum payment could not be financed, then as ex-spouses they would be economically linked for the rest of their working lives. This tax-induced perpetual intertwining of finances would occur even when each ex-spouse was capable of self-support, and even when there were no minor children of the marriage. 172

On both fairness and practical grounds, applying the splitting ratio to human capital brought into the marriage seems like a bad idea. One suspects that Smith thought so too, which would explain why his proposal does not include the linkage called for by the logic of his analysis. It is tempting to take Smith’s basic insight in a very different direction—not as the basis for intermediate filing, but as the basis for an argument against a return to the 1948 system of automatic 50-50 income splitting between spouses. The first step in the argument comes from Smith—that income splitting is justified only when it reflects the actual division of ownership of the income-producing property. The second step asserts that a 50-50 division of ownership of human capital predating a marriage is both unfair and impractical. The conclusion is that the state of affairs necessary to justify the 1948 system should not and cannot exist.

IV. THREE SMALLER STEPS TOWARD MARRIAGE PENALTY RELIEF

Proposals for narrowly targeted marriage penalty relief fall into three categories: attacks on the marriage penalties created by the EITC, 173 attacks on standard deduction and lower bracket marriage

172 Of course, alimony currently involves the intertwining of the finances of ex-spouses, but there would be significant differences between alimony payments and the payments induced by the Smith proposal. First, divisions of human capital under the amended proposal probably would be much more common than alimony awards. (Alimony is awarded in only about 15% of all divorces. See Martha M. Ertman, Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements, 77 Tex. L. Rev. 17, 87 (1998) (citing studies). Second, unlike the frequent short-term nature of alimony (as permitted by § 71, subject to the recapture rules of § 71(f)), the payments under the amended Smith proposal would continue indefinitely. Finally, the intertwining of finances under the amended proposal would be more strongly tax-induced than is alimony. The tax law merely gives a payor spouse incentive to characterize a payment to a payee spouse as alimony (rather than as a property settlement or child support); it does not give him an incentive to make the payment in the first place.

173 One bill has been introduced in Congress with the sole purpose of reducing the marriage penalty of the EITC. H.R. 3995, 105th Cong. (1998) (Reps. Neal, McDermott and Kennedy, sponsors). The bill would increase the income level at which the phaseout of the credit begins to $16,020 for joint returns (compared to $12,690 under current law). Other bills have included similar partial relief from the EITC marriage penalty as part of a larger attack on marriage penalties. Gramm Amendment, note 63 (increasing the joint return
penalties, and restoration of some form of the two-earner deduction. The major practical difference among these proposals is in their distributional effects. Not surprisingly, the benefits of EITC relief go mostly to lower income couples. The CBO estimated that 41% of the benefits of one form of EITC relief (giving two-earner couples twice the EITC parameters available to single persons) would be received by couples with incomes under $20,000, 58% by couples with incomes from $20,000 to $50,000, and only 1% by couples with incomes above $50,000. Unfortunately, the CBO did not estimate the distribution of benefits for standard deduction relief. It is possible, however, to gain a rough idea of the distributional effects of such relief by examining the distribution of joint returns claiming the standard deduction. Of the taxable joint returns filed for 1994 claiming the standard deduction, 14.9% reported AGI of less than $20,000, 65.4% reported AGI of $20,000 to $49,999, and 19.7% reported AGI

EITC phase-out threshold by $3,400); S. 8, 106th Cong. (1999) (introducing a two-earner deduction, and also allowing the deduction for purposes of the EITC phaseout threshold). Unlike the other two bills, the S.8 approach would benefit only two-earner couples. It would not limit its benefits, however, to couples suffering EITC marriage penalties under existing law.

The conference bill that passed both houses of Congress in 1999 would have increased the joint return EITC phaseout threshold by $2,000. H.R. 2488 (conference version), note 6, § 115(a)(2). This was identical with the EITC marriage penalty relief contained in the bill originally passed by the Senate. S. 1429, note 6, § 202(a)(2). The original House bill, by contrast, included no relief from EITC marriage penalties. H.R. 2488 (House version), note 6. The most ambitious 1999 proposal was that of the Senate Finance Committee Democrats. That proposal would have increased the joint return phaseout threshold by $4,350. Moynihan & Kerrey, note 8. The vetoed 2000 legislation would have increased the joint return EITC phaseout threshold by $2,000. H.R. 4810, note 9, § 4.

The most prominent include attacks on standard deduction marriage penalties in H.R. 4579, note 4, § 101(a); S. 1429, note 6, § 209; and H.R. 2488 (conference version), note 6, § 111. All three would have given married taxpayers twice the standard deduction available to single taxpayers (other than heads of households). Marriage penalties created by the standard deduction also have been targeted in the following: S. 284, 106th Cong. (1999) (Sen. McCain, sponsor); Gramm Amendment, note 63; S. 1989, 105th Cong. (1998) (Sen. Ford, sponsor); H.R. 3524, 105th Cong. (1998) (Rep. McDermott, sponsor). The Ford bill would provide a standard deduction of $6,000 for single taxpayers, $9,000 for heads of households, and $12,000 for joint returns. The McCain and McDermott bills take the same approach as H.R. 4579.

Attacks on the bottom bracket marriage penalty appear in H.R. 2488 (conference version), note 6, § 101 (making the bottom bracket twice as wide for joint returns as for single taxpayer returns), and in H.R. 4810, note 9, § 3 (same).

H.R. 2593, 105th Cong. (1997) (Rep. Herger, sponsor), would allow two-earner couples a deduction of 10% of the earnings of the lower-earning spouse, up to a maximum deduction of $3,000. S. 8, note 173, would allow a deduction of 20% of the earnings of the lower-earning spouse. The deduction would be phased out as combined spousal income exceeded $50,000, with the phaseout complete at $60,000. The maximum deduction would be $5,000 (for a couple with two $25,000 earners).

CBO Study, note 1, at xviii summary tbl. 4.
of $50,000 or more.\textsuperscript{177} Although the distribution of benefits from increasing the joint return standard deduction would not be identical with the distribution of standard deduction returns,\textsuperscript{178} this strongly suggests that the benefits would have a higher income distribution than the benefits of EITC relief.\textsuperscript{179} Of the three options, the restoration of the two-earner deduction would have by far the highest income distribution of benefits. According to the CBO, 1% of the benefits would go to couples with incomes below $20,000, 17% to couples with incomes between $20,000 and $50,000, and 82% to couples with incomes above $50,000.\textsuperscript{180} Policy and technical issues relating to each of the three options are considered below.

A. EITC Marriage Penalty Relief

1. The Distributional Case

Roughly speaking, the question in choosing between the three options is whether to focus relief on the working poor (EITC), on the lower-middle class (standard deduction), or on middle-middle to upper-middle class taxpayers (two-earner deduction). When the question is put that way, there is a strong case that EITC marriage penalty relief should be the highest priority. As a percentage of income, EITC marriage penalties are much larger than marriage penalties from other sources.\textsuperscript{181} The CBO offers an example of a two-child

\textsuperscript{177} Author’s calculations, based on data from IRS, Individual Income Tax Returns 1994, 33 tbl. 1.2. The calculations are for taxable returns, rather than for all returns, because filers of nontaxable returns cannot suffer a standard deduction marriage penalty and would not benefit from standard deduction marriage penalty relief.

\textsuperscript{178} One reason the distribution of benefits would not be identical with the distribution of returns is that the tax saving from an increase in the standard deduction is a function of a couple’s marginal tax rate—the higher the marginal tax rate, the greater the tax savings. This would make the distribution of benefits more skewed toward higher income couples than the distribution of standard deduction returns. A second complication is that an increase in the standard deduction would benefit not only couples currently claiming the standard deduction, but also couples currently itemizing—if the increased standard deduction is greater than their itemized deductions. There is no reason to suppose the AGI distribution of these couples on the margin between itemizing and the standard deduction is identical with the AGI distribution of couples currently claiming the standard deduction. In all likelihood, couples on the margin have a higher AGI distribution than that of all couples claiming the standard deduction.

\textsuperscript{179} A briefing paper of the Democratic Budget Caucus estimates that couples with incomes over $50,000 would enjoy 35% of the tax cut resulting from increasing the joint return standard deduction to twice the amount of the single taxpayer standard deduction. The paper suggests this estimate comes from the CBO, but the estimate is not included in the published CBO study. House Budget Comm. Democratic Caucus, The “Marriage Penalty” and Related Proposals, 98 TNT 85-92. May 4, 1998, available in LEXIS, TNT File.

\textsuperscript{180} CBO Study, note 1, at xviii summary tbl. 4.

\textsuperscript{181} CBO Study, note 1, at 25 (EITC marriage penalties for two-earner low income couples can reach 18% of family income); Edward J. McCaffery, Taxtion and the Family:
couple with $22,000 income, earned one-half by each spouse. Under 1996 tax law, the couple would suffer a marriage penalty of $3,701 (16.8% of AGI), of which $2,936 is due to the EITC.\footnote{See note 125.}

It is not clear whether marriage penalties of this magnitude have a significant effect on decisions to get married or stay married. Studies to date indicate that marriage penalties have small or no effects on marriage decisions,\footnote{McCaffery, Taxation and Family, note 181, at 1016. On the other hand, Anne Alstott suggests that “the EITC’s potential disincentives to marriage may be blunted by the numerous psychological, social and economic factors that influence marital decisions and by EITC recipients’ apparently limited understanding of the terms of the program.” Anne L. Alstott, The Earned Income Credit and the Limitations of Tax-Based Welfare Reform, 108 Harv. L. Rev. 533, 560 (1995).} but these studies do not isolate the effects of large penalties on low income couples. Edward McCaffery’s suggestion that the marriage penalties of the EITC apply “at exactly the point where legally-sanctioned marriages might be most sensitive to economic conditions”\footnote{As Eugene Steuerle points out, the EITC is just one of a number of antipoverty programs that impose substantial marriage penalties. Gene Steuerle, Is It Worth Spending Money to Reduce Marriage Penalties?, 79 Tax Notes 1629 (June 22, 1998).} seems plausible. It would be surprising if every couple in the situation of the CBO example decided being married was worth almost $4,000 per year. In any event, worrying about the uncertain behavioral effects of marriage penalties on low income couples seems rather beside the point. Whether or not the couple chooses marriage, the results are disturbing. If they reject marriage, the tax system has driven them to that rejection. If they heroically choose marriage despite the cost, their children may enjoy the benefits of a stable, two-parent family, but much of the tax penalty will be borne by the children, already living at or near subsistence.\footnote{“I regard the marriage tax problem as a problem of an income tax system endorsing and incorporating the wrong values; I am far less concerned with its behavioral effects.” Testimony of Michael J. Graetz before the House Ways and Means Comm., 98 TNT 19-69, Jan. 29, 1998, available in LEXIS, TNT File.} Either way the tax system harms children—by driving their parents out of marriage, or by penalizing the entire family if the parents insist on marriage.

There is force to the argument that marriage penalties send a disturbing message even when they have no effect on marriage decisions and even when they fall on affluent families.\footnote{See note 125.} But if marriage penalty relief is to be limited, the most urgent need is where behavioral effects are most likely and poor children are at risk.

\footnote{A Fresh Look at Behavioral Gender Biases in the Code, 40 UCLA L. Rev. 983, 1014-17 (1993) [hereinafter Taxation and Family].}
Why, then, has relief from EITC marriage penalties been absent from much of the proposed legislation, and little more than token when present? Apart from cold calculations of political advantage, relating to which marriage penalty victims are most likely to vote, there may be a mistaken application of principle. In contrast to the view of economists and accountants that a dollar is a dollar, many conservatives believe there is a fundamental moral distinction between taxes and transfer payments—that the last dollar of tax relief is on much higher moral ground than the first dollar of transfer payments. Under this view, it makes no sense to talk of EITC penalties, at least with respect to the refundable portion of the credit. Since a transfer payment is largesse in the first place, no reduction in the amount of the payment can be considered a penalty. To those who think a dollar is a dollar, this will be unpersuasive, maybe even incomprehensible. But even to those who accept the notion of a great moral gulf between taxes and subsidies, there is good reason to be concerned about the EITC’s effects on marriage. If the EITC, as a subsidy, cannot be viewed as penalizing people for being married, it can still be viewed as subsidizing—bribing—they not to marry. If conservatives do not believe in the EITC marriage penalty, they should be interested in ending the EITC cohabitation bribe.

2. The Two Sources of Penalties

There are two sources of marriage penalties in the EITC. First, the maximum earnings eligible for the credit, and the credit percentages, are the same for single and married taxpayers. Thus, for example, a single person with two children and $10,000 earned income would be eligible for a credit of $3,888. Two such single persons, of course, would be entitled to a combined credit of twice that amount—$7,776. If they were to marry and continue to earn the same income, neither the maximum earnings nor the credit percentage would increase, so their combined credit (calculated before phaseout) would be reduced to $3,888. This aspect of the marriage penalty would exist even if

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187 See note 173 for a description of the several legislative proposals for EITC marriage penalty relief.
188 Under this interpretation, the more conservative a legislative body happens to be, the more resistant it should be to EITC marriage penalty relief. Some support for this interpretation is provided by comparing the absence of EITC marriage penalty relief in the 1999 bill originally passed by the very conservative House Republicans, with the modest relief included in the bill originally passed by the more moderate Senate Republicans. H.R. 2488 (House version), note 6; S. 1429, note 6, § 202(a)(2).
189 This is derived by applying the two-child credit percentage of 40% to the $9,720 earned income amount (the maximum earnings eligible for the credit). IRC § 32(a); Rev. Proc. 99-42, note 85, § 3.03.
there were no phaseout of the credit. But the credit is phased out, and the design of the phaseout is a second source of marriage penalties. For joint returns the phaseout is based on combined spousal income, but the income range over which the phaseout occurs is identical for married couples and for single taxpayers. The phaseout begins (for earners with two or more children) at $12,690 AGI, and functions as a 21.06% tax until it eliminates the credit (which occurs at AGI of $31,152).\textsuperscript{190} Continuing with the same example, the two single taxpayers earning $10,000 each were not subject to the phaseout. But if they were married, their combined AGI of $20,000 would subject them to a tax of 21.06% on $7,310 ($20,000 - $12,690). The $1,539 phaseout tax reduces their credit from $3,888 to $2,349. The combined effect of the two aspects of the penalty reduces their EITC by $5,427, which is more than 27% of their earned income.\textsuperscript{191}

The system also produces marriage bonuses, because of the fact that the amount of the credit varies with the number of dependent children. A childless single person earning $10,000 would be entitled to no credit,\textsuperscript{192} as would a single parent with two children but no earnings. If they married, thus bringing together income and children, they would be entitled to a credit of $3,888. In fact, a recent study of low income couples found that most poor married couples have highly uneven distributions of income between spouses, with the result that EITC marriage bonuses are more common than penalties among the married poor.\textsuperscript{193}

3. Options for Reform

There is an almost bewildering array of options for doing something about EITC marriage penalties. The alternatives are described and critiqued below.

\textsuperscript{190} Id.

\textsuperscript{191} If each person had only one child, the marriage penalties described in the text would be partly offset by the fact that marriage would entitle the couple to use the two-child earned income amount and credit percentage. Unmarried, each would be entitled to a credit of $2,353 (.34 x $6,920), for a total of $4,706. Their married credit (after application of the phaseout) would remain at $2,349. The penalty is reduced to a still-substantial $2,357 (about 12% of income).

\textsuperscript{192} There is a small credit available to childless workers, but it is fully phased out at the $10,000 income level. IRC § 32(b).

\textsuperscript{193} Stacy Dickert-Conlin & Scott Houser, Taxes and Transfers: A New Look at the Marriage Penalty, 51 Nat'l Tax J. 175 (1998). Approximately 80% of the poor couples (defined as having incomes below the official poverty level) in the study enjoyed tax marriage bonuses, with the EITC the major source of bonuses. Id. at 177, 187-90. The situation is quite different among near-poor married couples (defined as having incomes from one to two times the poverty level). Near-poor couples are more likely to have similar spousal incomes, and so to suffer tax marriage penalties. Id. at 192.

Imaged with the Permission of N.Y.U. Tax Law Review
a. The Big Fix—Applying the 1948 Approach to the EITC

The obvious “fix” for the EITC marriage penalties would be to double all the EITC parameters for married couples. Compared with singles, couples would have twice the maximum earnings eligible for credit, and their phaseout would begin and end at twice the income levels applicable to singles. Assuming the current EITC parameters for singles remained unchanged (so that there were no nominal losers), and the joint return parameters were set at twice the current limits, the effect would be to extend the completion of the phaseout—and hence eligibility for some credit—to over $62,000 AGI.194 Although the credit would be quite small for couples approaching this AGI level, extending any benefits of an antipoverty program to that income level may prove controversial.

Doubling EITC parameters would be analogous to a return to the 1948 rate structure. As with a return to 1948, it would create some very substantial marriage bonuses. Suppose the current EITC parameters for singles remained unchanged, and the joint return parameters were doubled. A one-earner couple with two children and $20,000 income would receive a credit of $7,776.195 Unmarried, the parent earning $20,000 would receive a credit of only $2,349 (assuming the parent still qualified for the two-child credit).196 Given the potential for such large marriage bonuses, it is initially surprising that the CBO estimates that less than 1% of revenue losses and spending increases from this approach would go to couples who currently receive EITC marriage bonuses.197 The explanation is that the CBO estimate is not addressed to the right question. If the parents in the example were married, they would not receive an EITC bonus under current law. Rather, their EITC would be the same whether they were single or married. Even though the proposed reform would give them a very large marriage bonus, none of that bonus would be counted by the CBO as going to a couple currently enjoying an EITC marriage bonus. The right question, which unfortunately the CBO does not ask, is what percentage of the revenue loss and spending increases would be due to increases in existing marriage bonuses or the creation of new bonuses.

Although a return to 1948 would eliminate all rate schedule marriage penalties (in comparison with § 1(c) single rates), the analogous

194 Under current law, the two-child version of the credit is fully phased out at $31,152. IRC § 32(a); Rev. Proc. 99-42, note 85, § 3.03.
195 40% x $19,440 (maximum credit-eligible earnings, derived by doubling the current maximum earnings of $9,720).
196 See text accompanying note 191.
197 CBO Study, note 1, at 53.
doubling of EITC parameters would not eliminate all EITC marriage penalties. Consider Wife with $10,000 earned income, married to Husband with $100,000 earnings. If Wife were single (and had one or more children) she would be entitled to a substantial credit. But the effect of Husband's income is to phase out her entire credit, so that married, she receives no credit at all. Even if the phaseout parameters were doubled for married couples, the phaseout would be complete well before $110,000 AGI.198

This vestigial EITC marriage penalty would fall largely on the part-time jobs of wives with high-income husbands. Since it falls only on the financially comfortable, its elimination may not be a high priority. If its elimination is considered essential, however, the 1948 approach is not the solution.

b. A Smaller Fix—Applying the 1969 Approach to the EITC

As nice as it would be to eliminate most EITC marriage penalties, the solution of doubling the parameters for joint returns likely would be met by complaints from singles, similar to those that followed the 1948 joint return legislation. If Congress is going to spend an additional $4 billion per year on the EITC,199 should it all be spent on married couples? Are not working single parents also in difficult circumstances, and also in need of additional assistance? This is what might be called the dynamic version of a singles penalty complaint—that all the new goodies are going only to married couples. Of course, the parameters could be increased for singles as well, but that would mean either the reintroduction of marriage penalties or giving married couples twice the increase given to singles (on top of the initial doubling of the current parameters).

Adoption of the proposed reform also would give rise to a post-reform static singles penalty complaint. As noted above, a single parent with two children and a $20,000 job would receive a credit of $2,349, while a married couple with two children and the same combined income would receive $7,776. The single parent might understandably view this as a whopping singles penalty. Telling her to get married is not a helpful response; there may be no plausible candidate

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198 One way of understanding why EITC marriage penalties persist even with a doubling of parameters is to note that the phaseout functions as a tax on phantom income. Phasing out the credit has the same effect as creating phantom income equal to the phaseout range and taxable at the phaseout rate. Even with doubled parameters, combining spousal income creates phantom taxable income where none existed before. By contrast, the 1948 approach to rate structures never creates phantom income, and so never results in marriage penalties.

199 CBO Study, note 1, at xvii summary tbl. 4 (CBO's cost estimate for doubling the parameters for joint returns).
on the horizon, and tax-induced marriage to the first loser who comes along is not a good thing. The difference in the credit amounts may be especially galling if the married couple enjoys the tax-free benefits of the services of a full-time homemaker.

There is a sad irony here. If marriage penalties are especially disturbing at low income levels, so are singles penalties. An initial enthusiasm for focusing marriage penalty relief on the EITC may be dampened by consideration of the resulting singles penalties, both dynamic and static. Perhaps the best that can be done (assuming retention of joint returns and the basic structure of the EITC) is something along the lines of the much-maligned 1969 approach to the rate structure—EITC parameters for joint returns more generous than those for single taxpayers, but less than twice as generous. It is an uneasy compromise, not a solution, but it may be less objectionable than either the massive marriage penalties of current law or the massive singles penalties of the 1948 approach.

The bills that have been introduced to reduce EITC marriage penalties all take the same basic approach: increasing by a few thousand dollars the joint return threshold at which the phaseout begins. This is modest relief indeed. It has no effect on the first source of EITC marriage penalties; the maximum credit for a married couple would remain one-half of the maximum credit for two singles. And although it reduces penalties caused by the phaseout, it does not come close to eliminating them. Nevertheless, this approach may not be a bad compromise, given the intractability of the problem.

c. EITC Separate Filing

It would be possible, of course, to abandon marital status as a factor in EITC determinations. That system would be marriage neutral (by definition), featuring neither marriage penalties nor bonuses. This approach is subject, however, to two serious objections. First, it would create large homemaker penalties. If the current credit parameters

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200 Edward McCaffery has suggested this. McCaffery, Taxation and the Family, note 181, at 1059 ("The earned income credit must have at least the degree of sensitivity to marriage that the basic rate structure has.").

201 They differ, however, on whether the increased threshold applies to all married couples, or only two-earner couples. See note 173.

202 To be marriage-neutral in all cases, the system would have to be designed so that marital status did not affect allocation of children for EITC purposes. If the system gave married couples more flexibility than unmarried couples in allocating children so as to produce the greatest EITC benefit, there would be some marriage bonuses. If the system allowed double-counting of children by married taxpayers (that is, each spouse could claim the same child for EITC purposes) but not by unmarried taxpayers, the system would have substantial marriage bonuses in many cases.
were retained in a separate return EITC system, a couple earning $20,000 evenly divided between the spouses would receive a combined credit of $7,776,\(^{203}\) but a one-earner couple with $20,000 earnings would receive a credit of only $2,349.\(^{204}\)

The other problem, which is probably even more serious (at least as a political matter), is that EITC separate returns would mean no family income limit on eligibility for the credit. If the wife of a billionaire earned $10,000 from a part-time job, she would be eligible for the credit. The CBO estimated that under this approach, one-third of the tax reduction would go to couples with incomes exceeding $50,000\(^{205}\)—an unattractive prospect for an antipoverty program.

It might be possible to defend an EITC transfer to the billionaire's wife on the grounds that her credit is trivial compared to his tax liability, and that their combined tax burden—that is, his tax liability net of her credit—is appropriate. It seems inconsistent, however, to defend the results of a separate return system by appeal to an analysis of combined tax burdens. In any event, the defense seems inadequately responsive to the appearance problem of the government issuing checks to wives of rich men.

d. Separate Returns for Phasing In the Credit, Joint Returns for Phasing Out

The separate return system described above could be modified by phasing in the credit on a separate return basis, but phasing out the credit based on combined spousal income. As with a completely separate return system, this would feature homemaker penalties on the phasing-in side; a two-earner couple with each spouse's income at or above the ceiling on credit-eligible earnings would be entitled to twice the credit of an equal income, one-earner couple.\(^{206}\) Unlike a completely separate return system, it would also feature marriage penal-

\(^{203}\) Each spouse would be eligible for the maximum credit of $3,888, and would not have enough income to be subject to any phaseout. This assumes there are enough children to enable each spouse to take the credit based on two or more children.

\(^{204}\) This results from reducing the maximum credit of $3,888 by the phaseout amount of 21.06% of $7,310. Again, the example assumes the relevant parameters are those for earners with two or more children.

\(^{205}\) CBO Study, note 1, at 53.

\(^{206}\) This would be true whether or not the couples had sufficient income to be subject to the phaseout. At the beginning of the phaseout range, the two-earner couple has twice the credit of the one-earner couple, and every dollar earned in the phaseout range would produce twice the credit reduction for the two-earner couple as for the one-earner couple (because it reduces two credits instead of one), thus preserving the two-to-one ratio throughout the phaseout range.
ties resulting from the phaseout.\textsuperscript{207} On the other hand, it has the major political virtue of guaranteeing that part-time workers with wealthy spouses would not receive EITC checks.

e. Phasing Out the Phaseout

In a recent article, Daniel Shaviro has challenged the standard assumption that an explicit phaseout of the EITC—a bubble in effective marginal rates—is necessary.\textsuperscript{208} If the credit is viewed as part of an integrated tax-and-transfer system, rather than as a freestanding program, the credit implicitly would be phased out by the ordinary tax rate schedule. At some point, a person’s tax liability under the rate schedule would equal her earned income credit. Those below that income level would receive net transfers, and those above would pay net taxes. There is no reason to object to a high income taxpayer being nominally entitled to an earned income credit on her first few thousand dollars of earnings, as long as her net tax burden is appropriate. This analysis suggests a remarkably simple solution to marriage penalties caused by the EITC phaseout—elimination of the phaseout. That solution is worthy of consideration, but there are two caveats.

Achieving desired net tax burdens with an EITC that is not phased out would require a thorough reworking of the entire § 1 rate structure. A credit not subject to phaseout may be too big a change to implement simply to alleviate EITC marriage penalties. The other caveat is that the phaseout is only one source of EITC marriage penalties. Assuming the EITC continues to be determined on a joint return basis, the rules governing the maximum amount of the credit will continue to create marriage penalties (or singles penalties, or both), even if the phaseout is eliminated. The alternative would be to combine elimination of the phaseout with a separate return system for phasing in the credit. That would eradicate all EITC marriage penalties (and bonuses). It is subject to the same objections, however, as a separate return system \textit{with} a phaseout—that it creates homemaker penalties, and that it results in the issuance of EITC checks to part-time workers with high-income spouses.

\textsuperscript{207} The extent of the phaseout marriage penalties would depend on the relationship between the phaseout parameters for single and married earners. The most marriage-favorable approach—doubling phaseout parameters for married couples—would produce marriage \textit{bonuses} in many cases. Even that approach, however, would produce marriage penalties in some cases (generally involving part-time jobs of wives of high-income husbands). See text accompanying note 198.

\textsuperscript{208} Daniel Shaviro, The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy, 64 U. Chi. L. Rev. 405, 408-09, 462-66 (1997).
4. A Need for Bolder Thinking?

If nothing else, the above discussion demonstrates that problems of marriage neutrality under the EITC are especially disturbing and especially intractable. While there is room for improvement within the basic structure of the current credit, that room is quite limited. Some commentators have suggested replacing the credit with a fundamentally different sort of low wage family subsidy. Although such proposals are beyond the scope of this Article, the problems of marriage non-neutrality in the current credit are reason enough to investigate new approaches.

B. Standard Deduction and Lower Bracket Marriage Penalty Relief

1. Standard Deduction Relief

a. A Modest Proposal

After all the rhetoric about the unacceptability of marriage penalties, and after all the ambitious proposals for far-reaching marriage penalty relief, in late 1998 the Ways and Means Committee approved and the House passed only modest marriage penalty relief—giving married taxpayers twice the standard deduction available to single taxpayers. This was also the only marriage penalty relief in the original (that is, pre-conference) bill passed by the House in 1999, and was one of the forms of marriage penalty relief included in the 1999 Senate bill and in the conference bill. It was also a feature of the vetoed 2000 legislation. The standard deduction is far from the leading source of marriage penalties. By one estimate, increasing the joint return standard deduction to twice the single taxpayer standard deduction would remove only 7% of all marriage penalties. Nevertheless, the relationships among the standard deductions for joint returns, single filers, and heads of households create substantial marriage penalties for some taxpayers. For 2000, a husband and wife

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209 For another expression of this conclusion, see McIntyre & McIntyre, note 101, at 922 ("[W]e have not yet devised a method for eliminating those [EITC marriage] penalties that is consistent with the goals of the credit and with current political realities.").


211 H.R. 4579, note 4.

212 H.R. 2488 (House version), note 6, § 111.

213 S. 1429, note 6, § 209.

214 H.R. 2488 (conference version), note 6, § 111.

215 H.R. 4810, note 9, § 2.

216 Democratic Caucus, note 179.
are entitled to a standard deduction of $7,350. If they were not married, and if one of them qualified as a head of household, their combined standard deductions would be $10,850 ($6,450 head of household and $4,400 single). Even without head of household status, as two single taxpayers they would have a combined standard deduction of $8,800. For a two-earner couple in the 15% bracket, the maximum standard deduction marriage penalty is $525 if one could qualify as a head of household, and $217.50 if not.

The penalty does not apply to taxpayers at very low income levels. If the $7,350 standard deduction and available personal exemptions are enough to shelter all income from tax, it does not matter that the married standard deduction is smaller than two unmarried standard deductions. In addition, the penalty applies to few couples at high income levels because most high income couples itemize rather than claiming the standard deduction. And even for the few two-earner high income couples who do claim the standard deduction, the standard deduction marriage penalty is small, relative both to their total income and to marriage penalties attributable to the rate schedules.

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217 Rev. Proc. 99-42, note 85, § 3.05.
218 Id.
219 In 2000, the first $18,550 of income of a married couple with two children generates no tax liability. (The $7,350 standard deduction and four $2,800 personal exemptions shelter $18,550 from tax.) For a couple with that amount of income or less there can be no standard deduction marriage penalty, regardless of how much larger their unmarried standard deductions would have been.
220 As the following table demonstrates, the popularity of the standard deduction generally declines as income increases.

<table>
<thead>
<tr>
<th>Adjusted Gross Income</th>
<th>% Returns Claiming Standard Deduction</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;$20,000</td>
<td>90.8</td>
</tr>
<tr>
<td>$20,000 to &lt;$30,000</td>
<td>82.1</td>
</tr>
<tr>
<td>$30,000 to &lt;$40,000</td>
<td>69.0</td>
</tr>
<tr>
<td>$40,000 to &lt;$50,000</td>
<td>50.4</td>
</tr>
<tr>
<td>$50,000 to &lt;$75,000</td>
<td>28.0</td>
</tr>
<tr>
<td>$75,000 to &lt;$100,000</td>
<td>12.8</td>
</tr>
<tr>
<td>$100,000 to &lt;$200,000</td>
<td>6.1</td>
</tr>
<tr>
<td>$200,000 to &lt;$500,000</td>
<td>5.1</td>
</tr>
<tr>
<td>$500,000 to &lt;$1,000,000</td>
<td>8.0</td>
</tr>
<tr>
<td>$1,000,000 or more</td>
<td>7.3</td>
</tr>
</tbody>
</table>

Author's calculations, based on Statistics of Income, note 177, at 33 tbl. 1.2. (columns 14 and 19, using data for taxable joint returns). The percentage of returns claiming the standard deduction at very high AGI levels may seem surprisingly high, both in absolute terms and relative to the lower percentages in the low six-figure income ranges. A likely explanation is § 68, which, at very high income levels, disallows 80% of the itemized deductions otherwise allowable. This means that a very high income couple will itemize only if itemized deductions (before the application of § 68) are more than five times the amount of the standard deduction.

221 Applying the top marginal rate of 39.6% to the $3,500 difference between the joint return standard deduction and the combined standard deductions for a single taxpayer and a head of household yields a maximum standard deduction marriage penalty of $1,386.
Thus, the main victims of the standard deduction marriage penalties are those two-earner couples in the lower-middle and middle-middle income ranges.

Given that the victims of the standard deduction marriage penalty tend to be in less desperate circumstances than the victims of the EITC marriage penalty, perhaps alleviating the EITC penalty should be the higher priority. There is something to be said, however, in defense of a focus on the standard deduction. Compared with the can of worms that EITC relief opens up, the fix for the standard deduction marriage penalty is fairly simple.222 And while the fix would increase singles penalties and existing marriage bonuses, the dollar amounts would be modest compared to those under EITC marriage penalty relief.223

Assuming other standard deduction amounts are to remain the same, standard deduction marriage penalties could be eliminated simply by giving a $10,850 standard deduction to couples with dependents in the home, and an $8,800 standard deduction to other couples. This, of course, would increase the standard deduction marriage bonuses already enjoyed by one-earner couples. A one-earner couple with children, already receiving a standard deduction marriage bonus worth $135 in the 15% bracket,224 would receive an additional bonus worth $525.225 From the penalty perspective, a head of household in the 15% bracket would suffer a total standard deduction singles penalty (relative to marriage to a spouse with no income) of $660.226 The amount is not trivial, but it is not of the same order of magnitude as the singles penalties in excess of $5,000 associated with EITC marriage penalty relief.227

Although complete standard deduction marriage penalty relief would distinguish between married couples with and without dependent children, and although implementing that distinction would not be technically difficult, most legislative proposals have ignored the issue. Thus, the 1998 House-passed bill, the original 1999 House-

222 Which is not to say it is so simple that mistakes are impossible. See Zelenak, Gramm Penalty Fix, note 63, at 1515 (criticizing the Gramm Amendment, note 63, for being unduly generous to childless couples and to couples who itemize, and for having a dramatic cliff effect instead of a gradual phaseout).

223 By one estimate, couples already enjoying marriage bonuses would capture 49% of the revenue loss from increasing the married standard deduction to twice the single standard deduction. Democratic Caucus, note 179.

224 This is 15% of the difference between the $7,350 married standard deduction and the $6,450 head of household standard deduction.

225 This is 15% of the difference between their new standard deduction of $10,850 and their old standard deduction of $7,350.

226 This is 15% of the difference between the new married standard deduction of $10,850 and the head of household standard deduction of $6,450.

227 See text accompanying notes 199-201.
Senate-passed bills, the 1999 Conference bill, and the vetoed 2000 bill, all provided complete standard deduction marriage penalty relief for childless couples, but not for couples with dependent children.\textsuperscript{228} The Gramm amendment missed the mark in the opposite direction, by giving marriage penalty relief based on a comparison with the head of household standard deduction, even for childless couples.\textsuperscript{229}

\textit{b. Targeting Two-Earner Couples}

An ingenious suggestion by Jane Gravelle would improve the targeting of the relief. Under Gravelle’s approach, which is a hybrid of standard deduction relief and a two-earner deduction, the first $1,450 earned by the lower-earning spouse would be tax-exempt.\textsuperscript{230} The exempt amount is the excess of two single standard deductions over one married standard deduction. The exemption would be available only to couples who did \textit{not} itemize their deductions.\textsuperscript{231} The substance of the Gravelle proposal was included in President Clinton’s fiscal 2001 budget proposal.\textsuperscript{232} The effect of this approach would be to eliminate the standard deduction marriage penalty for childless two-earner couples (and lessen it for two-earner couples with children), without increasing the existing standard deduction bonus for one-earner couples.\textsuperscript{233} The proposal would increase existing marriage bonuses for some two-earner couples with very unequal divisions of

\textsuperscript{228} See text accompanying notes 211-18.
\textsuperscript{229} Gramm Amendment, note 63.
\textsuperscript{230} Gravelle, note 83, at ¶ 126. (The $1,450 figure mentioned in the text is slightly increased from the original Gravelle proposal, in order to reflect 2000 inflation adjustments.)
\textsuperscript{231} More precisely, the amount eligible for exemption would be reduced by one dollar for every dollar by which itemized deductions exceeded the married standard deduction. Id.
\textsuperscript{232} Treasury Dep’t, General Explanations of the Administration’s Revenue Proposal, 2000 TNT 26-8, ¶ 191, Feb. 8, 2000, available in LEXIS, TNT File. The Treasury proposal is described as increasing the standard deduction for two-earner couples to the lesser of (1) twice the standard deduction for single filers, or (2) the sum of the standard deduction for one-earner couples and the earned income of the lower-earning spouse. This is merely a different way of expressing the Gravelle proposal.
\textsuperscript{233} It would create or increase standard deduction marriage bonuses, however, in cases where the lower-earning spouse makes less than $4,400 (the amount of the single standard deduction). Suppose, for example, the lower-earning spouse makes $2,000. The combination of the official $7,350 standard deduction and the $1,450 exemption is the equivalent of an $8,800 standard deduction. Even without the $1,450 exemption, this couple already enjoyed a standard deduction marriage bonus. Unmarried, their functional combined standard deductions would have been only $6,400 (for practical purposes, the lower-earner’s standard deduction would have been $2,000—that is, the lesser of her official standard deduction or her income). Thus, the $7,350 married standard deduction already creates a marriage bonus, which Gravelle’s proposal would increase.
income, but it would be significantly better targeted at penalty victims than a universal increase in the married standard deduction.

c. Is a Phaseout Worth the Trouble?

The complexity of standard deduction marriage penalty relief would increase if Congress decided that the larger standard deduction should be limited to low and moderate income couples. The Gramm amendment would have allowed the increased deduction only for couples with modified AGIs of $50,000 or less. This leads to a dramatic cliff effect, in which the 50,001st dollar of income causes the loss of a $3,500 deduction. The loss of the deduction increases the tax liability of a couple in the 15% bracket by $525—a marginal tax rate of 52.50% on that dollar. Phasing out the deduction over some income range would be a more sensible, albeit somewhat more complicated, approach. But an even better approach might be to have neither a cliff effect nor an explicit phase out. The benefit of the standard deduction tends to phase out naturally, because as income increases more and more taxpayers itemize their deductions instead of claiming the standard deduction. When the standard deduction is claimed by only 28% of couples in the $50,000-$75,000 income range, by 12.8% of couples in the $75,000-$100,000 income range, and by well below 10% of couples in all ranges above $100,000, the complexities of an explicit phaseout do not seem worth the trouble.

2. Eliminating the Marriage Penalty in the Bottom or Lower Brackets

A new development in marriage penalty relief proposals in 1999 was based on the realization that it is possible to compromise mere standard deduction relief and a complete return to 1948 by extending the joint return doubling of single taxpayer allowances up the income range from the standard deduction. Thus, the conference bill included, in addition to standard deduction relief, a lowest rate bracket

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234 Some couples currently suffer a standard deduction marriage penalty, even though their overall tax result is a marriage bonus. The proposal to eliminate their standard deduction penalty would increase their overall bonus. In addition (as explained note 233), where the lower-earner spouse has very low income, the proposal would increase an existing standard deduction marriage bonus.

235 Gramm Amendment, note 63.

236 Zelenak, Gramm Penalty Fix, note 63, at 1515 (utilizing 1998 standard deduction levels).

237 See note 220.
(reduced from the current 15% to 14%) twice as wide for joint returns as for single taxpayer returns.238

The conference bill’s lowest bracket relief resembles most of the standard deduction and return to 1948 proposals in its disregard of marriage penalties created by the head of household provisions, and in its propensity to create or increase marriage bonuses in many cases. It has distributional effects that are all its own, however, and that may be a sensible compromise between the other approaches. When added to the standard deduction revision, it extends complete marriage penalty relief (for couples without dependent children) from two-earner couples near poverty to couples well into the middle class. A more interesting distributional difference from standard deduction relief, however, is due to the fact that the benefit of the lowest bracket is not phased out for higher income taxpayers. Standard deduction relief does nothing for those higher income, two-earner couples who do not claim the standard deduction (the vast majority). By contrast, even the highest income couples benefit from the expansion of the lowest rate bracket. While expansion of the lowest bracket benefits high income couples as much as anyone in terms of absolute dollar amounts, as a percentage of total tax liability the benefit falls (and eventually becomes almost trivial) as income increases. Compared with the alternatives of standard deduction relief only (with no benefit for most upper income taxpayers), and a return to 1948 for the entire rate schedule (with almost 90% of the tax savings going to couples with incomes above $50,000239), this limited relief for affluent couples has its attractions.

In 2000 the Senate extended this approach to the 28% bracket, thus leaving rate bracket marriage penalties only in the 31%, 36%, and 39.6% brackets.240 In appearing to single out high income couples for less favorable treatment, this resembles the Moynihan proposal to phaseout the benefit of optional filing for couples with combined AGIs of more than $100,000.241 An important difference, however, is that a couple with AGI of $150,000 or more would receive no benefit from the Moynihan approach, whereas such a couple would benefit from the expansion of the lower brackets under the 2000 Senate ap-

238 H.R. 2488 (conference version), note 6, § 101. The idea seems to have been borrowed from a bill introduced earlier in 1999 by Rep. Thune. H.R. 767, 106th Cong. Somewhat oddly, the Thune bill did nothing about marriage penalties created by the standard deduction.

239 CBO Study, note 1, at xviii summary tbl. 4.

240 Marriage Tax Relief Reconciliation Act of 2000, H.R. 4810, 106th Cong. § 3 (Senate version passed on July 18, 2000).

241 Amend. 3863 to H.R. 4810, note 65.
proach (despite the remaining marriage penalties in the higher brackets).

C. The Return of the Two-Earner Deduction

1. The Objections

Former § 221, in effect from 1981 to 1986, granted two-earner couples a deduction equal to 10% of the earned income of the lower-income spouse, with the maximum allowable deduction set at $3,000.242 The CBO estimates that restoration of the deduction would cost $9 billion annually.243 The deduction would remove 32% of all tax marriage penalties, with the vast majority of the tax savings, 82%, going to couples with incomes over $50,000.244 At first glance, the skewing of benefits toward higher income couples makes this proposal unattractive, both politically and on principle. If there is only limited money to spend on marriage penalty relief, should it be spent on those couples best able to afford the penalty and least likely to be discouraged from marriage by taxes?245

In addition to its focus on an income range of lesser concern, the two-earner deduction is a crude tool against marriage penalties, greatly under- and over-inclusive even within that income range. Although the CBO estimates that, in the aggregate, the deduction would remove almost one-half the penalties for couples with incomes between $50,000 and $100,000, the bulk of the penalty would remain for many couples even in that income range.246 And for many other couples, the deduction would create a marriage bonus, or increase an existing bonus. The CBO estimates that 20% of the revenue loss from

242 IRC § 221 (repealed 1986).
243 CBO Study, note 1, at 51.
244 Id. at xviii summary tbl. 4.
245 Consider a two-earner couple with one spouse earning $50,000 and the other $30,000. If they have children (so that one could file as head of household if they were not married), they suffer a significant marriage penalty under current law. Restoration of the two-earner deduction would entitle them to the maximum deduction of $3,000. In the 28% bracket, that would save them $840 in taxes. It is hard to imagine that a substantial number of such couples would base marital decisions on $840.
246 CBO Study, note 1, at 51. Consider again a couple with earnings of $50,000 and $30,000. Suppose they have two children and do not itemize deductions. If they were not married, and if the higher earner filed as a head of household and claimed both children as dependents, their combined tax liability (using 2000 inflation adjustments set forth in Rev. Proc. 99-42, note 85) would be $8,695.50 ($5,272.50 on the higher earner, and $3,420 on the lower). If they were married, and if there were no two-earner deduction, their joint return liability would be $11,505.50. The marriage penalty is $2,810. The $840 tax savings from a two-earner deduction would eliminate less than 30% of their penalty.
the deduction would serve not to alleviate marriage penalties, but to create new bonuses or enlarge existing ones.247

An especially odd feature of the two-earner deduction is that it can create small marriage bonuses even for equal income couples. For example, a childless couple with two $28,000 incomes would enjoy a marriage bonus of $202.50 if former § 221 were reinstated.248 By contrast, although optional filing or a return to 1948 could eliminate marriage penalties for equal income couples, neither would ever create a bonus.

There is one more objection. Without doing that much about marriage penalties, especially those of greatest concern, the deduction also violates couples neutrality. Remember that marriage penalties result from a commitment to joint returns, and that the commitment to joint returns results from the belief that couples with equal incomes should pay equal taxes regardless of how the incomes are distributed between spouses. But the two-earner deduction means that any given amount of marital income will always be taxed more heavily if it is all earned by one spouse than if some is earned by each spouse. In other words, the two-earner deduction can be viewed as creating a full-time homemaker penalty.249

2. Serving a Different Purpose

All this makes the two-earner deduction sound quite unattractive. The surprise is that the deduction fares much better if it is viewed as serving a different purpose. A strong case can be made for the deduction as a method of alleviating not the marriage penalty, but the work

247 CBO Study, note 1, at 51. As an example of how the deduction would increase existing bonuses, consider a childless, nonitemizing couple with earnings of $20,000 and $60,000. Under current law (using 2000 inflation adjustments set forth in Rev. Proc. 99-42, note 85), their combined tax liabilities as unmarried taxpayers would be $13,291.50 ($11,371.50 and $1,920). Married, their joint return liability is $13,073.50. Thus, they already enjoy a small marriage bonus. If the two-earner deduction were restored, they could deduct $2,000, increasing their marriage bonus by $560. The CBO calculates that about one-fifth of couples already receiving marriage bonuses would benefit from the two-earner deduction. Id.

248 Using 2000 inflation adjustments set forth in Rev. Proc. 99-42, note 85, as singles each would owe tax of $3,120, for a combined tax of $6,240. Married, their joint return liability with a $2,800 two-earner deduction would be $6,037.50. Married or single, all their taxable income is in the 15% bracket. The lower joint return liability results because the benefit from the $2,800 two-earner deduction more than offsets the detriment from the loss of $1,450 of standard deduction. If the facts were the same except the couple had one child (so that one could file as a head of household if not married), the $2,800 two-earner deduction would not fully offset the loss of $3,500 of standard deduction, and a small marriage penalty would remain.

249 Hewlett & West, note 78, at 243, describe optional separate filing as creating a homemaker penalty. They could make the same complaint about the two-earner deduction.
disincentive the joint return system imposes on the secondary earner in a marriage (usually the wife). If a homemaker decides to enter the paid labor force, the couple must spend money to replace her home-making services (purchases may include child care, housecleaning services, and restaurant meals), and on nondenudable work-related expenses (such as commuting and work clothes). Yet, except for a limited allowance for child care, the tax system makes no allowance for these expenses. The couple will be taxed on more than the true net income from the second job, and this may discourage the homemaker from taking the job. Restoration of the two-earner deduction would alleviate the problem. From a tax base perspective, a wife's $30,000 job would be treated as producing only $27,000 of net income. Alternatively, from a tax rate perspective, if the couple's marginal rate under § 1(a) is 28%, the deduction has the same effect as taxing the entire $30,000 earned by the wife, but at a reduced rate of 25.2%.

Nondenudable work-related expenses are not unique to the second job in a marriage, however, and Boris Bittker thus has criticized a special tax benefit for two-earner couples as "curiously narrow." He argues that if any earned income tax allowance is appropriate, it is appropriate for all employed taxpayers. But there are other reasons why an allowance limited to the second (that is, lower-paying) job in a marriage may make sense.

First, there is the stacking effect, which is unique to the secondary earner in a marriage. In a joint return system, with the husband's job taken as a given, a couple will view the husband's job as having appropriated the benefit of the standard deduction and personal exemptions, and of the lower rate brackets. They will view all the wife's earnings as taxed at high marginal rates. Second, unlike the husband's job, the wife's job means the absence of any major imputed income producer in the family. If only the husband has a job, there may be major nondenudable costs for commuting and work clothes, but probably not for child care, housecleaning, and restaurant meals. This

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250 The child care credit is available only with respect to $2,400 of child care expenses for one child, or $4,800 for two or more children. These amounts are not subject to adjustment for inflation. IRC § 21(c)(1), (2). If either spouse's employer has a dependent care assistance plan, the couple may choose to take advantage of the exclusion under § 129 instead of the child care credit. In that case, the limit on excludible benefits is $5,000, regardless of the number of children. IRC § 129(a)(2)(A). This ceiling is also not subject to inflation adjustment.

251 Zelenak, Marriage, note 11, at 372-75.

252 Bittker, note 17, at 1435.

253 Id. Bittker notes that the income tax has featured universal earned income deductions twice in the past, from 1924 to 1931 and from 1934 to 1943. Id.

254 See text accompanying notes 82-90.
point is more compelling, of course, if there are children in the household.\footnote{255} Finally, there is the argument that the taxation of wives has special social policy implications. The current system encourages wives to remain full-time homemakers, and that social engineering role may be inappropriate for the tax system.\footnote{256}

3. A Homemaker Penalty?

It does not seem likely that the return of the deduction would generate significant complaints about homemaker penalties. In its previous life the deduction was not attacked on this basis,\footnote{257} and unfairness to one-earner couples was not cited as a reason for its repeal in 1986.\footnote{258}

Why the deduction gave rise to no complaints about one-earner penalties is an interesting question. One possibility is that most people simply did not (and do not) consider couples neutrality—that is, equal tax on equal income couples—an important policy goal. I suggested as much in a previous article advocating mandatory separate filing for married couples.\footnote{259} Even if that is wrong, however, I suspect that people generally accepted the idea that the deduction did rough justice between one- and two-earner couples, in terms of ability to pay. Most people, including most one-earner couples, probably accepted the idea that a two-earner couple should have a somewhat

\footnote{255} If the two-earner deduction is viewed as primarily a response to the extra costs of having children and no full-time homemaker in the household, the deduction also should be available to heads of households. Of course, increasing the ceilings on expenditures eligible for the child care credit and the dependent care assistance exclusion would be a more targeted response to extra expenses directly related to the presence of children. Although heads of households are entitled to both a larger standard deduction and wider rate brackets than other single taxpayers, neither benefit is designed to compensate for the absence of a full-time homemaker. See text accompanying notes 276-87.

\footnote{256} This theme is developed at length in McCaffery, Taxing Women, note 17. See also Zelenak, Marriage, note 11, at 371 ("As long as society is so evenly split [between the one-earner and two-earner models of marriage], the only proper stance for the tax system is one of neutrality.").

\footnote{257} The Nexis ARCNWS file includes a large number of major newspapers, dating as far back as late 1982. A search of the file found over 100 references to the two-earner deduction prior to its repeal in 1986, but not one complaint about its unfairness to one-earner couples.

\footnote{258} The official explanation for the repeal was that the 1986 Act decreased the progressivity of the rate structure to the point where special marriage penalty relief was no longer needed. Staff of the Joint Comm. on Tax’u, 99th Cong., General Explanation of the Tax Reform Act of 1986, at 15 (Comm. Print 1987) [hereinafter 1986 Bluebook].

\footnote{259} Zelenak, Marriage, note 11, at 358-63. Another possibility is that the dollar amounts were not large enough to generate much opposition. The deduction could be as much as $3,000, however, and with a top marginal rate of 50\%, the tax involved could be as much as $1,500. That is usually enough to get taxpayers’ attention. There is no shortage of complaints about the marriage penalty, and the average marriage penalty is about $1,400. CBO Study, note 1, at 1.
lower tax bill than a one-earner couple with equal gross earnings. They might not have thought in terms of the two-earner couple’s higher nondeductible expenses and lower imputed income, but they understood that the two-earner couple was not as well-off, and they accepted the deduction as a response to that fact. In other words, they may have accepted the deduction as a legitimate refinement of the concept of income, so that the deduction resulted in the imposition of equal tax on one- and two-earner couples with equal net incomes.\textsuperscript{260} The deduction certainly resulted in equal tax on couples with equal taxable incomes, and the deduction’s adjustment to the taxable income of two-earner couples had a basis in principle.

In sum, the return of the two-earner deduction (not necessarily in the exact form of its previous incarnation) deserves serious consideration—but not as a means of alleviating the marriage penalty. Marriage penalty relief would be merely a happy side effect.\textsuperscript{261} If the deduction must be considered solely on its merits as a form of limited marriage penalty relief, it is not targeted at the most critical income level, and even at the targeted level, it is a crude instrument. There are better choices.

4. A Hybrid Approach

Jane Gravelle’s suggestion of an exemption for the first $1,450 earned by a secondary earner is a hybrid of standard deduction marriage penalty relief and a two-earner deduction.\textsuperscript{262} Compared with the more common sort of two-earner deduction, its relief is aimed lower in the income distribution, both because it is available only to nonitemizers and because it applies only to the first dollars earned by the lower-income spouse. Viewed solely from the perspective of marriage penalty relief, these may be points in favor of the Gravelle approach. In terms of the other purpose of a two-earner deduction, however, the Gravelle approach is less appealing. Because most high income couples itemize, the proposal would do nothing to alleviate

\textsuperscript{260} This defense of the two-earner deduction would not serve as a defense of optional separate filing from the claim that it imposes homemaker penalties. See text accompanying notes 78-79. Whereas the two earner deduction can be viewed as a fine-tuning of the concept of joint spousal income, optional filing abandons the concept altogether for those spouses who choose to file separate returns.

\textsuperscript{261} In 1981, the Staff of the Joint Committee on Taxation justified the two-earner deduction on grounds of both marriage penalty relief and decreasing the tax burden on second earners, but gave the greater emphasis to marriage penalty relief. Staff of the Joint Comm. on Tax’n, 97th Cong., General Explanation of the Economic Recovery Tax Act of 1981, at 33-34 (Comm. Print 1981). The defense of the deduction would have been more persuasive had the emphasis been reversed.

\textsuperscript{262} See text accompanying notes 230-34.
the tax burden on the earnings of the wives of most high income husbands, despite the fact that those wives are subject to especially severe stacking effects. Even for couples claiming the standard deduction, it would provide no tax benefit for wives moving from part-time to full-time employment, since the full benefit is obtained by the first $1,450 of earnings.\textsuperscript{263}

The standard form of the two-earner deduction is the better choice if the tax disincentives on secondary earners are the main concern and the alleviation of the marriage penalty is a nice side effect. The Gravelle version is the better choice if the marriage penalty is the main concern and any decrease in secondary earner disincentives is the nice side effect.

5. \textit{A Phased-Out Deduction}

One prominent proposal for a two-earner deduction, by Senator Daschle, would allow a deduction of 20\% of the earnings of the lower-earning spouse, but would phase out the deduction beginning at $50,000 combined spousal income.\textsuperscript{264} The deduction would be reduced by two percentage points for every $1,000 (or fraction thereof) of income above $50,000, so that it would be eliminated by $60,000 (actually, by $58,001).

Viewed as marriage penalty relief, this is a rather strange proposal, for two reasons. First, it creates significant marriage bonuses (rather than merely removing penalties) for many equal income, two-earner couples. A childless couple with two $25,000 incomes would enjoy a marriage bonus of $532.50 under the Daschle plan.\textsuperscript{265} Second, it takes a form of marriage penalty relief—the two-earner deduction—which

\textsuperscript{263} On the other hand, if a wife were choosing between no paid labor and full-time employment, the exemption of the first $1,450 \textit{would} figure into her labor force participation decision.

\textsuperscript{264} S. 8, note 173, § 222. A similar proposal for a phased-out two-earner deduction was included in the proposal offered by the Senate Finance Committee Democrats in 1999. See Moynihan & Kerrey, note 8. The proposal was for a two-earner deduction equal to 20\% of the earnings of the lower-earning spouse, with a maximum deduction of $4,350 (20\% of $21,750). The deduction was to be phased out for joint filers with combined incomes between $75,000 and $95,000. The criticisms noted in the text with respect to the Daschle proposal (relating to the creation of marriage bonuses and the dubious effects of the phaseout) also apply to this proposal.

\textsuperscript{265} Using 2000 inflation adjustments set forth in Rev. Proc. 99-42, note 85, as singles each would pay tax of $2,670, for a combined liability of $5,340. Married, their joint return liability would be only $4,807.50. All taxable income is in the 15\% bracket in both cases. The benefit of the $5,000 two-earner deduction more than offsets the detriment from the loss of $1,450 of standard deduction. Even if they had a child (so that one could file as a head of household if not married), the $5,000 deduction would more than offset the loss of $3,500 of standard deduction, and there would be a net marriage bonus of $225 (15\% of the $1,500 difference).
is naturally tilted toward couples with incomes over $50,000, and then uses a phaseout to deny benefits to that very group. The result would be a deduction with little revenue loss, but also with little effect. Standard deduction marriage penalty relief would focus benefits on roughly the same income level as the phased-out two-earner deduction, without the complexity of an explicit phaseout. On the other hand, the Daschle proposal is better targeted toward reducing marriage penalties (rather than increasing existing bonuses), since it is available only to two-earner couples. Whether that better targeting justifies larding up the Code with yet another phaseout is questionable, especially when the Gravelle hybrid has similar distributional effects and two-earner targeting, without the need for an income phaseout.266

Viewed as a response to the tax disincentives on secondary earners, the Daschle proposal is even more dubious. Obviously, the proposal would do nothing to lighten the tax burden on a wife’s earnings if the husband’s earnings alone exceed $60,000. That is unfortunate since it is wives of high income husbands whose earnings are subject to the highest marginal rates as a result of the stacking effect. Worse than that, however, is the effect when a wife’s earnings trigger the phaseout of the deduction. Suppose the husband earns $40,000 and the wife currently has a part-time job paying $10,000. The two-earner deduction, at 20%, would be $2,000, and the tax savings (in the 15% bracket) would be $300. But what happens if the wife decides to increase her hours, earning an additional $10,000? That would bring the couple’s income to $60,000, resulting in the loss of the entire $2,000 deduction. If their official marginal rate is 15%, the true income tax burden on the wife’s last $10,000 of earnings would be 18%—consisting of $1,500 explicit tax and the loss of a deduction worth $300. The phaseout’s increase in the marginal tax rate on a secondary earner is perverse if encouraging secondary earners is a purpose of the deduction.

V. What About Head of Household Status?

The existence of head of household status, with wider rate brackets and a larger standard deduction than for other single taxpayers, considerably complicates efforts to eliminate the marriage penalty. Proposals that eliminate marriage penalties for childless couples will not eliminate marriage penalties for couples with children. A couple with one or more children could get divorced, continue to live together,
and thereafter file as one head of household and one single taxpayer.\textsuperscript{267} For a mandatory joint return system to eliminate all marriage penalties for such couples, the standard deduction would have to equal the sum of a single taxpayer and a head of household standard deduction—and not merely two single taxpayer standard deductions, as the current bills provide.\textsuperscript{268} The same bills fall short of complete relief for rate bracket marriage penalties in the same way. A complete fix is possible, of course, but it would increase both the cost and the complexity of the legislation substantially. There would need to be two married standard deductions and two married rate schedules, their applicability depending on the presence or absence of children.\textsuperscript{269}

Taking head of household status into account also would make optional separate filing more complicated and more costly to the fisc. For an optional separate return system to provide complete marriage penalty relief, it would have to allow one spouse to file as a head of household if the couple has children. The optional filing bills do not

\textsuperscript{267} The CBO study assumes complete marriage penalty relief would have to reflect the possibility that ex-spouses could both file as heads of households, as long as there were at least two children. CBO Study, note 1, at 28. That is correct if they were to live apart (each with at least one child), but the standard—and most compelling—version of the marriage penalty complaint considers the taxes the couple would owe if they continued to live together after a divorce. See text accompanying notes 105-10. If they continue to live together, they almost certainly could not both qualify as heads of households. The statute requires a head of household to furnish “over half of the cost of maintaining the household during the taxable year.” IRC § 2(b)(1) (final sentence). If the ex-spouses live in the same household, only one can satisfy this support test. The “almost” qualification is necessary because there is some authority that one house can contain more than one “household,” with the head of each qualifying for favorable tax treatment. In the course of deciding that there were two households in a house occupied by a widow and her unmarried daughter, and by the family of a married daughter, the Tax Court stated that “[t]he extent of a ‘household’ is not determined solely by physical or tangible boundaries.” Estate of Fleming v. Commissioner, 33 T.C.M. (CCH) 619, 621 (1974). The Court found that the two family groups “respected each other’s quarters as private areas which were not to be disturbed.” Id. Similar findings for cohabiting ex-spouses, divorced for tax reasons alone, would be unlikely. The recent case of Jackson v. Commissioner, 71 T.C.M. (CCH) 2022 (1996), is more closely on point. The court denied head of household status to an unmarried father, who claimed to live with his daughter in one room of a two-bedroom apartment owned by the child’s mother: “We find that the one room allegedly lived in by petitioner and Fatimah [the daughter] in the two-bedroom apartment owned by Fatimah’s mother, without use of a kitchen or telephone, does not constitute a separate household.” Id. at 2024.

\textsuperscript{268} H.R. 6, note 5; S. 12, note 68.

\textsuperscript{269} Alternatively, even childless couples could be allowed to use a rate schedule and a standard deduction reflective of the head of household rules. That is, in fact, the approach to the standard deduction taken by the Gramm Amendment, note 63. The result, however, would be a substantial tax windfall—more than complete marriage penalty relief—for childless couples.
permit head of household filing, however, and so do not provide complete relief.\textsuperscript{270}

Such problems did not exist when Congress introduced income splitting joint filing in 1948, because head of household status did not exist at the time. It appeared just three years later,\textsuperscript{271} however, and has remained part of the Code ever since. As long as head of household status continues to exist, marriage penalty opponents must choose between incomplete fixes that disregard the head of household rules and complete fixes that are expensive and complex. This suggests it is time to revisit the rationale for head of household status. If the status could be eliminated, fixing the marriage penalty would be much easier.

\section{The First Marriage Penalty}

Before considering the rationale for the head of household provisions, it is worth reflecting on an historical oddity. The contribution of head of household status to marriage penalties is no secret today.\textsuperscript{272} I have not found any indication, however, that anyone realized when Congress created the status in 1951 that marriage penalties were a result.

The standard history is that marriage penalties were created in 1969, when Congress made the tax brackets for single taxpayers more than half as wide as the joint return brackets.\textsuperscript{273} This is technically inaccurate. At any time after the 1951 Act, a married couple with one or more children, and a roughly equal division of income, could have saved taxes by getting a divorce, continuing to live together, and filing as one single person and one head of household. No one complained, however, or even noticed the problem.

Two explanations come to mind, as to how the contribution of head of household status to marriage penalties might have been invisible in 1951, despite its obviousness today. First, the 1951 version of the marriage penalty, like marriage penalties generally, would have fallen

\textsuperscript{270} H.R. 2456, note 54; S. 1314, note 54; S. 1429, note 6.
\textsuperscript{271} Revenue Act of 1951, Pub. L. No. 82-183, § 301, 65 Stat. 452, 480.
\textsuperscript{272} The CBO study, for example, makes the point clearly. CBO Study, note 1, at 28. The Gramm Amendment, note 63, also reflects this understanding.
\textsuperscript{273} See, e.g., Jonathan Chait, Penalty Box: The Folly of Fighting the Marriage Tax, The New Republic, Oct. 20, 1997, at 14, 16 ("[I]n 1969, Congress reduced the tax disadvantages of living single and, for the first time, introduced some negative tax consequences for certain married couples."); Graetz, note 17, at 33 ("In 1969, Congress introduced into the tax law for the first time a tax penalty on marriage."). Brozovsky and Cataldo note a few very small pre-1969 marriage penalties, but they do not consider any penalties created by the head of household provisions. Brozovsky & Cataldo, note 22, at 165 (explaining that they calculate marriage tax penalties by comparison to the tax on two single taxpayers with no dependents).
only on two-earner couples with relatively equal incomes. Apparently there were not enough two-earner couples with roughly equal incomes and with children in 1951 to achieve critical mass.\textsuperscript{274} If wives with substantial earned incomes were unusual in 1951, married mothers with substantial incomes were rarer still. And if the few that did exist met with social disapproval, then tax penalties on them would have been of little concern.

Second, the marriage penalty analysis requires a counterfactual that is viewed as a reasonable alternative to marriage. If it was unthinkable in 1951 for a respectable couple with children to live together out of wedlock, then the theoretical marriage penalty created by the head of household provisions was not socially real. The counterfactual necessary to create a marriage penalty was simply not available. The dating of the marriage penalty to 1969 may be practically correct, then, despite its technical inaccuracy. Even if the 1969 legislation had never been passed, however, at some point between 1951 and today social changes would have created meaningful marriage penalties out of the head of household provisions. As spouses with similar incomes and with children became more common, and as cohabitation became a socially available option, marriage penalties would have arisen out of the 1951 Act. Even though the head of household rules did not create real marriage penalties in 1951, they do now.

\section*{B. Justifying the Head of Household Provisions}

Since these penalties are real today, it is worth considering the justification for head of household tax status. The first child living with an unmarried taxpayer entitles the taxpayer to a larger standard deduction and wider tax brackets. No additional child of a single taxpayer, and no child of a married couple, has either of these effects. What is so special about this child? Here is the official explanation, from the 1951 House Ways and Means Committee report:

\begin{quote}
It is believed that taxpayers, not having spouses but nevertheless required to maintain a household for the benefit of other individuals, are in a somewhat similar position to married couples who, because they may share their income, are treated under present law substantially as if they were two
\end{quote}

\textsuperscript{274} In 1951, 25.2\% of married women with husbands present were in the labor force. Bureau of the Census, U.S. Commerce Dep't. Historical Statistics of the United States, Colonial Times to 1970, pt. 1, 133 (series D 61) (Bicentennial ed. 1975). Of course, the mere fact that a wife was in the labor force did not mean the couple suffered a marriage penalty. That would occur only if the couple had at least one child, and the husband was also employed, with earnings roughly equal to the wife's.
single individuals each with half of the total income of the couple. The income of a head of household who must maintain a home for a child, for example, is likely to be shared with the child to the extent necessary to maintain the home, and raise and educate the child. This, it is believed, justifies the extension of some of the benefits of income splitting. . . . However, it was not deemed appropriate to give a head of household the full benefits of income splitting because it appears unlikely that there is as much sharing of income in these cases as between spouses. In the case of savings, for example, it appears unlikely that this income will be shared by a widow or widower with his child to the same extent as in the case of spouses.275

This could be clearer, but it seems to have two threads. First, single parents deserve tax recognition for the expenses of maintaining a household, which are similar to the household maintenance costs of a married couple.276 This is supposed to justify a larger standard deduction than for other unmarried taxpayers, who need not maintain households of their own. Second, a single parent should be allowed some income splitting with a child, to the extent single parents typically share their income with their children. This is supposed to justify wider tax brackets than for other single taxpayers. Neither claim stands up well under scrutiny.

1. Who Needs to Maintain a Household?

In 1986 Congress embraced the idea that the combination of the standard deduction and personal exemptions should be sufficient to shelter the cost of basic of subsistence—of living at a level of minimal decency—from the income tax.277 It made an exception, however, in the case of unmarried taxpayers other than heads of households. The Senate Finance Committee explained why the standard deduction for those taxpayers was not made large enough, when combined with one personal exemption, to equal the official poverty level: "[T]he majority of single individuals between ages 25 and 64 live with other individuals, and thus share household costs. Thus . . . the committee believes

276 Congress offered this argument again in 1986 when it narrowed the gap between the standard deduction for a married couple and the standard deduction for a head of household: "[T]he costs of maintaining a household for an unmarried individual and a dependent more closely resemble the situation of a married couple than that of a single individual without children." S. Rep. No. 99-313, at 36, reprinted in 1986-3 C.B. (vol. 3) 1, 36.
that the poverty line is not an accurate guide to the true circumstances of the majority of those who file tax returns as unmarried individuals.\textsuperscript{278}

Despite the appeal to census data, this is really a normative argument that living at a level of minimal decency does not require living alone for childless singles, but does require living alone (that is, without other adults) for a single parent family. What constitutes minimal decency is a social construct, not a fact of nature. Perhaps Congress is right when it assumes society does not view minimal decency for childless singles as including the privacy of living alone (for those who wish to do so). That view seems rather harsh, however, especially for older singles. At one time, the House agreed. In 1969 Dorothy Shinder told the House Ways and Means Committee that “an older woman is not as flexible as a younger woman, needs to live alone, and requires more privacy.”\textsuperscript{279} The House responded to Shinder in an interesting way. Its version of what became the Tax Reform Act of 1969 did not widen the tax brackets for non-head of household singles, as the Act eventually did. Instead, the House decided that head of household status should be about the costs of maintaining a one-adult household, rather than about the presence of children in the household. The House bill implemented this decision by affording head of household tax status to childless singles at least 35 years old.\textsuperscript{280} It would seem strange for a 35th birthday to have major tax consequences. Nevertheless, it was not absurd for the House to decide that minimal decency requires living alone for childless adults 35 or older, but not for younger adults.

Under the 1986 Senate Finance Committee explanation, the larger standard deduction for heads of households is not so much a special benefit, as the smaller standard deduction for other singles is a special detriment. If one rejects the premise underlying the difference in the deduction amounts, the logical response would be to increase the standard deduction for other singles, not to decrease the deduction for heads of households. Whatever the merits of that reform, it would serve only to increase the revenue cost of eliminating all marriage penalties.

2. \textit{Sharing Income With a Child}

The justification for the favorable head of household rate schedule is that a single parent shares income—\textit{including above-subsistence in-}

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\item \textsuperscript{278} S. Rep. No. 99-313, note 266, at 33, reprinted in 1986-3 C.B. (Vol. 3) 1, 33.
\item \textsuperscript{279} 1969 Hearings, note 47, at 1977.
\item \textsuperscript{280} H. Rep. No. 91-413, note 47, at 210-11, reprinted in 1969-3 C.B. 200, 422.
\end{itemize}
\end{footnotesize}
come—with her child, and so should be allowed a degree of income splitting throughout the rate schedule. There are two problems with this justification. First, as the 1951 House Ways and Means report rightly notes, it is more likely a single parent shares a consumption standard with a child than that the parent shares savings with the child.281 From that observation, the Report draws the conclusion that “only one-half of the benefits of income splitting [should be] granted to heads of households.”282 A more reasonable conclusion would be that a child gains little or no benefit from parental income in the higher bracket ranges—either because that income typically is saved, or because children simply have no consumption uses for such large amounts of money. The moral would be that income splitting with a child, if it is appropriate at all, should extend only to the middle income ranges.283 So, for example, a head of household might be entitled to wider 15% and 28% brackets than other single taxpayers, but not to wider 31% and 36% brackets.

The second problem is more fundamental. Certainly a single parent shares her income with her first child, but she also shares her income with additional children, and married parents share their incomes with all their children. Bracket widening based on the number of children in the family is philosophically defensible and technically feasible,284 but it should be done either for all children or for none. As long as above-subsistence income splitting is not allowed for other children,285 it should not be allowed for the first child of a single parent.

C. What to Do?

Eliminating the tax distinctions between heads of households and other single taxpayers is not a promising approach to simplifying the problem of providing marriage penalty relief. If the difference in standard deduction amounts is eliminated, it should be done by increasing the standard deduction for other singles. That would make marriage penalty relief even more expensive. There is a strong case on the merits for eliminating the special head of household rate sched-

282 Id.
283 It still might be appropriate to allow less than full income splitting even in the lower and middle income ranges, on the ground that children are more efficient consumers than adults; that is, at any given standard of living, it costs less to support a child than to support an adult. Zelenak, Children, note 113, at 385-87 (summarizing studies indicating that families typically spend roughly twice as much on an adult’s consumption as on a child’s).
284 See text accompanying notes 114-15.
285 Dependency exemptions can be viewed as below-subsistence income splitting allowed regardless of the number of children, and regardless of the marital status of the parents.
ule, but it is difficult to imagine that Congress would remove a tax benefit that has existed for almost half a century when there is no clamor for its demise. Merely by existing for so long it has become the baseline, so that any decrease in head of household tax benefits would be considered unfair to single parents. Any attempt to remove the special rate schedule would be met with the argument that single parent families are typically poor, so that any increase in their share of the tax burden would have unacceptable distributional impact. The weakness in the argument is that the increased taxes from loss of the special rate schedule would be paid by atypically affluent single parent families. Despite this weakness, the argument probably would prevail with Congress.

VI. Conclusion

As promised at the outset, I leave it to the reader to decide on the best response to the incompatibility of the goals of progressivity, couples neutrality, and marriage neutrality. I cannot resist, however, a few observations. First, although there is no reason to assume the current messy compromise is the best of all possible approaches, once the intractability of the problem is understood—once it is appreciated that there is no way to develop rules for the tax treatment of marriage that will make everyone happy—the current mess does not look all that bad. It certainly would be possible to do worse. The House Republicans appeared to reach the same conclusion in 1998. After months of rhetoric about the outrageousness of marriage penalties, they settled on tinkering with the standard deduction in a manner that left over 90% of marriage penalties in place. The 2000 congressional efforts, although more ambitious, still fell far short of eliminating all marriage penalties. Congress appears more interested in a symbolic “doing something” than in a rejection of the basic compromise of current law. The failure to act more boldly cannot be attributed solely to revenue constraints, since any change in the relative tax burdens of singles, one-earner couples, and two-earner couples could be made revenue-neutral, as long as Congress was willing to increase the absolute tax burden on one or more groups.

286 In 1994, the median income for female-headed, single parent households was $14,902. The median for male-headed, single parent households was $24,092. Female single parents outnumbered males by nearly five to one. These medians were far below those for married couples with children ($47,244) and for all families regardless of composition ($38,782). Bureau of the Census, U.S. Commerce Dep't, Statistical Abstract of the United States 1997, 471 tbl. 727.
287 H.R. 4579, note 4.
288 Democratic Caucus, note 179, at tbl. 7.
A more ambitious attack on marriage penalties might prove unstable. It is easy to imagine Congress becoming caught in an endless recycling of unstable solutions. The 1948 system of only marriage bonuses led to complaints of singles penalties, which led to the 1969 legislation, which led to complaints about marriage penalties for two-earner couples, which might lead to optional separate filing, which would lead to complaints about homemaker penalties for one-earner couples, which might lead to a return to the 1948 system, and the beginning of the next cycle.

The impossibility of anything better than an uneasy compromise, within the context of joint returns and progressive marginal rates, suggests a reconsideration of those constraints. One commentator has used the intractability of marriage issues in a progressive tax system as an argument for eliminating progressivity. To one who highly values progressivity this would be letting the tail wag the dog. Yet, the argument may prove decisive to those who already question progressivity for other reasons.

Even to one who values progressivity, the problems progressive marginal rates pose for the taxation of marriage may make a fundamentally different way of achieving progressivity more attractive. Imagine a tax-and-transfer system with a flat rate tax and a universal cash grant (demogrant) of several thousand dollars per person. Considering the tax and the cash grant together, the system has average rate progressivity. If, for example, the flat rate is 25% and the demogrant is $5,000, average rates are negative at incomes below $20,000 (that is, the demogrant exceeds the tax), the average rate is zero at $20,000, and as income rises above $20,000 the average rate rises—approaching, but never quite reaching, 25%.

Despite this average rate progressivity, the system would have both marriage neutrality and couples neutrality. Administered on a separate return basis, it obviously would be marriage neutral. It also would have couples neutrality: Regardless of how income is distributed between spouses, any couple with $X of income would have a tax liability (positive or negative) of $X(25%) - 2($5,000).

There are objections, from both ends of the political spectrum, to a flat tax-demogrant system. It could result in net transfers to many above the poverty level, and Kemper Moreland and I have suggested elsewhere that such a result may be politically unacceptable in the

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299 Bartlett, note 82, at 1348.
300 The demogrant is not identical with the earned income credit not subject to phaseout discussed in text accompanying note 208. Only those with earned incomes would be entitled to the earned income credit, but everyone would receive the demogrant.
United States. A flat tax-demogrant system also would sharply limit the government’s ability to tax very high incomes; the average rate on Bill Gates could be no higher than the marginal rate we are willing to impose on everyone else.

These are not trivial objections. On the other hand, the unique capacity of a flat tax-demogrant system to cut the Gordian knot—to simultaneously deliver average rate progressivity, marriage neutrality, and couples neutrality—is reason enough to give it serious consideration.

The other fundamental reform worthy of serious consideration—and my own preferred approach—is mandatory separate returns. This would achieve marginal rate progressivity and marriage neutrality, at the cost of abandoning couples neutrality. Perhaps the U.S. public would not consider couples neutrality an important goal if squarely presented with the question. If that turns out to be true, a mandatory separate return system is the clear choice.

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292. Lawrence Zelenak & Kemper Moreland, Can the Graduated Income Tax Survive Optimal Tax Analysis?, 53 Tax L. Rev. 51, 60-62 (1999). The strongest evidence for this is the hostile public response to George McGovern’s 1972 proposal for a $1,000 demogrant. See Theodore H. White, The Making of the President, 1972, 117 (1973) (“the ‘thousand dollar giveaway,’ as it came to be known, . . . was to haunt McGovern all through the year”).

293. In addition, optimal income tax analysis suggests that a flat tax-demogrant system can come close to maximizing social welfare, by best balancing the utility gains from redistribution against the disincentive effects of taxation. Joseph Bankman & Thomas Griffith, Social Welfare and the Rate Structure: A New Look at Progressive Taxation, 75 Cal. L. Rev. 1905 (1987).

294. The reasons for my preference, and suggestions for the design of a separate return system, are discussed at length in Zelenak, Marriage, note 11.

295. Id. at 358-63 (presenting some evidence to that effect).